NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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1. Appointed 19 December 1977.
2. Appointed 23 November 1977.
3. Appointed 5 December 1977.
4. Appointed 10 February 1978 to succeed Perry Martin who resigned 13 November 1977.
5. Appointed 27 January 1978 to succeed John Webb who was appointed to the Court of Appeals effective 21 December 1977.
6. Appointed 5 December 1977.
7. Appointed 15 December 1977.
8. Appointed 30 November 1977.
9. Appointed 22 November 1977.
10. Appointed 7 December 1977.
11. Appointed 1 December 1977.
12. Appointed 28 November 1977.
13. Appointed 6 January 1978.
14. Appointed 6 January 1978.
15. Appointed 1 December 1977.

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1. Appointed 28 February 1978 to succeed Linwood T. Peoples who resigned 31 January 1978.
2. Appointed 11 January 1978 to succeed Coy E. Brewer, Jr. who was appointed to the Superior Court 30 November 1977.
3. Appointed 30 September 1977.
4. Appointed 15 December 1977 to succeed George M. Harris who retired 31 October 1977.
5. Appointed Chief Judge 9 December 1977.
6. Appointed 28 December 1977 to succeed F. Fetzer Mills who was appointed to the Superior Court 21 November 1977.
7. Appointed Chief Judge 1 December 1977.
8. Appointed 5 December 1977 to succeed David B. Sentelle who resigned 13 November 1977.
9. Appointed 16 January 1978 to succeed Clifton E. Johnson who was appointed to the Superior Court 1 December 1977.

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30	MARCELLUS BUCHANAN III	Sylva

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RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 21st day of August, 1977, and said persons have been issued certificates of this Board:

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CLAUD ROBERT WHITENER III	Raleigh
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WILLIAM CONRAD WICKER	Fayetteville
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PAUL THOMAS WILLIAMS	Newton
THEODORE RAVON WILLIAMS	Greensboro
CHARLES GREGORY WILLIAMSON	Lumberton
GAYLAN SIX WILLIAMSON	Boone
PAMELA ANN WILLIAMSON	Reidsville
ALBERT LEE WILLIS	Durham
MARY WYNNE WITUL	Chapel Hill
ALLEN WILTON WOOD III	Raeford
RONALD HARRISON WOODRUFF	Lansing, Michigan
ROBERT WILLIAM WOODY	Spruce Pine
TERRY CRAIG WRIGHT	Clarendon
LAURA LEE YAEGER	Charlotte
ANDREW LEE YARBOROUGH IV	Winston-Salem
GARRIS NEIL YARBOROUGH	Benson
NORMAN MONROE YORK, JR.	Burgaw
CHARLES JESSE YOUNG, JR.	Maxton
JULIA JONES YOUNG	Shelby
SARAH C. YOUNG	Norwood
RALPH D. YOUNT	Conover
KENNETH H. ZEZULKA	Burlington
KENNETH ADOLPH ZICK II	Pfafftown

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PHILIP REID TRACY, JR.	Raleigh
RALPH DAVID SMITH	Burlington
THOMAS DUDLEY ROWE, JR.	Durham
PAUL AMOS HOLCOMBE, JR.	Raleigh
FREDERICK PETER HAAS	Durham
SCOTT FORMAN	Greensboro
KENT FOSTER CHRISTISON	Raleigh
DEWEY J. CUNNINGHAM	Cary
JOSEPH HARTLEY GREER	Durham
GEORGE MICHAEL JENNINGS	New Bern
LEWIS BRITTLE SNIDER	Salisbury
DAVID PAUL GREEN	Raleigh
CHARLES THOMAS FENNIMORE	Charlotte
HARVEY ZELLER	Julian
WILLIAM LEE HOPPER	Oxford
GEORGE WILLIAM HOUSE	Greensboro
MICHAEL LESLIE MCPHERSON	Newport
DANIEL MICHAEL WORK, JR.	Newport
JAMES RONALD SMITH	Charlotte
WENDELL LESLIE SCHOLLANDER	Winston-Salem
THOMAS DOUGLAS STONE	Chapel Hill
LOIS J. ELY	Charlotte
JOHN ATTERBURY KENDALL	Winston-Salem
MICHALE BARD	Greensboro
GROVER MICHAEL MYERS	Winston-Salem
HARRY DAVID SAUNDERS	Charlotte
FREDERICK KEITH WALLACH	Greensboro
STANLEY I. ROSEN	Greensboro
JAMES ALTON VICKREY	Charlotte
RONALD EDWARD BOGLE	Hickory
WILLIAM MICHAEL SULLIVAN	Raleigh
LOUIS STEPHEN GILLOW	Charlotte
STEVEN FRANCIS TECHET	Raleigh
DAVID LEWIS HUREWITZ	Greensboro
SUSAN HOLLINGSWORTH LEWIS	Chapel Hill
KENNETH C. DAY	Greensboro
JOHN JAMES MASSARO	Wilson

Given over my hand and the Seal of the Board of Law Examiners, this the 11th day of October 1977.

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

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

JERRY BRASWELL ..... Chapel Hill

Given over my hand and the Seal of the Board of Law Examiners, this the 13th day of December 1977.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1977

STATE OF NORTH CAROLINA v. ALLEN ROBERTS

No. 83

(Filed 13 June 1977)

1. **Criminal Law § 161— assignment of error not supported by exception—no question presented for review**

Defendant's assignment of error to the denial of his motion to suppress an in-court identification was not supported by an exception duly taken at trial and therefore presented no question for appellate review.

2. **Criminal Law § 66.1— identification of defendant—witness's opportunity for observation**

Evidence was sufficient to support the trial court's conclusion that a rape victim's in-court identification of defendant was "based upon her independent recollection of the event without suggestion as to identity from any person" where the evidence tended to show that the victim observed defendant for about five seconds when she turned to see who was following her; she observed her assailant in bright sunlight for two to three minutes while he had intercourse with her; and the victim identified defendant from among twenty other black men at the preliminary hearing without having been told where he would be sitting and without having her attention directed to him in any way.

3. **Criminal Law § 117.1— scrutiny of testimony—instruction not required absent request**

In the absence of a request, the court is not required to give a cautionary instruction that the jury scrutinize the testimony of a witness on the grounds of interest or bias.

4. **Constitutional Law § 35; Criminal Law § 75.11— waiver of rights form—defendant's name printed—waiver effective**

Defendant's contention that a waiver of rights form was ineffectual because defendant printed his name instead of signing it is without merit, since evidence was sufficient to support the trial court's findings that defendant was advised of his rights, said he fully understood those rights, and printed his name on the waiver of rights form.

5. **Criminal Law § 114.2— jury instructions—evidence "tended to show"—no expression of opinion**

Defendant's contention that the trial court erred in instructing the jury on what the evidence presented in the case "tended to show" in that use of the phrase misled the jury into believing that all the evidence restated by the judge was true is without merit, since the court repeatedly reminded the jury that it must determine what the evidence adduced at trial did in fact show, and the trial judge concluded his instructions with the declaration that he did not have any opinion on what the verdict in the case should be.

6. **Criminal Law § 113.1— review of evidence after deliberations begun—discretionary matter**

Generally, in the absence of a statute governing the situation the decision to review evidence after the jury has begun its deliberations rests in the sound discretion of the trial judge.

7. **Robbery § 4— common law robbery—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for common law robbery where it tended to show that defendant requested his cousin to accompany him to Duke Gardens; during defendant's assault upon his rape victim, the cousin forcibly removed her purse from her arm, and defendant then called to the cousin to bring him the purse; after the assault, the cousin hid the purse and wallet but kept the money, car keys, driver's license and bank book he found inside; when defendant next saw his cousin, he asked what had been done with the purse and demanded items taken from the purse, which the cousin gave him; defendant also warned the cousin not to tell anyone about the robbery or rape; and police later found the victim's car keys in the possession of a girl friend of defendant.

8. **Rape § 5— first degree rape—serious bodily injury—sufficiency of evidence**

Evidence in a first degree rape prosecution was sufficient to support a finding that the victim suffered a serious bodily injury where it tended to show that the victim suffered, at the hands of defendant, a hard blow to her upper jaw that left her stunned and dazed and knocked five teeth out of alignment, breaking the root of one tooth; the teeth had to be deadened, forced back into line and secured with a metal brace which was uncomfortable but

which the victim wore for six weeks; and expert medical opinion predicted that the teeth would eventually die, despite the brace, and root canals or extraction would then be necessary.

9. **Rape § 1— first degree rape—resistance overcome by serious bodily injury—meaning of statute**

G.S. 14-21(a)(2), the rape statute, does not mean that the victim's resistance must completely cease in order to be "overcome" by infliction of serious bodily injury; rather, the statute means that the assailant is guilty of first degree rape if the rape is accomplished by force and against her will after the victim's resistance is rendered ineffectual by the infliction of serious bodily injury.

10. **Constitutional Law § 63— exclusion of jurors opposed to death penalty—death penalty invalidated—exclusion not error**

Defendant's contention in a first degree rape prosecution, made in reliance upon *Witherspoon v. Illinois*, 391 U.S. 510, that his constitutional rights were violated by the exclusion of jurors who expressed scruples against the death penalty is groundless, since the death penalty provisions of G.S. 14-21(a)(2) were, by implication, invalidated by *Woodson v. North Carolina*, 428 U.S. 280, and the *Witherspoon* decision affected only the death sentence and not the conviction.

11. **Constitutional Law § 80; Rape § 7— first degree rape—life imprisonment substituted for death penalty**

A sentence of life imprisonment is substituted for the sentence of death imposed upon defendant convicted of first degree rape.

APPEAL by defendant from judgments of *Canaday, J.*, 10 February 1975 Session, DURHAM Superior Court. This case was argued as Case No. 21 at the Fall Term 1975.

On separate indictments, proper in form, defendant was charged with first degree rape and common law robbery of Maureen Elizabeth Fahey on 10 June 1974 in Durham County.

Maureen Elizabeth Fahey, twenty-six years of age, testified that she was employed at the Duke University Media Center as an assistant producer-director. On the afternoon of 10 June 1974 she left her office at the Old Chemistry Building about 5:30 p.m. and walked to the Perkins Library where she remained until 7:40 p.m. Upon leaving the library, she decided to take a shortcut through the Sarah Duke Gardens to reach her home near the campus. The weather was clear and sunny and several people were observed in the gardens which did not close until 8 p.m. While walking through the gardens Miss Fahey became aware of two people behind her. Glancing around, she observed two young

black males, later identified as defendant in this case and his cousin John Holeman, walking at a normal pace. She continued walking, immediately heard running footsteps, and was grabbed from behind by defendant and struck on the side of her mouth. Despite her screams and struggles, defendant dragged her about fifteen feet toward some bushes and pushed her to the ground. John Holeman grabbed her purse and sat down nearby to rummage through it despite defendant's instructions that Holeman bring the purse to him. Miss Fahey continued to struggle and scream at defendant to leave her alone. Defendant repeatedly told her to shut up and then struck her in the upper left jaw with his fist, leaving her stunned and dazed. Defendant removed one leg of her pants and, in spite of her repeated calls for help, completed an act of sexual intercourse by force and against her will. Defendant then said to her, "You won't tell anyone about this, will you?" And she replied, "No." Defendant said, "O.K., you can get dressed now." Then defendant and Holeman ran off in the direction of Anderson Street.

Miss Fahey testified further that, after her assailants left, she dressed and walked to Duke Hospital to receive medical attention for her throbbing jaw and her bleeding mouth. There she received ten stitches to close the cut on her mouth and penicillin shots for the pain in her jaw. X-rays taken the next day by an oral surgeon revealed that five teeth had been knocked out of alignment and that one root was completely broken. A metal brace was inserted in her mouth to realign the teeth. She wore the brace for six weeks during which time she could not chew on that side of her mouth and could eat only soft foods.

Miss Fahey described her two assailants to the Durham Police as two light skinned young black men wearing jeans and T-shirts. She specifically remembered the prominent jaw and short Afro haircut of the defendant. She identified her purse and the contents that were stolen, to wit: wallet containing approximately one dollar, eyeglasses, credit cards, driver's license, hairbrush and a set of jewelry screwdrivers.

Dr. Claude Joseph Hearn, the practicing oral surgeon who treated Miss Fahey, corroborated her testimony concerning the brace and the injuries to her teeth. Dr. Hearn stated that in his opinion the five teeth partially dislodged by defendant's blow would die, necessitating the performance of root canals or the extraction of the teeth.

Dr. Bruce Romig, Chief Resident in Obstetrics and Gynecology at Duke Hospital, testified that he examined Miss Fahey on 10 June 1974 and found superficial abrasions on her back, arms and legs, in addition to the laceration on her mouth and the misaligned teeth. A pelvic examination revealed the presence of sperm.

John Holeman, a witness for the State, testified that he was fourteen years of age and a first cousin of the defendant. On 10 June 1974 defendant came to his home and asked him to accompany defendant to Duke. They went by a local swimming pool and then to the Sarah Duke Gardens where they began taking pennies out of the wishing well located there. Leaving the wishing well, they spotted Miss Fahey below the steps that lead to the parking lot on Anderson Street. Defendant voiced his intention to rape her and the two began jogging to overtake her. Defendant then grabbed Miss Fahey around the neck and struck her in the mouth as she struggled to free herself. He dragged her toward some bushes and wrestled her to the ground, striking her in the jaw when she continued to scream and struggle. During the assault Holeman grabbed the pocketbook off her arm and sat down nearby to rummage through it. After defendant had completed his act of sexual intercourse with Miss Fahey, he asked Holeman if he "wanted any" but Holeman said no. Holeman testified that he then took her money, keys, driver's license and bank book and hid the wallet and purse nearby.

Holeman admitted on cross-examination that his hearing in juvenile court on this matter had resulted in only a warning to stay out of trouble. Since that time, however, he was placed on probation for larceny and a sexual assault on a minor boy.

Detective H. L. Hayes, of the Durham Police Department, testified that he received a call about 9 p.m. on 10 June 1974 to investigate a rape in Duke Gardens. When he first interviewed Miss Fahey she appeared very upset. Her jaw was swollen and the left side of her mouth was bleeding. She told Detective Hayes what had happened and her narration to the officer was substantially the same as her testimony on the witness stand. She described her assailants to Officer Hayes as Negro males and said defendant wore jeans, a light colored T-shirt and had high cheekbones.

Detective Hayes further testified that in response to an anonymous telephone call on 12 June 1974 he went to 1030 More-

land Street in Durham where he found John Holeman and defendant sitting on the front porch. Defendant attempted to elude arrest but was captured about thirty minutes later. Holeman signed a waiver of rights and gave the police a statement which corroborated his testimony at trial. Then he took the police to a creek near Anderson Street where he had hidden the victim's pocketbook.

Following a voir dire at which the trial court heard evidence, found facts, and determined that defendant had knowingly and voluntarily waived his constitutional right to remain silent and signed a written waiver of rights, Detective Hayes testified that defendant denied any part in the crime until confronted with the inculpatory statement by John Holeman. At that point defendant related to the officers the events leading up to the assault on Miss Fahey. With respect to the assault itself defendant declined to narrate any details, stating only: "Well, whatever John told you that is the way it happened."

Defendant offered no evidence. Defendant was convicted of rape in the first degree and common law robbery as charged in the bills of indictment. He was sentenced to death for rape and to a term of not less than eight nor more than ten years for the robbery with credit for time spent in custody awaiting trial. He appealed both cases to the Supreme Court but was unable to docket the record on appeal within the time prescribed by the rules and on 5 June 1975 we allowed certiorari to bring up the late appeal. Errors assigned will be discussed in the opinion.

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

Henry D. Gamble, attorney for defendant appellant.

HUSKINS, Justice.

[1, 2] Defendant first assigns as error the denial of his motion to suppress the in-court identification of defendant by Miss Fahey. Defendant contends the prosecutrix saw her assailant for only two or three minutes during which time she was beaten about the face. Therefore, defendant argues, Miss Fahey is not competent to identify him as her assailant. This assignment is not supported by an exception duly taken at trial and therefore presents no question for appellate review. *State v. Green*, 280 N.C. 431, 185 S.E.

2d 872 (1972); *State v. Jacobs*, 278 N.C. 693, 180 S.E. 2d 832 (1971); 1 Strong, N.C. Index 2d, Appeal and Error § 24. Nevertheless, upon examination we find the identification of defendant by Miss Fahey clearly competent and admissible.

On voir dire the victim testified that she had twenty-twenty vision when wearing her contacts and that she was wearing her contact lenses on 10 June 1974 as she walked through Duke Gardens in bright sunlight. She observed defendant for about five seconds when she turned to see who was following her. She observed him again for two to three minutes while he dragged her into some bushes and had sexual intercourse with her. On 1 July 1974 she identified defendant at his preliminary hearing. At that time he was sitting among approximately twenty other blacks in the courtroom. She had not been told where he would be sitting and her attention had not been directed to him in any way. She recognized defendant by his prominent jawline and facial expressions. David LaBarre, defendant's former attorney in this matter, also testified on voir dire that the prosecutrix identified defendant at the preliminary hearing on 1 July 1974. On cross-examination Miss Fahey said she told LaBarre that she had not been shown any pictures of defendant or viewed him in a lineup prior to the hearing, and LaBarre testified he had no knowledge of any acts on the part of any person which would tend to suggest to the prosecutrix that defendant was her assailant.

The trial court made findings of fact and then concluded that ". . . the identification by the prosecutrix of the defendant as the person who allegedly assaulted her was and is based upon her independent recollection of the event without suggestion as to identity from any person." The trial court's findings were amply supported by competent evidence and are therefore binding on this Court. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

[3] By his next assignment of error, defendant contends the trial court erred in permitting Holeman to testify to statements made by defendant before, during and after the rape of Miss Fahey. More specifically, defendant contends that, in light of Holeman's statement on cross-examination that he had received only a warning to stay out of trouble as a result of his participation in the

alleged crimes, the trial court should have instructed the jury to scrutinize Holeman's testimony as that of an interested witness. No request for such an instruction was made by defendant and, in the absence of a request, the court is not required to give a cautionary instruction that the jury scrutinize the testimony of a witness on grounds of interest or bias. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975), *cert. den.*, 423 U.S. 918 (1975); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970). This assignment of error is overruled.

The trial court, after a voir dire hearing, denied defendant's motion to suppress evidence pertaining to in-custody statements to the police. Defendant assigns the denial of this motion as error.

[4] The trial court found that prior to interrogation of the defendant, Officer Hayes of the Durham Police Department fully advised defendant of his constitutional rights; that defendant said he fully understood these rights, did not want an attorney present, and that he would make a statement. Defendant then signed the waiver of rights form in Officer Hayes' presence, after which he recounted the events leading up to the assault of Miss Fahey. Concerning the rape itself, defendant stated only, "Well, whatever John told you, that is the way it happened." Against the advice of counsel, defendant refused to testify on voir dire. He now urges to this Court that the waiver is ineffectual because it is not signed but printed. This contention is feckless. Officer Hayes testified on voir dire that some defendants sign the form while others print their names and that defendant willingly and without fear of punishment or hope of reward printed his name on the waiver form in his presence. We fail to see any legal significance in the fact that defendant printed his name instead of signing it. Judge Canaday's findings are supported by competent evidence and the findings in turn support his conclusions that a voluntary and knowing waiver of rights occurred. Consequently, his denial of the motion to suppress is conclusive on appeal. *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970). *See also State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975); G.S. 7A-457(c) (Cum. Supp. 1975).

[5] Defendant next contends the trial court erred in instructing the jury on what the evidence presented in the case "tends to show" in that use of this phrase misleads the jury into believing

that all the evidence restated by the judge is true. This contention is without merit. *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967); *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948); 3 Strong, N.C. Index 2d, Criminal Law § 114. The record reveals repeated reminders to the jury that *it* must determine what the evidence adduced at trial did in fact show. In addition, the trial judge concluded his instructions with the declaration that he did not have any opinion on what the verdict in the case should be. This assignment is overruled.

[6] After jury deliberations had begun, the jury returned to the courtroom to request a repetition of the definitions of first and second degree rape and to ask what recourse existed when members of the jury remembered different versions of certain testimony. The court reiterated the definitions but refused to review any of the evidence, giving only the following instruction:

> ". . . [L]adies and gentlemen, as I instructed you during the charge, you are the sole triers of the facts. You must determine what those facts are and any differences of recollection with respect to the facts, any differences in evaluation of those facts must be resolved among yourselves."

Defendant now assigns as error the trial court's refusal to review the evidence, contending the trial court should have inquired into the source of the jury's confusion. As defendant lodged no objection to the court's instruction, his assignment of error on appeal is to no avail. *State v. Green, supra; State v. Jacobs, supra. See also State v. Dill*, 184 N.C. 645, 113 S.E. 609 (1922). Even were this assignment properly presented, we note it is generally held that in the absence of a statute governing the situation the decision to review evidence after the jury has begun its deliberations rests in the sound discretion of the trial judge. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). *See generally* Annot., 50 A.L.R. 2d 176 (1956). Although a review of certain evidence might have proved helpful to the jury, we will not presume prejudice from the court's refusal to refresh the jurors' recollections and defendant has shown none. This assignment is overruled.

[7] Concerning his conviction for common law robbery, defendant brings forward two assignments of error: first, that his

motion as of nonsuit was erroneously denied and second, that the trial court erred in its instructions on common law robbery.

It is elementary that a motion as of nonsuit requires the trial court to consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Caron*, 288 N.C. 467, 219 S.E. 2d 68 (1975); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). If there is evidence, whether direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it, the motion as of nonsuit should be overruled. *State v. Caron, supra; State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). The evidence here tends to show that defendant requested Holeman to accompany him to Duke Gardens; that during defendant's assault on Miss Fahey, Holeman forcibly removed her pocketbook from her arm and that defendant then called to Holeman to bring him the purse and covered Miss Fahey's mouth to stop her screaming. After the assault, Holeman hid the pocketbook and wallet but kept the money, car keys, driver's license and bank book he found inside. When defendant next saw Holeman, he asked what had been done with the purse and demanded the items taken from the purse, which Holeman gave to him. Defendant also warned Holeman not to tell anyone about the robbery or rape of Miss Fahey. The Durham Police later found Miss Fahey's car keys in the possession of a girl friend of defendant. We hold this evidence sufficient to carry to the jury the question of defendant's guilt or innocence of the crime of common law robbery. The motion for nonsuit was properly denied.

Defendant's assignment of error challenging the definition of common law robbery is broadside and unsupported by any argument, reason or authority brought forward in defendant's brief. Therefore, under Rule 28, Rules of Appellate Procedure, 287 N.C. 671, this assignment of error is deemed abandoned. *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Bumgarner*, 283 N.C. 388, 196 S.E. 2d 210 (1973).

Defendant advances several assignments of error challenging his conviction of first degree rape. Specifically, he contends that his motion to reduce the charge to second degree rape or his motion as of nonsuit on the first degree charge should have been

granted and that the court erred in its instructions on first degree rape.

Our present rape statute, enacted in 1973 and applicable to crimes of rape committed after 8 April 1974, provides:

> "§ 14-21. Rape; punishment in the first and second degree. — Every person who ravishes and carnally knows any female of the age of 12 years or more *by force and against her will*, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape —
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, *and the rape victim had her resistance overcome or her submission procured* by the use of a deadly weapon, or *by the infliction of serious bodily injury to her*, the punishment shall be death.
>
> (b) Second-Degree Rape. — Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." (Emphasis added.)

Defendant's argument, reduced to its essentials, is simply that the prosecutrix here did not suffer "serious bodily injury," or, if she did, this injury did not overcome her resistance or procure her submission, as required by the statute.

Defendant contends that the phrase "serious bodily injury" should be given a strict interpretation and, in accord with this contention, defendant submitted two requests for instructions.

The first requested the trial court to define "serious bodily injury" for the jury as follows:

> "An injury is a serious bodily injury if incapacitation, permanent physical impairment, loss of eyesight or disfigurement results."

The second, apparently an alternative, requested the trial court to give the following instruction:

> "In order to find the defendant guilty of first-degree rape you must find that the victim had her resistance overcome or her submission procured by the infliction of serious bodily injury. To find that an injury is serious you must find more than just that force was used or that the rape was against the will of the woman. The injury must be grave in order to be serious, not just trivial. The phrase 'serious bodily injury' means an injury the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other bodily injury. An injury which creates a substantial risk of fatal consequences is a 'serious bodily injury.' The permanent or protracted loss of the function of any important member or organ is also a 'serious bodily injury.'
>
> If you find that the defendant inflicted serious bodily injury on the victim, then you must continue with your deliberations, and before you find the defendant guilty of first-degree rape, you must find that as a result of the injury the victim stopped resisting or that the victim submitted as a result of the injury."

The trial court gave the following instruction:

> "Now, ladies and gentlemen, serious bodily injury may be defined as being such physical injury to the person as may, but not necessarily must, result in death, resulting from an assault upon the person. Now, the injury must be serious, but must fall short of causing death.
>
> Now, whether such serious injury has been inflicted in this case must be determined by you, the jury, from the evidence in the case. This is a matter solely for your determination, as to whether or not serious injury has been inflicted in this case."

It is clear, as defendant contends, that "serious bodily injury" is not the equivalent of "by force and against her will." The latter element has long been present in our rape statutes, *see, e.g., State v. Jesse*, 20 N.C. 95 (1838), and is still sufficient to support a conviction of second degree rape under G.S. 14-21(b) (Cum. Supp. 1975). The force necessary to meet the latter requirement, as explained on numerous occasions by this Court, need not be physical force but may take the form of fear, fright or coercion. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). The mere *threat* of serious bodily harm which reasonably induces fear thereof constitutes the requisite force. *State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56 (1975); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974).

A conviction of *first degree rape*, however, requires not only the carnal knowledge of a female "by force and against her will" but also the use of a deadly weapon or the infliction of "serious bodily injury" which overcomes the victim's resistance or procures her submission. *See State v. Dull*, 289 N.C. 55, 220 S.E. 2d 344 (1975).

It is not contended by the State that a deadly weapon was used, nor is there evidence of such use. Defendant's conviction of first degree rape must therefore stand on the contention that the victim's resistance was overcome by the infliction of serious bodily injury. "Serious bodily injury," as required by G.S. 14-21(a)(2) (Cum. Supp. 1975), has never been defined by this Court; however, some guidance to the meaning of the phrase can be found by reference to our cases construing G.S. 14-32 (assault with a deadly weapon with intent to kill inflicting serious injury) and by viewing similar cases from other jurisdictions.

The leading case in North Carolina defining "serious injury" under G.S. 14-32 appears to be *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962), where Justice Higgins, speaking for the Court, stated:

> ". . . The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted

must be determined according to the particular facts of each case."

This statement was approved in *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964).

In *State v. Jones*, *supra*, the Court held that where the prosecuting witness was shot in the back with a .410 shotgun loaded with birdshot and went to a hospital where seventeen shots were removed, the evidence was sufficient to go to the jury on the question of serious injury.

In *State v. Ferguson*, *supra*, the State's evidence tended to show that the defendant, in a pickup truck, rammed the back of an automobile driven by the prosecuting witness, causing him to suffer a whiplash injury. The prosecuting witness testified that as a result of the injury he could not turn his head without pain; that he had periodic pains in his legs causing them to cramp and hurt; and that he had visited the doctor on two occasions but had not been hospitalized. This Court, finding that an injury of this nature "may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim," concluded that the evidence was sufficient to go to the jury on the question of serious injury.

Knife wounds requiring sixty-four stitches to close were held, in *State v. White*, 270 N.C. 78, 153 S.E. 2d 774 (1967), to be sufficient to support a finding of serious injury. *See also State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930); *State v. Roseman*, 108 N.C. 765, 12 S.E. 1039 (1891); *State v. Shelly*, 98 N.C. 673, 4 S.E. 530 (1887).

Other jurisdictions have taken a similar approach where a finding of serious bodily injury was an essential element of assault. Thus it is said that "the words 'serious bodily injury' are words of ordinary significance, and it is not required that the court define the term in the instructions since they are well understood by any jury of ordinary intelligence." *State v. Perry*, 5 Ariz. App. 315, 426 P. 2d 415 (1967); *accord, State v. McKeehan*, 91 Idaho 808, 430 P. 2d 886 (1967); *Andrason v. Sheriff, Washoe County*, 88 Nev. 589, 503 P. 2d 15 (1972); *Le Barge v. State*, 74 Wis. 2d 327, 246 N.W. 2d 794 (1976).

In *State v. Perry*, *supra*, the court held that evidence of a two and one-half inch cut, a black eye and a broken rib suffered by the prosecuting witness was sufficient to support a finding of

serious injury. The Pennsylvania court, in *Commonwealth v. Alexander*, 237 Pa. Super. 111, 346 A. 2d 319 (1975), noting the special dangers of blows to the head, held that evidence of a broken nose, two black eyes and other head wounds requiring stitches adequately supported a finding of serious injury. *C.f. State v. Miller*, 16 Ariz. App. 92, 491 P. 2d 481 (1971) (bruise on ear, abrasions on hand and knee, and jaw fractured); *State v. McKeehan*, *supra* (bruises, swelling, cuts and eye injury); *Andrason v. Sheriff, Washoe County*, *supra* (kick in the groin left the victim unconscious and with area swollen and black and blue); *Le Barge v. State*, *supra* (twelve wounds needing stitching and minor cuts, abrasions and bruises).

Brooks v. Sheriff, Clark County, 89 Nev. 260, 510 P. 2d 1371 (1973), involved a Nevada rape statute requiring a finding that the victim suffer "substantial physical injury" in order to convict defendant of a particular grade of the crime. The court there held that evidence of a cut on the head, swollen eyes and a swollen head was sufficient to support such a finding.

[8] Here, the evidence reveals injuries similar in nature and extent to those deemed serious in the cited cases. Miss Fahey suffered a hard blow to her upper jaw that left her stunned and dazed and knocked five teeth out of alignment, breaking the root of one tooth. These teeth had to be deadened, forced back into line and secured with a metal brace. Dr. Claude Joseph Hearn, who treated Miss Fahey, testified as follows concerning the injury to her teeth:

> "I first saw Miss Fahey on June 12, 1974, in the oral surgery area at Duke Hospital. She had a metallic bar, which was maintained along the upper left teeth, from approximately the front left lateral and sides, or back, to the posterior teeth in order to maintain in position two previously knocked out, rather loosely hanging teeth, which were fractured, one in the root area. The bar actually is put on much as a cast might be put on a broken arm or extremity, so that stabilization would afford the teeth, in this case, a chance to replant themselves in the jawbone. One tooth was fractured in the root structure of the tooth itself, the socket structure. It was a complete fracture, the root was actually separated.
>
> Miss Fahey remained my patient for six weeks. She kept this mechanical device in her mouth for six weeks. I stressed

that she stay on a very soft diet, to chew on the opposite side, and to take no chances of, in any way, biting at anything hard enough to dislodge the teeth from the appliance. This device would cause discomfort. After six weeks, I removed the stitches and mechanical device from her mouth.

I have an opinion, based on reasonable medical certainty, that these teeth will die. 'Dying' means that the tooth loses its nerve supply and blood supply such that the tooth actually would become darkened and there would be discoloration. Ultimately the possibility of abcess is always a problem. This is what must be done with the dead teeth: the nerve and blood vessels that go through the center of the root have to be removed and the center of the root canal, that is a root canal is performed. In certain instances the upper part of the root might also have to be removed so that you can clean it and fill the end of the tooth. There is never a guarantee that a root canal will be successful, so there is really no guarantee, but it is the next recourse. The last recourse is extraction of the teeth."

Miss Fahey suffered protracted pain and impairment of function of her jaw and teeth while wearing the metal brace for six weeks. Expert medical opinion predicts these teeth will die, despite the brace, and root canals or actual extraction will be necessary. We hold this evidence sufficient to support a finding that the victim suffered a serious bodily injury.

Defendant's contentions under this assignment, however, have not yet been exhausted. Even assuming that Miss Fahey suffered "serious bodily injury," defendant urges that this did not overcome her resistance or procure her submission as required by G.S. 14-21(a)(2) (Cum. Supp. 1975). Defendant contends that Miss Fahey continued to struggle and scream even after the blow to her jaw and that the rape was accomplished only by virtue of defendant's superior strength, not because Miss Fahey stopped resisting as a result of the injury.

This contention is absurd and wholly without merit. There is abundant evidence that Miss Fahey's resistance was overcome by the injuries she sustained. In her testimony she stated that, after defendant dragged her toward the bushes, "[h]e hit me in the upper left-hand jaw with his fist. I was stunned and dazed and

scared they might kill me." The testimony of defendant's accomplice, Holeman, is even more to the point. He states:

> "While she was struggling, trying to get loose from him, he took and hit her. She was still struggling so I took and grabbed the pocketbook off her arm. Defendant hit her in the jaw with his fist. While he was dragging her toward the woods, I was looking through the pocketbook. Defendant hit her again in the jaw with his fist because she was still trying to get loose. After he got her down, he started taking her clothes and stuff off. She was calling the police and stuff. Robert hit her in the jaw with his fist again because she was trying to raise up. Her mouth started bleeding."

[9] When the statute is correctly interpreted and applied, this evidence is sufficient to support a conviction of rape in the first degree. G.S. 14-21(a)(2) (Cum. Supp. 1975) does not mean that the victim's resistance must completely cease in order to be "overcome" by infliction of serious bodily injury. The statute means that the assailant is guilty of first degree rape if the rape is accomplished by force and against her will after the victim's resistance is rendered ineffectual by the infliction of serious bodily injury. Defendant's motion for nonsuit on the charge of first degree rape was therefore properly denied.

[10] By his next assignment of error, defendant, relying on *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), contends that his constitutional rights were violated by the exclusion of jurors who expressed scruples against the death penalty. In light of the holding in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), the death penalty provisions of G.S. 14-21(a)(2) (Cum. Supp. 1975), have, by implication, been invalidated. *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). As the *Witherspoon* decision affected only the death sentence and not the conviction, defendant's contention is groundless. *See State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). This assignment is overruled.

[11] 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 for murder as provided by G.S. 14-17 (Cum. Supp. 1975). By implication, *Woodson* also invalidated the death penalty for first degree rape as provided in

G.S. 14-21(a)(2) (Cum. Supp. 1975), the statute under which defendant was indicted, convicted and sentenced to death. *State v. Thompson, supra.* Therefore the judgment in Case No. 74-CR-12595 which imposed a sentence of death upon defendant Allen Roberts is vacated and a sentence of life imprisonment is substituted in lieu thereof under authority of section 7, chapter 1201 of the 1973 Session Laws (1974 Session).

Our examination of the entire record discloses no error affecting the validity of the verdicts returned by the jury. The trial and verdicts must therefore be upheld. To the end that a sentence of life imprisonment may be substituted in lieu of the death sentence heretofore imposed, Case No. 74-CR-12595 is remanded to the Superior Court of Durham County with directions (1) that the presiding judge, without requiring the presence of defendant, enter judgment imposing life imprisonment for the first degree rape 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.

In Case No. 74-CR-18760: No Error.

In Case No. 74-CR-12595: No Error in the Verdict; Death Sentence Vacated.

STATE OF NORTH CAROLINA v. B. C. WEST, JR.

No. 38

(Filed 13 June 1977)

1. State § 11— action by State—statute of limitations

The three year statute of limitations did not bar the right of the State to recover two bills of indictment issued in 1767 and 1768 because (1) nothing in the record indicates when the documents were taken from the possession of the State and so the record does not show when the State's cause of action for their recovery arose, and (2) no statute of limitations runs against the State

unless it is expressly named therein, and the statute pleaded by defendant has not been expressly made applicable to the State.

2. **State § 1— change of sovereignty—official property**

A change of sovereignty transfers but does not alter the right of the former sovereign to his official, as distinguished from his personal, property.

3. **State § 1— transfer of sovereignty from the King to the State**

While the Treaty of Paris recognized the established fact of history that North Carolina was, by reason of a successful revolution, a free and independent state, and no longer a British colony, this accomplished fact, not the formal recognition of it, transferred the sovereignty in North Carolina from the King to the State.

4. **State § 2.1— indictments signed by King's Attorney—right to possession—transfer of sovereignty**

The turmoil and confusion incident to the War of the Revolution did not terminate the title of the sovereign to bills of indictment signed by the Attorney for the King in 1767 and 1768 or defeat the King's right to the possession thereof, and succession of the new sovereignty to the properties of the old sovereign was instantaneous, for there is no gap in sovereignty.

5. **State § 2.1— indictments filed in King's court—rights of the State**

At some time between the creation of the right of King George III in and to indictments filed in the King's court for the District of Salisbury in 1767 and 1768 and the signing of the Treaty of Paris, the State of North Carolina succeeded to the sovereign rights and properties of the King, including the indictments, whether then in or out of the possession of the King's custodian.

6. **Abandonment of Property § 1— passage of title after abandonment**

The owner of articles of personal property may terminate his ownership by abandoning it and, in that event, title passes to the first person who thereafter takes possession.

7. **Abandonment of Property § 1— owner's intent**

An essential element of abandonment is the intent of the owner to relinquish the article permanently, and it is not enough that the custodian into whose hands the owner entrusted it intentionally discarded it.

8. **State § 2.1— abandonment of records by sovereign—discarding of records by clerk of court**

Evidence that, in times past, there have been instances in which clerks of court in North Carolina, in order to provide filing and storage space for new documents, have removed from their offices and discarded old records, does not establish abandonment of such property by the sovereign so as to confer upon the first taker thereof a title good against the sovereign.

9. Trover and Conversion § 1; State § 2.1— possession of sovereign's documents —conversion

The *bona fides* of a person taking documents owned by the sovereign into his possession or of a subsequent purchaser for value from him, whether on the open market or otherwise, would not confer good title upon such taker or subsequent purchaser, but, on the contrary, such purchaser, himself, regardless of his having acted in good faith, became a converter liable to the true owner.

10. Abandonment of Property § 1; State § 2.1— indictments issued in 1767 and 1768—discard by clerk—no abandonment by sovereign

Even if bills of indictment issued in 1767 and 1768 were intentionally thrown away by the clerk of court, such action by the clerk would not constitute an abandonment by the sovereign of its property in the absence of a showing that the sovereign authorized it or, with knowledge of it, ratified it.

11. State § 2.1— indictments issued in 1767 and 1768—State's right to possession

The State established its right to the possession of bills of indictment issued in 1767 and 1768 where title to the bills of indictment was shown to have been in the State, as successor to the King of England, and there was no showing that the State, or the sovereign under whom it claims, intentionally abandoned the property or authorized a transfer of its possession by the custodian whose official duty it was to keep the documents in his possession.

Justice COPELAND dissenting.

Justice MOORE joins in the dissenting opinion.

APPEAL by defendant from the Court of Appeals, which reversed the judgment entered by *Webb, J.*, who denied the State's motion for summary judgment and dismissed the action with prejudice, *Britt, J.*, dissenting from the decision of the Court of Appeals, which is reported in 31 N.C. App. 431, 229 S.E. 2d 826.

In 1767 and 1768, William Hooper, who later signed the Declaration of Independence on behalf of North Carolina, was the Attorney for the King. In that capacity, he signed and filed in the King's Court for the District of Salisbury, North Carolina, two indictments, one charging John Parker "late of the County of Rowan," with "an assault upon one Daniel Clary," the other charging "William Nelson and Willis Smith both of the County of Anson in the District of Salisbury" with an assault "upon one James White." The cases were duly brought to trial and the defendants were found not guilty.

On 7 February 1975, more than two hundred years later, the State instituted this civil action against B. C. West, Jr., a resident of Pasquotank County, in the Superior Court of that county, to recover possession of the two indictments. The State alleged in its complaint that it is the lawful custodian of and has the right to possession of all public records, including court records and documents, of the State of North Carolina; that the defendant is wrongfully in possession of the said indictments, which are such public records, and has refused the State's demands to surrender them to the State. The defendant filed answer admitting his possession of the documents but denying the State's right thereto, alleging that he is the owner of them. The authenticity of the two documents is not questioned.

The matter came on for hearing before Webb, J. without a jury. He gave judgment for the defendant, setting forth therein the following findings of fact and conclusions of law:

FINDINGS OF FACT

"1. The defendant, a resident of Pasquotank County, North Carolina, for valuable consideration and in good faith, purchased from Charles Hamilton Galleries, Inc. of New York, NY, two Bills of Indictment. These documents originated at a time when North Carolina was a province subject to the authority of England. They were filed in the Salisbury District Superior Court and are dated March 23, 1767, and September 5, 1768, respectively. They were signed by William Hooper as Attorney for the King. William Hooper subsequently was one of the North Carolina signers of the Declaration of Independence.

"2. The defendant was in possession of said two documents at the time of the institution of this action. Prior to the defendant's acquiring them, they were in the possession of private individuals or institutions and, like many other historical documents which were at one time public records, were the subject of trading between collectors.

"3. The evidence in this case is that the two Bills of Indictment were docketed in the Salisbury District Superior Court shortly after they were drawn in 1767 and 1768 respectively. There is no evidence as to how long they stayed on file with the Salisbury District Superior Court or

any of its successor courts or as to how either of the two Bills of Indictment were removed from the court.

"4. There is no evidence, other than the docketing, that either of the two Bills of Indictment have been in the possession of the Province of North Carolina, the State of North Carolina or any of its agencies since 1767 and 1768 respectively.

"5. Although statutory provisions governing the custody of court records for the Province and the State of North Carolina have never specifically permitted the removal of bills of indictment from court records, this Court cannot hold as to what the officially sanctioned practices of the various clerks and other custodians of court records have been in regard to the disposition of bills of indictment in the more than two hundred years in which these documents have been in existence.

CONCLUSIONS OF LAW

"1. This Court cannot hold that in the more than two hundred years existence of each of these Bills of Indictment that either of them left the possession of the Salisbury District Superior Court or any of its successors in any irregular manner.

"2. The defendant has possession of the documents which he obtained in good faith. The State of North Carolina has not overcome the presumption of title which arises in the defendant's favor through his possession of the documents.

"3. The plaintiff is not the owner of the two Bills of Indictment described in the Complaint.

"4. Said documents are owned by the defendant and he is entitled to the possession thereof."

By an act of the Colonial Assembly of North Carolina in 1766, the Chief Justice was empowered to appoint clerks of the Superior Court who were required to give bond for the safekeeping of records and the faithful discharge of their duties. By an act of the Assembly in 1760, the Salisbury District Superior Court was designated a court of record. The Colonial District Superior Courts were closed in 1773. State District Su-

perior Courts were opened in 1778, the Act of 1777 providing for the continuation of causes from the dockets prior to 1773. State District Superior Courts were replaced by County Superior Courts in 1806, statutory provision was then made for the transfer and transition of records from the former to the latter and the clerks of the District Superior Courts were constituted clerks of the County Superior Courts. Upon the adoption by the State in 1868 of the Code of Civil Procedure, the clerks of the then new Superior Courts received all the records, books, papers and properties of the former County Superior Courts. By the Public Laws of 1903, the State Historical Commission was established and charged with the duty of collecting valuable documents pertaining to the history of the State.

The evidence offered by the defendant, in addition to the foregoing historical data which was set forth in the State's answers to the defendant's interrogatories, is to the following effect:

The State does not know when the two bills of indictment, which are the subject of this action, were last in the possession of an officer of the court or how the State, or the officers of the court, lost the possession thereof. Since 1903, it has been the policy of the State to permit the discarding or destroying of some official papers but the witness so testifying was unable to say whether "someone in the State of North Carolina since 1903 exercised a discretion which resulted in the discarding of any bills of indictment." There is a large national and international market in which documents of historical significance, including documents which were once public documents, are purchased and sold. There are now in the possession of private institutions documents which formerly were public records of North Carolina. Some of the other indictments originally filed in the Salisbury District Superior Court, from 1767 to 1770, are presently in the custody of the State Division of Archives and History, which received them from the Clerk of the Superior Court of Rowan County in 1959.

The defendant is a private collector of manuscripts of historical significance. As such, he acquired the two bills of indictment in controversy in 1974 at an auction sale in New York City conducted by the Charles Hamilton Galleries which sold them for Robert Loy of East Bend, North Carolina. Mr. Loy, in turn, purchased them from J. H. Knight of Winston-Salem,

North Carolina, and from the Greensboro Historical Museum in 1972. There is no evidence in the record as to when or from what source either of these vendors acquired the documents. Documents which were formerly public documents are frequently purchased and sold in the market by private collectors and institutions, such as libraries.

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

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P. A., by Dewey W. Wells for defendant appellant.

Kirkland & Ellis by William D. North, attorney for American Library Association, Amicus Curiae.

Corinne A. Houpt, Assistant University Counsel, Duke University, Amicus Curiae.

Henry Bartholomew Cox, Amicus Curiae.

LAKE, Justice.

The fact that William Hooper, who signed the bills of indictment which are the subjects of this lawsuit, subsequently also signed the Declaration of Independence gives to these documents the greater part of their present intrinsic value, but that circumstance has no bearing upon the principles of law which must govern our decision. The record shows that, at the present time, other bills of indictment, filed in the Superior Court of Justice for the Salisbury District at about the same time, have remained in the custody of county or State officials and are now held by the Division of Archives and History. If the subject of this lawsuit were one of those documents, signed by a King's Counsel, whose name and professional prominence are now somewhat obscure in the mists of our Colonial history, the governing legal principles would be the same as those to which we must turn for guidance in this action.

[1] Although the defendant, in his answer, pleaded the three year statute of limitations in bar of the right of the State to recover, he does not, on this appeal, rely upon that statute. In this he is well advised. First, nothing in the record indicated when the documents were taken from the possession of the State and so the record does not show when the State's cause of action

for their recovery arose. Second, the statute so pleaded by the defendant does not apply to this action by the State.

Notwithstanding the provisions of G.S. 1-30, which states, "The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private persons," this Court said in *Raleigh v. Bank*, 223 N.C. 286, 26 S.E. 2d 573 (1943), "It has been uniformly held that no statute of limitations runs against the State, unless it is expressly named therein." In that case, the Court held that a civil action to foreclose a street assessment lien was barred by the ten year statute of limitations for the reason that the legislative intent to make such suit subject to such limitation "sufficiently appears." The three dissenting justices took issue with the majority on the latter point. They expressly said:

> "The majority opinion contains these pronouncements: (1) The policy of the State as established over the years is expressed in the maxim *nullum tempus occurrit regi*, which 'is still regarded as the expression of a sound principle of government.' (2) It has been uniformly held that 'no statute of limitations runs against the State unless it is expressly named therein.' (3) The Act of 1929, Chapter 331 [the statute deemed by the majority to impose a limitation upon the bringing of such action], is 'lacking in that degree of precision ordinarily to be found in restrictive statutes.' With these premises, we are all in accord."

As the majority, speaking through Justice Devin, later Chief Justice, said in *Raleigh v. Bank*, *supra*, whether there ought to be a statute of limitations applicable to suits by the State is a matter for the Legislature, not the courts.

Likewise, the relative merits of private collectors of and speculators in documents relating to the history of the State, as compared to archivists employed by the State, in the matter of preserving such documents and making them available to the public for respectful inspection and scholarly research is not determinative of the present appeal. That is also a matter for consideration of the Legislature in determining the State's policy concerning the collection and preservation of such papers. Our concern in the determination of this appeal is solely with the determination of the property right of the State in the two

documents here in question. We are not here concerned with the collection and retention of documents private in origin.

By Chapter I of the Acts of the Colonial Assembly of North Carolina in its 1766-1767 Session, the State was divided into six districts (Wilmington, Newbern, Edenton, Halifax, Hillsborough and Salisbury) for each of which the act provided for the establishment of "a Court for the trial of causes, civil and criminal * * * by the name of the Superior Court of Justice." The act provided that each such court "shall have, use, exercise, and enjoy, the same powers and authorities, rights, privileges, and preheminencies (sic), as are had, used, exercised, and enjoyed, by the Chief Justice or any of his Majesty's Justices of the Courts of Westminster in England." The act further authorized the Chief Justice to appoint "experienced and discreet Clerks of the Superior Courts; who shall, each of them, give bond * * * to our Sovereign Lord the King, his heirs and successors * * * for the safekeeping of the records and faithful discharge of his duty in office." The act further provided, "[T]hat for the more entire and better preservation of the records of causes, when any cause is finally determined, the clerk shall enter all the proceedings therein, and other matters relating thereto, in a book, well bound, so that an entire and perfect record may be made thereof." It also provided, "[T]hat all causes * * * indictments and presentments whatsoever, that are, or shall be depending in any of the late Superior Courts of Justice within this Colony * * * and not fully determined, shall be transferred and put on the dockets of the respective Superior Courts hereby established."

It is apparent that the Colonial Assembly recognized the importance of maintaining records of court proceedings, civil and criminal, and of collecting and preserving in a public office documents relating thereto. Obviously, the bills of indictment charging criminal offenses upon which the Colonial subjects of the King were to be tried in his Court were among the papers so designed to be collected and preserved. When a bill of indictment, prepared by the King's Counsel, was filed in the office of the clerk of such court, the paper was no longer the private property of the draftsman but became part of the records of the King's Court and, therefore, property of the King. Its subsequent retention or disposition was subject to his direction and control. Nothing else appearing, the inherent powers of his Court would include the power to order the return of its posses-

sion of a bill of indictment removed from the clerk's office without authority. Such removal could not terminate the King's title to the document, nor would his right to recover its possession be barred by the passage of time, however great, for the common law of England clearly accepted the maxim, *nullum tempus occurrit regi.*

[2] A change of sovereignty transfers but does not alter the right of the former sovereign to his official, as distinguished from his personal, property. Thus, in 48 C.J.S., International Law, § 15, it is said: "A state which is formed out of, or which absorbs, another, succeeds to the latter's international rights and obligations. Property of the old state passes to the new one, and the former's debts are generally assumed by the latter." Thus, "Sovereignty survives changes in governments and in forms of government." 45 Am. Jur. 2d, International Law, § 40. As Justice Sutherland, speaking for the Court in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), said: "Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense."

Officially, the War of the American Revolution ended with the signing of the Treaty of Paris on 3 September 1783 providing: "His Britannic Majesty acknowledges the said United States, viz. * * * North Carolina * * * to be free, sovereign and independent states; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, property and territorial rights of the same, and every part thereof." The treaty further provided: "His Britannic Majesty shall * * * also order and cause all archives, records, deeds and papers belonging to any of the said states, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored, and delivered to the proper states and persons to whom they belong." The right of the State to the bills of indictment here in question does not arise from that provision of the treaty for there is nothing to indicate that these bills of indictment, "in the course of the war," fell into the hands of an officer of the King. This provision of the treaty, however, indicates clearly the intent of the King to relinquish any claim which he otherwise might have to records, such as indictments and other portions of official court records.

The defendant and the amici curiae referred in their briefs to an alleged state of "anarchy" prevailing during the War of the Revolution. Nothing in the record indicates that any disorder or unrest in the Salisbury District disturbed the records of the Superior Court of Justice therein. In any event: "Internal disorder, rebellion, or continuing civil war does not affect the existence of a nation, although foreign relations may be interrupted thereby. Even when anarchy exists for a considerable period of time, the nation continues to subsist; and so will its existence continue until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the state." 45 Am. Jur. 2d, International Law, § 14.

[3] The Treaty of Paris simply recognized the established fact of history that North Carolina was, by reason of a successful revolution, a free and independent state, and no longer a British colony. This accomplished fact, not the formal recognition of it, transferred the sovereignty in North Carolina from the King to the State. As Justice Clifford said in *United States, Lyon et al. v. Huckabee*, 16 Wall. 414, 21 L.Ed. 457 (1873); "Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government, or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation or State. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered State, including even debts as well as personal and real property. Halleck's International Law, 839; *Elphinstone v. Bedreechund*, 1 Knapp's Privy Council Cases, 329; Vattell, 365; 3 Phillmore's International Law 505."

In *United States v. McRae* [1869], L.R. 8 Eq. 69, the United States sued in the English courts to gain possession of funds which previously belonged to the Confederate States of America. Vice Chancellor James said:

> "I apprehend it to be clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property to everything in the nature of public property, and to all rights in respect to the public property of the displaced power, whatever

may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor or accountant of such other persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced, and was itself seeking to enforce it."

[4] Thus, the turmoil and confusion incident to the War of the Revolution did not terminate the title of the sovereign to the bills of indictment here in question or defeat his right to the possession thereof, nor did it suspend sovereignty. The succession of the new sovereign was instantaneous for there is no gap in sovereignty. The proclamation and formal recognition of the new sovereign is not essential to such transfer of the properties of the old sovereign to the new. This is the meaning of the classical pronouncement, "The King is dead; long live the King."

[5] We need not determine the precise time at which the State of North Carolina succeeded to the sovereign rights of King George III. At some time, between the creation of the latter's right in and to these indictments and the signing of the Treaty of Paris, that succession occurred and the properties of the King, including these documents, whether then in or out of the possession of his custodian, passed automatically to the State.

The defendant relies upon the doctrine of abandonment. In *Church v. Bragaw*, 144 N.C. 126, 56 S.E. 688 (1907), this Court, speaking through Justice Walker, said:

"The word 'abandonment' has a well defined meaning in the law which does not embrace a sale or conveyance of the property. It is the giving up of a thing absolutely, without reference to any particular person or purpose, and

includes both the intention to relinquish all claim to and dominion over the property and the external act by which this intention is executed, and that is, the actual relinquishment of it, so that it may be appropriated by the next comer. 1 Cyc., 4. 'Abandonment must be made by the owner without being pressed by any duty, necessity or *utility* to himself, but simply because he desires no longer to possess a thing; and, further, it must be made without a desire that any other person shall acquire the same; for if it were made for a consideration, it would be a barter or sale, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift.' *Stephens v. Mansfield*, 11 Cal., 363."

[6] Thus, the owner of articles of personal property may terminate his ownership by abandoning it and, in that event, title passes to the first person who thereafter takes possession. 1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property, § 18. However, an essential element of abandonment is the intent of the owner to relinquish the article permanently. "An abandonment must be made to appear affirmatively by the party relying thereon and the burden is upon him who sets up abandonment to prove it by clear, unequivocal, and decisive evidence." 1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property, § 36.

[7, 8] It is the owner who must have the intent so to terminate his title. Thus, it is not enough that the custodian into whose hands the owner entrusted it intentionally discarded it. Here, as in other modes of disposing of property, an owner may act through an agent, but to deposit an article with an agent for safekeeping obviously does not imply authority in the agent to discard it. Nothing in the record indicates a grant by King George III, or by the State of North Carolina, to the Clerk of the Superior Court of Justice of the Salisbury District, or his successor in office by that or any other title, to throw away these documents committed to his custody. On the contrary, the above mentioned act of the Colonial Assembly required that the clerk give bond "for the safekeeping of the records." Obviously, neither careless disregard nor intentional misconduct by the clerk will show an intent by the owner of the documents in question to abandon them. It is even more obvious that unauthorized removal of the documents from the office of the clerk by a third person, with or without the knowledge and consent of the clerk, whether or not a state of unrest bordering on

anarchy prevails in the community, does not show an intent by the owner to abandon his property. Thus, the evidence in the record that, in times past, there have been instances in which clerks of courts in North Carolina, in order to provide filing and storage space for new documents, have removed from their offices and discarded old records, does not establish abandonment of such property by the sovereign so as to confer upon the first subsequent taker thereof a title good against the sovereign. In this respect, the sovereign is like any other owner of property.

The defendant and the amici curiae contend that the greater probability is that these indictments were so thrown away by the Clerk of the Superior Court of Justice for the Salisbury District, or some successor to him, during the period of unrest while the War of the Revolution was in progress, or at some later date when these papers were regarded as of no further consequence. It would seem more likely that they were intentionally removed from the clerk's office in more recent times, when discovered by one who was aware of their intrinsic value by reason of the presence thereon of the signatures of William Hooper, a signer of the Declaration of Independence. The fact that other, contemporaneous records of the Superior Court of Justice of the Salisbury District still remain in the possession of the State tends to negate the supposition of the defendant that the documents here in question were intentionally discarded by the clerk of the court, or his successor in office, in order to make room for newer documents.

[9] In either event, the *bona fides* of the person taking the documents into his possession, or of a subsequent purchaser for value from him, whether on the open market or otherwise, would not confer good title upon such taker, or subsequent purchaser, but, on the contrary, such purchaser, himself, regardless of his having acted in good faith, became a converter liable to the true owner. *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E. 2d 559 (1966); 18 Am. Jur. 2d, Conversion, § 7. Furthermore, these documents, being bills of indictment, bear upon their face notice to all the world that they were part of the court records of the Colony of North Carolina and, therefore, the property of the State. See: *Mayor of the City of New York v. Lent*, 51 Barb. 19 (1868).

[10] In his brief, the defendant relies upon the presumption that the Clerk of the Superior Court of Justice of the Salisbury District, and his successors, being public officials, have properly performed their duties. Since their duty included the safekeeping of the court records, including these indictments, this presumption would not support the defendant's theory that these documents were intentionally thrown away by the clerk, but even if they were, such action by him would not constitute an abandonment by the sovereign of its property in the absence of a showing that the sovereign authorized it or, with knowledge of it, ratified it. There is nothing in the record to indicate either such prior authority or subsequent ratification. Such authorization or ratification cannot be presumed.

In 66 Am. Jur. 2d, Records and Recording Laws, § 10, it is said:

> "Public records and documents are the property of the State and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the Legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. Thus, an indictment duly filed cannot be removed legitimately by anyone, including the District Attorney, except for purposes of the trial thereon, or for purposes of evidence under a subpoena duces tecum or an order of court."

[11] Title to the bills of indictment in question having been shown to have been in the State, as successor to the King of England, there being no showing that the State, or the sovereign under whom it claims, intentionally abandoned the property, or authorized a transfer of its possession by the custodian whose official duty it was to keep the documents in his possession, and the right of the State to maintain this action not being barred by the lapse of time, the State has established its right to the possession of the documents and the judgment of the Court of Appeals, reversing that of the Superior Court, was correct.

Neither this Court nor any other has authority to direct reimbursement of the defendant for expense incurred in acquiring or maintaining his possession thereof in good faith, thus preserving it from destruction or loss. If such claim is meritorious, the Legislature, and it alone, may authorize the use of State funds for such purpose.

Affirmed.

Justice COPELAND dissenting.

Reluctantly, I must dissent from the scholarly opinion of the majority.

The State brings this action to recover two bills of indictment signed by William Hooper, one of the three signers of the Declaration of Independence on behalf of North Carolina. The State having brought the action must carry the burden of proof to establish title to the documents. The State has shown that there were two bills of indictment signed by William Hooper in 1767 and 1768. The only other thing that has been shown by the State is their presence in private hands over 206 years later. What happened to them in the meantime is just one big question mark.

It is well known that most of the discoveries of old papers and records are made by private citizens. To permit the State to ride freely on the backs of private individuals and libraries who have expended their efforts and money to recover and preserve these documents and records, without any reimbursement, does not strike me as fair. The net result of the majority opinion will be to drive documents and records underground and out of the State. I do not consider this good public policy.

I believe the dissenting opinion of Judge Britt of the Court of Appeals puts this case in the proper perspective. Since the State has failed to carry the burden of proof in this instance, I would reverse the Court of Appeals and affirm the trial court.

Justice MOORE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CURTIS DONNIE SHULER

No. 107

(Filed 13 June 1977)

1. **Homicide § 21.5— first degree murder—shooting—sufficiency of evidence**

Evidence in a first degree murder prosecution was sufficient to be submitted to the jury where it tended to show that deceased's body was found on the shoulder of a road with a fatal wound in the chest and three other bullet wounds in the head; his pocketbook and automobile were missing; several persons saw defendant in possession of deceased's automobile shortly after the crime was committed; on the morning following decedent's death, defendant told an acquaintance that on the night before he had shot a man while attempting to rob him and had taken his money and automobile; deceased's death was caused by bullets from a .25 caliber pistol; and there was evidence that defendant had a .25 caliber pistol in his possession on the morning after the deceased met his death.

2. **Criminal Law § 34.4— defendant's guilt of prior offense—admissibility**

The trial court in a first degree murder prosecution did not err in allowing into evidence testimony by a witness that less than one month prior to the fatal shooting in question defendant had a gun that "was little and it was black and it was at my head," since evidence of that prior criminal act was admissible (1) to prove a material fact at issue, that defendant possessed a pistol and, (2) to contradict defendant's testimony that he had never had a .25 caliber pistol in his possession.

3. **Constitutional Law § 34— double jeopardy—time of attachment—exception to rule**

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn; nevertheless, a subsequent trial of a defendant, following the termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted, over defendant's objections, due to "a physical necessity or the necessity of doing justice."

4. **Constitutional Law § 34; Criminal Law § 26.8— mistrial required by necessity of *doing justice*—subsequent former jeopardy plea properly denied**

Where a deputy sheriff commented to a juror during defendant's first trial that "unless there is more evidence produced than there has been, that man will never be found guilty by this jury," the court on appeal cannot say that the trial judge's declaration of a mistrial, *sua sponte*, was not required by the "necessity of doing justice"; therefore, defendant's subsequent plea of former jeopardy was properly denied.

State v. Shuler

APPEAL by defendant from *Clark, J.*, 7 September 1976 Session of CUMBERLAND Superior Court.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Ivey Jerome Lilly. Defendant entered a plea of not guilty.

The State's evidence tended to show that on 3 December 1975 the body of Ivey Jerome Lilly was found on the shoulder of a rural paved road in the eastern edge of Cumberland County. Medical testimony established that his death was caused by multiple gunshot wounds. Four bullets were taken from the body of the deceased and were identified by a firearms expert as being .25 caliber automatic fire jacketed bullets. It was the opinion of the expert that all four of the bullets were fired from the same weapon.

It was further established by the State's evidence that the deceased owned a 1971 maroon, black-topped Chevrolet Impala. On 5 December 1975, after pursuit by police officers in which he initially failed to heed siren and flashing light signals, defendant was finally apprehended by police officers and it was ascertained that he was operating the automobile formerly owned by the deceased. Upon questioning by the police officers, defendant stated that the automobile belonged to him, but upon being advised that the Chevrolet was listed as a stolen vehicle he said that he rented it from a friend by the name of Allen James. The officers were unable to locate a person by the name of Allen James. Defendant thereafter gave a written statement to the effect that he had obtained the automobile from a man named Poe Currie by paying him a small sum of money. He last saw Currie going toward a bus station in Raleigh for the stated purpose of taking a bus out of North Carolina.

Certain tire marks were found on the shoulder of the road about 100 feet from the body of the deceased and on the opposite side of the road. There was expert testimony that two of the tires on the deceased's automobile could have made part of those impressions.

Scharoyle Louise Williams testified that she saw defendant between the hours of 12:00 midnight and 1:00 a.m. on the morning of 3 December 1975. She was sitting in an automobile with Harold Pridgen and Margie Walters waiting for a man to sell her some heroin. Defendant drove up in a Chevrolet automobile

which she described as having a black top and a rust-colored bottom. Defendant asked if any of them wanted to buy a gun. She observed that he had a .25 caliber automatic pistol. She later identified the Chevrolet belonging to deceased as the one defendant was driving on that morning.

Thomas Bernard Richardson testified that on the morning of 3 December 1975 defendant called him and stated that he was coming by his apartment to get some clothes. Shortly thereafter defendant drove up in a maroon, black-topped Chevrolet. Defendant came into the apartment and told the witness that on the prior night he had run across a "dude" and had "burnt" or tricked him out of some money; that during a later attempt to rob him this man gave him a lot of trouble and he had to shoot him. Defendant stated that he took the man's money and his automobile. At the time of this conversation, defendant had a .25 caliber pistol in his possession.

The State offered other evidence tending to show that defendant was in possession of a black-topped Chevrolet and a .25 caliber pistol on or about 3 December 1975.

Defendant testified and denied any knowledge of the killing of Ivey Jerome Lilly. He stated that he had received the automobile from a man named Poe Currie after giving him $20.00 for the use of the car. He said that he made conflicting statements to police officers concerning his possession of the automobile because he did not want them to know that he was in possession of a stolen vehicle.

On rebuttal Willie Currie testified that he had never had a Chevrolet automobile in his possession and that he had never loaned or rented any kind of vehicle to defendant.

Other evidence pertinent to the decision of this appeal will be hereinafter stated in the opinion.

The jury returned a verdict of guilty of murder in the first degree. Judge Clark entered judgment on 10 September 1976 imposing a sentence of life imprisonment.

Attorney General Edmisten, by Assistant Attorney General George J. Oliver, for the State.

Harold D. Downing for the defendant.

BRANCH, Justice.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit.

Pertinent portions of our often stated rule concerning a trial judge's consideration of a motion for judgment as of nonsuit are as follows: The question presented by a motion for judgment as of nonsuit is whether upon consideration of admitted evidence, both competent and incompetent, in the light most favorable to the State, there is substantial evidence to support a jury finding that the offense charged in the bill of indictment has been committed and that the defendant is the person who committed it. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679; *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661. The credibility of the witnesses is for the jury even when their character is questionable. 2 N. C. Index 2d, Criminal Law § 106.

Here the deceased's body was found on the shoulder of a road with a fatal wound in the chest and three other bullet wounds in the head. His pocketbook and automobile were missing. Several persons saw defendant in possession of deceased's automobile shortly after the crime was committed. On the morning following decedent's death, defendant told an acquaintance that on the night before he had shot a man while attempting to rob him and had taken his money and automobile. Deceased's death was caused by bullets from a .25 caliber pistol and there was evidence that defendant had a .25 caliber pistol in his possession on the morning after the deceased met his death.

We hold that the State offered ample evidence to support reasonable inferences that the deceased met his death as the result of a homicide committed during an armed robbery and that defendant was the person who committed the crime.

This assignment of error is overruled.

[2] Defendant next contends that the trial court erred by permitting the witness Terry Blackwelder to testify, over objection, as to defendant's prior criminal acts.

Defendant testified that he had never had a .25 caliber pistol in his possession. He further stated that he knew "a white female by the name of Terry," but denied that he had ever had a .45 automatic pistol in her presence. The State, in rebuttal,

offered Terry Blackwelder who testified that during the month of November 1975 defendant possessed a gun. She stated:

> . . . I don't know what kind of gun, all I know it was little and it was black and it was at my head. . . .

The general rule is that in a prosecution for a particular crime the State cannot offer evidence tending to show that the defendant has committed another distinct, independent or separate offense. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535.

The landmark case of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364, contains this language:

> ". . . 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. . . ."

The testimony of the witness Blackwelder tended to prove that less than a month before Lilly met his death by wounds inflicted by a .25 caliber pistol, defendant had a similar weapon in his possession. The challenged evidence was therefore admissible as substantive evidence to prove a material fact at issue. We recently considered a similar question in *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574. There defendants were charged with first-degree murder. The State's evidence disclosed that the deceased was killed by a shotgun owned by defendant Ham. The State offered evidence that less than a month before the charged crime occurred, defendant Ham's furniture was being removed from a rented mobile home by his landlord's son and Ham, by the use of a shotgun, forced the boy to return his possessions to the mobile home. We there held that this evidence was relevant and properly admitted to show possession of a shotgun by defendant Ham shortly before the charged crime took place.

The evidence here challenged was also admissible to contradict defendant's testimony. In *State v. Lewis*, 177 N.C. 555, 98 S.E. 309, the defendant was charged with the crime of rape. He offered testimony tending to show that he was sick and in bed during the week before and the week after the date that the alleged crime occurred. In rebuttal the State offered evidence that defendant had chased a Mrs. Loftin and tried to grab

her and that three nights thereafter he was seen peeping in her home. Finding no error in the admission of this evidence, this Court, speaking through Justice Walker, stated:

> The evidence admitted by the court was manifestly competent for the single purpose of contradicting the prisoner's statement and the testimony of his witnesses that he was sick for two weeks, including 17 January, 1918, as one of the days, and it was thus restricted by the judge. This assignment also must be disallowed.

We further note that defense counsel elicited testimony similar to that challenged during the cross-examination of the witness Blackwelder. The admission of testimony over objection is ordinarily harmless when defendant elicits similar testimony on cross-examination. *State v. Brown*, 272 N.C. 512, 158 S.E. 2d 354; *State v. Humbles*, 241 N.C. 47, 84 S.E. 2d 264.

For the reasons stated, this assignment of error is overruled.

Finally, defendant argues that the trial court erred in denying his motion for dismissal on grounds of former jeopardy.

Defendant was originally put on trial for first-degree murder before Judge James H. Pou Bailey at the 11 May 1976 Session of Cumberland Superior Court. On the third day of that trial, after the presentation of the State's case in chief, Judge Bailey allowed the State's motion to reopen its case for the purpose of introducing the testimony of Thomas Bernard Richardson, who was to be flown in from Texas. The trial judge allowed the State until 2:00 p.m. to produce this witness and recessed court at about 10:00 a.m. During this time Judge Bailey was informed by an attorney not appearing in the case that an unidentified woman had been observed talking loudly outside the courthouse in the presence of persons wearing juror badges. She had stated that it would be a shame to put anyone to death on the evidence in the case. Upon reconvening court at 2:00 p.m., Judge Bailey inquired of the jury whether anyone had overheard any comment regarding the possible penalties involved in this trial. Receiving no affirmative response, he again recessed court until the arrival of the State's additional witness, Thomas Bernard Richardson.

The witness Richardson arrived at 2:58 p.m. and the trial was resumed. After Richardson had testified, the following colloquy occurred:

COURT: Ladies and Gentlemen of the Jury, what I am about to say is in no way intended to be a criticism of you or anyone of you. We are trying this case in a very crowded setup. The toilet facilities for you and everybody else are obviously inadequate. Witnesses and people involved in this case, mingling up and down the halls, and I think talking fairly freely. Have any of you heard any comment from anybody, whether it was directed to you or just in passing, concerning this case or anybody in it?

JUROR D. H. POWELL: Yes sir.

* * *

The remaining jurors were sent to the Jury Room and the juror Powell was taken into the Judge's Chambers where the following transpired:

* * *

COURT: What was the comment?

POWELL: The comment was, quote: Unless there is more evidence produced than there has been, that man will never be found guilty by this jury.

COURT: Did he make any comment to whether the man was or was not guilty?

POWELL: No, Sir, he only made this comment that I told you at that time.

COURT: This afternoon session?

MR. BYRD: I believe it was between two and three o'clock, if it's the same time I remember.

POWELL: I think it was at the time when we was hanging loose, waiting for the State man to come, and that's why we were out in the hall, and this was when the statement was made.

COURT: And since that time, there has been additional evidence?

POWELL: Yes sir, since that time.

* * *

COURT: My effort is to make sure the trial is fair to both sides.

POWELL: I was hoping that you would ask that question again. I didn't know what I was going to do if you were going to turn it over to the jury.

COURT: Let me ask you this. Do you feel, I don't want to know the details, but do you feel that you were influenced one way or the other by that comment?

POWELL: No Sir, but I want you to know that it was made.

COURT: I need to know it, because that's why I asked. I despise trying a case up here in this area, because it's so crowded, everybody pushed in together, and folks do talk. It's a very unsatisfactory situation.

Deputy Sheriff Charles Musselwhite, who had transported defendant to the courtroom that day, admitted that he had commented on the sufficiency of the State's evidence directly to the juror Powell. Although not in uniform at the time, he was wearing an identification badge on his shirt collar.

Following his conference with juror Powell and counsel, Judge Bailey entered the following findings and order:

COURT: Upon the resumption of the court at 2:00 on Wednesday, May 12, the presiding Judge was informed by an attorney of Fayetteville that during the lunch recess he had observed a person whose name is unknown to him, in front of the courthouse in the presence of some persons wearing juror badges, commenting on the possibility of a death penalty in this case. That upon questioning the jurors, none engaged to try this case acknowledged having heard said comments. The Court further observes that on the third floor of the Cumberland County Courthouse, there is little or no room for traffic circulation; that the witnesses both for the State and for the Defendant have been closely in the presence of the jurors in this case, both before and after Court on Tuesday and Wednesday, that the Court has no assurance that comments have not been made

in the presence of the jurors that might influence the jurors in this case; that one juror has acknowledged overhearing a comment by a law enforcement officer as to the quality of the State's evidence in this case; that at the time the comment was made, the State's evidence was not sufficient to send the case to the jury. That since that time, a witness brought in for this trial by chartered plane from San Antonio, Texas has testified to an extra-judicial admission of the [defendant] that he killed someone; which evidence has materially strengthened the State's case. The Court feels that he is unable to guarantee the integrity of the jury, not by reason of any known wrongdoing on the part of the jurors, but due to the nature of the evidence in this case, and the necessity of bringing a witness in from Texas, which fact is known to the jury. The Court is of the opinion and so finds that the verdict in this case would invariably and inevitably be suspect. The Court finds and determines that to permit the case to continue under these circumstances would be contrary to the interest of justice, prejudicial both to the State and to the Defendant. The Court of its own motion elects to withdraw a juror and declare a mistrial. To the entry of the above order, the Defendant in apt time objects; objection overruled.

At the second trial of this case, Judge Clark conducted a hearing on defendant's motion to dismiss. After making findings and conclusions similar to those contained in Judge Bailey's order, Judge Clark entered an order denying defendant's motion.

It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense. U. S. Const. Amend. V; N. C. Const. Art. I, § 19; *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745.

[3] Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838. Nevertheless, a subsequent trial of a defendant, following the termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted, over defendant's ob-

jections, due to "a physical necessity or the necessity of doing justice." *State v. Beal*, 199 N.C. 278, 154 S.E. 604. The United States Supreme Court, speaking through Justice Story in the landmark case of *United States v. Perez* (a capital case), 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165, fashioned the test to be applied upon a plea of former jeopardy:

> We think, that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .

This rule of "necessity" has consistently been adhered to in subsequent decisions of that Court. *United States v. Dinitz*, 424 U.S. 600, 47 L.Ed. 2d 267, 96 S.Ct. 1075; *Illinois v. Somerville*, 410 U.S. 458, 35 L.Ed. 2d 425, 93 S.Ct. 1066; *United States v. Jorn*, 400 U.S. 470, 27 L.Ed. 2d 543, 91 S.Ct. 547; *Downum v. United States*, 372 U.S. 734, 10 L.Ed. 2d 100, 83 S.Ct. 1033; *Gori v. United States*, 367 U.S. 364, 6 L.Ed. 2d 901, 81 S.Ct. 1523; *Wade v. Hunter*, 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834; *Simmons v. United States*, 142 U.S. 148, 35 L.Ed. 968, 12 S.Ct. 171.

In *Somerville* the respondent was brought to trial on a defective indictment which could not have been cured by amendment under existing Illinois law. The trial judge declared a mistrial over defendant's objection. After being reindicted, tried, and convicted, the defendant petitioned for a writ of habeas corpus alleging double jeopardy. This petition was granted by the Seventh Circuit Court of Appeals. The United

States Supreme Court allowed certiorari to review that decision and reversed. The plurality opinion quoted the *Perez* standard with approval and emphasized the breadth of the trial judge's discretion with these quotes:

> . . . In *Wade v. Hunter*, 336 U.S. 684 (1949), the Court, in reaffirming this flexible standard, wrote:
>
> > "We are asked to adopt the *Cornero [v. United States*, 48 F. 2d 69,] rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Id.*, at 691.
>
> Similarly, in *Gori v. United States*, 367 U.S. 364 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.
>
> > "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.*, at 368.

Our Court has characterized the types of necessity which will justify a reprosecution following a declaration of mistrial. In *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243, Justice Bobbitt (later Chief Justice) summarized:

> The two kinds of necessity, *i.e.*, "physical necessity" and the "necessity of doing justice" were so classified by *Boyden, J.*, in *S. v. Wiseman*, 68 N.C. 203. As to "physical necessity," he said: "One class may not improperly be termed physical and absolute; as where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial; or where the prisoner becomes insane

during the trial, or where a female defendant is taken in labor during the trial." As to "necessity of doing justice," he said that this arises from the duty of the court to "guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution."

Accord: State v. Cutshall, supra; State v. Birckhead, supra.

[4] Obviously in instant case we must narrow our consideration to the question of whether Judge Bailey's declaration of a mistrial, *sua sponte*, was born of "the necessity of doing justice." Such a decision would be well within the trial judge's discretion when faced with "the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *State v. Crocker, supra.* In capital cases the trial court must make findings of fact and place them in the record so that the court's action may be reviewed on appeal. *State v. Cutshall, supra; State v. Tyson*, 138 N.C. 627, 50 S.E. 456.

Here, had the law enforcement officer expressed an opinion that the jury would find defendant guilty upon the then-existing evidence, there would, in all probability, be a unanimity of opinion that the trial judge acted correctly. We find no authority which holds that the test of "necessity of doing justice" exists solely for the benefit of a defendant. It is fundamental in our system of jurisprudence that each party to an action is entitled to a fair and impartial trial. In *Simmons v. United States, supra*, the Court recognized this fundamental principle when it stated:

> There can be no condition of things in which the necessity for the exercise of this power [to declare a mistrial] is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that . . . by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us, "It is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally

> a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case." *United States v. Morris*, 1 Curtis C. C. 23, 37.

Our own Court in considering exceptions to an order of mistrial in *State v. Cain*, 175 N.C. 825, 95 S.E. 930, also recognized that principle of evenhanded justice with this succinct statement: "The object of a trial is to acquit the innocent and convict the guilty."

The recent decisions of the United States Supreme Court seem to emphasize that the double jeopardy clause protects a defendant from prosecutory actions which tend to provoke mistrial requests and from bad faith conduct by the judge or the prosecutor which subjects the defendant to multiple trials for the purpose of affording the State a more favorable opportunity to convict. *United States v. Dinitz, supra; Illinois v. Somerville, supra.*

In the case *sub judice* there is nothing to indicate that the prosecutor did anything to provoke a mistrial or that the trial judge acted in bad faith so as to give the State a more favorable position or to lessen defendant's opportunity for an acquittal.

It is unchallenged that an expression of opinion by a law enforcement officer as to the weakness of the State's case had reached the jury box. The juror's statement that he would not be prejudiced by this remark would not, standing alone, prevent the trial judge from exercising his discretion and declaring a mistrial. In *Whitfield v. Warden of Maryland House of Correction*, 486 F. 2d 1118, the Fourth Circuit Court of Appeals aptly stated:

> . . . [A] trial judge need not explore whether the extraneous communication has in fact prejudiced the juror. When a judge concludes that on the basis of facts and reasonable inferences to be drawn from the facts that a juror has been exposed to information that might taint his verdict, he may withdraw the juror in the exercise of his sound discretion without unconstitutionally subjecting the defendant to double jeopardy. . . .

Under the circumstances disclosed by his findings, we cannot say that Judge Bailey's declaration of a mistrial was not

required by the "necessity of doing justice." Therefore, defendant's subsequent plea of former jeopardy was properly denied by Judge Clark.

No error.

STATE OF NORTH CAROLINA v. REGINALD WILSON

No. 106

(Filed 13 June 1977)

1. **Criminal Law § 104— motion for nonsuit—inherently incredible evidence**

While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established by the State's own evidence.

2. **Criminal Law § 66.1— identification of defendant—opportunity for observation**

A burglary victim had a sufficient opportunity to observe defendant so as to render competent her in-court identification of defendant where defendant was within eight to ten feet of the victim; a kitchen light illuminated the bedroom of the victim's house where the victim saw defendant; the victim had seen defendant earlier that summer on the street and did not know his name but knew that he was a named person's son; the victim told her husband and an officer shortly after the crime that one of the burglars was the named person's son; the victim positively identified defendant at a pretrial photographic viewing; and her identification testimony was clear and unequivocal.

3. **Burglary and Unlawful Breakings § 1.1— burglary indictment—felony intended**

While a burglary indictment must specify the particular felony which the defendant allegedly intended to commit, it is ordinarily sufficient to state the intended offense generally.

4. **Burglary and Unlawful Breakings §§ 1.1, 3.2— burglary indictment—intent to commit larceny—description and ownership of property**

Where a burglary indictment alleged that defendant's ulterior intent was to commit larceny, the State was required to prove that intent at the time of the breaking and entering in order to make out the offense of burglary; however, there was no necessity to allege or prove that defendant intended to steal any particular item of property owned by any particular individual.

5. **Burglary and Unlawful Breakings § 1.1— burglary—commission of intended felony**

The actual commission of the intended felony is not essential to the crime of burglary.

6. **Burglary and Unlawful Breakings § 3.2— burglary—intent to commit larceny—description and ownership of property**

Allegation and proof in a burglary case that defendant intended to steal the goods and chattels of another located in the burglarized dwelling, *i.e.*, to commit the crime of larceny, were sufficient, and the additional allegation specifying an intent to steal a Schwinn 10-speed bicycle and proof concerning its ownership were surplusage and harmless.

7. **Criminal Law § 102.12— jury argument—punishment for first degree burglary**

Defense counsel properly informed the jury of the consequences of a conviction of first degree burglary and properly argued that, in light of those consequences, the jury should give the matter close attention and its most serious consideration.

8. **Criminal Law § 102.12— jury argument—punishment as part of substantive deliberations**

The trial court in a first degree burglary case properly excluded defense counsel's jury argument implying that identification of defendant was based on a fleeting view and that, while such a view may be sufficient to convict in some situations, it is inadequate to convict in this case because the punishment is so severe, since counsel may not ask the jury to consider punishment as part of its substantive deliberations.

9. **Criminal Law § 120— failure to instruct on punishment for burglary**

The trial court in a first degree burglary case did not err in failing to instruct the jury that upon conviction a sentence of life imprisonment would be imposed, since such an instruction may be given or withheld in the court's discretion, and the exercise of that discretion will not, absent abuse, be disturbed on appeal.

DEFENDANT appeals from judgment of *Browning, S.J.*, 27 September 1976 Criminal Session, PITT Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging that between 1 a.m. and 2 a.m. in the night of 13 July 1976, with force and arms, defendant feloniously and burglariously broke and entered the occupied dwelling house of Barbara White, 700-B Imperial Street, Greenville, North Carolina, with intent, feloniously, and burglariously, to steal, take and carry away the goods and chattels of Barbara White located in said dwelling house, specifically one Schwinn 10-speed bicycle.

Mrs. Barbara White testified that on 13 July 1976 she lived with her husband, Willie Andrew White, at 700-B Imperial Street in Greenville. This apartment consists of three rooms—a living room on the front, a bedroom in the middle and a kitchen on the back with a bath closed in on the porch. A front door leads to the living room and a back door leads out of the kitchen.

Mrs. White testified that she got off work at 10:30 p.m. on 13 July 1976 and, upon arriving home, prepared her clothing for the next day's work and then locked the doors. No windows were open—"they had been nailed down." Her husband was not at home and, according to custom, she left the kitchen light on and went to bed. Her husband owned a 10-speed Schwinn bicycle and when she went to bed it was parked on the living room floor. She awoke sometime during the night, about 1:00 or 1:30 a.m., and saw two men, one standing over her and the other with the bicycle pushing it toward the kitchen. She screamed and while the intruders ran out the back door, she ran out the front door. She did not recognize the man standing over her but earlier in the summer had seen the person who was pushing the bicycle. She said: "I didn't know his name, all I knew he was Sister Wilson's son, one of Sister Wilson's sons. He's not a personal friend of mine, but I knew Sister Wilson had a lot of children." Following a voir dire, she was permitted to identify defendant in court. She said he was wearing a black hat and old "railroadman-type" gloves. "The hat had rubber in the back of it and it had a cap-like bill with a piece across."

When her husband got home she told him one of the burglars was Sister Wilson's son and that she didn't know the other person. They called the police. An examination of the apartment disclosed that the kitchen window had been forced open. The screen had been taken off and was lying on the grass in the backyard beside the house.

Several days later Mrs. White made a photographic identification of defendant as the person in her house pushing the bicycle on the night in question. Mrs. White testified she based her in-court identification "on having seen the person in my house with the bicycle and nothing else I am fully satisfied that Reginald Wilson is the person that had the bicycle that night."

Willie Andrew White testified over objection that he owned the Schwinn 10-speed bicycle to which the bill of indictment refers and that he kept it in the living room of the apartment where he and Mrs. White lived. He said his wife told him when he arrived home that she recognized one of the burglars as Sister Wilson's boy. On the night of the burglary he and the officers checked the windows of the apartment and found the kitchen screen had been removed from the kitchen window.

Detective Joseph Tripp testified, among other things, that Mrs. White told him when he arrived at the scene on the night in question that one of the intruders "was one of the Wilson boys." He further testified that he showed Mrs. White six photographs of black males and that she selected Reginald Wilson's picture as the person who was pushing the bicycle through her bedroom on the night of 13 July 1976. Police Officer Linwood E. White testified to substantially the same thing.

Defendant offered no evidence.

The jury convicted defendant of burglary in the first degree and defendant was sentenced to life imprisonment. He appealed to the Supreme Court assigning errors discussed in the opinion.

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

Dallas Clark, Jr., court-appointed counsel for defendant appellant.

HUSKINS, Justice.

Defendant moved to suppress his in-court identification by the prosecuting witness on the ground that its exclusion is required by the due process clause of the Federal Constitution. Denial of this motion constitutes defendant's first assignment of error.

It is proper to note at this point that G.S. 15A-974(1), pursuant to which defendant's motion is purportedly filed, mandates the suppression of evidence *only* when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights. Such is not the case here. Defendant candidly concedes in his brief that "there was no constitutional [sic]

out-of-court confrontation or any pretrial identification procedure suggestive and conducive to mistaken identification." Defendant confines his argument to the contention that Mrs. White had no adequate opportunity to observe him, thus rendering her testimony so weak and unreliable that it should have been excluded and nonsuit entered at the close of the State's evidence. For that reason defendant argues that the court erroneously admitted Mrs. White's in-court identification of him.

[1] While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established by the State's own evidence. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). Defendant seeks the benefit of this rule, thus requiring an examination of the *Miller* decision.

In *Miller*, the Hall Oil Company building in Charlotte was broken and entered by two or more men on the night of 28 September 1966 and a safe was damaged in an effort to force it open. The exterior of the building was well lighted by street lights, floodlights at the front and back, and spotlights attached to the eaves. The building was 286 feet from a Texaco service station with a vacant lot between. The only evidence tending to identify defendant as one of the burglars was the testimony of a 16-year-old witness who identified defendant in a lineup as one of the persons he had seen at the scene of the crime. The witness was never closer than 286 feet to a man he saw running alongside the Hall Oil Company building. *The witness had never seen the man theretofore* and testified he saw this man run once in each direction, peep around the corner of the building and look in the direction of the witness. The witness could not describe the man except to say that his clothes were dark. Held: The uncontradicted testimony as to the physical facts was insufficient to support the subsequent identification of defendant with that degree of certainty which would justify submission of the case to the jury. Our holding was based on the general rule that evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury. *State v. Cox*, 289 N.C. 414, 222 S.E. 2d 246 (1976); *Jones v. Schaffer*, 252 N.C. 368, 114 S.E. 2d 105 (1960).

The holding in *Miller* has no application where, as here, "there is a reasonable possibility of observation sufficient to permit subsequent identification." *State v. Miller, supra.* In such event the credibility of the witness and the weight of his or her identification testimony is for the jury. *State v. Cox, supra; State v. Humphrey,* 261 N.C. 511, 135 S.E. 2d 214 (1964).

[2] Here, Mrs. White had an opportunity to view defendant who was within eight to ten feet of her. The kitchen light was illuminating the area where defendant was pushing the bicycle. She had seen defendant earlier that summer when both were meeting and passing on the street. She did not know his name but knew he was Sister Wilson's son. She told her husband when he came home a few minutes later that the man with the bicycle was Sister Wilson's son. She told Detective Tripp the same thing and positively identified defendant at a pretrial photographic viewing. The court found as a fact on a pretrial voir dire that she based her identification on the initial recognition of defendant as Sister Wilson's son when she saw him in her bedroom on the night in question. Her identification testimony is clear and unequivocal. Thus the record discloses plenary competent evidence, corroborated by the physical facts and by other witnesses, to support the findings of the trial judge. Such findings are conclusive when supported by competent evidence. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972).

Defendant's argument goes only to the weight of Mrs. White's identification testimony and not to its competency. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); 4 N.C. Index 3d, Criminal Law § 104, and cases there cited. The identification testimony of Mrs. White was properly admitted. Defendant's first assignment challenging its competency is overruled.

Defendant next assigns as error the denial of his motion to strike the testimony of Mr. and Mrs. White concerning the ownership of the bicycle. He argues that the bill of indictment is fatally defective because it does not allege the ownership of the bicycle and therefore it was prejudicial error to allow proof of ownership without allegation. This constitutes defendant's second assignment.

We commence with the observation that defendant was not charged with larceny. Rather, he was charged with burglary in the first degree—breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein, *i.e.*, the felony of larceny. Felonious intent is an essential element of burglary which the State must allege and prove, "and the felonious intent proven, must be the felonious intent alleged. . . ." *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965).

[3, 4] In an indictment for burglary it is not sufficient to charge generally an intent to commit "a felony" in the dwelling house of another. "The particular felony which it is alleged the accused intended to commit must be specified. . . . The felony intended, however, need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony, where the State is relying only upon the charge of burglary. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal the goods and chattels of another then being in said dwelling-house, or to commit therein the crime of larceny, rape, or arson. [Citations omitted.]" *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923); *accord*, *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967).

The indictment attacked in the case before us reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Reginald Wilson, late of the County of Pitt on the 13th day of July 1976, about the hour of between 1:00 a.m. & 2:00 a.m. in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Barbara White, 700B Imperial St. Greenville there situate, and then and there actually occupied by one Barbara White feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Barbara White in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away one (1) Schwinn 10 speed bicycle against the peace and dignity of the State."

We are of the opinion that this indictment meets the standards prescribed by the foregoing principles of law. Having specified defendant's ulterior intent, *i.e.*, the intent to commit larceny, the

State was required to prove that intent at the time of the breaking and entering in order to make out the offense of burglary. With respect to that offense, however, there was no necessity to allege or prove that defendant intended to steal any particular item of property owned by any particular individual.

[5] The actual commission of the intended felony, *i.e.*, larceny, is not essential to the crime of burglary. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). "The crime of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted." *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *accord, State v. Allen, supra.* Here, these principles were included in the trial judge's charge as follows:

> "So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about July 13, 1976 Reginald Wilson removed the screen in the kitchen window and raised it and went through the window opening into Mr. and Mrs. White's sleeping apartment, without their consent, in the nighttime, intending at the time to commit larceny, and that . . . Mrs. Barbara White was in the apartment when he broke and entered, it would be your duty to return a verdict of guilty of burglary in the first degree. However, if you do not so find, or if you have a reasonable doubt as to any one of the seven things which I enumerated, it would be your duty to return a verdict of not guilty."

[6] Allegation and proof that defendant intended to steal the goods and chattels of another located in the burglarized dwelling, *i. e.*, to commit the crime of larceny, is sufficient. The additional allegation specifying the Schwinn bicycle and the proof concerning its ownership was surplusage and entirely harmless. Defendant's second assignment is overruled.

The record discloses that before any objection was interposed to defense counsel's argument to the jury, he had already made the following argument:

> "In this State, under General Statute 14-52, I want to read to you what the legislature has established as the punishment for burglary. 'Any person convicted of the

crime of burglary in the first degree, shall be imprisoned for life in the State's prison.' That means that this is about as important a thing, I submit and argue to you, as you are ever going to do. Because the way you rule depends exactly on what happens to Reginald Wilson for the rest of his life. He either walks out of the courtroom if you acquit him, or he goes to prison for his life. So I submit very earnestly and strongly that the duty that you have in this case is as high as you are ever going to have because very seldom do citizens have an opportunity to determine the lifetime of another citizen. And I agree furthermore with [the prosecutor] that the whole case boils down to Mrs. White's testimony."

Defense counsel then pointed to what he conceived to be the weakness in Mrs. White's identification testimony and continued his jury argument as follows:

"And she said from the time she closed her eyes that she did not thereafter see the people who were in the bedroom. That means, ladies and gentlemen, that she had an opportunity to view the people in the bedroom for a period, I suggest to you, well under five seconds . . . And what the State of North Carolina is asking you to do in this case is to send this defendant to prison for the rest of his life based on the testimony of Mrs.—"

At this point the prosecutor's objection was sustained and defense counsel continued in these words: "The statute has been read to you. And I am absolutely certain in my heart that you understand the seriousness with which you must treat this case."

At the close of the court's charge to the jury one juror asked: "Did you say we are not to consider possible punishment when we think of others?" After a consultation at the bench during which defense counsel requested the court to charge the jury that it "should be impressed with the seriousness of its duty in deliberating upon the case since its deliberations could result in life imprisonment should it reach a verdict of guilty," the court refused to give such charge and answered the juror's question as follows:

"Ma'am, in answer to your question, as best I can answer it, you are to base your verdict on the evidence as you heard it from the witness stand in this courtroom

and only on the evidence as you heard it. Punishment is a matter for the Court to apply to the case after the jury has ascertained the facts that speak the truth in the case."

Defendant contends the trial court erred (1) in sustaining the prosecutor's objection to the quoted portion of his jury argument relative to the punishment defendant would receive if found guilty and (2) in refusing to instruct the jury regarding the seriousness of its duty and the punishment which would result from a guilty verdict. This constitutes defendant's third assignment.

In *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969), we held that, except in capital cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute while the jury discharges its duty when it returns a verdict of guilty or not guilty. " . . . In the absence of some compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel' and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment *in non-capital cases.* If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given the error will be evaluated like any other." (Emphasis added.) *State v. Rhodes*, *supra; accord*, *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

In *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974), we held that defense counsel could not make an *argument* to the jury upon the question of the punishment to be imposed, that is, that he had no right to argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty provided by law. To like effect is *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974), in which Justice Branch, writing for the court, said:

"Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. [Citations omitted.] He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. [Citations omitted.] Nor may

counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely."

Based on the language of G.S. 84-14 that in jury trials "the whole case as well of law as of fact may be argued to the jury," we held in *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976), that defense counsel had the right to inform the jury that conviction would necessarily result in imposition of a life sentence. There, Justice Exum, writing for the court, said:

> "It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration. . . . Whether the trial judge should tell the jury in a proper case that upon conviction a mandatory life sentence will be imposed is still an open question. It could hardly be error to do so."

[7] Applying these principles to defendant's first contention we hold that the trial court did not err in excluding the contested portion of defense counsel's jury argument. Both before and after the excluded portion, counsel informed the jury of the consequences of a conviction and stated that, in light of those consequences, the jury should give the matter close attention and its most serious consideration. These statements were in all respects proper. *State v. McMorris, supra.*

[8] In the contested portion, however, counsel gave his argument a different slant. There, counsel implied that identification of the defendant was based on a fleeting view and that, while such a view may be sufficient to convict in some situations, it is inadequate to convict in this case *because the punishment is so severe.* Thus counsel was asking the jury to consider the punishment as part of its substantive deliberations and this he may not do. The trial judge correctly excluded that portion of defendant's jury argument.

[9] By his second contention under this assignment, defendant argues that the court erred in failing to instruct the jury that it "should be impressed with the seriousness of its duty in deliberating upon the case since its deliberations could result in

life imprisonment should it reach a verdict of guilty." We do not agree. The trial judge is *not required* to instruct the jury that upon conviction a sentence of life imprisonment will be imposed. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. McMorris, supra; State v. Rhodes, supra.* Such an instruction may be given or withheld in his discretion and the exercise of that discretion will not, absent abuse, be disturbed on appeal. *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969); *Welch v. Kearns*, 261 N.C. 171, 134 S.E. 2d 155 (1964). No abuse of discretion is shown. Defendant's third assignment of error is overruled.

Defendant's fourth assignment addressed to the charge is without merit and requires no discussion. When read contextually, the charge as a whole is free from prejudicial error.

Defendant's motion in arrest of judgment is based on the alleged insufficiency of the indictment argued under his second assignment of error. The question posed here was resolved against him there and deserves no further discussion. We hold the motion was properly denied.

Defendant's motion to set aside the verdict is addressed to the discretion of the trial court and refusal to grant it is not reviewable in the absence of abuse of discretion. *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960). Nothing presented shows abuse of discretion in this aspect of the trial.

Defendant having failed to show prejudicial error, the verdict and judgment must be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLIE LEE WOODS, ALIAS AJABA X

No. 100

(Filed 13 June 1977)

1. **Criminal Law § 29.1 — mental capacity to stand trial — motion for psychiatric examination — evidence — hearing — denial proper**

The trial court did not err in denying defendant's request for a commitment and psychiatric examination to determine his capacity to stand trial, since (1) no evidence was presented in support of defend-

ant's motion other than defendant's record at Butner, which was seven years old and which indicated his competency to function in society, and defense counsel's conclusory statements concerning defendant's criteria for deciding right and wrong, and (2) defendant was heard on his request and expressly declined an opportunity to be heard further, the hearing requirements of G.S. 15A-1002(b)(3) thus being satisfied.

2. Criminal Law § 91.6— continuance to review taped confession—denial proper

Defendant failed to show error in the trial court's denial of his motion for a continuance to review a taped confession which defendant had allegedly made to police officers in Florida and which defense counsel received the day before trial where the State made no delay in making the taped confession available to defense counsel who did prior to trial review and evaluate it, and where the tape was identical to a written copy already in defendant's possession.

3. Criminal Law § 101.2— jurors' reading of newspaper article—defendant not prejudiced

The trial court did not abuse its discretion in denying defendant's motions for mistrial and for *voir dire* of the jury after several jurors read a newspaper account of the first day of the trial, since the court instructed the jury that their decision must be based entirely upon the evidence they had heard at trial and they must not be influenced by anything they had seen in a newspaper, and since the trial judge himself was acquainted with the newspaper article which merely recounted testimony already heard by the jurors.

4. Constitutional Law § 80; Homicide § 31.1— first degree murder—life sentence substituted for death penalty

A sentence of life imprisonment is substituted for the death penalty imposed upon defendant's conviction of first degree murder.

DEFENDANT appeals from judgment of *Crissman, J.*, at the 20 May 1976 Session of FORSYTH Superior Court. Docketed and argued as No. 163, Fall Term 1976.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, and Alfred N. Salley, Assistant Attorney General, for the State.

Dennis T. O'Madigan, Attorney for defendant appellant.

EXUM, Justice.

Defendant was tried and convicted of first degree murder upon a proper bill of indictment. He was sentenced to death.

Other than a meritorious challenge to the death penalty, defendant presents three questions on appeal challenging the

correctness of the trial court's rulings in: (1) denying defendant's motions for commitment and examination by a psychiatrist to determine his capacity to stand trial; (2) denying defendant's motion for a continuance to review and evaluate a taped confession which defense counsel received the day before the trial; and (3) denying defendant's motions for mistrial and for *voir dire* of the jury on grounds of some jurors' exposure to a newspaper article concerning the trial. We find no merit in any of these contentions.

The state's evidence tended to show that defendant and two unnamed companions perpetrated an armed robbery at a convenience store in Winston-Salem on 20 December 1974. Two persons who were in the store at the time testified defendant was one of the three men who came into the store, and that he was carrying a gun. At about the time the three left the store, a car pulled up in front. Defendant and one companion approached the car, shouting "This is a holdup." Defendant asked the driver of the car, a fireman named Paul Toney, for his money. As Mr. Toney was handing some money out the window, defendant shot him twice. Mr. Toney's wounds resulted in his death. Defendant and his companions left the scene, divided the money obtained in the armed robberies and defendant left the state, going first to Massachusetts and later to Florida.

To establish its case, the state presented, among other witnesses, the two who identified defendant as one of those who had robbed the convenience store, a witness who was in the car with Mr. Toney when he was shot but who could not identify defendant, a female friend of defendant's to whom he had confided the story of the robbery and shooting of the Winston-Salem fireman some time after the incident, and an Orlando, Florida, police officer to whom defendant confessed his role in these crimes, including the killing of Mr. Toney. A tape recording of the confession was introduced at trial.

Defendant presented no evidence.

We first note defense counsel's failure in several instances to follow the mandates of Rule 10[1] of the Rules of Appellate Procedure. Exception No. 2, purportedly supporting his first argument, follows not the denial of his motion for commitment but the denial of the motion for a continuance. Under his second argument, where Exception No. 2 should properly be referenced, defense counsel refers to Exception No. 3, which follows no action by the trial court at all. That exception is apparently taken to defendant's trial counsel's own motion for exclusion of evidence. Defendant's third argument is set out in conjunction with his objection to the imposition of the death penalty. Under the argument addressing denial of defendant's motions regarding the newspaper article, defendant lists Exception No. 4, which follows the court's final ruling on the commitment request, and Exception No. 5 which follows the court's invitation to hear defendant's trial counsel's arguments concerning the newspaper article. The specific page in the record where each exception appears is not set out following assignments of error as required by Rule 10(c).

The carelessness of defense counsel in setting out his exceptions has occasioned an inordinate investment of this Court's time in an effort to consider the merits of his arguments. Under Rule 10(a) the second and third arguments, at least, are not properly presented for our consideration. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Nevertheless, because of the gravity of the offense charged and the

1."(a) Function in Limiting Scope of Review. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

. . . .

"(c) Assignments of Error—Form. The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient."

severity of the sentence, and because we are reluctant to penalize this indigent defendant because of his counsel's omissions, we have entertained all the arguments presented and have carefully reviewed the record.

[1] Defendant first contends the court erred in denying his request for a commitment and psychiatric examination to determine his capacity to stand trial. In support of this argument he relies upon General Statute 7A-454 which provides:

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

In connection with this argument, defendant contends the denial of his request constituted a denial of equal protection.

The statute upon which defendant should properly have relied is not General Statute 7A-454, which provides for expert assistance in preparation for trial, *see State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), but General Statute 15A-1002, which provides in pertinent part:

> "(a) The question of the capacity of the defendant to proceed may be raised at any time by the prosecutor, the defendant, the defense counsel, or the court on its own motion.
>
> "(b) When the capacity of the defendant to proceed is questioned, the court:
>
> "(1) *May* appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. . . .
>
> "(2) *May* commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. In no event may the period exceed 60 days." (Emphasis added.)

That defendant is an indigent is irrelevant to the applicability of this statute. There is no equal protection issue presented.

On his original motion for psychiatric evaluation on 5 April 1976, defendant presented no evidence. He merely informed the court of the following grounds: (1) defendant had been a patient at Butner; (2) defense counsel had doubts about whether defendant's "criteria . . . for deciding what is right and what is wrong" were the same as his own; and (3) defendant's grandmother informed him defendant had always had psychiatric problems. The court denied the motion, observing that defendant "looks like he is right intelligent."

On 17 May 1976, the day before trial, defense counsel renewed his motion, but again offered no evidence and no new information. The court again denied the motion. The next day, apparently just before trial, defense counsel presented defendant's record showing a commitment at John Umstead Hospital, Butner, in 1969 with a notation of a "tentative mental diagnosis" of "anxiety—possibly schizophrenic reactive." This record concluded with the hospital superintendent's finding that defendant's commitment was terminated as he was then, in the superintendent's opinion, not injurious to himself or to society. The judge considered this record as if it had been presented at the hearing the day before, and confirmed his ruling.

Under General Statute 122-91, repealed when section 15A-1002 became effective 1 September 1975, the decision whether to grant a motion for commitment for psychiatric examination to determine competency lay within the sound discretion of the trial judge. *State v. Gray, supra*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied*, 414 U.S. 1132 (1974). The new statute contains no provision making the granting of such a motion mandatory, and the decision remains within the sound judicial discretion of the trial court.

We find nothing in this record to indicate that defendant lacked the capacity to stand trial. The last psychiatric examination made of him at Butner indicates his competency to function in society. No evidence at all other than his Butner record, which was some seven years old, and defense counsel's conclusory statements were presented in support of his motion. There is nothing indicating any reliance at trial upon a defense of insanity. No abuse of discretion in the denial of this motion is shown.

We are not inadvertent to General Statute 15A-1002 (b)(3) which requires the trial court to conduct a hearing on the question of defendant's capacity to stand trial when this capacity "is questioned." The record is not entirely satisfactory as to whether and to what extent defendant was accorded a hearing. It seems, though, that defendant was heard on this question and expressly declined an opportunity to be heard further. The record reveals the following colloquy between the prosecuting attorneys (Tisdale and Yeatts), the court, and defense counsel:

> "MR. TISDALE: I would like to ask if he wishes a hearing on the competency of Willie Woods to proceed.
>
> "MR. YEATTS: We would like this record to show that that hearing has been held at this time. It is my understanding of this statute that he has a right to have a hearing on the motion, and if he wants to present any evidence I'd like for that to be in the record, of course, at this time.
>
> "THE COURT: Well, I assumed that he did not. I didn't hear anything about it.
>
> "MR. O'MADIGAN: No. We are asking the permission of the Court to order that a psychiatric examination be performed. That, of course, is our position and then come back to the Court with the results of that psychiatric examination.
>
> "THE COURT: Well, I will just deny that. I believe that is all for today. Recess until 9:30 in the morning."

Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial. That defendant makes no complaint about the lack of a hearing on this threshold question bolsters our view that the requirements of General Statute 15A-1002(b)(3) were, in fact, satisfied at trial.

[2] Defendant next contends the court erred in denying his motion for a continuance to review the taped confession which defendant had allegedly made to police officers in Orlando, Florida. This argument is wholly without merit. Defense counsel knew of the tape and specifically referred to it in his request for discovery on 24 March 1976. The tape came to the state's attorney on 13 May 1976, and defense counsel's office was noti-

fied of its availability the same day. Defense counsel attempted to pick up the tape from the state on Thursday before the trial, but found no one at the office. When he finally obtained the tape on Monday, 17 May, the day before the trial, he discovered it to be identical to a written statement signed by defendant which defense counsel had obtained much earlier.

"A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby." *State v. Harrill*, 289 N.C. 186, 189, 221 S.E. 2d 325, 327-28, *death sentence vacated*, 96 S.Ct. 3212 (1976); *see State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Here, where the state made no delay in making the taped confession available to defense counsel who did prior to trial review and evaluate it, and where the tape was identical to a written copy already in defendant's possession, no prejudicial error in the denial of the motion for continuance is shown.

[3] Defendant's final argument concerns the court's denial of motions for mistrial and for *voir dire* of the jury after several jurors read a newspaper account of the first day of the trial. The trial judge read the article, which constituted merely a reiteration of testimony adduced at the trial. The tone of the article was objective and non-inflammatory. Nor does defendant's picture, which appears with the article, seem likely to produce prejudice.

The motion for mistrial was directed to the sound discretion of the trial judge. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). No abuse of discretion is shown here. The motion for mistrial was properly denied.

The court carefully instructed the jury that their decision "must be based entirely upon the evidence" they had heard introduced at trial and that they were "not to be influenced by anything [they] may have seen in a newspaper somewhere or any outside influence." In light of this instruction and of the trial judge's acquaintance with the article, which merely recounted testimony already heard by the jurors, we can perceive no prejudice to defendant arising from the denial of his motion for a *voir dire* examination of the jurors.

In an annotation on the subject of newspaper articles read by jurors after commencement of trial, 31 A.L.R. 2d 417, it is correctly observed that the ultimate decision as to the effect of such articles must rest in the sound judicial discretion of the court in each instance and, further:

> "Nevertheless there are certain propositions which, through frequent application by the courts, may be referred to as general rules. Among these is the principle that a fair trial is not interfered with by a newspaper account of the trial which does not prejudice either party and could not be said to put either in a bad light in the minds of the jurors. This rule has been applied where the article merely sets forth an accurate and unbiased account of the occurrences which took place in the courtroom and in the presence of the jury, it being reasoned that what the jurors already knew first hand could not affect their decisions when later brought to their attention by something they read. The act of reading the newspapers may still constitute an irregularity, not condoned by the court, but be of such an inoffensive nature as not to warrant any remedial action." *Id.* at 421.

This assignment is overruled.

[4] 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. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). So that a sentence of life imprisonment may be substituted under the authority of 1973 Session Laws, Ch. 1201, § 7 (1974 Session), we remand this case 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 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.

No error in the verdict.

Death sentence vacated.

TONY EUGENE GUTHRIE v. ROBERT M. RAY

No. 35

(Filed 13 June 1977)

1. **Rules of Civil Procedure § 4— summons left with one other than defendant—requirements for effectiveness**

Where service of process is had by leaving the summons and complaint with a person other than the named defendant the substitute person must be a "person of suitable age and discretion," who lives with defendant in his "dwelling house or usual place of abode," and the summons must be left with the substitute person *at their* usual place of abode.

2. **Rules of Civil Procedure § 4— summons left with one other than defendant—showing of residence required on return of service**

Though the better practice, when summons and complaint are left with a person other than the named defendant, would be for the sheriff to state explicitly in his return of service that the place where the summons was left was the dwelling house or usual place of abode of both the named defendant and "the person of suitable age and discretion" to whom he delivered the summons, the return of service in this case substantially complied with the requirements of G.S. 1A-1, Rule 4, where it stated that summons was left with defendant's mother at Route 3, Box 187, and that she was "a person of suitable age and discretion . . . who resides in the defendant's dwelling house or usual place of abode," and, in the summons, defendant's address was given as Route 3, Box 187, Weaverville, N. C.

3. **Process § 4— officer's return of service—two affidavits required to set aside**

An officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit and is clear and unequivocal; therefore, defendant's motion to set aside a judgment entered against him on the ground that the purported service of summons upon him was invalid was properly denied, since defendant filed in support of his motion only one affidavit, his own.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals (reported in 31 N.C. App. 142, 228 S.E. 2d 471 (1976)), which reversed the order of *Styles, J.*, denying defendant's motion to set aside the judgment entered against him at the February 1976 Session of BUNCOMBE County District Court.

Plaintiff brought this action to recover for personal injuries and property damage suffered on the night of 18 August 1971 when his automobile collided with a parked Ford pickup

truck registered in the name of defendant. The complaint was filed and summons issued on 10 May 1972. In the body of the summons defendant's address was listed as "Route 3, Box 187, Weaverville, North Carolina." In his "return of service" Deputy Sheriff W. G. Biggs certified that defendant was served "on the 16th day of May 1972, at the following place: Route 3, Box 187 By: leaving copies with Mrs. C. Ray (mother) who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

Defendant having made no appearance and filed no answer or other responsive pleading, on 1 March 1973 the presiding judge entered judgment that plaintiff recover from defendant such damages as a jury might award. Plaintiff waived a jury trial, and Judge Styles heard evidence on the sole issue of damages. On 26 September 1973 he entered judgment in favor of plaintiff in the amount of $2,900.00.

On 27 March 1975 defendant moved to set aside the judgment under G.S. 1A-1, Rule 12(b)(2)(5) and Rule 60(b)(4) on the ground that the purported service of summons upon him was invalid, and the judgment against him was, therefore, void. In support of his motion, defendant offered a single affidavit, his own. Therein he stated: On May 16, 1972, Route 3, Box 187, Weaverville, N. C., the home of his mother, was not his dwelling house or place of abode. He had not dwelt or lived with his mother at that address, or any other, since 1944. Since 1962 he has been a resident of Tennessee, continuously employed by the University of Tennessee. Since February 1963 he has resided at 305 Snowbird Drive, Concord, Tennessee. Since July 1962 he has been registered to vote in both state and national elections in Tennessee. He owned a 1949 Ford pickup truck, which he registered in North Carolina because it was used on farm property he owned in this State.

After hearing the motion the trial court found and concluded, *inter alia*, that the sheriff's return showed he had served defendant by delivering copies of summons and complaint to defendant's mother, Mrs. C. Ray, "in defendant's dwelling house or usual place of abode" and that "the evidence of the defendant fails to satisfy the Court that the defendant was not a resident of the State of North Carolina at the time the process was left with his mother." The court thereupon denied defendant's motion to vacate the judgment and dismiss the action.

The Court of Appeals reversed, holding (1) that "the return clearly fails to disclose that service was had on the defendant by leaving a copy of the summons and complaint *at* defendant's dwelling house or usual place of abode as required by G.S. 1A-1, Rule 4(j)(1)(a)"; and (2) that "all of the evidence in the record tends to show that the defendant was a resident of Tennessee when service of process was attempted in North Carolina." 31 N.C. App. at 144, 228 S.E. 2d at 473.

Swain, Leake & Stevenson for plaintiff-appellant.

Morris, Golding, Blue & Phillips by Steven Kropelnicki, Jr., and James F. Blue III for defendant appellee.

SHARP, Chief Justice.

The sole question presented by this appeal is whether service of process was had upon defendant.

In pertinent part G.S. 1A-1, Rule 4(j), provides that the manner of service to exercise personal jurisdiction over a natural person shall be "a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

In support of his contention that the service of process was inadequate defendant first argues that, on its face, the sheriff's return shows insufficient service inasmuch as it states only that summons was left with "Mrs. C. Ray (mother) who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode." Defendant asserts that this return is inadequate because: (1) Rule 4(j) requires that the summons and complaint be delivered to a person of suitable age and discertion at a time when that person is physically present *at* the defendant's dwelling house or usual place of abode. (2) The instant return of service indicated only that Mrs. Ray resided in defendant's dwelling house; nowhere did it indicate that the place where the summons was left was defendant's usual place of abode.

[1] "[W]here a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service." *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915). *See Williams v. Hartis*,

18 N.C. App. 89, 195 S.E. 2d 806 (1973); 62 Am. Jur. 2d *Process* § 42 (1972). Therefore, where service of process is had by leaving the summons and complaint with a person other than the named defendant the substitute person must be a "person of suitable age and discretion," who lives with defendant in his "dwelling house or usual place of abode," and the summons must be left with the substitute person *at their* usual place of abode. If delivery is made elsewhere the service is invalid. *See Tart v. Hudgins*, 58 F.R.D. 116 (M.D. N.C. 1972), a case in which delivery of summons and complaint to defendant's wife at his place of business instead of at his dwelling house or usual place of abode was held not to meet the requirements of the personal service rule prescribed by either Fed. R. Civ. P. 4(d)(1) or N.C. G.S. 1A-1, Rule 4(j). Service upon a defendant's wife at her own home, where she had lived apart from her husband following their legal separation three years earlier, has also been held to be invalid under Fed. R. Civ. P. Rule 4(d)(1). *Williams v. Capital Transit Co.*, 215 F. 2d 487 (D.C. Cir. 1954). Service upon a defendant's mother in a car far removed from their usual place of abode was held inadequate in *Williams v. Hartis*, *supra*.

[2] The better practice, then, would be for the sheriff to state explicitly in his return of service that the place where the summons was left was the dwelling house or usual place of abode of both the named defendant and "the person of suitable age and discretion" to whom he delivered the summons. However, we think the return of service in this case substantially complied with the requirements of Rule 4. It is stated therein that summons was left with defendant's mother at Route 3, Box 187 and that she "is a person of suitable age and discretion . . . who resides in the defendant's dwelling house or usual place of abode." In the summons, defendant's address is given as Route 3, Box 187, Weaverville, North Carolina. On its face the return at most is ambiguous, but even so it does not reveal facts which would constitute false or incomplete service.

Defendant's affidavit, submitted in support of his motion to dismiss the judgment for lack of valid service of process, states that Mrs. C. Ray is his mother and that she resides at Route 3, Box 187, Weaverville, North Carolina. Thus the ambiguity is resolved by defendant's own affidavit. It is clear that, since service was had upon defendant's mother at Route 3, Box 187, Weaverville, North Carolina, it was had at her dwelling.

The return further states Mrs. Ray resides in the defendant's dwelling house. The conclusion is inescapable; according to the return, service was had *at* defendant's dwelling house. Thus, on its face, the return was proper.

[3] Defendant's second challenge to the validity of the purported service of process upon him is based on a single affidavit, his own. In it he avers that the sheriff's return of service erroneously stated that his dwelling house or usual place of abode was located at Route 3, Box 187, Weaverville, North Carolina; that this address was not then, nor had it been for many years, his dwelling or usual place of abode.

If, in fact, the summons and complaint were not served upon defendant as prescribed by G.S. 1A-1, Rule 4(j)(1)(a), the default judgment of 1 March 1973 and the judgment of 27 September 1973 assessing damages against him are void and must be set aside. *North State Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356 (1964). However, "[w]hen the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. . . . Service of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not 'be lightly set aside.' . . . Therefore, this Court has consistently held that an officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) *and* is clear and unequivocal." *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E. 2d 239, 241 (1957); 6 Strong's N.C. Index 2d *Process* § 4 (1968).

The sheriff's return imports truth, and it "cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made. It has often been held that the return of a ministerial officer, as to what he has done out of court, is *prima facie* true, and cannot be contradicted by a single affidavit [or witness]. . . . It would be oath against oath, and we could not well say with whom was the truth." *Burlingham v. Canady*, 156 N.C. 177, 179, 72 S.E. 324, 325 (1911).

The foregoing rule evolved to avoid the spectacle of such a confrontation between a party to an action and a public officer

sworn to perform the duties of his office according to law. *See North State Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356 (1964); *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 127 S.E. 2d 573 (1962); *Bolton v. Harrison*, 250 N.C. 290, 108 S.E. 2d 666 (1959); *Lucas v. Board of Commrs. of Beaufort County*, 208 N.C. 699, 182 S.E. 328 (1935); *Glass v. Moore*, 195 N.C. 871, 142 S.E. 585 (1928); *Long v. Town of Rockingham*, 187 N.C. 199, 121 S.E. 461 (1924); *Lake Drainage Commrs. v. Spencer*, 174 N.C. 36, 93 S.E. 435 (1917); *Mason v. Miles*, 63 N.C. 564 (1869).

The rule that an officer's return of service may not be set aside upon the contradictory testimony of one witness does not place an undue burden on a person who in truth has not been legally served. In our view, it would be a rare occasion when a party who had not been served in accordance with the legal requirements would be unable to corroborate his testimony. In this case, for example, if defendant had lived, worked, and voted in Tennessee since February 1963 surely his neighbors, employer, and the registrar of voters would have been among those available to corroborate his allegation that he was a resident of that state. Under those circumstances, his mother would undoubtedly have given her affidavit that on 16 May 1973 defendant was not living with her at Box 187 on Route 3, Weaverville, N.C. Defendant, however, produced no such corroboration. The single affidavit contradicting the sheriff's return was his own. His motion therefore was properly denied.

Finally, defendant contends that the rule stated in *Harrington v. Rice, supra*, and the cases cited therein is outmoded and contrary to the practice in the federal courts, whose Fed. R. Civ. P. Rule 4(d)(1) governing service of process on an individual is substantially equivalent to our G.S. 1A-1, Rule 4(j)(1)a. Our examination of federal cases belies this contention.

Although our perusal of pertinent federal decisions has not disclosed an explicit requirement of a minimum of two affidavits to impeach a sheriff's return of service, it appears that federal law generally is in accordance with the familiar rule that "the officer's return upon the summons imports verity" and the presumption "can be overcome only by strong and convincing evidence." *Hicklin v. Edwards*, 226 F. 2d 410, 414 (8th Cir. 1955); *Cleaves v. Funk*, 76 F. 2d 828 (10th Cir. 1935). *Accord, Lavino v. Jamison*, 230 F. 2d 909 (9th Cir. 1956); *Hill*

v. Sands, 403 F. Supp. 1368 (N.D. Ill. 1975); *Halpert v. Appleby*, 23 F.R.D. 5 (S.D. N.Y. 1958); *Publix Food Market, Inc. v. Bear*, 156 F. Supp. 274 (D. Mass. 1957); 4 Wright & Miller, Federal Practice and Procedure ¶ 1130 (1969); 2 Moore's Federal Practice § 4.43 (1970). *See* 62 Am. Jur. 2d *Process* § 181 (1972).

Defendant in this case has given us no reason to abandon the rule stated in *Harrington v. Rice*, *supra*, and similar cases, and we adhere to it. As an English Court said with reference to another doctrine, it "is grown revered by age, and it is not now to be broken in upon." *Jee v. Audley*, 1 Cox 324, 325, 29 Eng. Rep. 1186, 1187 (1787).

Accordingly, the decision of the Court of Appeals is reversed. The case will be remanded to the District Court of Buncombe County with directions that the default judgment from which defendant appealed be reinstated.

Reversed.

RAYMOND E. ROLLINS v. PAUL H. GIBSON AND R. F. WALKER

No. 55

(Filed 13 June 1977)

1. **Sheriffs and Constables § 4— liability for false return**

A false inference in a sheriff's return will render the return false within the meaning of G.S. 162-14 if the facts from which the inference is drawn are omitted from the return; however, where the facts underlying the inference or conclusion are truly stated in the return, there can be no liability for a *false* return, although the sheriff may still be exposed to a lesser liability for failing to execute the writ or for not making a proper and legal return.

2. **Sheriffs and Constables § 4— false return—inadvertence—damage to plaintiff**

A sheriff is liable under G.S. 162-14 for a false return even though the returning officer may have inserted the falsehood in his return through inadvertence and even though plaintiff was not damaged thereby.

3. **Sheriffs and Constables § 4— false return—"due and diligent search"**

The conclusion in a return that a defendant "after due and diligent search is not to be found," if untrue, may be the basis for a finding of a false return.

4. Sheriffs and Constables § 4; Process § 4; Penalties— penalty for false return—criminal cases

The penalty provided by G.S. 162-14 for a false return applies to process issued in criminal as well as civil cases. The decisions of *Harrell v. Warren*, 100 N.C. 259 (1888) and *Martin v. Martin*, 50 N.C. 349 (1858) are overruled.

5. Sheriffs and Constables § 4— false return—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in an action against the sheriff to recover the $500.00 penalty for a false return where it tended to show that the return stated that the party to be served "after due and diligent search is not to be found," that the party to be served had an established and well-known (listed in the telephone directory) residence in the county, and that he was at home every day, except for working hours, while the process was in the sheriff's hands.

6. Process § 4; Sheriffs and Constables § 4— false return—amendment

It is within the discretion of the presiding judge to permit a sheriff to amend his return of process so as to make it speak the truth even after suit has been brought for the penalty imposed for a false return and though the amendment defeats plaintiff's right to recover such penalty.

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. 154, 228 S.E. 2d 506 (1976) (opinion by Parker, J., Brock, C.J., and Arnold, J., concurring), which reversed judgment of Alexander, D.J., for the plaintiff entered 18 November 1975 in District Court, GUILFORD County.

Plaintiff Rollins (then defendant) was convicted of a traffic offense in Davidson County District Court and appealed to the Superior Court. A subpoena requiring the plaintiff's appearance at the Davidson County Superior Court on 25 November 1975 was issued on 13 November 1974 and delivered to the Sheriff of Guilford County on 14 November 1974. This subpoena was subsequently returned to the Davidson County Superior Court with the following notation thereon:

> "After due and diligent search Raymond Rollins not to be found in Guilford County. This 24 day of Nov., 1974. Time_____
>
> PAUL H. GIBSON, SHERIFF
> By s/ R. F. WALKER, D.S."

The plaintiff had been advised in Davidson County District Court that he would be notified of the date of his trial in superior court. He was never notified. When he did not appear on the scheduled date, a *capias instanter* was issued by the superior court. It was received by the Sheriff of Guilford County on 13 December 1974 and served on the plaintiff on 29 December 1974. Rollins was taken into custody until he posted an appearance bond.

Plaintiff brought this action pursuant to G.S. 162-14 against the Sheriff of Guilford County and his deputy, claiming the return on the subpoena was false and praying for the $500.00 relief provided for a false return in the statute.

At trial, plaintiff relied for his proof on his own testimony. He testified that he had lived at his residence in Guilford County since 1972, that he worked in Davie County, and that his name was listed in the telephone book. He further testified that between 14 November and 24 November 1974 he was at home in Guilford County each day except for the hours he was at work. Rollins left for work at 7:00 a.m. and returned home at 6:00 p.m., Monday through Friday.

The defendants' evidence principally tended to show the heavy workload of the sheriff's department with reference to service of process. As to the particular process, the sheriff had no personal knowledge of any attempts to serve the subpoena. Deputy Sheriff Walker recalled first locating the plaintiff's number in the telephone directory but was unable to contact him by phone. The subpoena was then carried in a deputy's car and rotated from car to car through three shifts a day. Deputy Walker testified that he recognized the plaintiff's house and must have carried the process two or three times to the plaintiff's house because he "wouldn't stamp it unless I had been there at least two or three times." He could not say that he left a card at the plaintiff's residence or attempted to contact the plaintiff's neighbors but indicated that these were usual procedures and that he followed procedure.

The trial court submitted the following two issues to the jury:

(1) "Did the defendant fail to make due and diligent search for the plaintiff, as alleged?"

(2) If so, was the return by the defendants false, as alleged?"

The jury answered both issues "yes" and the trial judge entered judgment on the verdict in the amount of $500.00 against defendant Paul H. Gibson, Sheriff of Guilford County, after having determined that G.S. 162-14 does not impose liability on deputy sheriffs.

As indicated, the Court of Appeals on appeal reversed and remanded with instructions to dismiss the action on the ground that G.S. 162-14 does not apply to "a return made to process issued in a criminal proceeding."

Other pertinent facts will be discussed in the opinion.

Michael R. Greeson, Jr., for plaintiff appellant.

William L. Daisy, Assistant County Attorney, for defendant appellees.

COPELAND, Justice.

The statute under which the plaintiff sues reads as follows:

"Every sheriff, by himself or his lawful deputies, shall execute and make due return of all writs and other process to him legally issued and directed, within his county or upon any river, bay or creek adjoining thereto, or in any other place where he may lawfully execute the same. He shall be subject to the penalty of forfeiting one hundred dollars ($100.00) for each neglect, where such process shall be delivered to him 20 days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved by order of court, upon motion and proof of such delivery, unless the sheriff can show sufficient cause to the court at the next succeeding session after the order.

"For every false return, the sheriff shall forfeit and pay five hundred dollars ($500.00), one moiety thereof to the party aggrieved and the other to him that will sue for the same, and moreover be further liable to the action of the party aggrieved, for damages." G.S. 162-14.

This statute, enacted in 1777, has remained largely unchanged over the years (except that the $100.00 and $500.00 penalties were both originally 50 pounds). *Produce Co. v. Stan-*

ley, 267 N.C. 608, 148 S.E. 2d 689 (1966). The statute authorizes the following actions and remedies:

> "1. An amercement *nisi* for $100, on 'motion and proof' by the party aggrieved, for failure to 'execute and make due return.' 2. A *qui tam* [civil] action for penalty of $500 for a 'false return,' one moiety to the party aggrieved, and the other to any one who will sue for the same. 3. An action for damages by the party aggrieved." *Manufacturing Co. v. Buxton*, 105 N.C. 74, 76, 11 S.E. 264, 265 (1890).

During this century, few cases involving the amercement of a sheriff have reached this Court. Nevertheless, the need for amercement in proper cases is as great today as it was during the reign of King Edward I of England. *Produce Co. v. Stanley, supra;* Wyatt, *Amercement of Sheriffs*, 10 Wake Forest L. Rev. 217 (1974). A 1285 statute, after reciting the twin problems of sheriffs failing to return writs or returning them falsely, provided:

> "That such as do fear the Malice of Sheriffs, shall deliver their Writs original and judicial in open County, . . . and may take of the Sheriff or Undersheriff, being present, a Bill, wherein the Names of the Demandants and Tenants mentioned in the Writ shall be contained; and at the Request of him that delivered the Writ, the Seal of the Sheriff or Undersheriff shall be put to the Bill for a testimony, and Mention shall be made of the Day of Deliverance of the Writ. . . . And if the Sheriff will not return Writs delivered unto him, and Complaint thereof be made to the Justices, . . . an Inquest shall be returned. And if it be found by the Inquest, that the Writ was delivered to him, Damages shall be awarded to the Plaintiff or Demandant. . . ."

The same statute also provided:

> "And the King hath commanded, that Sheriffs shall be punished by the Justices once or twice (if Need be) for such false Returns; and if they offend the third Time, none shall have to do therewith but the King." 13 Edw. I, Stat. 1, c. 39 (1285).

The question presented by this appeal asks whether a sheriff can be liable under G.S. 162-14 for a return of criminal process which states only that a defendant "after due and dili-

gent search is not to be found," when a jury finds, upon sufficient competent evidence, that the return is false. We hold that a sheriff can incur liability in this situation.

We first consider when, if ever, a return of "after due and diligent search not to be found" can be considered a false return within the meaning of G.S. 162-14. What constitutes a false return under G.S. 162-14 is well established. For the sheriff to incur the heavy $500.00 penalty, the return "must be false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion." *Lemit v. Mooring*, 30 N.C. 312, 314 (1848) (Ruffin, C.J.) "To subject one to the heavy penalty of the statute, the falseness must be stated as a fact and not merely by way of inference from facts." *Hassell v. Latham*, 52 N.C. 465, 466 (1860). A comparison of three cases serves to illustrate what our Court has intended by this rule.

In *Lemit v. Freeman*, 29 N.C. 317 (1847) (Ruffin, C.J.), a writ was delivered to a sheriff seventeen days before the term to which it was returnable. The return was made in the sheriff's name by his deputy. The return did not indicate the day upon which the writ was received by the sheriff. In an action against the sheriff for $500.00 for making a false return of "Too late to hand to execute in time," this Court held the sheriff liable. In two later cases with similar fact situations, the Court reached a contrary result because the return additionally truthfully gave the date upon which the writ was received.

In *Lemit v. Mooring, supra*, the return stated:

> "This writ came to hand on 22 February, 1847, during the term of Martin Superior Court of Law, and from that day until Friday, inclusive, of that court, I and my deputies were engaged, so that I could not serve said writ on the defendant. . . ." *Mooring, supra* at 312

In finding no liability for a false return, the Court in *Mooring* reasoned that "[t]he act was designed to punish sheriffs for putting on process deceptive returns, such as mislead the parties in point of fact and baffle them in the execution of their process" and concluded that no part of the return was untrue as to a matter of fact and that the statement " 'so that I could not serve this writ on the defendant'—is barely a conclusion or

inference from the preceding facts, and purports only to be so, and could not deceive the plaintiff as to the acts of the sheriff or with respect to his recourse on him." *Mooring, supra* at 314.

In *Hassell v. Latham, supra*, the sheriff's return read:

"Received 8 March, 1859; too late to hand."

Five days intervened between the receipt and return days. The Court, finding for the sheriff, said:

> "The day of its [the writ's] reception is endorsed; the day of its return is known; the 'Too late to hand,' in this case, is merely a *false inference*, if false at all." (Emphasis in original.) *Hassell, supra* at 467.

[1] It appears from these cases that a false inference in a return will render the return false within the meaning of G.S. 162-14 if the facts from which the inference is drawn are omitted from the return. But where the facts underlying the inference or conclusion are truly stated in the return there can be no liability for a *false* return although the sheriff may still be exposed to a lesser liability for failing to execute the writ or for not making a proper and legal return. *Lemit v. Mooring, supra; accord, Tomlinson v. Long*, 53 N.C. 469 (1862).

Besides the possibility of misleading the parties, another reason exists for treating false inferences in a return differently, depending upon the presence or absence in the return of the facts giving rise to the inference. In *Albright v. Tapscott*, 53 N.C. 473 (1862), we noted "[t]he great importance of securing for these returns absolute verity, being *quasi* records, and the strong temptations which exist [for officers] to cover over omissions by the technical form of a return. . . ." *Albright, supra* at 474.

[2] It is this latter consideration, veracity of *quasi* judicial records, which led us to adopt the stringent rule that "every untrue return, in fact, is a false return within the purview of the statute." *Albright v. Tapscott, supra* at 474. "It is of great importance that judicial proceedings and all executions and return of process should be absolutely truthful." *Peebles v. Newsom*, 74 N.C. 473, 475 (1876).

This stringent rule applies even though the returning officer may be mistaken and insert the falsehood in his return

through inadvertence. *Finley v. Hayes*, 81 N.C. 368 (1879); *Albright v. Tapscott, supra; Peebles v. Newsom, supra.*

> "It is immaterial that the officer had no selfish purpose to subserve, or was unmoved by any criminal intent. If . . . his return is false in its facts or any of the facts touching the things done under it, he is as well exposed to the penalty of $500 denounced against a false return, as if the false facts were wilfully and corruptly inserted." *Finley, supra* at 370; *accord, Peebles, supra.*

Under our case law and the statute, it is also immaterial in a civil action for the $500.00 penalty whether any damage was done to the plaintiff. G.S. 162-14 allows "him that will sue for the same" to institute the action for a false return. It is obvious from the statute that the $500.00 penalty is not intended by the legislature to be a substitute for damages to an injured party because the same statute allows "the party aggrieved" to bring a separate action for damages. *Manufacturing Co. v. Buxton, supra;* G.S. 162-14. In *Finley v. Hayes, supra*, our Court upheld a $500.00 judgment for the plaintiff even though the untrue facts of the sheriff's return "were without fraud and benefit to him, and *without any damage to the plaintiff.*" (Emphasis supplied.) *Finley, supra* at 372; *cf. Swain v. Phelps*, 125 N.C. 43, 34 S.E. 110 (1899).

Sheriffs have been held liable for a false return when a subpoena was served on a person other than the person named, *Albright v. Tapscott, supra* (judgment arrested because of a pleading irregularity); when the date of sale of land and the application of the proceeds were incorrectly stated in a return on an execution, *Finley v. Hayes, supra;* when the date money was collected under an execution was incorrectly stated in the return, *Peebles v. Newsom, supra.*

[3] It may still be questioned whether the conclusion found in a return of "due and diligent search," without more, if untrue, may be the basis for a finding of a false return. We believe that such a false conclusion or inference can render a return false and that *Tomlinson v. Long, supra*, is controlling on this point.

G.S. 162-14 commands the sheriff, by himself or his lawful deputies, to "execute and make due return" of all writs and other process issued and directed to him. That the sheriff must

be diligent in both the execution and return of process or suffer the $100.00 penalty provided in G.S. 162-14 is clear. *Produce Co. v. Stanley, supra; Swain v. Phelps, supra; Bell v. Wycoff,* 131 N.C. 245, 42 S.E. 608 (1902).

In *Tomlinson v. Long, supra,* the plaintiff had issued a subpoena, in due form, directed to the sheriff, commanding him to summon a certain witness for the plaintiff to appear in a pending civil action. The sheriff received the subpoena around 15 December 1859 and returned it 10 January 1860, endorsed "Not to be found in my county." The plaintiff subsequently sued the sheriff for the $500.00 penalty for a false return.

At trial, the plaintiff showed that the party to be served "had an established and well known residence in the county, and was absent from the county for five days only, immediately preceding Christmas day." *Tomlinson v. Long, supra* at 471. The defendant's evidence showed that a deputy went to the witness's residence at least once but did not find him at home; that it was a long distance from the sheriff's office to the witness's residence, and that a person who knew the witness had told the sheriff, while the witness was out of the county, that the witness would not return for two or three weeks. The trial court nonsuited the plaintiff's action. On appeal, this Court felt that, in its "present state," the sheriff's return was false and ordered a new trial.

The Court noted that even if it put a construction on the words of the return most favorable to the defendant and interpreted the return to mean that the witness had not been found after due search, the return would still be false, because it was not true to say that a proper search had been made. We are at a loss to distinguish *Tomlinson* from the present case on any ground other than the fact that it involved a false return of process in a *civil* case, which leads us to the next consideration.

The Court of Appeals correctly determined that our prior cases hold G.S. 162-14 inapplicable to a return of process issued in a *criminal* proceeding. *Harrell v. Warren,* 100 N.C. 259, 6 S.E. 777 (1888); *Martin v. Martin,* 50 N.C. 349 (1858). Formerly, a rigid dichotomy existed in the remedies available for defective returns of process in civil and criminal actions. Our cases construed G.S. 162-14 to be the exclusive remedy for a defective return of civil process and G.S. 14-242 to be the criminal process equivalent remedy. *See Manufacturing Co. v. Bux-*

ton, supra; Harrell v. Warren, supra. G.S. 14-242, a part of our jurisprudence since 1818, reads as follows:

> "If any sheriff, constable or other officer, whether State or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor."

In *State v. Berry,* 169 N.C. 371, 85 S.E. 387 (1915), our Court took the first step in eroding this dichotomy when it held G.S. 14-242 applicable to returns of both criminal and civil process based upon the "plain language" of that statute. We are asked in the present case to reconsider the correctness and wisdom of our holdings confining G.S. 162-14 to civil process only.

[4] In *Martin v. Martin, supra,* it was conceded that the language of G.S. 162-14 describing the process is "very general; 'all writs and other process to him legally issued and directed.' " But the Court felt that "[t]hese general words are restrained by other parts of the section, i.e. 'one moiety to the party aggrieved.' " *Martin, supra* at 351. Focusing on the words "party aggrieved" (formerly "party grieved") in the statute, the Court decided that the legislature could not have intended the statute to apply to criminal process. We now reject this reasoning because it completely overlooks the fact that the action for a false return can be brought by anyone who will sue, whether or not that person is the party aggrieved. We believe the statute is clear on its face and means what it says—"all writs and other process." We hold that G.S. 162-14 applies to process issued in criminal, as well as civil, proceedings. *Harrell v. Warren, supra,* and *Martin v. Martin, supra,* are hereby overruled. Proper performance of official duties is as important in criminal matters as it is in civil.

[5] The defendant also questions on this appeal the sufficiency of the plaintiff's evidence to go to the jury. In light of *Tomlinson v. Long, supra,* we must conclude that plaintiff's evidence was sufficient to survive defendant's motion for a directed verdict. The plaintiff proved, as did the plaintiff in *Tomlinson,* that the party to be served had an established and well-known

(listed in the telephone directory) residence in the county and that he was at home, except for working hours, every day from 14 to 24 November 1974. It is not necessary under *Tomlinson v. Long, supra,* for the plaintiff to show the sheriff's efforts, or lack of efforts, to serve the process.

The heavy workload of the sheriff's department, while it renders the sheriff's lack of diligence more understandable, is of little legal significance. In *Tomlinson v. Long, supra,* the defendant sheriff introduced evidence of the distance (25 miles on horseback) between his office and the witness's residence as a part of his defense. In that case we said: "We attach but little importance to the distance between the sheriff and witness's residence. The sheriff must be able, either by himself or deputies, to discharge his duty in all parts of the county with proper official dispatch." *Tomlinson, supra* at 471.

We have also examined defendant's contention that the trial court committed prejudicial error in instructing the jury that Deputy Sheriff Walker was an interested witness and find no merit in it.

Our holding today poses no hardship on sheriffs for two reasons. As we pointed out in *Tomlinson v. Long:*

> "If the sheriff desires to avoid the heavy penalty of the statute for a false return, he should in all cases of doubt return the facts, and not merely his [or his deputy's] conclusions. By doing so, if it should appear that he has erred, he will have subjected himself to the penalty of $100 for not duly executing and returning, but not to the higher penalty for a false return. This last penalty is imposed only for returns false in fact, and not for those which are false only by way of inference (the facts being truly stated)." *Tomlinson, supra* at 471-72.

[6] After he has made a false return, a sheriff still has a means of protecting himself against liability for a false return. In *Peebles v. Newsom,* we said:

> "Any hardship resulting from this rule may be relieved, and will be relieved by our law of amendments. If a return is false by mistake or inadvertence, the Court will allow the Sheriff to amend his return so as to speak the truth. If the return is false of purpose, then no amendment will

be allowed, and the penalty will be recovered." *Peebles, supra* at 475.

A sheriff may move to amend his return of process so as to make it speak the truth even *after* suit has been brought for the penalty imposed for a false return and though the amendment defeats the plaintiff's right to recover such penalty. *Stealman v. Greenwood*, 113 N.C. 355, 18 S.E. 503 (1893); *accord, Swain v. Burden*, 124 N.C. 16, 32 S.E. 319 (1899). In such a case, the sheriff does not as a matter of law have the right to amend his return in order to correct his error, rather, it is within the discretion of the presiding judge to allow such amendments in meritorious cases. *Campbell v. Smith*, 115 N.C. 498, 20 S.E. 723 (1894).

The decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. RICHARD MARTIN BISHOP

No. 89

(Filed 13 June 1977)

1. Criminal Law § 34.5— other offense—admissibility to show identity

Evidence that a gun stolen during a robbery and burglary was used by defendant in a break-in at another location some eight days later was relevant to establish defendant's identity as one of the perpetrators of the robbery and burglary in which it was stolen.

2. Criminal Law § 42.4— stolen gun—sufficiency of identification

A burglary and robbery victim's testimony that a weapon was a gun stolen from him "as far as [he] could tell" and testimony by defendant's accomplice that "this is the weapon or an identical weapon that came out of the Tucker home the night of the burglary and armed robbery" constituted sufficient identification of the gun to allow its admission into evidence even without the abundance of other more definite testimony presented at the trial to establish the identity of the gun.

3. **Criminal Law § 113.3— recapitulation of testimony—length of defendant's hair**

Defendant was not prejudiced by the court's recapitulation of the evidence and contentions as to the length of defendant's hair on the date of the crimes charged where the court referred specifically to hair length three times in the charge and recounted defendant's testimony concerning the length of his hair, and where none of the identifications of defendant were grounded upon the length of his hair and there was testimony that he had a stocking tied around his head, which presumably might alter the appearance of his hair.

4. **Criminal Law § 86.3— cross-examination of defendant—other criminal activities**

The trial court did not err in permitting the district attorney to continue cross-examination of defendant about his criminal activities after defendant had admitted a lengthy criminal record where there is no indication in the record of bad faith on the part of the State or of any attempt to badger or humiliate defendant.

5. **Criminal Law § 88.2— limiting cross-examination of accomplice—right against self-incrimination**

The trial court did not err in limiting defendant's cross-examination of a State's witness concerning his participation in crimes in South Carolina in response to the witness's assertion of his constitutional right against self-incrimination where the witness testified as an accomplice in the crime charged and had already testified at length acknowledging his substantial involvement in criminal activities, and it is improbable that his response to defendant's inquiry as to his involvement in any crime in South Carolina would have added weight to defendant's assertions as to his incredibility as a witness or would have shown any bias or interest.

ON defendant's appeal under General Statute 7A-27(a) from *Wood, J.*, presiding at the 6 February 1976 Criminal Session of GUILFORD Superior Court. This case was docketed and argued as Case No. 140, Fall Term 1976.

Rufus L. Edmisten, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

E. L. Alston, Jr., attorney for the defendant.

EXUM, Justice.

Defendant was tried and convicted of first degree burglary and armed robbery. He was sentenced to consecutive terms of life imprisonment on the burglary charge and 20 years on the armed robbery charge.

Defendant presents four arguments upon this appeal. Of most interest is his contention that the trial court erred in allowing certain testimony concerning defendant's alleged participation in a subsequent break-in at another location some eight days after the incident for which he was tried in this case. By this testimony the state sought to show defendant's possession of a gun allegedly stolen from one of the victims of the crime charged. We hold the evidence was properly allowed. Defendant's remaining arguments are of no merit.

The state's evidence tends to show that in the late evening of 14 May 1974, Emmett Z. Tucker and his wife and daughter were at their home on Ritters Lake Road in Greensboro. When Mr. Tucker stepped out of his back door to check the weather, he was rushed by a man crouched over with a gun which he pressed to Mr. Tucker's breast. The two men wrestled, but the fight was ended abruptly when two other men approached. While one of these entered the house, the other hit Mr. Tucker with his gun barrel, knocking him down.

The first assailant, whom Mr. Tucker called "No. 1," took his billfold and removed about $600.00 from it. Then "No. 1" helped Mr. Tucker into the house where his wife and daughter, both bloody, were tied up with television antenna wire. Mr. Tucker was likewise restrained. Two of the men searched the house while the third remained with the Tuckers. The three men finally left and the family managed to untie themselves. Mr. Tucker went for help.

Besides the money and some other items a .380 Remington automatic pistol, which Mr. Tucker had owned since the 1930's, was found to be missing. Mr. Tucker could not identify any of the three men. He said "No. 3" had a stocking over his head. Numbers 1 and 2 wore something over their faces and both had hair that was neither very long nor short.

Two witnesses, Charles Frederick (Red) Rice and Allen Odell Smith, gave essentially identical testimony tending to establish that they had perpetrated the crime at the Tucker residence with defendant, and that defendant was the man called "No. 1" by Mr. Tucker. They testified that Mrs. Tucker had in her possession at the time a .380 automatic pistol which was taken from her by Smith during the robbery and burglary and that defendant Bishop had been given the pistol afterward.

A .380 automatic "squeezer" pistol with a worn handle was offered in evidence and identified as having been recovered from the spot where defendant fell after having been wounded in a break-in at Pegram-West Builders Supply on 22 May 1974. This gun was identified by Mr. and Mrs. Tucker as that which was taken from their home on 14 May.

Defendant sought to establish an alibi defense.

By several assignments of error presented in his first argument, defendant challenges the admissibility of evidence relating to the Pegram-West break-in on 22 May 1974.

It has long been recognized that, notwithstanding the general rule of exclusion of evidence of other crimes in a criminal prosecution, the commission of another crime may be shown if the evidence presented tends to prove any relevant fact other than the character of the accused or his disposition to commit the crime charged. 1 Stansbury's North Carolina Evidence, § 91 (Brandis Rev. 1973).

This Court listed several exceptions to the rule of exclusion in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). One of these was: "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *Id.* at 175, 81 S.E. 2d at 367. *See also Boyd v. United States*, 142 U.S. 450 (1892); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944); *State v. Ferrell*, 205 N.C. 640, 172 S.E. 186 (1934).

In *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975), the state introduced evidence of three previous robberies in which defendant had used a pistol identical to that used in the crime charged. Defendant sought to prove alibi. We held the evidence competent on the issue of identity. *See* Annotation, Robbery—Evidence of Other Robberies, 42 A.L.R. 2d 854.

In this case there is plenary evidence that the gun found where defendant fell near the scene of the Pegram-West incident was that taken from the Tucker's home eight days earlier.

Mr. Tucker testified, "I would say in all honesty that is my gun." Mrs. Tucker definitely identified it, as did defendant's alleged accomplices who testified the gun was given to Bishop. There is also ample evidence to show defendant's possession of the gun during the 22 May 1974 break-in at Pegram-West. It was found by police at the spot where defendant fell on that occasion. Although it was not recovered until daylight, some hours after defendant's apprehension, defendant himself acknowledged that the gun recovered and introduced into evidence was that used by himself in the Pegram-West incident. His testimony that he had bought the gun from Rice simply produced a conflict in the evidence which the jury evidently resolved in favor of the state.

[1] There was testimony by two witnesses that defendant had asked for and kept Mr. Tucker's pistol on the night of the crime charged; the same gun was used by defendant in the second crime within a short time and in the same city; in both crimes defendant operated with one companion at least and in both, defendant was the first to accost the victim. The evidence of defendant's participation and use of the Tucker pistol in the Pegram-West incident is relevant to establish his identity as one of the perpetrators of the robbery and burglary in which it was stolen.

[2] Defendant next argues that the court should not have given a charge on the doctrine of recent possession relative to the pistol solely upon the ground that the gun was insufficiently identified both as that stolen from the Tuckers and as that used by defendant at Pegram-West. This contention is frivolous. As we have already observed, the identity of the gun was well established by the testimony of a number of witnesses, including defendant himself. It is true that some of the witnesses were less than absolutely certain in their testimony. Mr. Tucker originally said that the weapon exhibited was his gun "as far as [he] could tell" and Rice testified that "this is the weapon or an identical weapon that came out of the Tucker home the night of the burglary and armed robbery." Such identifications are adequate to allow its admission into evidence even without the abundance of other more definite testimony found in this record to establish the identity of the gun. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975), *death sentence vacated*, 96 S.Ct. 3207 (1976); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38

(1974), *death sentence vacated*, 96 S.Ct. 3205 (1976); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972).

[3] Defendant next argues that the court erred in failing to charge the jury on the discrepancy in the testimony of various state's witnesses as to the length of defendant's hair. This argument is without merit. The record is not altogether clear as to the substance of the testimony involved. One witness told defense counsel on cross-examination that defendant's hair was "not quite as long as your hair," at the time of the Tucker crime, while another said his hair on the night of the Pegram-West incident was "approximately the length that it is now." Mr. Tucker said "No. 1" 's hair was neither very long nor short. The length indicated by each of these references is nowhere specified and remains a mystery to us. In any case, the court referred specifically to hair length three times in the charge to the jury. He recounted defendant's testimony that his hair was "down to his chest" on 14 May. The judge also reminded the jury that the witness Smith "testified about his hair length, and you will recall that." Since none of the identifications of defendant were grounded upon the length of his hair and there was testimony that he had a stocking tied around his head, which presumably might alter the appearance of his hair, we can find no error, nor can we conceive of any prejudice to defendant in the court's summary of the evidence on this point. The court recapitulated the evidence and the parties' contentions with reasonable accuracy. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Defendant made no objection to these portions of the charge and requested no further instruction. Objections to these portions of the charge are, therefore, deemed waived. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[4] Defendant next contends the court erred in allowing the state's cross-examination of defendant to continue when the district attorney, as defendant claims, was simply "badgering" and "humiliating" defendant. Defendant's objection is that the district attorney continued to question defendant about his criminal activities after defendant had admitted a lengthy criminal record. We find no merit in this contention.

By testifying in his own behalf, defendant subjected himself to impeachment by questions pertaining to prior instances of specific misconduct. *State v. Foster*, 284 N.C. 259, 200 S.E.

2d 782 (1973); *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973). We note defendant answered negatively to many of the questions objected to by his counsel. "Whether the cross-examination goes too far or is unfair is a matter for determination of the trial judge and rests largely in his sole discretion." *State v. Blackwell*, 276 N.C. 714, 724, 174 S.E. 2d 534, 541, *cert. denied*, 400 U.S. 946 (1970); *see State v. Black*, *supra*. There is no indication in this record of bad faith on the part of the state nor of any attempt to badger or humiliate defendant.

[5] Finally, defendant argues that the court erred to his prejudice in limiting his cross-examination of the witness Rice as to his prior acts of misconduct. Rice was an accomplice in the crimes for which defendant was tried, and testified after a grant of immunity as to charges pending against him in Guilford County. This witness seemed to have a rather sophisticated knowledge of the law and recognized his vulnerability to charges in other counties. Thus in response to one of defense counsel's queries as to his participation in criminal activities outside Guilford County, Rice refused to answer, obviously upon the grounds of his Fifth Amendment right against self-incrimination. A conference with Rice's counsel ensued and Rice answered the question in the negative. The court sustained the state's objections to further questions as to that particular incident and as to "any other burglaries in South Carolina . . . ."

The judge in this case apparently decided to limit further examination as to foreign crimes in response to the witness' assertion of his constitutional right against self-incrimination. There is no indication that the court's ruling deprived defendant of any opportunity for material cross-examination. The questions to which the state's objections were sustained had nothing to do with Rice's testimony on direct examination. One question was repetitive, being directed toward Rice's participation in a crime which he had already denied. As to that crime, it was within the trial court's discretion to prohibit further questioning. *State v. Blackwell*, *supra*. The second question concerned other crimes allegedly committed in South Carolina. This witness had already testified at length acknowledging his very substantial involvement in criminal activities. That testimony occupies six to seven pages of the record. He testified, moreover, as an accomplice in the crime charged. It appears most improbable that his response to defendant's inquiry as to his

involvement in any crime in South Carolina would have added any weight to defendant's assertions of his incredibility as a witness. Nor is there any contention that an affirmative answer would have shown any bias or interest on the part of this witness.

We find no error prejudicial to defendant in the court's rulings on this phase of the case.

We find that defendant was accorded a fair trial in which there was

No error.

STATE OF NORTH CAROLINA v. ELBANKS WHITE

No. 118

(Filed 13 June 1977)

Homicide § 21.4— murder by stabbing—insufficiency of evidence

Evidence in a murder prosecution was insufficient to be submitted to the jury, though it established that defendant had an opportunity to commit the crime charged, since it was deficient in the following respects: (1) the desk clerk at the motel where deceased lived could not identify the man he saw leaving deceased's mobile home probably because of the distance and the darkness; (2) black men other than defendant were staying at the motel at the time of the offense in question; (3) no evidence was presented that defendant owned the murder weapon; (4) no fingerprints were found on the knife which was found in deceased's body; (5) no evidence was introduced of any blood found on defendant's pants; (6) about 15% of the population has the type of blood found on defendant's left shoe; (7) the type of blood found on the right shoe is found in 30% of the population; (8) the blood specks on the defendant's tee shirt and the blood found on his carpet were not identified by type or otherwise; (9) no motive was established for the crime; (10) no flight was attempted by defendant.

DEFENDANT appeals pursuant to G.S. 7A-27 (a) from judgment of *Seay, J.*, 15 November 1976 Criminal Session, WILKES Superior Court.

On an indictment, proper in form, defendant was charged with the murder of Shirley Ingram Billings. Upon call of the case for trial, the district attorney indicated that he would

seek a verdict of guilty of murder in the second degree or such verdict as the law and the evidence in the case may warrant. Defendant was convicted of second degree murder and sentenced to life imprisonment.

Defendant has been tried three times for this offense before Judge Thomas W. Seay, Jr. The first trial, held during the August 1976 Criminal Session of Wilkes Superior Court, ended in a mistrial due to the inability of the jury to reach a verdict. The second trial, at the September 1976 Session of Wilkes Superior Court, also ended in a mistrial when the jury failed to reach a verdict. We are concerned here with the third trial.

The evidence for the State tended to show the following:

The deceased, Shirley Billings, a middle-aged white woman, was stabbed to death in her mobile home located at Lowe's Motel in Wilkesboro about 8:30 p.m. E.S.T. on 23 April 1976. (We take judicial notice that on this date the sun set at approximately 7:00 p.m. E.S.T. *See The World Almanac and Books of Facts 1976* at 767-79.) She was found with a knife still in her side lying in a pool of blood. According to expert testimony, the cause of death was multiple, deep penetrating stab wounds.

About 8:30 p.m. Oscar Garcia, the night clerk at Lowe's Motel, received a telephone call from Room 47, which was the mobile home occupied by the deceased. When he picked up the telephone he heard a long scream of a woman. He dropped the telephone, ran outside the motel within view of the mobile home, and saw a black man, with bushy hair, wearing a light shirt and dark trousers running out of the mobile home. The mobile home was some 200 to 250 feet from the Lowe's Motel Office. No evidence was offered as to the outside lighting conditions at the motel. The black man ran in the direction of Room 40, defendant's room, before disappearing from view behind some parked cars. Defendant's room was at the end of the motel, 40 to 60 feet from the deceased's trailer.

Garcia ran to the deceased's mobile home, pushed open an already partially open door, and saw the body of the deceased on the floor. No one else was observed outside and no cars left the motel. Garcia returned to the office and called the owner of the motel, who in turn notified the police.

Wilkesboro Police, representatives of the sheriff's department, and SBI agents, all came to the scene that evening to in-

vestigate. Laney Vickers of the Wilkesboro Police arrived at 8:43 p.m. and found the defendant, a black man, standing outside his room, No. 40. Defendant was dressed in an off-white, long-sleeved shirt and dark pants. When asked what had happened, defendant replied that he did not know. Defendant indicated that he had not been inside the deceased's residence but had looked inside through the storm door. Defendant had been living at the motel for six to eight months and working for American-Drew Furniture Company.

No evidence of forced entry into the mobile home was found. The mobile home had only two entrances. The side door was padlocked. The body was lying about five feet from the main door near a sofa. The telephone was off the hook and the vacuum cleaner was still plugged in, close by the deceased's body. An effort was made to take fingerprints from the knife, but none were secured. The murder weapon was apparently a hot cutter's knife of the type used at Holly Farms Industries.

Steve Cabe, an SBI agent, talked with the defendant in his room about 9:00 p.m. Defendant told the agent that he went to a friend's room about 8:00 p.m.; that coming back to his room he walked in front of the deceased's trailer; that he heard the deceased call for him and figured that she had prepared some beans for him to eat, as she often did. He went into his room for a few minutes and then started back to the deceased's trailer. On his way, he met a man by the name of Howard Funk coming out of the mobile home and running very fast. Defendant stated that he then went to the trailer and looked inside and saw the deceased lying in a pool of blood. During this same conversation with SBI agent Cabe, the defendant also said he observed a black man with bushy hair coming out of the deceased's trailer who he thought was a Leech boy. Cabe observed the defendant wearing a brownish-red, long-sleeved shirt, a tee shirt and a pair of cordovan colored, wing-tipped, lace up shoes.

Later the same night at the Wilkes County Sheriff's Department, the defendant said that he had observed an unidentified white man coming from the deceased's home about 8:30 p.m. Defendant stated the man ran from the trailer and around behind the motel. Defendant emphatically repeated that he did not enter the deceased's mobile home that night. He reported that he had observed a Leech boy coming from the trailer and

indicated that he thought the Leech boy had killed Mrs. Billings. The tee shirt, the cordovan shoes and a pair of pants were taken from the defendant.

At Room 40 of the defendant, Jerry Garris of the Wilkes County Sheriff's Department, found an empty suitcase on the dresser, a small bowl of beans on a stand, and a "Holly Farms hot cutter" knife lying under a TV on top of the dresser. The room was searched with the defendant's permission.

Blood tests were made on blood extracted from the body of the deceased, defendant's blood and blood smears on the two shoes taken from the defendant. It was determined that the shoes had human blood on the toes which could not have come from the defendant. Approximately thirty percent of the population has the same blood type as found on defendant's right shoe and about fifteen percent has the same blood type as found on the left shoe. The expert testified that in his opinion the blood on both shoes could have come from the deceased, although he said the results as to the right shoe were inconclusive. The expert found six pinhead-sized specks of blood on the tee shirt.

A luminol test was made of the carpet of Room 40 of the defendant. In the test a reagent is sprayed on the floor. When it comes into contact with blood, it reacts and glows in the dark. The luminol examination in defendant's room produced several crescent-shaped reactions resembling the outline of the toe of a shoe. No evidence of a comparison of the reactions and defendant's shoes was introduced. Several officers entered the deceased's mobile home and later went into the defendant's room. These officers testified that they did not step in any blood in the mobile home.

Apparently, the bloodstains on defendant's tee shirt and the carpet in defendant's room could not be typed. No blood was apparently found on the trousers.

Defendant presented no evidence.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Max F. Ferree and William C. Gray, Jr., for the defendant.

COPELAND, Justice.

The only serious question raised by this appeal is whether the court was correct in denying defendant's motion for judgment as of nonsuit. The answer to this question depends upon whether there is substantial evidence to support a finding that the defendant was the perpetrator of the crime, it being conceded that there is substantial evidence that the crime charged was committed. We believe the evidence raises a strong suspicion as to defendant's guilt, but that it is *not* sufficient to remove the case from the realm of surmise and conjecture. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960).

It is elementary that, upon a motion for judgment as of nonsuit in a criminal case, the evidence must be considered by the court in the light most favorable to the State. Where there are contradictions and discrepancies in the evidence, these must be resolved in the State's favor and the State must be given the benefit of every reasonable inference arising on the evidence. *State v. Sellers*, 289 N.C. 268, 221 S.E. 2d 264 (1976); *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333 (1976); *State v. Cutler*, *supra*.

The case against this defendant is based entirely upon circumstantial evidence. The test of the sufficiency of the evidence to withstand a nonsuit motion is the same whether the evidence is circumstantial, direct or both. *State v. Thompson*, 256 N.C. 593, 124 S.E. 2d 728 (1962); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

> "When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965); *accord*, *State v. Cutler*, *supra*.

In searching our reports of the many cases that recite the above principles of law, we find that it is much easier to state the rule than to apply it. Each case turns on its own peculiar facts and a decision in one case is rarely controlling in another. However, in *State v. Cutler*, *supra*, we find a case with facts

strikingly similar to those of the instant case. If anything, the State presented a stronger case against the defendant in *Cutler* and in that case we held that the motion for nonsuit should have been allowed.

In *Cutler*, the State's evidence tended to show that the deceased was found in his home stabbed through the heart, lying in a pool of blood. Blood was found throughout the house and inside the defendant's abandoned pickup truck parked nearby. The defendant was seen driving his truck up the lane to the deceased's house on the morning of the murder. Later the same morning, the defendant appeared at the home of his uncle intoxicated and "bloody as a hog." The defendant had a bad gash on his head. The defendant's knife blade was bloody and a hair stuck in the blood on the knife was similar to the chest hair of the deceased. An expert testified that the blood under the deceased's body and the blood inside the defendant's truck came from different persons. The blood on the defendant's clothing was identified as the same type as that taken from the truck. The blood on the knife was human blood but could not be typed. The defendant told his uncle that "Joe [the deceased] had killed himself." Defendant was taken by a neighbor to the hospital and, en route, told the neighbor he "would rather get a pint of liquor and go back and see how Joe was than go to the doctor." Upon these facts, Justice Lake, speaking for our Court in *Cutler*, found the evidence was not sufficient to defeat the motion for nonsuit although the evidence established that the defendant had an *opportunity* to commit the crime charged.

The evidence for the State in the case at bar was deficient in the following respects: (1) Garcia could not identify the man he saw leaving deceased's mobile home probably because of the distance (200-250 feet) and darkness (1½ hours after sunset). *See State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967); (2) other black men were staying at the motel; (3) no evidence was presented that the defendant owned the murder weapon; (4) no fingerprints were found on the knife; (5) no evidence was introduced of any blood found on the defendant's pants; (6) about fifteen percent of the population has the type of blood found on the left shoe of the defendant; (7) the type of blood on the right shoe is found in thirty percent of the population; (8) the blood specks on the tee shirt, and the blood on the carpet were not identified by type or otherwise; (9) no mo-

tive was established for the crime; (10) no flight was attempted by the defendant.

The State has shown that the defendant was in the general vicinity of the deceased's home at the time of the murder and that he made several arguably contradictory statements during the course of the police investigation. It may even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter. Thus, the State has established that the defendant had an opportunity to commit the crime charged. *State v. Cutler, supra.* "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor,* 290 N.C. 68, 75, 224 S.E. 2d 180, 185 (1976); *accord, State v. Finney,* 290 N.C. 755, 228 S.E. 2d 433 (1976). Judge Seay should have allowed the motion for judgment as of nonsuit and his judgment is consequently

Reversed.

STATE OF NORTH CAROLINA v. JOSEPH LEE PERRY

No. 114

(Filed 13 June 1977)

1. **Criminal Law § 34.5— commission of another crime—competency to show identity**

In this prosecution for murder committed in the perpetration of an armed robbery of a convenience store, evidence of defendant's participation in an armed robbery of a second convenience store some two weeks earlier was relevant to show defendant's identity as the perpetrator of the crime charged where the victim was shot in both instances; in both robberies the perpetrator attempted to mask his appearance during the commission of the crime; defendant was positively identified as the perpetrator of the earlier robbery; a long black gun was used in both robberies; and empty cartridges found at the scene of both robberies were found by a ballistics expert to have been fired from the same gun.

2. **Homicide § 21.4— murder during robbery—sufficiency of evidence of defendant's identity**

The State's evidence was sufficient to permit the inference that defendant was the perpetrator of a murder committed during an armed robbery of a convenience store where it tended to show that defendant committed an armed robbery of another convenience store some

two weeks earlier; the same gun was used in both crimes and the same *modus operandi* was used in both instances; defendant was in possession of a black Cadillac prior to the robbery-murder; and a black Cadillac was parked near the convenience store at the time of the robbery-murder.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Braswell, J.*, at the 1 November 1976 Session of GRANVILLE Superior Court.

Defendant was tried upon an indictment, proper in form, for the murder of Roy Brent Bullock. Upon return of a verdict of guilty of first degree murder, defendant was sentenced to life imprisonment.

The State introduced evidence tending to show that on 18 November 1975, between 9:00 and 9:30 p.m., Lois Marie Bullock, fourteen years of age, was stocking the display racks of a "walk-in" cooler at The Food Mart in Butner. Her father, Roy Brent Bullock, was employed behind the counter of the store. The cooler had glass doors which enabled Lois Marie to see the counter of the store from inside the cooler. While in the cooler, Lois Marie saw two black males behind the counter of the store near the cash register. She then heard a total of three shots which were fired from a "long, black gun." Lois Marie was unable to give a description of the two men other than both were black and between sixteen and nineteen years of age. One of the men was tall and wearing a red bandana; the other man was short. Roy Brent Bullock was found to have been shot three times by a .22-caliber weapon. Mr. Bullock died as a result of the wounds inflicted.

On the evening of the murder, the scene of the crime was investigated. It was found that over $300 had been removed from the cash register. On 29 November 1975, a spent .22-caliber cartridge was found among books, papers and other items lying on a table adjacent to the cash register.

The State further introduced the testimony of Barbara Powell concerning the robbery of a Kwik-Pik in Durham. Ms. Powell testified that on 5 November 1975 she was managing a Kwik-Pik in Durham. At approximately 11:30 p.m. on that evening, a black male entered the store wearing an orange stocking over his head and carrying a gun with a long barrel and a black handle. After taking the money contained in the cash register and Ms. Powell's pocketbook, the male shot Ms.

Powell. Because of a run in the stocking over her assailant's face, Ms. Powell was able to positively identify defendant as the man who robbed and shot her. A spent .22-caliber cartridge was found on the floor of the Kwik-Pik. Through expert ballistics testimony, it was shown that the cartridge found on the table of The Food Mart and the cartridge found on the floor of the Kwik-Pik were fired from the same gun.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Claude W. Harris for the State.

James E. Cross, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the trial court erred in allowing the testimony of Ms. Powell concerning the robbery of the Kwik-Pik in Durham on 5 November 1975, and in admitting into evidence the spent .22-caliber cartridge found on the floor of the Kwik-Pik. It is a well established rule that in the prosecution of a defendant for one crime, evidence tending to show that a defendant committed another distinct, separate offense is not admissible. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury, N.C. Evidence § 91 (Brandis rev. 1973), and cases cited therein. The rule, however, is subject to certain equally well established exceptions. The exception relevant to present case is succinctly stated in *State v. McClain*, *supra*, at 175, 81 S.E. 2d at 367:

> "4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. [Citations omitted.]"

In *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972), defendant was on trial for a rape committed on the evening of 13 October 1971. The State's evidence tended to show that on the evening in question defendant abducted his victim and forced her to have sexual relations with him by threatening to lacerate her throat with a metal comb. The State further in-

troduced the testimony of another woman who stated that on the evening of 19 October 1971 defendant had abducted her by holding a metal comb to her neck. Defendant was apprehended by law enforcement officers before completing his crime. In upholding the admission of the evidence of the 19 October abduction, this Court stated:

> "The enumerated similarities tend to show a *modus operandi*, a common plan embracing the commission of both crimes, and also establish a chain of circumstantial evidence tending to identify defendant as the man who raped Miss Elliott. Thus, evidence of the Conklin offense was admissible and should not be rejected because it incidentally proves defendant guilty of another crime. Its logical relevancy to the rape of Miss Elliott is obvious. The trial judge instructed the jury to consider such evidence 'only as it relates to the identity of the defendant, Horace Ray McClain,' as the man who raped Miss Elliott on 13 October 1971. It was competent on the question of identity and properly admitted. [Citations omitted.]" 282 N.C. at 362, 193 S.E. 2d at 111-12. *See also State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944).

Under the decisions of this Court, we are of the opinion that the evidence of the Kwik-Pik robbery was admissible in present case. The Kwik-Pik robbery tended to show that during the evening defendant entered a convenience store while wearing a stocking over his face. He then requested the manager's money. Upon receiving the money, defendant shot the manager with a gun which had "a long barrel with a black handle." After defendant fled the scene, a spent .22-caliber Western Super X long rifle cartridge was found on the floor of the Kwik-Pik. The evidence in the case at bar tended to show that two black males entered a convenience store during the evening. One of the males was wearing a bandana over a portion of his face. The males took the contents of the cash register, and then one male shot the operator of the store with a "long, black gun." A spent .22-caliber Western Super X long rifle cartridge was found on a table near the cash register. Through expert

ballistics testimony, the two cartridges were found to have been fired from the same gun.

The similarities between the two crimes are patently obvious. Both robberies occurred at convenience stores; the same gun was used in both instances; the victim was shot in both instances; and in both robberies the perpetrator attempted to mask his appearance during the commission of the crime. The similarities in the method of operation in both robberies and the positive identification of defendant in the Kwik-Pik robbery tend to identify defendant as the perpetrator of the robbery at The Food Mart in Butner. The evidence was clearly relevant for the consideration of the jury on the issue of identity. Hence, we overrule this assignment.

Defendant further contends that his motion for judgment as in case of nonsuit should have been allowed. It is well established that a motion for nonsuit is properly denied if there is any evidence of each element of the offense charged, considering the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference deducible therefrom. *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977); *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976); 4 Strong, N.C. Index 3d § 106 (1976).

In present case, the State was required to prove that defendant committed a homicide during the perpetration or attempted perpetration of the felony of robbery. G.S. 14-17; *State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (1977), (decided this day); *State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435 (1970). As in all criminal cases, there are two items which the State must prove: (a) that a crime has been committed, *i. e.*, the *corpus delicti;* and (b) that defendant committed the crime. *See State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762 (1944).

[2] Clearly, there was sufficient evidence to go to the jury of a murder committed during the perpetration of a robbery, *i.e.*, the *corpus delicti.* The only contested issue, and the only issue which defendant seriously raises on appeal, was whether the State proved that defendant was the perpetrator of the crime. We are of the opinion that, for the purposes of nonsuit, the State has sufficiently proved the identity of defendant.

We have heretofore outlined the evidence and similarities of the crimes committed at The Food Mart in Butner on 18 November 1975 and at the Kwik-Pik in Durham on 5 November 1975. This evidence established that defendant committed the crime at the Kwik-Pik. The evidence further established that the same gun was used in both crimes and that the same *modus operandi* was used in both instances. The State also introduced testimony that defendant was in possession of a black Cadillac prior to 18 November 1975, and that at approximately the time of the incident at The Food Mart a black Cadillac was parked near the store. The similarities of the two crimes and the use of the same gun, coupled with the other evidence introduced by the State, were sufficient to permit the inference that defendant was the perpetrator of the crime in present case. Hence, the trial judge properly overruled defendant's motion for judgment as in case of nonsuit.

We have reviewed the entire record and find no error.

No error.

STATE OF NORTH CAROLINA v. EDDIE LEE WILLIAMS

No. 116

(Filed 13 June 1977)

Jury § 5— jurors as witnesses in pending cases—no disqualification

The trial court did not err in denying defendant's motion, made after defendant and the State had passed the jury, that he be permitted to examine further two jurors who were to be State's witnesses in two unrelated criminal cases set for trial at the same session as the present case, since G.S. 9-15(c) subjects a litigant rather than a witness to disqualification as a juror when he has a suit pending and at issue in the court in which he is called to serve as a juror.

APPEAL by defendant from *Braswell, J.*, at the 29 November 1976 Session of VANCE County Superior Court.

Defendant was charged in separate bills of indictment with second-degree rape and kidnapping. He entered a plea of not guilty to each charge.

The State offered evidence tending to show that on 14 June 1976 defendant, by the use of a knife, caused prosecuting

witness Wilhemina Terry to enter his automobile. He drove to a secluded area where, without her consent, he had sexual intercourse with the prosecuting witness in the front seat of his automobile. Wilhemina Terry testified that she offered no resistance because she feared that defendant would harm her. Defendant forced her to clean blood from the front seat of his automobile and then took her to Vance Technical Institute where she was a student. She reported the incident to her teacher on the following day.

Defendant testified that he had known Wilhemina Terry for some time and that she voluntarily entered his automobile on 14 June 1976. He did not have a knife at that time. He stated that he did drive to a secluded area where the prosecuting witness voluntarily had sexual intercourse with him. Defendant offered other evidence which was corroborative in nature. He also offered evidence as to his good character.

The jury returned verdicts of guilty as to each charge. The trial judge entered judgment imposing a sentence of life imprisonment upon the verdict of guilty of second-degree rape. A judgment imposing a sentence of twenty-five years imprisonment to run concurrently with the life sentence was entered on the verdict of guilty of kidnapping.

Attorney General Edmisten, by John R. B. Matthis, Special Deputy Attorney General, and Rebecca R. Bevacqua, Associate Attorney, for the State.

J. Henry Banks for defendant.

BRANCH, Justice.

The single question presented by this appeal is whether the trial judge erred by denying defendant's motion that he be permitted to further examine juror Underwood and alternate juror Faulkner. At some point in the trial, defense counsel discovered that juror Underwood was to be a State's witness in the case of *State v. Robinson* and that alternate juror Faulkner was to be a State's witness in the case of *State v. Creekmore.* Both of these unrelated criminal cases were at issue and were set for trial at the 29 November 1976 Session of Vance County Superior Court. Neither the record nor the briefs before us show with clarity at what point in the trial this information came to the attention of defense counsel. However, it appears

that it was after both the State and defendant had passed the jury. The record discloses the following exchange between the court and defense counsel:

> MR. BANKS: Your Honor, I would like to make a motion that His Honor in his discretion allow defense counsel to ask additional questions of those jurors mentioned, Mr. Undersood (sic) and Mr. Faulkner.
>
> THE COURT: What kind of questions; for what purpose to show what?
>
> MR. BANKS: To see that the fact that they are going to be witnesses for the State is of any type of influence in the deliberation.
>
> THE COURT: Respectfully denied. Under the circumstances, I do not feel that it is something that I ought to exercise my discretion in or allow you to reopen. It does not go to the ultimate merits of their qualifications to serve as a juror. Respectfully denied.

Defendant relies upon G.S. 9-15(c) which provides:

> If any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge.

Our decisions recognize that a juror may be challenged for cause if he has a suit pending, at issue, and for trial at the same term of court at which he is drawn to serve as a juror. *State v. Spivey*, 132 N.C. 989, 43 S.E. 475; *State v. Smarr*, 121 N.C. 669, 28 S.E. 549.

We find pertinent and persuasive language in *State v. Brady*, 107 N.C. 822, 12 S.E. 325. There the Court, in construing a nearly identical statute, stated:

> . . . [A] prosecuting witness in a criminal action is not disqualified as a juror. He is not a "party to an action" within the purview of the statute. The State and the defendant are the only parties to a criminal action by indictment. Indeed, the disqualification attaches only to a party to a *suit* pending and at an issue and it is doubted if it apply at all to a defendant, even in a criminal action.

In *State v. Hopkins*, 154 N.C. 622, 70 S.E. 394, the Court aptly stated the reason for this rule as follows:

> . . . The object of the statute, Revisal, sec. 1960, is to disqualify one to serve as a juror who has a suit to be tried at the same term at which his case is to be tried. Those who have suits to be tried at the same term should not be permitted to serve in close relationship to other jurors. . . .

Accord: State v. Ashburn, 187 N.C. 717, 122 S.E. 833.

This assignment of error is feckless since G.S. 9-15(c) subjects a *litigant* rather than a witness to disqualification as a juror when he has a suit pending and at issue in the court in which he is called to serve as a juror. The statute is designed to protect the prospective juror's adversary in his pending case rather than to protect parties to cases in which he might serve as a juror.

Defendant's motion was addressed to the trial judge's sound discretion and no abuse of that discretion has been shown. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763.

No error.

STATE OF NORTH CAROLINA v. ROBERT LOUIS HARDY AND WILBUR WILLIAM FOLSTON, JR.

No. 23

(Filed 14 July 1977)

1. **Criminal Law § 31— judicial notice—percentage of women in county**

   The percentage of women in a given county is not properly the subject of judicial notice.

2. **Constitutional Law § 61— grand jury—systematic exclusion of women —failure of proof**

   Even if the male defendants have a right to complain of underrepresentation of women on the grand jury which indicted them, defendants failed to make out a *prima facie* case of discrimination against women where they presented evidence of the percentage of female grand jurors in the county during a four-year period but presented no evidence of the percentage of women in the county.

3. Constitutional Law § 61— grand jury—systematic exclusion of 18 to 21 year olds—failure of proof

Even if the 18 to 21 year age group is considered a constitutionally identifiable group, defendants failed to make out a *prima facie* case of systematic exclusion of 18 to 21 year old persons from the grand jury which indicted them where they failed to present evidence of the proportion of 18 to 21 year olds serving on the grand juries in the county or of their percentage in the population of the county.

4. Constitutional Law § 60— grand jury—systematic exclusion of blacks—failure of proof

The systematic exclusion of blacks from the grand jury will not be presumed where no evidence of racial discrimination was presented and defense counsel made no effort to produce such proof, notwithstanding defendants contend that failure of the county to keep records of the race of members of the jury list or of persons selected to serve on juries made it impossible for them to meet their burden of proof.

5. Constitutional Law § 61— grand jury—absence of systematic exclusion—findings

The court's finding that there was no evidence before it to indicate systematic exclusion of blacks, women and 18 through 21 year olds from the grand or petit juries was supported by the record; furthermore, the court was not required to make findings of fact where the evidence was not contradictory or conflicting.

6. Constitutional Law § 61— grand and petit juries—absence of systematic exclusion

The State's evidence showed that there was no systematic exclusion of any cognizable group from the grand or petit juries where it showed that the jury commissions used names from the voter registration records and tax lists in preparing the jury lists, that they used a neutral systematic selection procedure (e.g., every sixth name) in selecting names from the source lists as required by G.S. 9-2, and that the only criteria used in striking names from the jury list were the permissible disqualifications set out in G.S. 9-3.

7. Criminal Law § 92.1— consolidation of charges against two defendants—same offense

The State's motion for consolidation of charges for the same crimes against two defendants was addressed to the sound discretion of the trial judge, and the judge's exercise of that discretion will not be disturbed absent a showing that a defendant has been denied a fair trial by the order of consolidation.

8. Constitutional Law § 72; Criminal Law § 48— statements by codefendant—admission by silence

In this joint trial of two defendants for a felony-murder in which neither defendant took the stand and testified, defendants' rights of confrontation, as stated in *Bruton v. United States*, 391 U.S. 123, were not denied by the admission of testimony by a cellmate

of defendants that he heard one defendant ask the second defendant why he shot the man and the second defendant did not reply, and that the second defendant stated in the first defendant's presence that the first defendant told him you had to kill the victim or he would testify, since the statement of each defendant was admissible against the codefendant as an implied admission by silence, and the *Bruton* rule does not apply where the admissions of a nontestifying codefendant are admissible against the defendant under well-recognized rules of evidence.

9. Criminal Law § 117.3— grant of immunity—instruction to jury—when given

The trial court was not required by G.S. 15A-1052 to instruct the jury immediately before a witness's testimony that the witness was testifying under a grant of immunity, and the court's instruction prior to the presentation of any evidence that the witness would testify under a grant of immunity if he testified was sufficient to comply with the requirement of the statute that the instruction be given "prior" to the testimony; furthermore, the court's instruction which failed to give all of the terms of the grant of immunity did not violate the statute where the material terms of the grant of immunity were explained, since the statute does not require the judge to inform the jury of the details of the grant, and the court's instruction substantially complied with the statute.

10. Criminal Law § 117.3— grant of immunity—interested witness—time of instruction to jury

The requirement of G.S. 15A-1052(c) that the trial judge "during the charge to the jury" must instruct that a witness testifying under a grant of immunity is an interested witness whose testimony must be carefully scrutinized means during the *final* charge and not in advance of the witness's testimony.

11. Criminal Law § 117.4— all evidence shows witness as accomplice—instruction

Where all the evidence showed that a State's witness was an accomplice, the court should have instructed the jury that the witness's testimony should be carefully scrutinized without first requiring a finding by the jury that the witness was an accomplice; however, the court's instruction requiring the jury first to find that the witness was an accomplice was invited by defendant's tendered instruction and did not constitute prejudicial error.

12. Bills of Discovery § 6— prior recorded statements—pretrial discovery—statutory authority

The court had no authority under G.S. 15A-903(d) to order pretrial discovery by defendant of a prosecution witness's prior recorded statements, although such statements were material to the preparation of the defense, since the court's authority under G.S. 15A-903(d) is limited by provisions of G.S. 15A-904(a) restricting discovery of statements made by prospective witnesses to anyone acting on behalf of the State.

13. Constitutional Law § 30; Bills of Discovery § 6— pretrial discovery— statutory restriction— inherent authority

Where a statute restricts pretrial discovery, the trial court has no inherent authority to order pretrial discovery of items so restricted.

14. Bills of Discovery § 6— pretrial discovery order— effect

A judge's pretrial order of discovery of "other papers, documents, photographs, mechanical or electronic recordings, tangible objects in control of the State relative to said case" applied only to those materials defendants are permitted to receive under G.S. 15A-903(d), as limited by G.S. 15A-904(a).

15. Criminal Law § 82.1— attorney and client— work product privilege

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation; it applies in civil as well as criminal cases and has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself.

16. Criminal Law § 82.1— waiver of work product privilege

The work product privilege is waived when the defendant or the State seeks at trial to make a testimonial use of the work product; therefore, when the State elected to use as a witness a person who had given a tape recorded statement to the police, it waived its right to claim the recorded statement was privileged with respect to matters covered in the witness's testimony.

17. Constitutional Law § 30; Bills of Discovery § 6— disclosure of State's evidence

The prosecution is constitutionally required to disclose only *at trial* evidence that is favorable and material to the defense.

18. Constitutional Law § 30; Bills of Discovery § 6— motion for discovery at trial— in camera examination

When a specific request is made *at trial* for the disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged, the trial court is required, at a minimum, to order an *in camera* examination of the evidence and to make appropriate findings of fact; if the court rules against the defendant on his motion for discovery, the judge should order the sealed evidence placed in the record for appellate review.

19. Constitutional Law § 30; Bills of Discovery § 6— failure of State to provide recorded statement— pretrial discovery order— motion to strike— motion for mistrial

The trial court did not err in failing to strike a witness's testimony or to declare a mistrial because the State failed to provide the witness's tape recorded statement pursuant to a pretrial discovery order where the State was not required to divulge the statement prior to trial, defendants made no request for disclosure of the statement at trial, and defendants failed to ask for a sealed transcript of the statement to be placed in the record for appellate review.

20. Homicide § 21.6— felony-murder—sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felony-murder where it tended to show that defendant borrowed his sister's car in Asheville so that he and his two companions could go to Durham; defendant remained in the car while his two companions entered a service station near Morganton and robbed and shot to death the station attendant; defendant was the only adult and oldest member of the group; defendant was a leader among black students at the college he attended; the car defendant borrowed from his sister had a phony license plate a short time after the robbery, and the lawful license plate was found under the front seat; before leaving Asheville, defendant placed a shotgun in his sister's car; at the service station, defendant ordered a bystander into the car and threatened him with the same fate as the murdered station attendant; in the car, defendant stated that the incident at the service station had occurred because the black man was "sick and tired of being opposed or stepped on"; defendant told one companion that when a police officer approached the car and asked for his driver's license, "he would have to shoot him"; defendant drove away from the police after the car was stopped; a shotgun and several pistols were found in the car after it wrecked while the police chased it; defendant ran from the police after the wreck; and while in jail, defendant told his codefendant that he had to kill the victim or he would talk.

21. Homicide § 31.1— first degree murder—substitution of life sentences for death penalties

Sentences of life imprisonment are substituted for penalties of death imposed for first degree murder.

22. Constitutional Law § 40— indigent defendant—appointment of only one attorney

Only one competent attorney should have been appointed to represent each indigent defendant in the trial and appeal of this case.

Justice LAKE concurs in result.

DEFENDANTS appeal from judgments of *Friday, J.*, 7 June 1976, Special Criminal Session, CLEVELAND County Superior Court.

On indictments, proper in form, defendants were charged with kidnapping, armed robbery, murder, and conspiracy to commit armed robbery and murder. A third defendant, Kevin Michael Green, was indicted for kidnapping, armed robbery and murder. The bills of indictment were returned in Burke County Superior Court. Upon motion for a change of venue, the cases were transferred to Cleveland County Superior Court for trial.

Upon call of the cases for trial, the district attorney announced that he intended to proceed only under the felony-murder rule against the two defendants and moved to consolidate the cases for trial. This motion was allowed and defendants' motions for a severance were denied.

At arraignment, defendant Folston pleaded not guilty. Defendant Hardy, upon being arraigned, tendered a plea of guilty to accessory after the fact of murder and robbery to the State, but this plea was not accepted by the State. Defendant Hardy refused to plead further so the court entered a plea of not guilty for him.

The trial commenced on 7 June 1976. The jury was selected after four full days of *voir dire* examination. Defendants were found guilty of first-degree murder and sentenced to death.

The State's evidence tended to show the following:

Hardy, aged 24, Folston, aged 19, and Green, aged 17, were at a lounge in Asheville, North Carolina, on the evening of 30 July 1975, and decided to go to Durham, North Carolina. They borrowed Hardy's sister's car, a 1971 Chevelle for the trip. Hardy transferred a shotgun from his car to his sister's car. During the early morning hours of 31 July 1975, the three left Asheville and proceeded east on Interstate 40. Hardy operated the vehicle. Folston rode on the passenger side of the front seat and Green rode in the rear. Before leaving Asheville, defendants each took a purple pill to stay awake which had the effect of increasing their laughter and talking.

At about 4:30 a.m., they arrived in the vicinity of Morganton, Burke County, North Carolina. They left Interstate 40 and pulled into a nearby Shell Service Station where Darrell Monroe Baldridge, the deceased, was working as a service station attendant and Vernon Robert Fragiacomo, a hitchhiker, was waiting for a ride to Richmond, Virginia.

Green and Folston went inside the station to use the restroom and to buy drinks from the drink machine. Hardy stayed at the automobile and purchased $2.00 worth of gasoline. He conversed with the deceased, Baldridge, and also with the hitchhiker, Fragiacomo. Folston returned and asked the attendant for change for a dollar. Green and Folston followed Baldridge into the service station. Inside Baldridge was forced

to open the cash register. At gunpoint Folston and Green took cash from the register and a .38 caliber pistol belonging to the station owner. According to Green's testimony, he then left the building and on his way to the car, heard a shot fired which resulted in the death of the service station attendant, Baldridge. Fragiacomo testified that Folston and Green were both inside the station at the time the fatal shot was fired. Through the window, Fragiacomo was able to observe Baldridge lying spread-eagle on the floor and saw the expression leave his face when the shooting occurred.

Baldridge lived unconscious for six days. The cause of death was a gunshot wound to the head. A .22 caliber bullet was removed from his brain, but the bullet was so mutilated it could not be identified as having come from a .22 caliber pistol that was later recovered.

After the shooting, Hardy threatened Fragiacomo with the same fate and ordered him to get into the car. When Folston and Green returned to the car, defendant Hardy drove east on Interstate 40 in the general direction of Durham, North Carolina, until coming to a detour near Hickory. A sheriff's car was parked along the road so Hardy asked the officer where Interstate 40 continued. They had traveled a short distance when they were pulled over into a shopping center parking lot by officers of the Hickory Police Department.

One patrolman approached the driver's side and asked Hardy for his driver's license and registration. The officers observed a shotgun in the hands of Green who was sitting in the rear seat and pulled their pistols. Defendants Hardy and Folston were directed to lay their hands on the dashboard. At this point, defendant Hardy shifted the car into gear and drove off.

A high speed chase ensued during which gunshots were fired from the vehicle being pursued. The Chevelle traveled west on Highway 64-70. Eventually, Hardy lost control of the vehicle in Pottery or Deadman's Curve and wrecked it. Folston and Green were taken into custody at the scene of the wreck. Defendant Hardy was apprehended in a field about four-tenths of a mile from the site of the accident two hours later.

Fragiacomo was treated at a hospital. After his release, he continued to receive medical and psychiatric attention for some time.

The cash register tape at the service station showed sales, including cash and credit, of some $1,400.00 for the day of the robbery. $248.00 and some change were recovered from under the right front floor mat of the Chevelle. At the scene of the wreck, two guns were found outside the car, and one gun and a shotgun were recovered from inside the automobile, including a .22 caliber pistol and the .38 caliber pistol stolen from the service station. At some earlier time, the lawful license plate for the Chevelle had been removed and another license plate substituted therefor. The lawful plate was found under the right-hand side of the front seat.

Cross-examination of co-defendant Green revealed that he was testifying under a plea-bargain arrangement whereby he agreed to plead guilty to the reduced charge of second-degree murder and to testify truthfully in the trials against Hardy and Folston in exchange for a sentence of no more than sixty years and dismissal of the other charges against him. Kevin Green was also known as "Clyde," apparently for "Bonnie and Clyde." The initials "B & C" were tatooed on his arm.

Green indicated that the purpose of the trip to Durham was for defendant Hardy to see someone concerning the publication of a book he had written entitled "Legacy of a Black Man." After the wreck, Hardy's brief case and some papers were found strewn all over the highway. The papers and brief case were recovered by the officers and returned to Hardy.

Defendant Folston offered no evidence. Defendant Hardy offered a number of character witnesses, including the Chancellor and the Dean of Students at the University of North Carolina at Asheville, which school Hardy had attended.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

J. Bruce McKinney and Claude S. Sitton for defendant Hardy.

H. Dockery Teele, Jr., and W. Harold Mitchell for defendant Folston.

COPELAND, Justice.

Defendants, through counsel, moved the Court to quash the indictments against them on the ground that there was arbitrary and systematic exclusion of blacks, women, and 18 through 21 year olds from the grand and petit juries. Defendants claim the court erred by ruling that there was no evidence of arbitrary or systematic exclusion of certain classes of people from the grand or petit juries and by denying their motions to quash. In this assignment of error, we are concerned with the grand jury selection process in Burke County, the county where the bills of indictment were returned, and the petit jury selection process in Cleveland County, the county to which the cases were transferred for trial.

A defendant has the burden of establishing discrimination in the composition of the jury. *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976); *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972). Both defendants concede that they failed to offer any evidence of discrimination against any groups in the selection of petit juries in Cleveland County. Consequently, defendants are not entitled to relief on this ground. Instead, defendants rely on evidence of alleged discrimination in the selection of Burke County *grand* juries.

In its latest pronouncement on the subject of grand jury selection, the United States Supreme Court indicated the elements that must be shown by a defendant in order to make out a *prima facie* case of discrimination against a particular group.

> "[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial under-representation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. (Citation omitted.) Next, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. (Citations omitted.) . . . Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut

that case." *Castaneda v. Partida*, ----- U.S. -----, -----, 51 L.Ed. 2d 498, 510-11, 97 S.Ct. 1272, 1280 (1977); *accord*, *State v. Cornell, supra; State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109 (1964).

[1, 2] The only evidence presented by the defendants on their motions was the lists of the grand jurors who served terms in Burke County expiring during the years 1973 through 1976. According to defendants' calculations, during this four-year period only 14 of the 51 grand jurors who served, or 27%, were women (by our calculations only 17 of 69 grand jurors, or 25%, were women). Of those grand jurors who served during 1976 and returned the indictments upon which defendants were tried, 4 of 18, or 22%, were women. Defendants did not introduce evidence of the proportion of women in the total population of Burke County but ask us to take judicial notice "of the fact that women make up at least 50% of our population, and in fact, in most instances, constitute more than one-half of the population." The percentage of women in a given county is not properly the subject of judicial notice. Without this element of proof, defendants have failed to show *any* under-representation of women on grand juries in Burke County and no *prima facie* case of discrimination against women has been made out.

Some question arises as to whether defendants, who are all male, have any right to complain of under-representation of women on grand juries, assuming it were proven. Defendants cite us to *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690, 95 S.Ct. 692 (1975), which held that a male defendant could challenge the exclusion of women from a *petit* jury. Clearly, *Taylor v. Louisiana* is distinguishable from the case at bar because the challenge was to the composition of a petit jury and the decision was bottomed on a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial in a criminal case, which the United States Supreme Court interpreted to mean a trial by a representative cross section of the community. By contrast, a challenge to the composition of a grand jury is necessarily based on either a Fourteenth Amendment due process or equal protection claim. From the language of *Castaneda v. Partida, supra*, it would appear a defendant must show that he belongs to the under-represented group before he can maintain an equal protection challenge to the grand jury composition.

But see Peters v. Kiff, 407 U.S. 493, 33 L.Ed. 2d 83, 92 S.Ct. 2163 (1972) which indicates that a due process claim can be maintained by a nonmember of an excluded group.

[3] By the same token, we question whether a grand jury system which excluded 18 to 21 year olds would violate defendant Hardy's right to equal protection under the laws, defendant Hardy being 24 years of age at the time crimes were allegedly committed. We also have serious reservations as to whether the 18 to 21 year age group would be considered a constitutionally identifiable group under *Castaneda v. Partida, supra.* It is doubtful that every characteristic that distinguishes one group of people from another is constitutionally significant. It may be that the exclusion of a group would not render invalid an indictment by a grand jury so long as there is no reasonable basis for the conclusion that the ineligible group would bring to the jury a point of view not otherwise represented upon it. *See Taylor v. Louisiana, supra; Peters v. Kiff, supra; State v. Knight*, 269 N.C. 100, 152 S.E. 2d 179 (1967). In any event, defendants failed to introduce any evidence of the proportion of 18 to 21 year olds serving on the grand juries in Burke County or of their percentage in the population of the county.

[4] Likewise, defendants did not present evidence of underrepresentation of members of their race on the grand juries of Burke County. Defendants claim that because Burke County keeps no records of the race of the members of the jury list or of persons actually selected to serve on juries it is difficult, if not impossible, for them to meet this burden of proof. Defendants acknowledge that this record keeping system reduces the possibility of intentional racial discrimination but claim that it precludes any examination of whether the procedures are inherently discriminatory with respect to blacks.

As support, defendants cite *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), which held that a defendant must be allowed a reasonable time and opportunity to inquire into and present evidence of racial discrimination in jury selection. *State v. Spencer* and the cases cited therein involved denials of a defendant's motion for a continuance to gather evidence of discrimination. In the present case, defendants never moved for a continuance and apparently never attempted by any means to ascertain the racial composition of the past grand juries. Where there is absolutely no evidence presented of racial discrimination

and defense counsel has made no efforts to produce proof, this Court will not presume it. *See State v. Wright, supra; State v. Ray, supra.*

[5] Defendants argue that the trial judge erred in not making findings of fact supporting his ruling on their motions to quash. To the contrary, the court found that there was no evidence before it to indicate that the jury commission in either county had intentionally, systematically or arbitrarily discriminated against any of the groups mentioned. The court's finding was sufficiently supported by the evidence (or lack of it). Moreover, the judge is only required to make findings when the evidence is contradictory and conflicting as to material facts. *State v. Wilson, supra.* Here there were no contradictions or conflicts in the evidence presented. Defendants' evidence did not show any discrimination.

[6] Although it was not required to come forward with evidence because no *prima facie* showing of discrimination had been made, the State offered evidence tending to show that the institution and management of the jury system in both counties was not in fact discriminatory. *State v. Wilson, supra.* Letters from the jury commission in each county indicated that the statutory procedure for the selection of jurors prescribed in Chapter 9 of the General Statutes was followed. We have held that the North Carolina statutory plan for the selection of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group. *State v. Cornell, supra; State v. Wilson, supra.*

These statutes leave little to the exercise of official discretion. Although under G.S. 9-2, the jury commissions could have used sources of names other than the voter registration records and tax lists of the counties in the preparation of the lists of jurors, they did not. Both jury commissions used a neutral systematic selection procedure (e.g., every sixth name) in selecting names from the source lists as required by G.S. 9-2, and it appears that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in G.S. 9-3. The trial court properly denied defendants' motions to quash and the assignment of error is overruled.

Next, defendants contend the court erred in consolidating their cases for trial and denying their motions for a severance.

[7] The State's motion for consolidation was addressed to the sound discretion of the trial judge. "Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other." *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786, 790 (1976); *accord*, *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975); G.S. 15A-926(b)(2). The trial judge's exercise of his discretion will not be disturbed absent a showing that defendant has been denied a fair trial by the order of consolidation. *State v. Taylor, supra; State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972).

[8] Each defendant contends his constitutional right of confrontation as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by the reception into evidence of statements by a codefendant which implicated him in the crime charged but which were inadmissible against him because the codefendant did not take the stand. Specifically, defendants complain that witness Green's account of a conversation that he overheard between defendants Folston and Hardy when the three were incarcerated in the Caldwell County Jail was not admissible at a joint trial. The defendants and Green occupied the same cell for about a week. Over objection, Green was allowed to testify that,

> "The conversation was more or less about the money. Mr. Hardy asked Mr. Folston why he did shoot the man and Mr. Folston gave no reply. Mr. Folston did not say anything when Mr. Hardy asked him why he shot the man."

Defendant Folston argues that Hardy's statement (actually a question) implicated him and was inadmissible hearsay as to him.

Witness Green was also permitted to testify over objection as follows:

> "Q: Mr. Folston said what?
>
> A: Mr. Hardy told him you had to kill the victim or he would testify."

Defendant Hardy argues that defendant Folston's statement inculpated him and was inadmissible hearsay as to him.

Both defendants rely upon *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), which held that the admission in a joint trial of a codefendant's confession implicating a defendant violates the non-confessing defendant's Sixth Amendment right of confrontation unless the confessor takes the stand so as to be subjected to cross-examination, notwithstanding instructions to the jury that the codefendant's confession is not to be considered in determining the accused's guilt or innocence. *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965) held that the Sixth Amendment right of an accused to confront witnesses against him is a fundamental right, made obligatory on the states by the Fourteenth Amendment. The rule as stated in *Bruton* applies equally to *admissions* by a codefendant that implicate another defendant against whom the evidence is inadmissible. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975); *see Bruton v. United States, supra.*

In interpreting *Bruton, supra*, our Court has held:

> "[i]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) *that the confession is inadmissible as to the codefendant* (Citation omitted), 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. (Citation omitted.)" (Emphasis supplied.) *State v. Fox*, 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1968); *accord*, G.S. 15A-927 (c)(1).

But where the incriminating admissions of a nontestifying codefendant are admissible against the defendant under well-recognized rules of evidence, the *Bruton* choice, does not present itself. *State v. Spaulding, supra; see Bruton v. United States, supra* at 128 n. 3, 20 L.Ed. 2d at 480 n. 3, 88 S.Ct. at 1623 n. 3. In the case at bar, the statements complained of were admissible as implied admissions.

> "Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circum-

stances that a denial would be naturally expected if the statement were untrue and it is shown that he [the defendant] was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. (Citations omitted.)" *State v. Spaulding, supra* at 406, 219 S.E. 2d at 184.

The evidence shows that during the prison cell conversation concerning the money, both defendants were present, both were in a position to hear and understand the statements by their co-defendants and both had the opportunity to speak. Clearly, the statements objected to were of such a nature that a denial would naturally be expected to be forthcoming if the statements were untrue. Defendants' motions for a severance were properly denied and the assignments of error related thereto are overruled.

[9] Both defendants contend the court failed to properly instruct the jury in accordance with G.S. 15A-1052(c) before receiving the testimony of witness Green.

G.S. 15A-1052(c) provides as follows:

"In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses."

The record discloses that before any witnesses were called in the case, Judge Friday instructed the jury as follows:

"Members of the jury, it's the Court's duty to instruct you that in the event Kevin Michael Green testifies, he will be testifying under a grant of immunity, the terms of which have been previously explained to you. That is, he would receive no more than sixty (60) years in the North Carolina Department of Corrections, and he would be allowed to plead Guilty to second degree murder. The Court will instruct you later on an accomplice's testimony."

First, defendants complain that this instruction did not comply with G.S. 15A-1052 because it was not given *immediately* preceding Green's testimony. Nothing in the statute requires the instruction to be given immediately before the witness's

testimony. The statute only specifies that the instruction be given "prior" to the testimony. We believe Judge Friday's instruction complied with the spirit as well as the letter of the law.

Next, defendants point out that Judge Friday's instruction did not give all the terms of witness Green's grant of immunity. The statute requires the trial judge to inform the jury "of the grant of immunity" and not the details of the grant. Obviously, the legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility. Where, as here, the material terms of the grant of immunity are explained to the jury, there is substantial compliance with the statute and no prejudicial error.

[10] Defendant Hardy additionally contends the judge should have instructed the jurors, prior to Green's testimony, that Green was an interested witness whose testimony should be carefully scrutinized by them. G.S. 15A-1052(c) clearly requires the court to so instruct the jury but "during the charge to the jury." We interpret this language to mean during the judge's *final* charge and not in advance of the witness's testimony. In his final charge Judge Friday instructed the jury as follows:

> "Now, Ladies and Gentlemen of the Jury (A) there is evidence in these cases which tends to show that the witness, Green, is testifying under an agreement with the prosecutor for a charge reduction in exchange for his testimony; and under agreement with the prosecutor for recommendation for sentence concession in exchange for his testimony, as the Court earlier stated to you. If you find this witness, Green, testified in whole or part from these reasons you should examine this testimony with great care and caution in deciding whether or not to believe it. (B) If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence in the case. (C) There is evidence which tends to show that the witness, Green, was an accomplice in the commission of the crime charged in this case, Ladies and Gentlemen. An accomplice may actually take part in acts necessary to accomplish the crime, and he may knowingly help and encourage another either before or during its commission. An accomplice is considered by law to have

an interest in the outcome of the case. He is considered to be an interested witness. If you find the witness, Green, to be an accomplice, (D) you should examine every part of his testimony with the greatest care and caution; and if after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence in this case."

[11] In a related assignment of error, defendants argue that this instruction was erroneous because (1) it required the jury to first find that witness Green was an accomplice and (2) it did not define accomplice. Defendants contend the trial court should have instructed the jury that Green was an accomplice because all of the State's evidence tended to show he was an accomplice. At the very least, defendants contend the court should have defined accomplice so as to enable the jury to make the finding.

In *State v. Harris*, a case on point, we held that "when all of the evidence shows a witness to be an accomplice, then the trial judge should instruct that the witness's testimony should be carefully scrutinized, without requiring any finding by the jury." *State v. Harris*, 290 N.C. 681, 699, 228 S.E. 2d 437, 447 (1976); *see also State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961). Having said this, we further noted that "[w]hile this type of instruction would have been proper in the case before us, it must be borne in mind that every poorly stated instruction does not result in such prejudice as to require a new trial. In order to constitute reversible error, it must be made to appear that, in light of all the facts and circumstances, the challenged instruction might reasonably have had a prejudicial effect on the result of the trial." *State v. Harris, supra* at 699-700, 228 S.E. 2d at 447. In *Harris* we found the error non-prejudicial and we are of the same opinion in this case.

We are certain that defendants did not consider the instruction given prejudicial because it appears of record that the instruction on accomplice testimony tendered by *defendants* would have required the jury to make the finding that the witness was an accomplice: N.C.P.I.—Crim. 104.25 (Oct. 1974). Thus any error in the judge's charge was invited by defendants.

Defendants' claim that the court should have defined accomplice is without merit. Judge Friday did define accomplice. Moreover, his definition was in substantial conformity with the

definition requested by defendants and was not required to be identical. *State v. Bailey, supra.*

The assignments of error relating to the judge's instructions on accomplice testimony and immunity grants are overruled.

In defendants' next assignment of error, they claim the court erred in failing to strike the testimony of Vernon Robert Fragiacomo or to grant a mistrial for the failure of the State to provide a prior recorded statement of the witness as per a pretrial discovery order. The discovery order was entered by Superior Court Judge Bruce B. Briggs on 20 November 1975, after defendants moved for discovery pursuant to G.S. 15A-903.

Judge Briggs' order, among other things, required the State to allow the defendants to examine, inspect, copy, or photograph the following:

> "5. Other papers, documents, photographs, mechanical or electronic recordings, tangible objects in control of the State relative to said case."

G.S. 15A-903(d), upon which the order was apparently based, provides as follows:

> "Documents and Tangible Objects.—Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant."

The official commentary to G.S. 15A-903 interprets this subsection to allow discovery of:

> "(5) Books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects in the control of the State and which are:
>
> a. Material to the preparation of the defense; or
>
> b. Intended for use by the State as evidence; or
>
> c. Were obtained from or belong to the defendant." Official Commentary, G.S. 15A-903 (1975).

In the course of Fragiacomo's testimony, at trial, a *voir dire* examination was held of Deputy Sheriff Sam Williams. The deputy revealed that Fragiacomo's statement was recorded on tape and a transcript of the statement furnished to the district attorney. Neither the recording nor the transcript was ever furnished to the defense. Defense counsel argued that the recording should have been disclosed as per the discovery order and moved that Fragiacomo's testimony be stricken from the record or that a mistrial be declared. The district attorney, out of the presence of the jury, adamantly stated that he would not allow defendants to hear the recording or read the transcript. He threatened to resign if the law of the State compelled him to turn over the tape or the transcript and indicated that all the other district attorneys in the State would do likewise. At length, the district attorney argued that neither the law nor Judge Briggs' order authorized discovery of the statement in question. Unfortunately, the district attorney's argument exceeded the bounds of propriety and was not restrained by the trial judge. Ultimately, Judge Friday ruled the recording and transcript were the "work product" of the State and denied the defendants' motions.

On appeal, the State contends that G.S. 15A-903 does not require disclosure of Fragiacomo's recorded statement because (1) it was not used during the trial of the case and (2) Fragiacomo was neither a defendant nor a codefendant. The State further contends that the order of Judge Briggs exceeded his authority under G.S. 15A-903 and thus, was a nullity. Defendants maintain that both the order and G.S. 15A-903 required the disclosure.

[12] As to Judge Briggs' pretrial discovery order, the State correctly observed that if the order contemplated pretrial discovery by a defendant of a prosecution witness's prior statements, the order exceeded the judge's authority. The State is correct, however, for the wrong reason. Standing alone, G.S. 15A-903(d) would allow discovery of Fragiacomo's recorded statement. On its face, G.S. 15A-903(d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense, as defendants now contend. However, we are not permitted to stop here but must construe the statutory scheme in its entirety. The very next section, G.S. 15A-904, limits G.S. 15A-903 and is dispositive of the issue of

prosecution witnesses' statements. G.S. 15A-904(a) provides as follows:

> "Except as provided in G.S. 15A-903(a)(b)(c) and (e), this Article does not require the production . . . of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State."

Notably lacking from the list of subsections excluded from the scope of G.S. 15A-904(a) is subsection d of G.S. 15A-903. G.S. 15A-904(a) is consistent with the legislature's desire, elsewhere expressed, to have the identity of State's witnesses shielded prior to trial. In the original bill, for example, the legislature rejected a proposal that would have allowed defendants to discover the names, addresses, and criminal records of witnesses the State intended to call, apparently, because witnesses may easily be subjected to harassment or intimidation. Official Commentary, G.S. 15A-903 (1975). *See also State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

[13] The question arises whether Judge Briggs had the *inherent* power to order pretrial discovery of a witness's statements. No right to pretrial discovery existed at common law. *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972); *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). However, the absence of discovery as a matter of right does not necessarily preclude the trial judge from ordering discovery in his discretion. R. Farb, *Overview of Criminal Discovery in North Carolina*, Administration of Justice Memoranda, September 17, 1976 (published by the Institute of Government, University of North Carolina at Chapel Hill). This question is apparently unresolved by this Court. *But see State v. Carter, supra; State v. Hoffman, supra* (for cases in which discovery orders, not authorized by statute, were entered by the trial judge without comment by this Court); *State v. Smith, supra* (for a case in which the Court expressly discouraged a pretrial order requiring the State to furnish the names and addresses of its witnesses).

A preliminary draft of proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure served as the model for the drafting of Article 48 of Chapter 15A of the General Statutes. Official Commentary, G.S. Ch. 15A, Art. 48 (1975). The Federal courts, in construing Rule 16, have recognized the

judiciary's inherent power to compel pretrial discovery where not specifically prohibited by Rule 16. *E.g., United States v. Cannone*, 528 F. 2d 296 (2d Cir. 1975); *United States v. Jackson*, 508 F. 2d 1001 (7th Cir. 1975).

On the facts of this case, it is not necessary for us to reach the question of whether North Carolina trial judges have the inherent power to order pretrial discovery in the absence of a statute prohibiting discovery. We do decide that where a statute expressly restricts pretrial discovery, as does G.S. 15A-904(a), the trial court has no authority to order discovery. Our holding is in accordance with the Federal courts' interpretation of their analogous provisions found in Rule 16 and the Jencks Act. *United States v. Percevault*, 490 F. 2d 126 (2d Cir. 1974); *e.g., United States v. McMillen*, 489 F. 2d 229 (7th Cir. 1972); *cert. denied*, 410 U.S. 955 (1973); Fed. R. Crim. P. 16, 18 U.S.C.; The Jencks Act, 18 U.S.C. § 3500.

[14] We do not construe paragraph 5 of Judge Briggs' order to be in excess of his authority but rather interpret it as ordering discovery of only those materials defendants are permitted to receive under G.S. 15A-903(d), as limited by G.S. 15A-904(a). Thus, Fragiacomo's statement was not discoverable *prior* to trial under either the statute or Judge Briggs' order.

A question remains as to the trial court's power to order discovery *at trial*. In *United States v. Nobles*, 422 U.S. 225, 45 L.Ed. 2d 141, 95 S.Ct. 2160 (1975), the United States Supreme Court held that Rule 16 applies only to pretrial discovery and thus the trial judge may order discovery during trial of material specifically exempted from discovery before trial by Rule 16. Similarly, we hold that G.S. 15A-904(a) does not bar the discovery of prosecution witnesses' statements *at trial*.

At trial, the identity of the State's witnesses is known and thus disclosure of their prior statements does not subject them to any additional risks. At trial the major concern is the "search for truth" as it is revealed through the presentation and development of all relevant facts. To insure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence. *United States v. Nobles, supra.*

[15] Apparently, Judge Friday felt himself constrained in this case from ordering disclosure by the work product doctrine.

The work product doctrine applies in criminal as well as civil cases. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); G.S. 15A-904, -906. It is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. *United States v. Nobles, supra; Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 451, 67 S.Ct. 385 (1947); E. Cleary, McCormick on Evidence 204-09 (2d Ed. 1972); 1 Stansbury's N.C. Evidence § 62 (Brandis Rev. 1973 and Supp. 1976); Annot., 35 A.L.R. 3d 412. The doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. *United States v. Nobles, supra.*

The doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. *United States v. Nobles, supra.* Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial (in this case, by the police for the district attorney). Such a statement is not work product in the same sense that an attorney's impressions, opinions, and conclusions or his legal theories and strategies are work product.

[16] As pointed out in *United States v. Nobles, supra*, the work product privilege, like any other qualified privilege, can be waived. The privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. By electing to use Fragiacomo as a witness the State waived any privilege it might have had with respect to matters covered in his testimony. *United States v. Nobles, supra.*

Counsel for defendants call our attention to *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed. 2d 215, 218, 83 S.Ct. 1194, 1196-97 (1963), which held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Accord, State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Obviously, the corollary to this constitutional holding, is that the prosecutor has the *duty* to disclose such evidence to a

defendant. Nakell, *Criminal Discovery for the Defense and the Prosecution — The Developing Constitutional Considerations*, 50 N.C.L.Rev. 437, 452 (1972) (hereinafter cited as "Nakell").

[17] Recently, *United States v. Agurs*,-----U.S.-----, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976), resolved several of the questions left unanswered by *Brady*. *See* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 115-131 (hereinafter cited as "Comment"). Under *Agurs*, it appears the prosecutor is constitutionally required to disclose only *at trial* evidence that is favorable and material to the defense. Due process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial. *United States v. Agurs*, *supra*. For the *Brady* standard to apply, a specific request for the evidence must have been made because a general request for all favorable and material evidence is no more efficacious than no request in alerting the prosecution to the materials sought. *United States v. Agurs*, *supra*.

Neither *Agurs* nor *Brady* addresses the question of who should decide when the evidence is material and favorable. The lower courts as a general rule have left the initial determination of whether evidence is both material and exculpatory to the prosecutor, although some have required evidence to be submitted to *in camera* inspection by the trial judge. Nakell, *supra* at 453; Comment, *supra* at 120-21.

Several objections to having the judge decide when disclosure of evidence is necessary, as a matter of due process, have been raised. First, the judge is ordinarily less oriented to the facts of the case and possible defenses than is the prosecuting attorney. Second, requiring the judge to review prosecution files for information useful to the defendant casts the judge in a defense advocate's role. Third, it is time consuming of judicial resources for the judge to sift through prosecution files. Nakell, *supra* at 460-61; Comment, *supra* at 120; Note, 74 Yale L.J. 136, 148-49 (1964).

[18] While all of these considerations are valid when the defense makes a general request for a fishing expedition, we believe justice requires the judge to order an *in camera* inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, compe-

tent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious.

We do not hold as the United States Supreme Court has held, as a matter of federal criminal procedure, that a defendant is automatically entitled to such statements at trial. *Jencks v. United States*, 353 U.S. 657, 1 L.Ed. 2d 1103, 77 S.Ct. 1007 (1957), a holding that Congress subsequently approved and codified in the Jencks Act, 18 U.S.C. § 3500. *State v. Chavis*, 24 N.C. App. 148, 210 S.E. 2d 555 (1974), *cert. denied*, 287 N.C. 261, 214 S.E. 2d 434 (1975), *cert. denied*, 423 U.S. 1080 (1976).

Instead, we hold that since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* and *Agurs* require the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review. Such a procedure has been employed in North Carolina by former Superior Judge Robert Martin (now a member of the N. C. Court of Appeals). *State v. Chavis*, *supra* at 176-84, 210 S.E. 2d at 574-78. See Annot., 7 A.L.R. 3d 181 (1966) for the rule in other states.

[19] In the present case, we find that Judge Friday's rulings on defendants' motions were not error. Defendants never requested disclosure of witness Fragiacomo's statement at trial nor did they ask for a sealed transcript to be placed in the record for appellate review even though Deputy Sheriff Williams testified that he had in his possession a copy of the transcript. Defendants moved the court to completely strike the witness's testimony or to declare a mistrial because the State did not comply with the pretrial discovery order. As previously noted, the State was not required to divulge the statement prior to trial.

On the basis of this record, we cannot say that defendants' constitutional rights were violated. We have no reason to believe that Fragiacomo's recorded statement was favorable to the defense and we decline to award defendants a new trial on the basis of pure supposition when they never attempted to have the statement placed in the record for our consideration. The assignment of error is overruled.

Both defendants assign as error the trial court's denial of their motions for nonsuit. Defendant Folston concedes, however, that when the evidence is viewed in the light most favorable to the State, as it must be, there was sufficient evidence of all elements of the offense charged to submit his case to the jury. In light of the testimony of the two eyewitnesses, Green and Fragiacomo, who observed Folston's participation in the crimes, we agree.

[20] Defendant Hardy, on the other hand, was never in the service station during the commission of the armed robbery and murder and contends his case should have been nonsuited. The evidence for the State and defendant Hardy's own evidence tended to show: (1) Hardy was the only adult and the oldest member of the group (5 years older than Folston and 7 years older than Green); (2) He was a friend of Green and Folston and asked them to accompany him to Durham; (3) He was a leader among black students at the University of North Carolina at Asheville; (4) Hardy switched his car in Asheville for his sister's car; (5) The sister's car had a phony license plate (some time before the car was wrecked, the lawful license plate had been removed and another plate substituted therefor. The lawful plate was found under the front seat); (6) Before leaving Asheville, Hardy placed his shotgun in his sister's car; (7) At the service station, Hardy ordered Fragiacomo into the car and threatened him with the same fate as the murdered service station attendant; (8) In the car, Hardy said that the reason the incident at the filling station had occurred was because the black man was "sick and tired of being opposed or stepped on"; (9) Hardy told Folston that when the police officer approached the vehicle and asked for his driver's license, "he would have to shoot him"; (10) Hardy drove away from police after the car had been stopped and he was ordered to place his hands on the dash board; (11) A shotgun and several pistols were found in the automobile after the wreck; (12) Hardy ran from police after the wreck; (13) In jail, Folston stated that Hardy told him he had to kill the victim or he would talk. These facts when combined with other facts in evidence showing that Folston entered the station, robbed and killed the station attendant in the plain view and hearing of Hardy, permit the reasonable inference that Hardy not only participated in the planning and execution of the robbery and murder, but also that he masterminded and directed it. The State is entitled to

have all favorable evidence and all reasonable inferences arising thereon considered on the motion for nonsuit. *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976); *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976). The evidence and the reasonable inferences drawn from it were sufficient to withstand the motion for nonsuit. These assignments of error are overruled.

[21] Finally, defendants contend the court erred in sentencing them to death because the death penalty is unconstitutional. In *Woodson v. North Carolina*, 428 U.S. 510, 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. Our Court is authorized to substitute life imprisonment for the death penalty by authority of the provisions of 1973 Sess. Laws, c. 1201 § 7 (1974 Session). *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976).

This case is remanded to the Superior Court of Cleveland County with directions (1) that the presiding judge, without requiring the presence of defendants, enter a judgment as to each defendant 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 a copy of the judgments and commitments as revised in accordance with this opinion.

We have carefully examined Hardy's Assignments of Error Nos. 3, 5, 8, 11, 12, 13, and defendant Folston's Assignments of Error Nos. 3, 5, 6, 11, 12, 13, 18, 19, and find them to be either without error, or without prejudicial error. Errors, if errors there be, were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). 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.

As a final matter, we consider some irregularities in the appointment of counsel in this case. First, the documentation of these appointments is skimpy at best. Apparently, J. Bruce McKinney was appointed on 6 August 1975 to represent defendant Hardy who was found to be indigent. Later, Claude

S. Sitton was retained as private counsel for defendant Hardy on 20 August 1975. We note that, at that time, the court should have relieved Mr. McKinney from his duties as counsel for defendant Hardy. "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." G.S. 7A-450(c). "It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay." *State v. Hoffman*, 281 N.C. 727, 738, 190 S.E. 2d 842, 849-50 (1972); *See* G.S. 7A-455(a).

The record on appeal indicates that both John H. McMurray and Gary Triggs were first appointed to represent defendant Folston, although the only order on file shows that Superior Court Judge Sam Ervin, III, appointed Attorney McMurray as counsel for Folston on 26 August 1975. Apparently, on 29 January 1976, Attorneys McMurray and Triggs were allowed to withdraw as counsel for defendant Folston and, on the same day, W. Harold Mitchell and H. Dockery Teele were appointed to represent defendant Folston.

[22] By orders, signed by Judge Friday on 20 June 1976, Attorneys Sitton and McKinney were appointed to represent defendant Hardy on appeal and Attorneys Mitchell and Teele were appointed to represent defendant Folston on appeal. We believe that, in the interest of the best utilization of the resources of this State, only *one* competent attorney should have been appointed to represent each indigent defendant in this case.

In the trial we find

No error.

Death sentences vacated and, in lieu thereof, life sentences imposed.

Justice LAKE concurs in result.

STATE OF NORTH CAROLINA v. CHARLES RAY FINCH

No. 8

(Filed 14 July 1977)

1. **Criminal Law § 111.1— instruction to take law from judge— statement about appellate review— no error**

The trial court's remarks in a first degree murder prosecution that the jury should take the law as given to them by the court and "If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court" merely informed the jurors that the law, as stated by the trial judge, would be subject to review by an appellate court, and did not suggest to the jury that its verdict was somehow less binding because of later opportunities for review.

2. **Constitutional Law § 63; Jury § 7— exclusion of jurors for death penalty views— death penalty invalidated**

Defendant's contention, made in reliance upon *Witherspoon v. Illinois*, 391 U.S. 510, that his constitutional rights were violated by the exclusion of jurors who expressed scruples against the death penalty is groundless, since the death penalty provision of G.S. 14-17, the statute under which defendant was sentenced, was invalidated by *Woodson v. North Carolina*, 428 U.S. 280, and the *Witherspoon* decision affected only the death sentence and not the conviction.

3. **Jury § 5— prospective jurors— expression of opinion during selection — no prejudice**

Defendant was not prejudiced by the denial of his motion for a mistrial made during jury selection and grounded on statements by two prospective jurors that they thought defendant was guilty, since the trial court promptly excused the prospective jurors and immediately instructed the other jurors not to consider the remarks.

4. **Criminal Law § 66— illegal and unconstitutional arrest— admissibility of identification testimony**

There is nothing in the law of North Carolina which requires that identification evidence, obtained subsequent to an illegal arrest, be excluded, nor does an unconstitutional arrest require the exclusion of identification testimony that is otherwise competent.

5. **Criminal Law § 66.5— lineup during investigation of crime— no right to counsel**

Defendant's contention that identification evidence should have been excluded because he was not represented by counsel at a pretrial lineup is without merit, since the lineup was conducted at a time when the proceeding was investigatory and had not become a criminal prosecution, and a person's right to counsel attaches only at or after the initiation of adversary judicial criminal proceedings.

6. **Criminal Law § 89.10— impeachment—witness's prior conviction—scope of cross-examination**

Where, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination, and this is permissible regardless of whether the witness is the accused.

7. **Criminal Law § 89.10— witness's prior criminal conduct—inquiry as to punishment improper**

Defendant had no right to inquire concerning punishment imposed upon a witness in a prior criminal proceeding where defendant failed to show that the witness had been convicted of an offense.

8. **Criminal Law § 89.10— witness's prior criminal conduct—inquiry as to punishment proper**

The trial court erred in refusing to allow defendant to cross-examine a witness concerning punishment imposed upon the witness's earlier conviction of traffic offenses, but exclusion of this testimony was harmless error.

9. **Criminal Law § 89.10— witness's prior conduct—cross-examiner bound by witness's testimony**

Where a State's witness testified on cross-examination that he was no longer a drinking man, defendant was bound by such testimony and was not entitled to introduce testimony of two other witnesses to contradict that of the first witness.

10. **Criminal Law § 87.1— leading question—discretionary matter**

The trial court did not abuse its discretion in refusing to allow defense counsel to ask a witness a leading question on direct examination.

11. **Criminal Law § 63— nonexpert opinion of mental capacity—insufficient basis for admissibility**

The opinion of a lay witness as to the mental capacity of another witness was based on observations too remote in time and was properly excluded by the trial judge where the evidence showed that the witness's opinion was based on observations made from 1969 to 1972, and there was no evidence that the witness observed the second witness at any more recent time.

12. **Constitutional Law § 80; Homicide § 31.1— first degree murder—life sentence substituted for death penalty**

A life sentence is substituted for the death penalty imposed in this first degree murder prosecution.

DEFENDANT appeals from judgment of *Crissman, J.*, 28 June 1976 Session, WILSON Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Richard Linwood Holloman on 13 February 1976 in Wilson County.

The State offered evidence tending to show that on 13 February 1976 at approxomately 9 p.m. the deceased, Richard Linwood Holloman, and his employee, Lester Floyd Jones, were closing Mr. Holloman's grocery store and service station located on N. C. Highway 117 south of Wilson, North Carolina. The lights in the store had been turned off and the front door locked with a padlock. Holloman and Jones were standing in front of the store talking when three black males walked up. One of them asked if he could get an Alka-Seltzer and Mr. Holloman said, "I reckon so." At that time Mr. Holloman had his .32 caliber pistol in his hand in full view. He unlocked the padlock on the front door with his left hand, holding the pistol in his right hand. Holloman and Jones then entered the store followed by two black males. There were no lights on in the store except the lights around a clock. However, there were two windows in front of the store, one on each side of the door, and there was a row of lights under the roof of the building all the way around—six lights on the front with hundred watt bulbs on the two corners.

Mr. Holloman got an Alka-Seltzer off the shelf with his left hand and asked the black male if he wanted a cup. The black man replied, "Yes, and your money too." Mr. Holloman replied, "Money, hell," whereupon the black man pulled a sawed-off shotgun and both he and Mr. Holloman fired their weapons. Mr. Jones jumped behind a counter on his stomach and heard additional shots being fired. Immediately following the shooting the three black males left. Mr. Jones called the rescue squad and Mr. Holloman was taken to Wilson Memorial Hospital where he later died from gunshot wounds under his collarbone on the right side and under the right shoulder blade.

When the officers arrived on the scene Lester Floyd Jones furnished a description of the three black males. He told the officers the man with the sawed-off shotgun was from 5 feet 9 inches to 6 feet tall, weighed 150 to 165 pounds, thirty to thirty-five years of age, and was wearing a dark coat, light shirt and dark pants, with part of a woman's light colored stocking on his head.

Later that night defendant Charles Ray Finch, in company with one Charles Lewis, was driving his blue Cadillac on East Nash Street in the City of Wilson and was stopped by several police officers who arrested him without a warrant. He and

Charles Lewis were taken to the Wilson County Courthouse where defendant's automobile was searched. A shotgun shell was found in the ashtray in the left rear door of the car. That same night at approximately 1 a.m. defendant was placed in a lineup with six other people and Lester Floyd Jones identified defendant as the man who shot Mr. Holloman. The witness Jones so testified at the trial and made an in-court identification of defendant as the man who shot Mr. Holloman.

Defendant did not testify but offered several other witnesses who testified that at 9 p.m. on 13 February 1976 when Mr. Holloman was shot, defendant was in a poker game at Tom Smith's Shoeshine Parlor on East Nash Street in downtown Wilson. These witnesses testified in detail as to defendant's activities on the night in question and were positive in their testimony that defendant was at the shoeshine parlor or in the downtown Wilson area at the time Mr. Holloman was shot at his place of business on N. C. Highway 117 several miles away.

Defendant was convicted of felony murder and sentenced to death. He appealed to the Supreme Court assigning numerous errors which will be discussed in the opinion.

Rufus L. Edmisten, Attorney General, by David S. Crump, Assistant Attorney General, for the State of North Carolina.

Vernon F. Daughtridge, attorney for defendant appellant.

HUSKINS, Justice.

[1] Prior to the call of the case the court spoke briefly to the jurors present in the courtroom. These remarks by Judge Crissman included the following statement:

> "Now as I said, you are supposed to listen well and observe and remember the evidence as well as you can, and evaluate it, but then you are supposed to take your instructions from the Court, and that is the law that is applicable in the case give to you then by the Court, and you are supposed to take what the Court says the law is and not what you think the law ought to be, or not what you would like for the law to be, but you take what the court says about the law, and what it is in the case. *If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court.*" (Emphasis added.)

Defendant contends the court thereby impermissibly informed the jury that the case would be reviewed by an appelllate court in the event a guilty verdict was returned. This, defendant argues, "lightened the burden" of the jury in violation of the rule discussed in *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975), and *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975). We think defendant misconstrues the holding in those decisions.

In *Hines*, the district attorney made the following statement to a juror in response to her expressed hesitation about returning a guilty verdict knowing it would result in a death sentence:

> "Well, everybody feels that way but this is the punishment that is provided at this point. And to ease your feelings, I might say to you that no one has been put to death in North Carolina since 1961."

Thus the district attorney suggested to the jury that even though they might return a verdict requiring the defendant to be put to death, such punishment in all probability would never be imposed. In light of this suggestion we held:

> "It is the province of a juror to return a verdict which speaks the truth. This duty is his sole responsibility. We cannot allow this solemn obligation to be diluted by statements *aliunde* the record and foreign to his single duty. In these volatile and bitterly contested cases, in which three human lives hung in the balance, *we think the solicitor's statement was intended to, and in all probability did, lighten the solemn burden of the jurors in returning their verdict.*" (Emphasis added.)

In *White*, the private prosecutor said:

> "You will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

By this statement the jury was informed that there was a further review of the case, including the *verdict*, and this Court held that argument "which suggests to the jury that they can depend upon either judicial or executive review to correct any

error in their verdict, and to share responsibility for it, is an abuse of privilege and prejudicial to the defendant." *State v. White, supra.*

The contested remark of Judge Crissman, while perhaps unnecessary, in no way "shares the burden" of the jury by intimating that its verdict will be reviewed or that the mandated punishment will be withheld. Rather, it merely informs the jurors that the law, as stated by the trial judge, will be subject to review by an appellate court. There is therefore no suggestion to the jury that *its* verdict is somehow less binding because of later opportunities for review. We fail to see how defendant has been prejudiced by the judge's remarks. Defendant's first assignment is overruled.

[2] Relying on *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), defendant next contends that his constitutional rights were violated by the exclusion of jurors who expressed scruples against the death penalty. We note, however, that the United States Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), invalidated the death penalty provision of G.S. 14-17, the statute under which defendant was sentenced. As the *Witherspoon* decision affected only the death sentence and not the conviction, defendant's contention is groundless. *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). This assignment is overruled.

[3] Defendant next assigns as error the denial of his motion for a mistrial made during jury selection. The motion is grounded on statements made by two prospective jurors, Kenneth Wood and Aaron Lewis. Wood, in response to a question as to whether he had formed an opinion as to defendant's guilt or innocence, responded that he thought defendant would be guilty. Lewis, when asked if he could reach a verdict based on the evidence, stated that from what he read he felt the defendant was guilty. Defendant contends that since these remarks were heard by the other jurors, he was prejudiced and the trial judge should have declared a mistrial. We think not.

The granting of a mistrial rests largely in the discretion of the trial judge. *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974). Here, Judge Crissman promptly excused jurors Wood and Lewis and immediately instructed the other jurors

not to consider the remarks. This sufficed to cure any prejudice. *See State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970).

Defendant next assigns as error the admission of evidence identifying the defendant as the man wielding the shotgun.

Under this assignment defendant contends first that his constitutional rights were violated in that the lineup was conducted while defendant was under an unlawful arrest. Apparently defendant argues that his in-court identification by Lester Floyd Jones and evidence of the lineup identification stemmed directly from the alleged unlawful arrest and, as such, were tainted as "fruits of the poison tree." For the reasons which follow we find no merit in this assignment.

[4] Defendant contends that his arrest was not only "illegal," *i.e.*, in violation of G.S. 15A-401, but also "unconstitutional." Assuming, for the moment, that the arrest was both "illegal" and "unconstitutional," there is no merit in defendant's contention that this compels the exclusion of identification evidence obtained thereby.

Clearly a finding that an arrest is "illegal" is not sufficient ground to exclude the controverted testimony. As we said in *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973):

> "The issue then is this: When an arrest is constitutionally valid but illegal under the law of North Carolina, must the facts discovered or the evidence obtained as a result of the arrest be excluded as evidence in the trial of the action? The answer is no. An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful search and seizure. All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a state court. *Mapp v. Ohio*, [367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961)]. Such evidence is also inadmissible by statute in North Carolina, G.S. 15-27(a). But there is no such rule and no such statute in this State with respect to facts discovered or evidence obtained following an illegal arrest. Neither reason nor logic supports the suggestion.
>
> We hold that nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his

> grievance for the warrantless arrest by a civil action for damages. [Citations omitted.] But the competency of the evidence obtained following his illegal arrest remains unimpaired."

We find nothing in the law of North Carolina which requires that identification evidence, obtained subsequent to an illegal arrest, be excluded.

Similarly, we find no merit in defendant's contention that an "unconstitutional" arrest *requires* the exclusion of identification testimony that is *otherwise competent.* In a recent decision dealing with a similar situation, the Fourth Circuit stated:

> "There is no constitutional right not to be viewed. *United States v. Quarles*, 4 Cir., 387 F. 2d 551 (1967). It is only when the arrest itself produces such pressure as to compel admissions or the production of contraband or the seizing of evidence that would not otherwise have been detected that the poisonous tree can be said to produce fruit. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). We hold that an unlawful arrest does not per se make inadmissible positive identification testimony that is otherwise competent. *See Vance v. State of North Carolina*, 4 Cir., 432 F. 2d 984, 990 (1970). Whether such testimony is admissible does not depend upon the validity of the arrest but upon whether the confrontation was 'so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellants were] denied due process of law,' *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed. 2d 1199 (1967)."

United States v. Young, 512 F. 2d 321 (4th Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *accord, People v. Love*, 24 Ill. App. 3d 477, 321 N.E. 2d 419 (1974); *Metallo v. State*, 10 Md. App. 76, 267 A. 2d 804 (1970); *State v. Timley*, 541 S.W. 2d 6 (Mo. Ct. App. 1976); *Commonwealth v. Garvin*, 448 Pa. 258, 293 A. 2d 33 (1972).

We see no chance that defendant's arrest created a likelihood that the pretrial confrontation was so "conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), and cases cited.

Moreover, we have reviewed the evidence, as disclosed at trial, upon which the officers acted when they arrested the defendant and find this evidence sufficient to establish probable cause to arrest defendant without a warrant for the felony of murder. *See State v. Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971); *State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970). Thus we hold the arrest was both legal, G.S. 15A-401(b)(2), and constitutional, *see Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964). Defendant's contention is without merit.

[5] By his second contention under this assignment of error, defendant argues that identification evidence should have been excluded because he was not represented by counsel at the lineup and the trial judge failed to make adequate findings that defendant had waived counsel.

The voir dire testimony of Deputy Sheriff Owens indicates that defendant was picked up because he was a *suspect* in an attempted armed robbery and killing. The record does not indicate that any adversary judicial proceedings were initiated against defendant prior to the lineup. It is clear from the testimony of Deputy Owens that at the time of the lineup confrontation the proceeding was investigatory and had not become a "criminal prosecution." A person's right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972); *United States v. Duvall*, 537 F. 2d 15 (2d Cir. 1976); *United States ex rel. Burbank v. Warden*, Ill. St. Pen., 535 F. 2d 361 (7th Cir. 1976); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Henderson, supra.* Thus it was not required that defendant be furnished counsel at the lineup and defendant's second contention is without merit.

Defendant assigns as error the exclusion of answers to certain questions asked by defense counsel.

During cross-examination of State's witness Nobel Harris, the following transpired:

> "On October 8, 1956, I did not plead guilty to assault with a deadly weapon.
>
> Q. Didn't you pay $25.00 and costs?

MR. BROWN: Objection.

COURT: Sustained."

During cross-examination of State's witness Lester Floyd Jones, the following transpired:

"I have been convicted of displaying a fictitious license in 1965, February 1965, and other than that traffic violations only. Displaying a fictitious driver's license. That was not in May, 1965. It was in February, 1965. I pled guilty at the same time to driving without a driver's license.

Q. Were you given a twelve months active sentence?

MR. BROWN: Objection.

COURT: Sustained."

It is the rule in North Carolina that for purposes of impeachment, a witness, including the accused, may be cross-examined with respect to prior convictions. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 112 and cases cited.

Defendant seeks to extend this rule to allow cross-examination of the witness as to the punishment imposed upon him as a result of that conviction. Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case. Nevertheless, where a conviction has been established, a limited inquiry into the time and place of conviction and the punishment imposed is proper. *See Beaudine v. United States*, 368 F. 2d 417 (5th Cir. 1966). Such examination, so limited in scope, permits the jury to more accurately gauge the credibility of the witness while minimizing the distraction inherent in any collateral inquiry.

[6] We therefore hold that where, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. *Accord*, *Gafford v. State*, 440 F. 2d 405 (Alaska 1968), *cert. denied*, 393 U.S. 1120 (1969), *overruled on other grounds*, 487 P. 2d 831 (Alaska 1971); *State v. Washington*, 383 S.W. 2d 518 (Mo. 1964); *State v. Sinclair*,

57 N.J. 56, 269 A. 2d 161 (1970); *State v. Sayward*, 66 Wash. 2d 698, 404 P. 2d 783 (1965); *see State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959); *State v. King*, 224 N.C. 329, 30 S.E. 2d 230 (1944); *State v. Holder*, 153 N.C. 606, 69 S.E. 66 (1910). *See generally*, Annot., 67 A.L.R. 3d 775 (1975). This is permissible regardless of whether the witness is the accused. Any intimation to the contrary expressed in the *per curiam* decision in *State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660 (1967), is expressly overruled.

[7] We now apply this law to the facts of the present case. With respect to the cross-examination of State's witness Nobel Harris, it is apparent that defense counsel did not first establish that Mr. Harris had been convicted of the offense of assault with a deadly weapon. Rather, the witness denied the conviction and that denial is conclusive. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 112. A showing that the witness has been convicted of an offense is a prerequisite to the *right* to cross-examine him relative to the punishment imposed. Defendant, not having satisfied this requirement, had no right to inquire concerning punishment.

[8] With respect to the testimony of State's witness Lester Floyd Jones, defendant's question relative to punishment imposed for traffic offenses was in all respects proper and the objection of the State should have been overruled. However, it is clear beyond a reasonable doubt that the exclusion of this testimony was harmless error. In our opinion there is no reasonable possibility that the excluded testimony might have contributed to defendant's conviction or that a different result likely would have ensued had the testimony been admitted. *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). This assignment is overruled.

[9] The defendant assigns as error the trial judge's exclusion of certain testimony tending to impeach the credibility of State's witness Lester Floyd Jones. Jones testified on cross-examination that while he had been a drinking man, this activity was in the past and he had not had a drink in the last four years. Defendant attempted to introduce the testimony of

Bobby Taylor and Archie Artis to contradict Jones' assertion that he no longer was a "drinking man." This testimony was excluded and defendant now assigns that exclusion as error.

Defendant's contention is wholly without merit. It is elementary that with respect to collateral matters such as these, "the cross-examining party is bound by the witness's answer and may not contradict it by extrinsic testimony. This rule applies to . . . specific instances of misconduct relevant only to the question of the witness's moral character." 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 48 and cases cited. This assignment is overruled.

[10] Defendant next contends that the court impermissibly restricted the direct examination of his witness Bobby Taylor. During that examination the following occurred:

> "[Lester Jones] said 'I have something to tell you.' We went on out and he said, 'You know I liked to got killed the other night.' I said, 'You did?' He said, 'Yes, I did.' I asked him where and he said, 'Do you know Ray Finch,' I said 'no' and he said, 'You know the colored boy named Ray Finch' and I said, 'Yeah.' He said, 'I will tell you something, but don't you tell nobody. I think he is the one who killed that man out there.' I said, 'What man?' He said, 'The man out there where I was working at. He said they shot a man.' Then he went on telling me that and he said three men came in the store and went back in the store and they asked for the man's money and Ray Finch shot the man in the back. He said he thought it was him. He didn't say anything else in regard to his identification. He said, 'Do you know how he looks?' I said 'Yeah, I know how he looks. He is about my height and about my size.' He was asking me how he looked.
>
> Q. I ask you whether or not he stated that he was not sure it was Finch?
>
> A. Well . . .
>
> MR. BROWN: Objection.
>
> COURT: Sustained. He is your witness. Don't answer that."

Defense counsel attempted several more times, unsuccessfully, to elicit the desired answer from Taylor and then was

permitted to place the following question and answer into the record out of the hearing of the jury.

> Q. (whispered) State whether or not Floyd Jones told you he was not sure it was Charles Ray Finch who shot Mr. Holloman.
>
> MR. BROWN: Objection.
>
> A. (whispered) He said he was not sure."

Defendant then moved to be allowed to put that question and answer before the jury, which motion was denied. Defendant contends the trial court erred in that, while the question was leading, the witness had exhausted his memory without stating the matter required and therefore, under the rule in *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974), the court erred in refusing to permit defense counsel to put the question and answer before the jury.

In *Greene*, this Court, speaking through Justice Branch, stated:

> "[I]t is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal. [Citations omitted.]
>
> The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when . . . (5) the examiner seeks to aid the witness's recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required. . . ."

Thus, even should defendant fall within one of the enumerated guidelines, the ruling is within the discretion of the trial court. We are unable to say from our examination of the record that the trial judge, by his ruling, abused his discretion and this assignment must be overruled.

[11] Defendant further objects to the exclusion of testimony by Taylor that State's witness Jones' "mind is not right." We see no merit to defendant's contention.

Ordinarily, lay opinion may be received as to the mental capacity of a witness. *State v. Armstrong*, 232 N.C. 727, 62 S.E. 2d 50 (1950); *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936); *State v. Ketchey*, 70 N.C. 621 (1874); 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 127. However, it is essential that such opinion be based on observation of the witness during a period not too remote from the time during which the witness's mental capacity is in question, so that a similar condition may be inferred to have existed at that time. *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1 (1960); *In re Will of Hargrove*, 206 N.C. 307, 173 S.E. 577 (1934); *In re Will of Stocks*, 175 N.C. 224, 95 S.E. 360 (1918); *In re Smith's Will*, 163 N.C. 464, 79 S.E. 977 (1913); Annot., 40 A.L.R. 2d 15 (1955).

The testimony of Bobby Taylor reveals that he worked with Lester Jones from 1969 to 1972 and that his opinion of the mental capacity of Jones *is based on observations during that period.* There is no evidence that he observed Jones at any more recent time and, in fact, the record reveals that when Jones first saw Taylor at Farrow's Grocery a week after the shooting, he said, "Man, where have you been so long?"

We hold on this record that the opinion of Taylor as to the mental capacity of the witness Jones was based on observations too remote in time and was properly excluded by the trial judge.

Defendant assigns as error other rulings by the trial judge in regard to evidence presented by both the State and defendant. We have examined these closely and find them wholly devoid of merit. Discussion is not necessary.

Defendant next assigns as error the denial of his motion for judgment as of nonsuit. He contends the identification testimony of Lester Jones should have been excluded and that, if it had been, nonsuit would have been required. It is axiomatic that all evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered when ruling on nonsuit. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). Further, since we have already held that the identification was competent and properly admitted, this assignment is overruled.

Under his next assignment defendant brings forward several objections to the jury argument of the district attorney.

We have examined the argument as a whole and find no impropriety in the district attorney's remarks which unfairly prejudiced the defendant so as to deprive him of a fair trial. This assignment is overruled.

Defendant next contends the trial court erred in that portion of the jury charge dealing with the responsibility of the defendant for the acts of his accomplices. The particular language pointed out by defendant, when viewed alone, does appear confusing. However, we have said many times that the "charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection." See 4 N.C. Index 3d, Criminal Law § 168 and the plethora of cases cited therein. When so considered, we hold that the charge substantially conveyed applicable law to the jury. Errors in the charge, if any, were favorable to defendant and do not entitle him to a new trial. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964).

[12] In *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), the Supreme Court of the United States 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. The death sentence in this case is therefore vacated and, 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.

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

STATE OF NORTH CAROLINA v. TIM GOSS

No. 41

(Filed 14 July 1977)

1. **Criminal Law § 127.1— motion in arrest of judgment—defect on face of record—motion made on appeal**

A motion in arrest of judgment is directed to some fatal defect appearing on the face of the record and such motion may be made for the first time on appeal in the Supreme Court.

2. **Rape § 1— first degree rape—elements**

Where the victim is at least 12 years old, the elements of first degree rape are: (1) carnal knowledge of a female person, (2) by force, or by fear, fright or coercion, (3) against the will of the victim, (4) the defendant being more than 16 years of age, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon or by the infliction of serious bodily injury.

3. **Rape § 3— indictment—first degree rape not charged—sufficiency to charge second degree rape**

An indictment failed to charge first degree rape since it charged neither the use of a deadly weapon or infliction of serious bodily injury nor that defendant, at the time of the offense, was more than 16 years of age; however, the indictment was sufficient to charge second degree rape, the evidence was clearly sufficient to support a verdict of guilty of that offense, and the verdict must therefore be regarded as a verdict of guilty of rape in the second degree.

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

Though the trial court in a rape prosecution erred in limiting consideration of the victim's bad character reputation to her credibility and in not allowing the jury to consider the evidence on the issue of consent, such error was not prejudicial to defendant since the credibility of the victim's testimony that she did not consent was the key to the State's case, and there was no real distinction between the issue of the victim's credibility and the issue of her consent.

5. **Criminal Law § 71— use of word "rape" by victim—shorthand statement of fact**

The trial court in a rape prosecution did not err in allowing the victim to testify over objection that, "then he started raping me,"

since her use of the term "rape" did not constitute an opinion on a question of law but was instead a convenient shorthand term, amply defined by the balance of her testimony concerning defendant's actions.

6. Criminal Law § 162.3— inadmissibility of evidence apparent during response—motion to strike proper

Where inadmissibility of testimony is not indicated by the question, but appears only in the witness's response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident; therefore, defendant was not prejudiced by the admission of testimony, which he contended was hearsay, where defendant made no motion to strike the testimony.

7. Criminal Law § 43— photographs—admissibility for illustration

The trial court did not err in allowing the introduction of two photographs to illustrate the testimony of a witness, and defendant's argument that the photographs, coming at the end of the witness's testimony, may not be supposed to illustrate that testimony is feckless.

8. Rape § 5— sufficiency of evidence

Defendant's motion for nonsuit in a rape prosecution was properly overruled where the evidence was sufficient to allow the jury to find that the victim never consented to sexual intercourse with defendant; he obtained her submission through threats and intimidation, including the threat of bodily harm to her or to her sister; he held a knife to her and let her know he carried a gun; he persisted in the act despite her pleas and her attempt to escape; police were immediately called to the scene and the victim gave a statement to them consistent with her testimony at trial; and bruises and scratches on the victim's body which were observed by a third person were consistent with the victim's account of the crime, but not with defendant's.

9. Criminal Law § 113.1— jury instructions—recapitulation of evidence

The trial court's instruction that "the state offered the testimony of [the victim] that she did not consent to voluntarily have any sexual relations with the defendant," though not in the victim's words, was not prejudicial to defendant since the victim's testimony, if believed, supported an inference of lack of consent on her part; the law does not require verbatim recitation of the evidence by the court, and error in recapitulation of the evidence generally must be called to the court's attention in time for correction; and the court instructed the jury to be governed solely and entirely by their recollection of the evidence.

DEFENDANT appeals from judgment of *Seay, J.*, at the 2 August 1976 Session of WILKES Superior Court.

Rufus L. Edmisten, Attorney General, by Henry H. Burgwyn, Associate Attorney, for the State.

McElwee, Hall & McElwee, by John E. Hall and William C. Warden, Jr., Attorneys for defendant appellant.

EXUM, Justice.

Defendant was tried upon an indictment charging first degree rape and upon two warrants each charging misdemeanor assault with a deadly weapon. The three charges were consolidated for trial. Defendant was convicted and sentenced to life imprisonment upon the rape charge and two years in prison for each of the misdemeanors. Motion to bypass the Court of Appeals in the misdemeanor case was allowed and the appeals were consolidated.

Defendant raises a number of questions on appeal. The most significant are: (1) his contention that the indictment, lacking an allegation that defendant was over sixteen years of age at the time of the alleged rape, was insufficient to support a conviction for first degree rape; and (2) his contention that the court erred prejudicially in its instruction limiting the jury's consideration of evidence of the victim's bad character reputation to her credibility. We find merit in both these arguments. Accordingly, the rape case is remanded for the entry of a verdict of guilty of second degree rape and reconsideration of the sentence by the trial court. In the jury instruction limiting the effect of evidence of the victim's character, we find the error was without prejudice to defendant. In other assignments of error raised, we find no merit.

The state presented evidence tending to show that Joyce Johnson, the victim, and her sister, Nancy, accompanied defendant, Tim Goss, with Diane Walker and one Monroe Hawkins in a truck to a deer camp. The Johnson girls had agreed to go to town with the others, but were told a detour by the camp was necessary to enable Hawkins to put out a fire and pick up some belongings. While at the camp, Tim Goss forced Joyce into the woods, threatening her with a knife and a gun. After one episode of sexual intercourse she escaped him. He followed her and caught her, slashing at the other two girls who attempted to interfere. Goss then took Joyce back into the woods and repeated the sexual act. When he allowed the girls to leave they

went to a nearby house occupied by Mr. Rowan Combs, where they called police.

Defendant's evidence, including his own testimony, tended to show the girls willingly accompanied Hawkins and himself to the camping area, that everyone at the camp was smoking "pot," that Joyce had sexual intercourse with him voluntarily and at her own suggestion inside the tent. He testified that he walked the girls to Mr. Combs' house. His knife was stuck in a tree near the tent all evening according to Goss, and he never possessed the pistol offered in evidence, which belonged to Rex Wiles. He could not explain the bruises and scratches on Joyce's body, but testified she kept her clothes on at all times outside the tent. Defendant also presented evidence tending to show the bad reputation of all three girls as well as his own good reputation.

Although no reference to the issue is made in his brief, defendant has challenged the sufficiency of the indictment for rape by a motion in arrest of judgment made during oral argument in this Court in reliance upon *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977).

[1] A motion in arrest of judgment is directed to some fatal defect appearing on the face of the record. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). It has been held that such a motion may be made for the first time on appeal in the Supreme Court. *State v. Sellers*, 273 N.C. 641, 161 S.E. 2d 15 (1968); 4 Strong's North Carolina Index 3d, Criminal Law § 127 (1976).

The motion in arrest of judgment, however, "is proper when it is apparent that *no judgment* against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment." *State v. Perry*, *supra* at 589, 231 S.E. 2d at 266. (Emphasis added.) "Such a motion is to be distinguished from a motion to vacate or set aside an erroneous judgment in order that a proper judgment may be entered." *Id.*

The motion in arrest of judgment is properly overruled in this case, for the indictment will clearly support a judgment against defendant for second degree rape. Under our holding in

State v. Perry, supra, however, the indictment is insufficient to support a conviction for rape in the first degree.

The crime of rape was divided into two degrees by the 1973 amendment to General Statute 14-21, which provided that second degree rape shall be a lesser included offense of first degree rape. That statute provides:

> "Rape; punishment in the first and second degree.—Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape—
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

[2] Where the victim is at least 12 years old, the elements of first degree rape are: (1) carnal knowledge of a female person, (2) by force, or as we explained in *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated,* 96 S.Ct. 3202 (1976), by "fear, fright or coercion," (3) against the will of the victim, (4) the defendant being more than 16 years of age, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon or by the infliction of serious bodily injury. G.S. 14-21; *State v. Perry, supra.*

The indictment in this case appears as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Tim Goss in Wilkes County, on or before the 24th day of November, 1975, with force and arms, at and in the county aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know Joyce K. Johnson, a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the state."

[3] As in *Perry*, there was ample evidence presented by the state to show first degree rape. But, as in *Perry*, the indictment fails to charge that offense since it charges neither the use of a deadly weapon or infliction of serious bodily injury nor that defendant, at the time of the offense, was more than 16 years of age. Both are elements of the crime which must be alleged and proved to support a conviction. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Perry*, *supra*.

As in *Perry*, however, the indictment is sufficient to charge rape in the second degree; the evidence is clearly sufficient to support a verdict of guilty of that offense and the verdict "must, therefore, be regarded as a verdict of guilty of rape in the second degree." *State v. Perry*, *supra* at 595, 231 S.E. 2d at 268. The defendant thus may not be sentenced for first degree rape. The case must be remanded to the Superior Court of Wilkes County for entry of a verdict of guilty of second degree rape and for a proper judgment on that verdict. *State v. Perry*, *supra*; *State v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861 (1958).

The punishment for rape in the second degree is provided by General Statute 14-21(b) to include life imprisonment or imprisonment for a term of years, in the court's discretion. This discretion is vested, as we noted in *Perry*, in the trial court, not the Supreme Court. The case must therefore be remanded for the exercise of that court's discretion in sentencing defendant Goss for second degree rape as provided by the statute.

[4] We next consider defendant's eleventh assignment of error, by which he urges the prejudicial impropriety of the following instruction to the jury:

> "Evidence has been received with regard to the reputation of the witnesses, Joyce Johnson, Nancy Johnson and Diane Walker, that is the defendant offered the testimony of Chief

of Police of North Wilkesboro that as to each of those girls their reputation was not good. You may consider this evidence for one purpose. If you believe all or any part of this evidence and find that it bears upon one of those particular girls' statements as a witness as to their truthfulness, you may consider it, together with all the other facts and circumstances bearing upon that particular witness's truthfulness, in deciding whether you will believe or disbelieve their testimony at this trial. Except as it may bear on this decision this evidence may not be considered by you in your determination of any facts in this case."

A similar instruction was given concerning evidence of a rape victim's reputation in *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). There, as here, the defendant contended the effect of the instruction was improperly to withdraw evidence of the victim's reputation from the jury's consideration on the issue of her consent to have intercourse with the defendant.

We recognized in *Davis*, *supra* at 15, 229 S.E. 2d at 295, that "the character of the complainant in rape may, it seems, be shown as bearing upon the question of consent." *State v. Stegmann*, 286 N.C. 638, 647, 213 S.E. 2d 262, 270 (1975), *death sentence vacated*, 96 S.Ct. 3203 (1976); 1 Stansbury's North Carolina Evidence § 105 (Brandis Rev. 1973). In the instant case, the evidence of character was offered according to the standard permissible method of proving character, *Michelson v. United States*, 335 U.S. 469 (1948); 1 Stansbury's North Carolina Evidence, *supra* § 110, since Chief Gentry's testimony was directed to the "general reputation and character" of the victim in North Wilkesboro, and not to his personal opinion. It was thus error for the court not to allow the jury to consider Chief Gentry's testimony on the issue of consent.

Nevertheless, as in *State v. Davis*, *supra* at 16, 229 S.E. 2d at 295, we find that "the credibility of the victim's testimony that she did not consent was the key to the State's case [and] there is no real distinction between the issue of the victim's credibility and the issue of her consent." The testimony of Joyce Johnson and that of Tim Goss are in "irreconcilable conflict" concerning the events that took place at the camp. Joyce Johnson contends she was forced, twice, by Goss' use of a knife and a gun, to engage in sexual intercourse with him in the woods near the camp. Goss contends the sexual act took place at Joyce's in-

stance, inside the tent. If the jury disbelieved Joyce Johnson's testimony because of doubts concerning her credibility, they must necessarily resolve the issue of consent in Goss' favor. There is thus no prejudice to defendant in the technically erroneous charge limiting consideration of the victim's character to the issue of credibility and this assignment is consequently overruled.

The remaining assignments of error we consider in order of their occurrence at trial.

[5] By his first assignment, defendant objects to the allowance over his objection of the victim's statement, "then he started raping me." The use of the word "rape," he argues, constitutes an impermissible legal conclusion.

In *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 96 S.Ct. 3204 (1976), we held the use of the word "rape" by a witness did not constitute an opinion on a question of law. The same issue was presented in *State v. Sneeden*, 274 N.C. 498, 501, 164 S.E. 2d 190, 193 (1968), where we held that the victim's statement that "defendant was in the act of raping her was merely her way of saying that he was having intercourse with her. She was not expressing her opinion that she had been raped. Rather, she was stating in shorthand fashion her version of the events . . . ." Joyce Johnson testified, "When I say he started raping me, I mean he got on top of me and he started having sexual intercourse with me and I begged him to leave me alone and to get off." She also testified that "on both of these occasions he penetrated me." Her use of the term "rape" was clearly a convenient shorthand term, amply defined by the balance of her testimony. This assignment is overruled.

[6] By his fourth assignment of error, defendant claims the court erred in allowing the repetition by witness Barry Wood of Joyce Johnson's pre-trial statement in corroboration of her trial testimony on grounds that the statement contained hearsay and conclusory declarations. Defendant's objections to the use of the word "rape" in this statement we have already answered. It remains for us to consider his contention that the court should have sustained his objection to a portion of the statement concerning the events which occurred before the young people arrived at the camp. The statement, which defendant argues is

hearsay, is set out with the court's response to defendant's objection in the record as follows:

> Barry Wood: "[T]hen they went to Tim's house and his mother came out and said she wanted his gun, said, 'Monroe, you know how he is when'—"
>
> By the Court: "Members of the Jury, this testimony again is solely for the purpose of corroboration."
>
> By Mr. Ferree [Defense Counsel]: "We object on the ground that the Court has heretofore sustained our objection as to what somebody said with reference to the gun."
>
> By the Court: "Overruled."

Earlier, during the questioning of Joyce Johnson, the solicitor cautioned her not to repeat what Goss' mother said when she came out to the truck. Nevertheless, the witness continued: "Anyway she asked for the gun because she said, 'You know how Tim is when he is like this.' " Defendant interrupted to interpose an objection, which the court sustained, but no motion was made to strike the statement, nor did the court on its own motion instruct the jury to disregard the statement.

Where inadmissibility of testimony is not indicated by the question, but appears only in the witness' response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. McMullin*, 23 N.C. App. 90, 208 S.E. 2d 228 (1974); 1 Stansbury's North Carolina Evidence, *supra*, § 27. This procedure is not a technical formality, but a means to ensure that the jury attach no improper significance to the testimony.

Joyce Johnson's testimony concerning defendant's mother's remarks was thus, to some extent at least, before the jury. Defendant made no attempt to clarify this anomalous situation by requesting the court to instruct the jury to disregard the statement. He does not now, nor has he ever objected to the court's failure to give such an instruction. The later repetition of the same statement under an instruction limiting the witness' testimony to corroboration, could not have been prejudicial to defendant.

Defendant further contends that the court should have reviewed the statement presented by Barry Wood prior to its being offered in evidence, in order to facilitate evidentiary rulings. Suffice it to say that defendant never requested such a procedure. In fact, defense counsel advised the court early in Wood's testimony: "At the same time if there is any further statement [of Barry Wood] we will just wait until the entire statement is in before—." It is to the court's response, "Do whatever you want to," that defendant takes exception to support this argument. We find no merit in his position.

[7] Defendant next argues that it was error to allow introduction of two photographs to illustrate the testimony of witness Effie Holloway, who testified that she observed and photographed bruises and scratches on Joyce's body the night of the alleged rape. There is no objection in the record to the introduction of these photographs, nor have the pictures themselves been submitted to this Court. Defendant's argument that the photographs, coming at the end of the witness' testimony, may not be supposed to illustrate that testimony is feckless. *Cf. State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). We have long allowed photographs to be received to illustrate the testimony of witnesses, *State v. Cox*, 289 N.C. 414, 222 S.E. 2d 246 (1976); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). The jury was given proper limiting instructions.

[8] Defendant's contention that nonsuit should have been granted because of a lack of substantial evidence that the victim did not consent is likewise without merit. Taking the evidence in the light most favorable to the state, as we must in considering the nonsuit issue, *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977), there is sufficient evidence to allow the jury to find that Joyce Johnson never consented to sexual intercourse with defendant; that he obtained her submission through threats and intimidation, including the threat of bodily harm to her or to her sister; that he held a knife to her and let her know he carried a gun; and that he persisted in the act despite her pleas and her attempt to escape. The inference of no consent is supported by the testimony of Nancy Johnson and Diane Walker as well as that of the victim herself. Police were immediately called to the scene and Joyce Johnson gave a statement to them consistent with her testimony at trial. Bruises and scratches on her body observed by the witness Effie Holloway

were consistent with the victim's account, but not with defendant's. The motion for nonsuit was properly overruled.

Our resolution of the nonsuit issue disposes as well of defendant's eighth assignment of error, by which he asserts error in the submission of the offenses of first and second degree rape to the jury, on the ground of the supposed lack of evidence of no consent. Since there was, as we have pointed out, persuasive evidence in the record of the victim's lack of consent to sexual intercourse, this assignment is wholly without merit.

[9] By his ninth and tenth assignments of error, defendant asserts the incorrectness of the trial judge's statement that "[t]he state offered the testimony of Joyce Johnson that she did not consent to voluntarily have any sexual relations with the defendant." While it is true that Joyce never testified in the words used by the trial judge, her testimony, if believed, supports an inference of lack of consent on her part, the voluntariness of her submission to the act of sexual intercourse being inconsistent with inducement by threat or violence. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 96 S.Ct. 3202 (1976). The law has never required verbatim recitation of the evidence by the court. *State v. Jones*, 97 N.C. 469, 1 S.E. 680 (1887). Generally, error in recapitulation of the evidence must be called to the court's attention in time for correction. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). Moreover, the court cautioned the jury as to any inconsistency between his summary of the facts and their recollections, instructing them to be governed solely and entirely by their recollection of the evidence. This assignment is, therefore, overruled.

Finally defendant contends the court erred in the misdemeanor cases in omitting from the final mandate of its jury instructions the elements of assault with a deadly weapon. He asserts prejudicial error in the court's supposed failure to apply the law pertaining to that offense to the evidence. We find, however, that early in the charge to the jury, the court instructed properly as to the elements of assault with a deadly weapon, defining the terms used in accordance with the law. He further instructed that the state must prove "the defendant assaulted Diane Walker by intentionally without justification or excuse threatening to cut her and striking at her with a

knife." Substantially the same instruction was repeated as to the charge of assault with a deadly weapon upon Nancy Johnson. Evidence of defendant's attempts to slash these two girls was summarized during the court's recapitulation of the evidence. Defense counsel declined the court's invitation to submit further instructions.

Viewed in context, *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977), the instructions are complete and correct. Where the charge as a whole is free from prejudicial error, it will not support reversal. *Id.*; *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972).

Because we find the indictment in the rape case (Case No. 75-CR-9490) to be insufficient to support a conviction for rape in the first degree, that case is remanded to the Superior Court of Wilkes County. That court is directed to bring defendant before it, and to enter a verdict of guilty of second degree rape in lieu of the verdict now of record, and to sentence the defendant for that offense in the discretion of the court.

In Cases No. 75-CR-9491 and 75-CR-9492, no error.

In Case No. 75-CR-9490, judgment vacated, and case remanded for correction of verdict and imposition of proper sentence.

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

BOOKER v. EVERHART

No. 141 PC.

Case below: 33 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 14 July 1977.

BROKERS, INC. v. BOARD OF EDUCATION

No. 152 PC.

Case below: 33 N.C. App. 24.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1977.

CLARK v. CLARK

No. 175 PC.

Case below: 33 N.C. App. 404.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 14 July 1977.

COCA-COLA CO. v. COBLE, SEC. OF REVENUE

No. 157.

Case below: 33 N.C. App. 124.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 14 July 1977.

INSURANCE CO. v. WALKER

No. 146 PC.

Case below: 33 N.C. App. 15.

Petitions by plaintiff and by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

McRAE v. MOORE

No. 165 PC.

Case below: 33 N.C. App. 116.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1977.

MANESS v. BULLINS

No. 170 PC.

Case below: 33 N.C. App. 208.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1977.

OIL CO. v. CLEARY

No. 139 PC.

Case below: 33 N.C. App. 212.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1977.

STATE v. BEMBERY

No. 163 PC.

Case below: 33 N.C. App. 31.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. BROTHERS

No. 156 PC.

Case below: 33 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. CAMP

No. 160 PC.

Case below: 33 N.C. App. 404.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. CHAPMAN

No. 167 PC.

Case below: 32 N.C. App. 599.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 14 July 1977.

STATE v. EARLEY

No. 179 PC.

Case below: 33 N.C. App. 636.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. FLEMING

No. 171 PC.

Case below: 33 N.C. App. 216.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 July 1977.

STATE v. HART

No. 164 PC.

Case below: 33 N.C. App. 235.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. HOOD

No. 173 PC.

Case below: 33 N.C. App. 404.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. HUGGINS

No. 148 PC.

Case below: 33 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. HYDE

No. 176 PC.

Case below: 33 N.C. App. 636.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. MIDDLEBROOKS

No. 168 PC.

Case below: 33 N.C. App. 239.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 14 July 1977.

STATE v. MOSLEY

No. 177 PC.

Case below: 33 N.C. App. 337.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

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

STATE v. PATTERSON

No. 159 PC.

Case below: 33 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. SPRINGS

No. 154 PC.

Case below: 33 N.C. App. 61.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

STATE v. TRAVIS

No. 182 PC.

Case below: 33 N.C. App. 330.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1977.

WATERS v. HUMPHREY

No. 169 PC.

Case below: 33 N.C. App. 185.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 14 July 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 14 July 1977.

THE BRANCH BANKING & TRUST COMPANY, PLAINTIFF v. EDWIN GILL, TREASURER OF THE STATE OF NORTH CAROLINA; W. G. PARHAM, JR., STATE WAREHOUSE SUPERINTENDENT; L. C. WOODCOCK: INSURANCE COMPANY OF NORTH AMERICA: AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, DEFENDANTS, AND HENRY L. STEVENS III AND VANCE B. GAVIN, RECEIVERS OF SOUTHEASTERN FARMERS GRAIN ASSOCIATION, INC., AND GREAT AMERICAN INSURANCE COMPANY, THIRD PARTY DEFENDANTS.

No. 84

(Filed 23 August 1977)

1. **Uniform Commercial Code § 58— warehouse receipts—absence of transferor's indorsement—no due negotiation**

Where a bank, by delivery from the payee, acquired without indorsement 13 fraudulent warehouse receipts which payee had obtained for nonexistent grain, the bank did not take by "due negotiation" even though payee's bookkeeper subsequently stamped the payee's name on the reverse side of the receipts, the bookkeeper having neither the authority nor the intent thereby to indorse them in the name of the payee. By this transaction the bank became a mere transferee of the receipts, acquiring only the title and rights which transferor had under the receipts. Because transferor had no title to any grain by virtue of the 13 receipts, the bank had no claim against the warehouse under G.S. 25-7-502 and G.S. 25-7-504, its claim—if any—being under G.S. 25-7-203.

2. **Uniform Commercial Code § 58— warehouse receipts—priority of competing claims—purpose of statutes**

The primary purpose of G.S. 25-7-502 and 25-7-504 is to determine the priority of competing claims to valid documents and goods *actually* stored in a warehouse and to determine the issuer's liability for a misdelivery of goods *actually received* by it.

3. **Uniform Commercial Code § 58— warehouse receipts—due negotiation—title to underlying goods**

Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods represented by them, the purpose of U.C.C. Art. 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts.

4. **Uniform Commercial Code § 58— warehouse receipts—misdescribed or nonexistent goods—liability of warehouse**

The purpose of G.S. 25-7-203 is to protect specified parties to or purchasers of warehouse receipts by imposing liability upon the warehouseman when either he or his agent fraudulently or mistakenly issues receipts (negotiable or nonnegotiable) for misdescribed or nonexistent goods.

5. **Uniform Commercial Code § 58— warehouse receipts—misdescribed or nonexistent goods—action against warehouseman—burden of proof**

To be entitled to recover from a warehouseman under G.S. 25-7-203 a claimant has the burden of proving that he (1) is a party to or a purchaser of a document of title other than a bill of lading; (2) gave value for the document; (3) took the document in good faith; (4) relied to his detriment upon the description of the goods in the document; and (5) took without notice that the goods were misdescribed or were never received by the issuer.

6. Uniform Commercial Code §§ 4, 58— exchange of warehouse receipts—acquisition by purchase and for value

When a bank surrendered to a grain association its old notes and the 16 negotiable warehouse receipts securing them in return for new notes secured by 13 new negotiable warehouse receipts, the bank acquired the 13 new receipts by purchase and gave "value" for them. G.S. 25-1-201(32), (33), and (44).

7. Uniform Commercial Code § 58— fraudulent warehouse receipts—acquisition in good faith and without notice—absence of verification of grain shortage

The absence of evidence that a bank's agents had themselves verified a warehouse's shortage of grain or had eyewitness knowledge that 13 warehouse receipts were fraudulently issued without the deposit of grain in the warehouse does not necessarily mean that they did not *in fact* know and does not preclude a finding that the bank did not acquire the 13 receipts in good faith and without notice of claims and defenses.

8. Uniform Commercial Code § 58— exchange of warehouse receipts—acquisition of fraudulent receipts not in good faith and without notice

In a transaction in which a bank exchanged demand notes of a grain association and 16 warehouse receipts securing them for new demand notes and 13 new warehouse receipts which had been fraudulently issued by the warehouse manager, who was also an officer of the grain association, for the purpose of obtaining and canceling the old receipts and concealing a grain shortage in the warehouse, the bank did not acquire the 13 new warehouse receipts in good faith and without notice that they had been fraudulently issued, and the bank thus could not recover on the 13 fraudulent warehouse receipts, where (1) the bank was fully alerted to the warehouse manager's dual agency for the grain association and the grain warehouse and warned of the opportunity for fraud inherent in that situation; (2) the bank was aware of the grain association's precarious financial condition but continuously dealt with the association in a manner inconsistent with sound banking practice as well as its own policies purporting to govern the association's line of credit; and (3) the warehouse manager's requests on a prior occasion and the occasion in question, when warehouse examiners arrived for routine inspections, that the bank refinance existing demand notes of the association without increasing the indebtedness and exchange the warehouse receipts securing the old notes for new receipts was so highly irregular as to provide notice that the warehouse was short of grain. G.S. 25-7-203.

9. Uniform Commercial Code § 58— negotiable document of title—intentional ignorance of facts

The Uniform Commercial Code (G.S. 25-7-203 and G.S. 25-1-201(25)) does not permit parties intentionally to keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title.

10. Warehousemen § 3— purpose of State Indemnifying and Guaranty Fund

When the General Assembly, by G.S. 106-435, created the State Indemnifying and Guaranty Fund to safeguard the State Warehouse System and to make its receipts acceptable as collateral, it did not intend to encourage individuals or financial institutions to engage in transactions from which they would otherwise have recoiled; rather, the fund was created to protect those parties to or pur-

chasers of warehouse receipts who, acting in good faith and without reason to know that the goods described thereon are misdescribed or nonexistent, suffer loss through their acceptance or purchase of the receipts.

This opinion displaces the opinion in *Trust Co. v. Gill, State Treasurer*, 286 N.C. 342.

Justice LAKE dissenting.

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

ON petition of defendants, Edwin Gill, Treasurer of the State of North Carolina and Custodian of the State Indemnity & Guaranty Fund, and Insurance Company of North America, to reconsider our former decision, reported in 286 N.C. 342, 211 S. E. 2d 327 (1975). The appeal was redocketed and reheard as Case No. 131 at the Spring Term 1975.

Plaintiff, The Branch Banking & Trust Company, hereinafter called Bank, brought this action to recover of the defendants the sum of $383,900.00, the value of yellow corn allegedly represented by 13 negotiable warehouse receipts. These receipts had been pledged to Bank by Southeastern Farmers Grain Association, Inc., hereinafter called Southeastern, as collateral for loans aggregating $314,354.38. In the alternative, Bank seeks to recover the principal of this indebtedness with interest.

The 13 receipts in suit, dated 5 May 1970 and numbered 974-986, were issued by Farmers Grain Elevator at Warsaw (Elevator), a unit of the State Warehouse System. Defendant Parham is the State Warehouse Superintendent. Defendant Gill is sued as custodian of the State Indemnity and Guaranty Fund, which is maintained pursuant to N.C. Gen. Stats., ch. 106, art. 38 (G.S. 106-435). Defendant L. C. Woodcock is sued as the local manager of Elevator, which position he held from 1 May 1967 to 8 May 1970. Defendant Insurance Company of North America is surety on the bond executed by Woodcock in the amount of $100,000.00 to insure the faithful performance of his duties as manager of Elevator. Defendant Hartford Accident and Indemnity Company is the surety upon a blanket faithful performance bond insuring the State in the amount of $100,000.00 against financial loss from any employee's failure to account for all money and property received by virtue of his employment. Woodcock, in addition to being the manager of Elevator, was also Secretary-Treasurer of Southeastern, the operations of which he conducted. Southeastern, now defunct, is in receivership.

Defendants Gill and Parham, answering the complaint, alleged that Woodcock, as manager of Elevator, unlawfully and fraudulent-

ly issued the 13 receipts to Southeastern without receiving any grain therefor, and delivered them to himself as manager of Southeastern for the purpose of using them as collateral for Southeastern's notes held by Bank. Defendants denied liability to Bank on the grounds that (1) the receipts were not duly negotiated to Bank by Southeastern; (2) Bank did not purchase the receipts in good faith and without notice of the defenses to them; and (3) the receipts were irregular on their face in that each purported to acknowledge receipt of 112,000 pounds of corn (equivalent to 2,000 bushels) while specifying the amount of grain at 20,000 bushels. The answers of the other defendants in substance alleged the same defenses.

In a cross action the original defendants made Woodcock, the receiver of Southeastern, and Great American Insurance Company, the surety on the fidelity bond which Woodcock executed to Southeastern for his faithful performance as manager, third-party defendants to this action. They alleged that, if Bank should recover against the original defendants, Woodcock and Southeastern were primarily liable to Bank and the court should so adjudicate.

Bank, replying "to the answers of the various defendants," alleged (1) that it was entitled to have the 13 warehouse receipts reformed to show that they represent 1,120,000 pounds of grain each; (2) that the receivers of Southeastern should be required to endorse the receipts properly and the endorsement held to relate back to the date the receipts were delivered to Bank; and (3) that "defendants be adjudged to be estopped to plead" Woodcock's fraud and to deny the validity of the warehouse receipts.

A jury trial was waived and, at the 18 March 1974 Civil Session of Duplin, Judge Cowper heard extensive oral testimony and received in evidence voluminous documentary exhibits.

Upon a finding that Southeastern sustained no loss through any fraudulent acts of Woodcock, its secretary-treasurer and manager during the period 1 May 1967 until 8 May 1970, on 14 April 1974 Judge Cowper dismissed with prejudice the original defendants' claim against Great American Insurance Company. Upon findings that original defendant Parham was guilty of no fraud or negligence in the operation of Elevator, on 6 May 1970 Judge Cowper dismissed with prejudice the action against Parham. No appeal was taken from these two judgments.

On 13 May 1974 Judge Cowper filed his judgment. His findings pertinent to this appeal are summarized or quoted below (enumeration being that of the judgment).

(1) Southeastern engaged in the business of buying and selling grain. During the time pertinent to this litigation it owned a grain storage facility (elevator) at Warsaw, North Carolina.

(2) From (August) 1966 through 8 May 1970 Parham, as State Warehouse Superintendent leased Southeastern's storage facility at Warsaw and, under the provisions of the United States Warehouse Act and the North Carolina Warehouse Law, operated it under the name of Farmers Grain Elevator (Elevator) as a public warehouse for the storage of grain.

. . .

(4) From April 1967 until 5 May 1970 Woodcock was an employee and Secretary-Treasurer of Southeastern. He was also licensed by Parham to act as local manager of Elevator. He received his compensation as manager of Elevator from Southeastern.

(5) Elevator neither bought nor sold grain. Its operations were limited to the storage of grain. Unlike Southeastern, it had no financial transactions. To obtain the necessary finances with which to operate, Southeastern arranged with Bank to borrow money from its Warsaw branch.

(6) From September 1967 and continuing throughout the period here involved, E. Craven Brewer was the Bank's manager at Warsaw.

(7) All grain stored with Elevator was weighed, inspected and typed. Thereafter an in ticket, a nonnegotiable document, was issued for the grain stored. Upon this ticket, on request, a depositor was entitled to the issuance of a negotiable warehouse receipt for the grain he stored.

(8) State and federal law required that warehouse receipts be issued only for grain actually in storage in Elevator "and that they be issued in terms of pounds of grain." Preprinted and prenumbered blank warehouse receipt forms, bearing the signature of Parham, were furnished to Woodcock for issuance by him as local manager of Elevator. In addition to acknowledging the receipt of a specified number of pounds of grain of the described grade and kind, the receipt form provided: "*The State of North Carolina guarantees the integrity of this receipt.* Grade and weight are as determined by an inspector and weigher licensed under the United States Warehouse Act. Said grain is fully insured by the State Warehouse Superintendent against loss or damage by fire, lightning, inherent

explosion, tornado, cyclone and windstorm unless expressly stated otherwise hereon." (Emphasis added.)

(9) The signature of Woodcock was required on each receipt prior to its issuance. The receipt also stated upon its face in red ink: "The Local Manager [Woodcock] is an employee of Southeastern Farmers Grain Association, Inc."

(10) Bank and Southeastern had agreed that warehouse receipts would be pledged as security for most loans obtained by Southeastern and that Bank would lend to Southeastern 80% of the lower of the cost or market price of the grain represented by the receipt.

(11) Before Elevator began its operations Parham and a representative of the Department of Agriculture met with officers of Southeastern and Bank "to discuss the nature and limitations of warehouse receipt financing." In consequence "each of the receipts initially received by the Bank as collateral on loans of Southeastern had a notation on the outer perimeter of the receipt indicating the inspection weight certificate number or some other identifying information to relate the warehouse receipts to the in ticket. This notation indicated that grain had actually been received by the Elevator. This practice continued until E. Craven Brewer became manager of the Warsaw Branch of the plaintiff Bank, and the receipts began to be issued in large round numbers, such as 5,000, 10,000, or 20,000 bushels."

(12) Beginning in 1969 Bank habitually carried substantial overdrafts on Southeastern's checking account. Throughout 1969 and January 1970 Bank held items for large sums from several days to several weeks without charging them to Southeastern's account or returning them to the payee. These overdrafts reached a high of $212,000.00 on 17 November 1969. Under North Carolina law and Federal regulations, if an overdraft item is not returned by the close of the business day following the receipt of the item, a bank loses its right to charge it back against the payee or an endorser.

(13) Under the "line of credit" which Bank's home office approved for Southeastern during 1969, Southeastern was required, *inter alia*, to provide Bank with weekly inventory reports, to furnish financial information as requested, and to repay in full all loans by 15 April 1969. Notwithstanding, on 31 May 1969 the balance due on notes which specifically recited they were secured by a chattel mortgage on grain stored in the Blanchard-Farrior Warehouse at Wallace, N. C. were renewed "despite the fact that the insurance

report received by the Bank for the month of April disclosed that there was no grain in the Blanchard-Farrior Warehouse."

(14) Bank did not receive Southeastern's financial statement for the fiscal year ending 31 May 1969 until the first week in November and the home office (in Wilson) did not approve a new line of credit for Southeastern until 20 November 1969. "Nevertheless, beginning in June of 1969 the Warsaw Branch of the plaintiff Bank began making substantial loans to Southeastern. By November 17, 1969, the Bank held loans of Southeastern in the amount of $383,253.00 plus overdrafts on the Southeastern checking account in the amount of $212,000.00. The request for a line of credit of $500,000.00 was submitted by Mr. Brewer to the home office of the plaintiff Bank on November 11, 1969, and on November 12, 1969, Mr. Brewer made an unauthorized loan to Southeastern in the amount of $131,520.00. The 1969 line of credit was increased on December 17 to $600,000.00 which was promptly exceeded by the Warsaw Branch on December 22, 1969, when the loan balance of Southeastern reached a total of $620,653.00, not counting outstanding overdrafts. The loan balance continued to climb to a sum of $634,224.00, which remained without reduction until February 3, 1970.

"(15) In addition, the Bank on December 11 and December 15, 1969, paid bills of lading of Southeastern with the Bank's own funds in the respective amounts of $22,548.67 and $34,465.86 without receiving payment or collateral until January 6, 1970, and January 7, 1970, respectively."

(16) On 9 February 1970 U. S. Warehouse Examiner Flynt arrived at Elevator to make a periodic examination pursuant to the agreement between the State of North Carolina and the U. S. Department of Agriculture. Woodcock, knowing that the grain in storage was not equal to Elevator's storage obligations, instructed Southeastern's bookkeeper (Mrs. Carlton) to prepare a check for $165,760.00 and deliver it to Bank in exchange for nine warehouse receipts (Nos. 834, 838-840, 845-847, 949 and 950), which were pledged to the Bank as security. Mrs. Carlton prepared the check, dated 10 February 1970, and delivered it to Bank in exchange for the designated warehouse receipts. "At the time of the presentation of this check for $165,760.00, the balance in Southeastern's checking account was $112,777.50. Pursuant to instructions from Bank's note teller (Mrs. Walker), a 'Hold' was put on Southeastern's bank balance on February 10, 1970."

(17) The nine warehouse receipts obtained by Southeastern's bookkeeper totaled 140,000 bushels of grain. Upon cancellation of

these receipts Elevator's grain shortage was eliminated and the inspector failed to discover anything "other than operational shortages."

(18) On 12 February 1970, the day after Inspector Flynt completed his examination, acting under Woodcock's instructions, Southeastern's bookkeeper prepared and delivered to Bank (1) Southeastern's check for $1,036.00 as payment of interest on the notes secured by the nine warehouse receipts she had obtained from Bank on 10 February 1970, (2) a new note in the amount of $71,040.00, and (3) six new warehouse receipts for 10,000 bushels each as security for said note. "The records indicate that no new grain had been received to support the issuance of the six new warehouse receipts. This new note provided the necessary funds to make good the check previously presented to the Bank on February 10, 1970 in the amount of $165,760.00."

Between 10 February 1970 and 5 May 1970, Bank continued to approve bills of lading for Southeastern to purchase 230,013.98 bushels of new grain shipped in from the West. "This was the period in the past during which the plaintiff had insisted upon and had received full payment of outstanding loans. Nevertheless during 1970 the plaintiff [Bank] continued to hold substantial loans secured by warehouse receipts and made no insistence that Southeastern sell the grain it allegedly had on hand before selling current purchases of Western grain. By letter dated March 11, 1970, E. C. Brewer advised the home office of the plaintiff Bank that the balance of loans to Southeastern secured by warehouse receipts was $468,464.00, and that these loans were expected to be substantially reduced as Southeastern's grain inventory was lowered from March 11, 1970 to May, 1970. In fact, the outstanding loan balance as of May 5, 1970 was $421,104.00."

(19) Between 10 February 1970 and 5 May 1970 Woodcock caused Elevator to deliver to or for the account of Southeastern 444,303.73 more bushels of grain than Elevator received during that period. These deliveries exceeded the grain allegedly stored by Southeastern in Elevator on 10 February 1970 by 112,928.56 bushels.

(20) On 5 May 1970, Warehouse Examiner Brown arrived at the Elevator to make another routine check of the grain storage operation. Woodcock then knew that due to the shipments so made to Southeastern's account there was not sufficient grain in the Elevator to meet the outstanding warehouse receipts.

(21) At the opening of business on 5 May 1970 the Warsaw branch of Bank held five demand notes of Southeastern totaling $545,424.00, 18 warehouse receipts for yellow corn, and one for barley. (Six of these receipts, Nos. 962-967, pledged to secure a note for $41,440.00, were receipts referred to in Finding No. 18 above.)

(22) During the morning of 5 May 1970, Woodcock caused Southeastern's check, drawn on sufficient funds, to be delivered to Bank in exchange for two of the pledged receipts (Nos. 951 and 953, dated 5 January 1970), which were immediately canceled on the books of Elevator. Thus, on the afternoon of 5 May 1970, Bank held 17 warehouse receipts (Nos. 954-958, 960-967, 969-971, and 973). The grain for these receipts had been delivered by Farmers Grain Elevator to or on the account of Southeastern, which had not surrendered the warehouse receipts for cancellation.

(23) On the afternoon of 5 May 1970 Woodcock went to Bank and requested C. C. Rouse, assistant branch manager, acting in the absence of E. C. Brewer, who was away on military duty, to release to him a portion of the warehouse receipts which Bank was holding as collateral. "The Bank was informed that the warehouse examiner was at the facility and the warehouse receipts were needed for the examination."

(24) After consulting with the home office, Rouse refused to release the receipts unless the loans which they secured were paid. As was done during the examination on February 10, 1970, Woodcock offered Bank a check drawn on insufficient funds, but Rouse refused it. Thereupon, Woodcock and Rouse agreed to negotiate a new loan, secured by new receipts, which would provide funds necessary to pay off the old loans secured by the old receipts.

(25) On the morning of 6 May 1970, pursuant to the instructions of Woodcock, the bookkeeper of Southeastern prepared two notes made by Southeastern payable to the order of the Bank in the total amount of $307,840.00, a deposit slip for that amount, and 13 new warehouse receipts numbered 974-986 issued by Elevator to Southeastern. She then also prepared Southeastern's check payable to the Bank in the amount of $328,952.00.

(26), (28) About noon on 6 May 1970, pursuant to the instructions of Woodcock, Southeastern's bookkeeper delivered the above papers to the Bank's note teller, who then surrendered 16 of the 17 warehouse receipts enumerated in paragraph 22 above. However, the teller retained the old notes because Southeastern's bookkeeper had failed to deliver a check for the accrued interest on them.

(27) At the close of business on 5 May 1970 Southeastern's checking account balance was $63,663.30. During 6 May 1970 five deposits totaling $55,201.54 and one check posted in the amount of $83,625.92 left a balance at the close of the day of $35,238.92.

(29) Shortly after the bookkeeper left with the 16 receipts on 6 May 1970 Bank's note teller discovered that the new receipts numbered 974-986 had not been endorsed; whereupon she telephoned Southeastern's bookkeeper and requested that they be endorsed.

(30) A resolution adopted by the Board of Directors of Southeastern, a copy of which had been delivered to the Bank, required the signatures of both its president and secretary-treasurer on all the notes and other evidences of such loans, all instruments of pledge, assignment or lien, and it provided that none of these instruments would be valid unless so signed or indorsed.

(31) Prior to 6 May 1970, on every occasion during 1969 and 1970, the indorsement of all warehouse receipts which Southeastern delivered to the Bank had contained Woodcock's signature.

(32) On the morning of 7 May 1970, Southeastern's bookkeeper went to the Bank and, with a rubber stamp, placed Southeastern's name on the back of each warehouse receipt numbered 974-986. These receipts have never been indorsed by Woodcock or any other officer of Southeastern. Neither Bank's note teller, Southeastern's bookkeeper, nor Woodcock considered the stamp which the bookkeeper had placed on the receipts a sufficient indorsement.

(33) Late in the afternoon of 7 May 1970, Southeastern's bookkeeper delivered to Bank a check drawn on Southeastern's checking account in the amount of $3,393.20 to pay the interest on the old notes.

(34) "Because of the lack of endorsement on the warehouse receipts, Mrs. Corrine Walker [note teller] did not process any of the papers that had been delivered to her even after receipt of the interest check, but instead held them in anticipation of obtaining the endorsement."

(35) In addition to the lack of endorsement each of the new receipts which Southeastern had pledged to the Bank contained an irregularity on the face thereof in that each receipt stated in words that it represented 112,000 pounds of corn, whereas the number of

bushels, shown in numerals, was 20,000. One hundred, twelve thousand pounds of corn are only 2,000 bushels.

(36), (37) During the afternoon of 7 May 1970, Inspector Brown discovered that Elevator was substantially short of grain and advised Parham of his findings. Parham and A. R. Willis of the U. S. Department of Agriculture immediately went to Warsaw to confer with the examiner and, during their continued investigation, they discovered the issuance of the 13 new receipts (Nos. 974-986). That evening Parham advised Rouse of the shortage and that Bank should have no further transactions with Southeastern until further determinations were made.

(38), (39) On the morning of 8 May 1970 Parham and Willis conferred with Rouse and A. F. Harrell (Bank's senior vice-president, who came from Wilson), and discussed with them the examiner's findings and the 13 warehouse receipts. Harrell instructed the Warsaw branch to hold the processing of the loan papers which Southeastern had delivered to Bank on 6 May 1970 until legal advice could be obtained "as to how to handle the transaction."

(40) On 11 May 1970, with full knowledge of Elevator's shortage and the improper issuance of the 13 warehouse receipts, Bank proceeded to process the papers which the note teller had held in abeyance from the transaction on May 6, 1970. Bank credited the proceeds of its new loan to Southeastern to the checking account of Southeastern and charged against that account the checks Bank had received from Southeastern's bookkeeper covering the principal and interest on the old notes. Immediately thereafter Bank credited the balance then in the account against Southeastern's remaining indebtedness to the Bank, and closed the account.

(41) The plan which enabled Southeastern to deliver to Bank the 13 new, fraudulent warehouse receipts in exchange for the 16 old warehouse receipts was not intended to and did not in fact benefit Elevator. All the grain which Southeastern had stored in Elevator having been delivered to it, or upon its order, Southeastern was obligated to surrender the 16 receipts to Elevator for cancellation, and when Elevator obtained possession of them "it had a perfect right to cancel them on its records."

(42), (43) On 14 May 1970, Bank demanded that Parham deliver to it the #2 yellow corn represented by the 13 new receipts it then held. On that date the market value of such corn was $1.44 per bushel.

(44) On 18 August 1970 Bank made demand upon Parham for the payment of all amounts which Southeastern owed it. A like demand was made on defendant Gill as custodian of the State Indemnity & Guaranty Fund.

(45) Southeastern was insolvent on 8 May 1970, and its affairs have been placed in the hands of receivers by order of the Superior Court of Duplin County.

(46) The Insurance Company of North America, a surety for Woodcock, manager of Elevator, executed a bond in the amount of $100,000.00 conditioned upon his faithful performance of his duties as such manager.

In addition to the foregoing findings of fact, all of which except No. 41, the Court held, in its former opinion, to be supported by the evidence, Judge Cowper made the following findings and conclusions summarized below (enumeration ours):

1. Bank did not acquire the 13 receipts numbered 974-986 by due negotiation under G. S. 25-7-501. Therefore, under G. S. 25-7-504, Bank holds the receipts subject to all claims and defenses which Elevator has against Southeastern. The grounds upon which this holding is based are: (a) The stamp which Southeastern's bookkeeper placed on the back of the receipts was not a valid indorsement. (b) Each of the receipts was irregular on its face in that the pounds of grain specified therein were not commensurate with the bushels specified, and this irregularity was sufficient to put Bank "on inquiry as to the 'regular course' quality of the transaction." (c) Also sufficient to put Bank on such inquiry was its knowledge of Southeastern's poor financial condition and the circumstances surrounding the transaction of 6 May 1970. (d) During 1969 and the first five months of 1970, Bank handled Southeastern's banking business "with gross disregard of the ordinary good business and banking practices." On 6 May 1970 Bank voluntarily surrendered 16 warehouse receipts pledged as collateral on notes without canceling or surrendering the notes. Due to the irregularities in the transaction Bank voluntarily delayed posting the new notes secured by the 13 fraudulently issued warehouse receipts. Then, after receiving actual notice of the infirmities and defenses to the 13 receipts, Bank elected to confirm the May 6th transactions and accept the instruments. (e) "Under the circumstances of this case, the plaintiff Bank did not receive warehouse receipts numbered 974 through 986 in good faith without notice of claims and defenses."

2. In causing Elevator (a) to deliver grain to or for Southeastern between 10 February 1970 and 5 May 1970 without surrendering Southeastern's outstanding warehouse receipts; (b) to issue the 13 receipts (Nos. 974-986) to Southeastern without the deposit of any grain; and (c) to cancel "certain warehouse receipts" which Southeastern had the obligation to surrender to Elevator, Woodcock was acting for the benefit of Southeastern. Defendants Gill and Parham are not estopped to plead the fraudulent conduct of Woodcock as a complete defense to Bank's cause of action. Gill, Parham, Insurance Company of North America and Hartford Accident and Indemnity Company, representing Elevator, have a complete defense against Southeastern and against Bank as to the 13 warehouse receipts now held by the Bank since they represented no grain in storage and were fraudulently issued.

3. "[B]ecause the plaintiff [Bank] does not have clean hands, and, further, to grant such relief would be in direct conflict with the provision of Chapter 25 of the General Statutes of North Carolina," Bank is not entitled (a) to require Southeastern's indorsement of the 13 receipts; (b) to reform the receipts by changing the number of pounds shown thereon; or (c) to require Elevator to restore to it the 16 receipts it surrendered to Southeastern on 6 May 1970. Bank abandoned any rights to recission and restitution by honoring Southeastern's check for $35,238.92 on 11 May 1970, when all the facts had been fully disclosed.

4. Since neither Woodcock as local manager of Elevator, nor Parham as State Warehouse Superintendent, is liable to Bank in any amount, Insurance Company of North America and Hartford Accident and Indemnity Company have no liability to Bank.

Upon the foregoing findings of fact and conclusions of law Judge Cowper entered judgment that Bank recover nothing of defendants.

The Supreme Court heard Bank's appeal prior to its determination by the Court of Appeals and, two justices not sitting, affirmed the trial court's judgment that Bank recover nothing of Parham and Hartford Accident and Indemnity Company. The judgment that Bank recover nothing from either Gill as custodian of the State Indemnity Fund or defendants Woodcock and his surety, Insurance Company of North America, was reversed. The cause was remanded for entry of judgment (a) reforming the 13 warehouse receipts to show that each represented 1,120,000 pounds of corn and (b) decreeing that Bank recover of these three defendants the value of the

corn represented by those receipts as reformed, not to exceed the amounts of the debt for the payment of which they were pledged, the State Indemnity and Guaranty Fund being secondary. These three defendants, in compliance with our Rule 44 (254 N. C. 785) petitioned for a rehearing, which was allowed.

On 8 January 1977 the Honorable Edwin Gill was succeeded as Treasurer of the State of North Carolina by the Honorable Harlan E. Boyles, who was automatically substituted as a party to this action by App. R. 38 (c).

Upon the rehearing six justices were sitting.

Carr, Gibbons and Cozart; Johnson and Johnson; and Dees, Dees, Smith, Powell & Jarrett for plaintiff-appellant.

Rufus L. Edmisten, Attorney General, Millard R. Rich, Jr., Assistant Attorney General, and Manning, Fulton and Skinner for Gill, defendant-appellee.

Young, Moore and Henderson for Insurance Company of North America, defendant-appellee.

Henry L. Stevens III and Vance B. Gavin, Receivers of Southeastern Farmers Grain Association, Inc., third-party defendant-appellees.

SHARP, Chief Justice.

In our earlier opinion in this case we held: (1) that the Bank did not take the 13 fraudulent warehouse receipts (Nos. 974-986) by "due negotiation" and thus did not acquire the rights specified in G.S. 25-7-502; (2) that "nothing else appearing" the Bank was merely a transferee of the negotiable warehouse receipts and thus acquired no greater rights or title than its transferor, Southeastern; (3) that Elevator, by canceling the 16 old receipts, obtained from the Bank by Woodcock's fraud, ratified Woodcock's issuance and exchange of the 13 fraudulent receipts for the 16 receipts previously held by the Bank, and it cannot now deny their validity; (4) that there was insufficient evidence to support a finding or conclusion that "the Bank was acting in bad faith" when it exchanged the 16 old receipts for the 13 new ones; that the Bank is entitled to have the new receipts reformed to show they represent 1,120,000 pounds of corn each; and (5) that Woodcock and the surety on his bond are primarily liable to the Bank for his fraud upon it. 286 N.C. at 357, 360, 365, 211 S.E. 2d at 338, 339, 343. Upon this rehearing we have elected to reconsider

these holdings and to redetermine the questions raised by the appeal.

[1] Our prior holding that the Bank did not take the 13 receipts through "due negotiation" is clearly correct. In pertinent part G.S. 25-7-501 provides:

"(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. . . .

"(4) A negotiable document of title is 'duly negotiated' when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation."

Holder, as defined by G.S. 25-1-201(20) "means a person who is in possession of a document of title . . . drawn, issued or indorsed to him or to his order or to bearer or in blank."

By their terms, the grain the 13 warehouse receipts purportedly represented was to be delivered to Southeastern or to its order. These receipts, therefore, were negotiable documents of title. G.S. 25-1-201(15), G.S. 25-7-102(1)(e), G.S. 25-7-104(1)(a). These receipts, however, were not indorsed by Southeastern at the time they were delivered to the Bank. Neither Woodcock, the secretary-treasurer, nor any other officer of Southeastern ever signed the receipts. Upon Bank's request for its indorsement, Southeastern's bookkeeper, Mrs. Carlton, stamped the name "Southeastern Farmers Grain Association, Inc." on the reverse side of the receipts.

As we said in our former opinion, "[T]he affixing of the payee's (or subsequent holder's) name upon the reverse side of a negotiable document of title by rubber stamp is a valid indorsement, if done by a person authorized to indorse for the payee and with intent thereby to indorse. *Mayers v. McRimmon*, 140 N.C. 640, 53 S.E. 447. However, the Superior Court found that Mrs. Carlton, who stamped the name of Southeastern upon the reverse side of these receipts, had neither the authority nor the intent thereby to indorse them in the name of Southeastern. The evidence supports these findings and would support no contrary finding." *Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 358, 211 S.E. 2d 327, 338 (1975). Since the receipts were not properly indorsed to the Bank, they were not negotiated to it. The Bank, therefore, not having acquired the

receipts through "due negotiation," did not acquire the rights provided in G.S. 25-7-502.

Under G.S. 25-7-506 the Bank could compel Southeastern to supply the lacking indorsement to the 13 receipts. However, the transfer "becomes a negotiation only as of the time the indorsement is supplied." Since the Bank was specifically informed of the fraud surrounding the issuance of the receipts on the evening of 7 May 1970 any subsequent indorsement by Southeastern would be ineffective to make the Bank "a holder to whom a negotiable document of title [was] duly negotiated." G.S. 25-7-501(4).

Thus, because of the lack of proper negotiation, the Bank became a mere transferee of the 13 warehouse receipts. The status of such a transferee is fixed by G.S. 25-7-504(1) which provides: "A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey." Here Southeastern, the Bank's transferor, had no title by way of the fraudulent receipts to any grain held by Elevator, and it had no rights against Elevator. Woodcock, acting for and on behalf of Southeastern, had fraudulently procured the issuance of these receipts to Southeastern without the deposit of any grain. Then, as Southeastern's manager, he had pledged them to Bank in substitution of 16 previously issued receipts purportedly representing corn deposited in Elevator. However, at least six of these represented no grain at the time they were issued, and between the warehouse examiner's inspection of 10 February 1970 and May 1970,—without requiring the surrender of any receipts—Elevator had delivered to or for the account of Southeastern nearly 113,000 bushels of grain more than Southeastern allegedly had in storage there. Thus, Elevator had no obligation to deliver any grain to Southeastern, and it did not become obligated to Bank merely because Southeastern transferred the receipts.

[2, 3] The foregoing discussion analyses the Bank's rights and Elevator's liabilities under G.S. 25-7-502 and G.S. 25-7-504. The primary purpose of these two sections is to determine the priority of competing claims to valid documents and goods *actually* stored in a warehouse and to determine the issuer's liability for a misdelivery of goods *actually received* by it. Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods

represented by them, the purpose of U.C.C., Art. 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts.[1]

In situations where there are actual goods, and there are conflicting claims either to them or to the documents, G.S. 25-7-502, G.S. 25-7-503, and G.S. 25-7-504 determine the priority of these claims. In the present case, since the 13 receipts represented no grain in storage at the time of their issuance and no grain was subsequently acquired by the warehouseman, no question of who has paramount title to goods arises. The sole question is under what circumstances and to whom is an *issuer* liable for the issuance of warehouse receipts when it has not received the goods which the receipts purportedly cover? G.S. 25-7-203 covers this situation. It provides in pertinent part:

"A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the non-receipt or misdescription of the goods, except to the extent that . . . the party or purchaser otherwise had notice."

In the trial below, and in all their briefs submitted to this Court, the parties, overlooking G.S. 25-7-203, have proceeded on the theory that G.S. 25-7-502 and G.S. 25-7-504 govern this case. Furthermore, we did not consider this section in our first opinion.

[4] The purpose of G.S. 25-7-203 is to protect specified parties to or purchasers of warehouse receipts by imposing liability upon the warehouseman when either he or his agent fraudulently or

1. A few examples will more fully explain the manner in which these sections are intended to work.

(1) An owner of goods (O) stores them in a warehouse, taking from the warehouseman negotiable receipts in bearer form. A thief (T) steals the bearer receipts and sells them to a holder who takes them through due negotiation. The holder acquires title to the receipts and to the goods represented by them and defeats O's claim to them. (G.S. 25-7-502(2).) If the purchaser for some reason did not acquire the receipts through due negotiation, or if the receipts were nonnegotiable, O would prevail against him. Similarly, assume O stores goods in a warehouse taking in return negotiable receipts made to a named person's order. Thereafter T steals them and transfers them to an innocent purchaser for value, forging the necessary indorsement. As between O and the innocent purchaser, O would prevail. The innocent purchaser could not be a holder through due negotiation under G.S. 25-7-502 and G.S. 25-7-501. Therefore, under G.S. 25-7-504 he would have only the rights and title to the document that his transferor had. Since his transferor was a thief having no title to the document, O would prevail against the innocent party.

(2) O stores his goods with warehouseman (W) who is not a merchant selling goods of that kind. Thereafter W, contrary to O's instructions, issued negotiable warehouse receipts which are ultimately duly negotiated to third-party (P). As between P and O, P would have title to the goods represented by the receipts. (G.S. 25-7-502, G.S. 25-7-503.) If P did not take by due negotiation he would have only the rights and title of his transferor and would not prevail against O (G.S. 25-7-504).

(3) Warehouseman (W) fraudulently issues negotiable receipts not covering goods actually in storage to third-party (P), who takes through due negotiation. Thereafter W acquires goods purportedly covered by the receipt. As against P, W is estopped from denying that he did not have title when the receipts were issued. G.S. 25-7-502(1)(c) and Comment thereto.

(4) Assume that a thief (T) steals goods from their owner (O) and stores them in a warehouse, taking negotiable receipts in return. T then negotiates the receipts to a purchaser (P) who takes through due negotiation. As between O and P, O has the superior right to the goods in the warehouse even though P took through due negotiation. G.S. 25-7-503. *See generally* J. White and R. Summers, Uniform Commercial Code 684-87 (1972).

mistakenly issues receipts (negotiable or nonnegotiable) for misdescribed or nonexistent goods. This section, coupled with the definition of issuer (G.S. 25-7-102(1)(g)), clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. *See* J. White and R. Summers, Uniform Commercial Code 690 (1972).

In the Comment to G.S. 25-7-203 it is said: "The issuer is liable on documents issued by an agent, contrary to instructions of his principal, without receiving goods. No disclaimer of the latter liability is permitted." *Issuer* is defined by G.S. 25-7-102 as "a bailee who issues a document.... Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions." Under these provisions Elevator would clearly be liable to the Bank on the 13 fraudulent receipts issued by its agent Woodcock *provided* the Bank could carry its burden of affirmatively proving that it came within the protection of G.S. 25-7-203.

Since G.S. 25-7-203 governs Bank's right to recover, under G.S. 25-1-103, the doctrine of agency and ratification discussed in our first opinion are "displaced".

We now consider whether the Bank qualifies for this protection. At the outset of our discussion we note that G.S. 25-7-203 contains no requirement that the purchaser take negotiable documents through "due negotiation" before he can recover from the issuer. (Compare this section with the analogous U.C.C. provision covering bills of lading, which provides protection to "a consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description...." G.S. 25-7-301(1).) Of course, had the Bank met all the requirements of due negotiation it also would have met the requirements of G.S. 25-7-203.

[5] To be entitled to recover under G.S. 25-7-203 a claimant has the burden of proving that he (1) is a party to or *purchaser of a document of title* other than a bill of lading; (2) *gave value* for the docu-

ment; (3) took the document in *good faith*; (4) *relied* to his detriment upon the description of the goods in the document; and (5) took *without notice* that the goods were misdescribed or were never received by the issuer. Many of these terms are defined in Article 1 of the U.C.C. (G.S. 25-1-201), and those definitions are also made applicable to Article 7. G.S. 25-7-102(4).

[6] Under G.S. 25-1-201(33) and G.S. 25-1-201(32) Bank acquired the 13 negotiable warehouse receipts by purchase. Further, when Bank surrendered to Southeastern its old notes and the 16 receipts securing them, taking in return the new notes secured by the 13 receipts, it gave "value." Under G.S. 25-1-201(44) a person, *inter alia*, gives "value" for rights if he acquires them "(b) as security for or in total or partial satisfaction of a pre-existing claim . . . . or (d) generally in return for any consideration sufficient to support a simple contract." It now remains to determine whether Bank, at the time it relinquished the 16 old receipts in return for the 13 receipts, was acting (1) without notice that no goods had been received by the issuer for the 13 receipts, (2) in good faith, and (3) in reliance upon the descriptions in the receipts.

The trial court, after making detailed findings as to facts known to Bank at the time it accepted the 13 receipts, found and concluded the ultimate fact that "the plaintiff Bank did not receive warehouse receipts numbered 974 through 986 in good faith without notice of claims and defenses." This finding, although stated in the negative in order to use the precise language of G.S. 25-7-501(4), is equivalent to a positive finding that Bank took the 13 receipts with notice that they were spurious. On the same findings the judge also concluded that plaintiff did not come into court with "clean hands." This finding likewise is equivalent in import and meaning to a finding that Bank did not take the 13 receipts in good faith. *Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 364, 211 S.E. 2d 327, 342; 27 Am. Jur. 2d, *Equity* § 137 (1966); 30 C.J.S., *Equity* § 93 (1965). Upon these findings he held that plaintiff had no cause of action either at law or in equity based on the 13 receipts against either the State Warehouse Superintendent or against the State Treasurer as custodian of the State Indemnity and Guaranty Fund. We must, therefore, determine whether these findings are supported by competent evidence.

Upon our reconsideration of this case we have concluded (1) that the record evidence fully supports the trial judge's findings that Bank did not take the receipts in good faith and without notice

that they had been fraudulently issued and (2) that his findings compel his conclusions of law.

[7] " 'Good faith' means honesty in fact in the conduct or transaction concerned." G.S. 25-1-201(19). The absence of evidence that Bank's agents had themselves verified Elevator's shortage of grain or had eyewitness knowledge that the 13 receipts were fraudulently issued does not necessarily mean they did not *in fact* know, and it did not preclude a finding by the judge that Bank did not acquire the receipts in good faith and without notice of claims and defenses.

Under G.S. 25-1-201(25) a person, or corporation (G.S. 25-1-201(30), (28), (27)), has "notice" of a fact not only when he has actual knowledge of it, but also when "from all the facts and circumstances known to him at the time in question he has reason to know that it exists."

Good faith ("honesty in fact") and "notice," although not synonymous, are inherently intertwined. Therefore, the relation between the two cannot be ignored. "The same facts which call a party's 'good faith' into question may also give him 'notice of a defense.' " J. White and R. Summers, Uniform Commercial Code § 14-6 at 471 (1972). Certainly the power of a court under G.S. 25-1-201(25) to find notice when a holder or transferee "has reason to know" that something exists on the basis of the "facts and circumstances known to him" makes it "a short step from that definition to say that one 'knows' what a reasonable prudent man in his circumstances 'knows.' " *Id.* at 473. As pointed out in 1 R. Anderson, Uniform Commercial Code at 104 (1970), ". . . as a practical matter, it must be recognized that the circumstances may be such that the trier of fact will conclude that the person in question just could not have had a particular belief [good faith] because no reasonable man under the circumstances would have so believed."

[8] The crucial question in this case is whether, from all the facts and circumstances known to the Bank at the time it relinquished the 16 receipts to Southeastern in exchange for the 13 receipts, Bank had reason to know that Elevator had received no grain for them, for if it did, recovery is precluded. The voluminous evidence in this case permits the finding that the Bank did in fact have reason to know that the receipts were fraudulently issued and that it was not acting in good faith.

First, as the trial judge found (findings of fact Nos. 9 and 11) Bank was specifically informed of the manner in which Elevator was operated and fully alerted to Woodcock's dual agency as manager of

both Elevator and Southeastern. Furthermore, it was warned of the opportunity for fraud inherent in that situation. There is testimony to the effect that Parham met with officials of the Bank and Elevator and explained to them the mechanics of operating a grain elevator and the handling of warehouse receipts as collateral. Parham informed them Bank could protect itself from fraud by requiring all receipts pledged as collateral to show the number of the in ticket it purported to represent. The Bank followed this procedure until Brewer became manager of the Warsaw Branch at which time it was discontinued. Furthermore, the receipts themselves gave notice that Elevator's manager was also an officer of Southeastern.

Secondly, in May 1970, Bank was acutely aware of Southeastern's precarious financial condition. Yet it had continuously dealt with Southeastern in a manner inconsistent with sound banking practice as well as its own policies purporting to govern Southeastern's line of credit. On numerous occasions Southeastern's total outstanding indebtedness, as permitted by the Warsaw Branch, exceeded the line of credit authorized by Bank's home office. Furthermore, despite Bank's requirement that Southeastern furnish weekly inventory reports and additional financial information evidencing a satisfactory financial condition, the use of these safeguards was gradually discontinued and ultimately ignored.[2] As early as June 1969 the Warsaw Branch, for extended periods, consistently held Southeastern's checks for substantial sums when its checking account balance was insufficient to pay the checks.[3] Bank's home office required daily reports of any such retained items. However, the Warsaw Branch frequently failed to report these items. (The retention of these items, of course, amounted to interest-free advances to Southeastern above its already overextended credit line.) See Findings Nos. 12-15.

Finally Southeastern's requests on February 10, 1970 and May 6, 1970, the dates on which the warehouse examiner arrived at the Elevator for a routine inspection, that Bank refinance existing demand notes without increasing the indebtedness and exchange the warehouse receipts securing the old notes for new receipts, was so highly irregular as to provide notice that Elevator was short of grain; and Bank's acquiescence in these requests permits the finding that Bank's participation in these transactions was not in good faith.

2. For example, the report due on 31 May 1969 did not arrive until about November 15th. The first and only report received in 1970 came on 27 January 1970.

3. On 21 July 1969 the list of Southeastern's cash items held over included a check for $23,835.10 held since July 3rd. On 17 November 1969 cash items held over reached a high of $212,848.17.

On 9 February 1970 the United States Warehouse examiner arrived at Elevator for an inspection. He determined from its records that Elevator's total recorded obligation on warehouse receipts was 449,261 bushels, 320,000 bushels of which were covered by receipts to Southeastern. Southeastern, however, on February 10th, actually held receipts for 460,000 bushels, which had been pledged to Bank to secure six notes totaling $165,760.00. These receipts represented 140,000 more bushels than the Elevator's records showed. In order to keep the examiner from learning that Southeastern had obtained grain without surrendering warehouse receipts, Woodcock signed and had his secretary, Mrs. Carlton, deliver to Bank a check for $165,760.00. On that day Southeastern's bank balance was $104,751.82. However, in spite of insufficient funds to pay the check, the Warsaw Branch under Brewer's management released to Southeastern nine warehouse receipts representing the 140,000 bushels of corn previously delivered to Southeastern. The word "Hold" was placed on Southeastern's checking account ledger sheet by the balance to indicate that no further checks would be charged to the account.

The nine warehouse receipts thus obtained were presented to the examiner as an oversight and he stamped them canceled on February 10th. This cancellation "left the warehouse temporarily in a favorable position." On February 12th, after the examiner had left the Elevator, Southeastern delivered a new note for $71,040.00 to Bank along with six new warehouse receipts (Nos. 962-967) for 60,000 bushels of yellow corn. Elevator had received no new corn to support these new receipts. This deposit made Southeastern's check for $165,760.00 good and the notes for that amount which had been secured by the previously surrendered receipts were then marked paid.

Brewer testified that he could not explain how warehouse receipts for 140,000 bushels were released by the Warsaw Branch on February 10th and canceled by the warehouse examiner when the notes secured by them had not been paid by a check drawn on sufficient funds in the bank to cover the check. Each of the Bank's employees who had authority to release collateral denied any recollection of having released the nine warehouse receipts which Mrs. Carlton obtained from Bank on February 10th.

Brewer also testified that during March and April 1970 Bank's records showed that Southeastern ordered 300,932.85 bushels of grain to be shipped on bills of lading and that during this period Southeastern had pledged with the Bank warehouse receipts to

secure approximately $400,000.00 in loans. *Inter alia*, he said: "I cannot answer your question, 'Did you ever suggest to Mr. Woodcock that he might sell the grain in the warehouses and pay us off, rather than get it from outside?' I cannot answer your question, 'Did it arouse any suspicion in your mind that he was ordering grain from outside, at a time when you were trying to get your money, and not selling the grain he had in his warehouse to pay you off?' "

On the afternoon of 5 May 1970, Mr. L. L. Brown, a United States Warehouse Examiner, arrived at the Elevator to make a periodic check of the grain storage operation. Woodcock knew he did not have enough grain in storage to pass inspection, and Southeastern's checking account contained only enough money to cover "the loan value plus interest" on two of its receipts pledged to the bank, Nos. 951 and 953. After Brown had started his inspection Woodcock prepared and signed a check in the amount of $83,625.92, dated 5 May 1970. With this check Mrs. Carlton procured the two receipts numbered 951 and 953.

Soon after the beginning of work on May 6th Brown asked Mrs. Carlton for the canceled warehouse receipts. She gave him all she had on hand, including Nos. 951 and 953. Shortly thereafter Woodcock left for the bank.

On the morning of 6 May 1970 Bank held demand notes against Southeastern in the amount of $544,424.00, on which the sum of $338,224.00 was due. This figure represented the face amount of three demand notes dated respectively 6 January 1970, 12 February 1970, and 8 April 1970 and the balance due on two demand notes, each dated 5 January 1970. The last four notes were secured by the 16 warehouse receipts which Elevator had issued to Southeastern and which then represented no corn in storage. These receipts were Nos. 954-958, 962-967, 969-973.

On 6 May 1970, in the absence of Brewer, who was away on naval reserve training, C. C. Rouse, the general operations and business loans manager, was in charge of Bank's Warsaw Branch. Rouse had been employed by Bank for 23 years, the last 17 at the Warsaw Branch. Rouse's testimony, summarized except when quoted, tends to show: On 6 May 1970, shortly after the bank opened at 9:00 a.m., Woodcock came in. "He stated that he had the Warehouse Examiners in his office and that he wanted to have us release all the warehouse receipts showing yellow corn . . . that he wanted to take these receipts to the examiners for his inspection with the possibility of working out a change in the method of issuing

these receipts, and that he would—expect within a day or two sufficient funds—collections to pay the notes that these receipts . . . secured."

Woodcock's request being "a little more than [he] would care to handle," Rouse called Vice-President Bateman at the home office in Wilson for instructions. In consequence, he told Woodcock he would not release the receipts until the notes they secured were paid. Woodcock's reply was, "Well, I'll make other arrangements." About 11:00 a.m. Woodcock returned to the bank "and made a proposal and request that he be permitted to issue new warehouse receipts along with notes and deposit it with the bank which would generate sufficient funds to pay off the notes, and of course release the collateral on the notes that the bank was at that time holding."

Rouse again called Bateman and reported Woodcock's proposal to him. "Mr. Bateman responded that if it would appear that everything was in order in the way of issuing new receipts, and that we will follow the prescribed procedure that we had followed in the past, *and that it was not going to increase the loans outstanding*, and that the existing loan with the bank would be paid off, he would have no objections to [Rouse] handling it.[4] And with this [Rouse] was back in touch with Mr. Woodcock and told him that [they] would be able to handle it in this way. Mr. Woodcock suggested that we issue receipts in an even amount, uniform amounts of 20,000 bushels per receipt." (Emphasis added.)

Woodcock returned to his office and, pursuant to his instructions, Mrs. Carlton prepared (a) a check for $328,952.00, which covered the loan value of the 16 receipts held by the Bank; (b) two demand notes for $165,760.00 and $142,080.00 respectively (these notes had previously been signed in blank by Southeastern's president); (c) a deposit slip in the amount of $307,840.00 (the sum of the two notes); and (d) 13 new warehouse receipts (Nos. 974-986) for 20,000 bushels of yellow corn each.

In preparing these receipts Mrs. Carlton erroneously showed the poundage on each as 112,000 pounds instead of 1,112,000 pounds.

After having procured Woodcock's signature to the documents, Mrs. Carlton delivered them to Bank's note teller, Mrs. Walker. At that time, Rouse asked Mrs. Carlton why the old receipts were be-

4. In this connection it is also relevant to recall that on the last prior occasion of an examiner's presence in town a similar incident of renewing demand notes and substituting new warehouse receipts for old had occurred. With reference to these renewals Brewer testified, "I can't determine why a demand note would be renewed by a demand note. It's completely unusual . . . I never recall a bank renewing a demand note, and I never recall renewing a demand note, but I guess we did it. There's no reason to renew a demand note."

ing canceled and new ones issued. She replied that she did not know that Woodcock had told her to do it. Mrs. Walker then gave her the old receipts in return for the check for $328,952.00. However, she kept the old notes in order to figure the interest for collection. Mrs. Carlton returned to her office, canceled the 16 receipts and immediately informed Brown that she "had found an additional 16 receipts." Shortly after lunch Mrs. Walker called to say that Woodcock had not indorsed the 13 new warehouse receipts. Mrs. Carlton returned to the Bank and stamped the name "Southeastern Farmers Grain Association, Inc." on the back of each of the 13 receipts. Woodcock told Mrs. Carlton he would go to the Bank and indorse the receipts that afternoon or the next morning, but never did. No explanation for Bank's failure to note the errors and absence of indorsement before accepting the new receipts in substitution for the old was attempted.

On May 7th Mrs. Walker called to say that the interest on the notes covered by the 16 surrendered warehouse receipts was $3,393.20. Accordingly Mrs. Carlton prepared a check for that amount, Woodcock signed it, and she delivered it to the Bank.

Although Woodcock's substitution of demand notes and warehouse receipts as collateral had been sufficient to cover up Elevator's shortage in February, it was insufficient in May. On May 7th the warehouse examiner discovered both the shortage and that the spurious 13 receipts were missing from the receipts book. (For further details of this discovery see *State v. Woodcock*, 17 N.C. App. 242, 193 S.E. 2d 759 (1973).)

The evidence recapitulated above should remove any lingering doubt that the record fully supports the trial judge's findings and conclusion that Bank did not take the 13 warehouse receipts in good faith and without notice that corn had not been received for them. It overtaxes credulity to accept plaintiff's contention that experienced bankers could have lacked notice of Woodcock's fraud. Measured by any acceptable standard of banking or business judgment, the reasons which Woodcock gave Bank on the morning of May 6th for wanting to obtain the 16 old receipts were so improbable that, under all the circumstances, its officers "must have known" there was a shortage of grain at the Elevator. (*Cf. State v. Oxendine*, 223 N.C. 659, 661, 27 S.E. 2d 814, 815 (1943), which discusses the test of knowledge required to carry a case to the jury on the issue of receiving stolen goods.)

It would appear that the Bank officials acquiesced in Woodcock's request because they erroneously believed that so long as

they did not themselves actually verify a shortage, Bank was protected by the statement on each of the 13 receipts in suit that, "The State of North Carolina guarantees the integrity of this receipt." Certainly Bank's conduct engenders the strong inference that it wilfully failed to seek actual knowledge as to why Southeastern wanted to substitute notes and receipts because of the well-founded belief that an inquiry would disclose that the new receipts represented no grain in Elevator. The trial judge, who heard the voluminous evidence in this case without a jury, and carefully considered and unraveled the complications which resulted from Woodcock's dual agency, came to that conclusion. There being ample evidence to support his findings and conclusions we are not at liberty to disturb them. *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966).

[9] Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," G.S. 25-1-201(19), the Uniform Commercial Code (G.S. 25-7-203 and G.S. 25-1-201(25)) does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. *See Winter & Hirsch, Inc. v. Passarelli*, 122 Ill. App. 2d 372, 259 N.E. 2d 312 (1970). Nor will it allow Bank to recover losses which it received through its participation in Woodcock's fraudulent efforts to cover up Elevator's grain shortages.

It follows from the trial judge's findings that Bank was in *pari delicto* with Woodcock in this attempt. To permit recovery under the facts found would be *contra bonos mores*. The doctrine which bars a party's right to recover in an action grounded on his own fraud "is based on the principle that to give plaintiff relief in such case would contravene public morals and impair the good society." 37 Am. Jur. 2d, *Fraud and Deceit* § 303 (1968). *See* 17 Am. Jur., *Contracts* § 222 (1964); *Lawrence Warehouse Co. v. Dove Creek State Bank*, 172 Colo. 90, 470 P. 2d 838 (1970).

[10] The Code was not designed to permit those dealing in the commercial world to obtain rights by an absence of inquiry under circumstances amounting to an intentional closing of the eyes and mind to defects in or defenses to the transaction. *See General Investment Corp. v. Angelini*, 58 N.J. 396, 278 A. 2d 193 (1971). Nor did the General Assembly, when, by G.S. 106-435, it created the State Indemnifying and Guaranty Fund to safeguard the State Warehouse System and to make its receipts acceptable as collateral, intend that it should encourage individuals or financial institutions to engage in transactions from which they would otherwise have

recoiled. On the contrary, the fund was created to protect those parties to or purchasers of warehouse receipts who, acting in good faith and without reason to know that the goods described thereon are misdescribed or nonexistent, suffer loss through their acceptance or purchase of the receipt. *Lacy v. Indemnity Co.*, 189 N.C. 24, 126 S.E. 316 (1925).

The case comes down to this: Plaintiff Bank based its right to recover on the 13 fraudulent warehouse receipts numbered 974-986 for which Elevator received no grain. Its action, if any, was under G.S. 25-7-203. Therefore, if plaintiff could prove it acquired the receipts in good faith and without notice of the fraud, it was entitled to recover; otherwise, not. The trier of facts, upon sufficient evidence, found that plaintiff did not acquire the receipts in good faith and without notice.

The judgment of the trial court is therefore affirmed as to all defendants and our former decision as reported in 286 N.C. 342, 211 S.E. 2d 327 (1975) is withdrawn.

Affirmed.

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

Justice LAKE dissenting.

On 31 January 1975, this Court, without a dissenting vote, held the Bank entitled to recover from the defendant Gill, as Custodian of the State Indemnity and Guaranty Fund, and from the defendants Woodcock and Insurance Company of North America, the surety on Woodcock's fidelity bond, the liability of Woodcock and his surety being primary and that of the State Indemnity and Guaranty Fund secondary. *Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 211 S.E. 2d 327.

Today, after nearly three years of further consideration and research, the present majority opinion "withdraws" that decision without finding a single legal principle stated therein erroneous and affirms the judgment of the Superior Court. Thus, this Court now holds, not only that the Bank cannot recover from the State Indemnity and Guaranty Fund, but cannot even recover from Woodcock, the actual perpetrator of the fraud, and the surety on his bond.

A judgment against Woodcock, himself, may or may not presently be uncollectible, but the Bank is entitled to it and to pur-

sue its remedy against his surety. The majority opinion speaks repeatedly, and correctly, of Woodcock's fraud in issuing the warehouse receipts for which the Elevator had received no grain. Whom did Woodcock defraud? The Bank, of course. He issued the receipts for the purpose of having them delivered to the Bank in exchange for then outstanding receipts held by the Bank, the validity of which such other receipts in the hands of the Bank is unquestioned. That purpose was accomplished and those previously outstanding receipts Woodcock caused to be cancelled. Thus, the Bank was damaged by Woodcock's fraud. Yet the majority opinion holds *it cannot even recover from Woodcock.* It is elementary that one damaged by fraud perpetrated upon him by another may recover his damages from such fraudulent party. *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960); *Buick Co. v. Rhodes*, 215 N.C. 595, 2 S.E. 2d 699 (1939); *Frick Co. v. Shelton*, 197 N.C. 296, 148 S.E. 318 (1929).

Of course, it is true that where parties to a transaction are *in pari delicto* neither can recover from the other. *Bledsoe v. Lumber Co.*, 229 N.C. 128, 48 S.E. 2d 50 (1948); *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466 (1943); *Bean v. Detective Co.*, 206 N.C. 124, 173 S.E. 5 (1934). However, the majority opinion does not say the Bank was *in pari delicto* with Woodcock, but only that it was so careless it must be deemed to have taken the wrongfully issued receipts in bad faith. Woodcock, himself, testified the Bank *did not know* there was not enough grain in the Elevator to support the receipts at the time they were delivered to the Bank. There was no testimony in conflict with this statement by him. As I shall show below, the surrounding circumstances compel the conclusion that the Bank did not know the new receipts were spurious when it received them. Exceedingly gullible the employees of this local branch of the Bank may have been (and I think they were), but there is no evidence whatsoever which would support a finding that the Bank was *in pari delicto* with Woodcock. Thus, the Bank, having been damaged by Woodcock's wrongful issuance of the receipts (for which he has served a prison sentence) and his fraudulent transfer of them to the Bank in exchange for receipts valid in the hands of the Bank, is clearly entitled to recover from Woodcock and the surety on his bond and, to this extent, at least, the Superior Court was in error and so is the present majority opinion.

Let us turn now to the more important question—the right of the Bank to recover from the State Indemnity and Guaranty Fund. It is my opinion that the present decision results in injustice and

throws the law into confusion by ignoring the established principle of law to the effect that a principal for whose benefit an agent acts without authority ratifies the act and is bound thereby if, with knowledge of the improper act of the agent, he accepts the benefit obtained for him thereby by the agent. That was the basis for our former decision. In my view, it still requires that result in this case. The present majority opinion does not mention the law of ratification or show its inapplicability to this case.

The Elevator and the Southeastern Farmers Grain Association, Inc. (hereinafter called Southeastern), are two distinct and separate entities. The Elevator, a unit of the State Warehouse System, was the warehouseman, Woodcock its agent. The Elevator was short of grain with which to meet then outstanding receipts valid in the hands of their holders. Consequently, the Elevator was faced with forced closure. Solely for the purpose of avoiding this, Woodcock issued, without authority, receipts for non-existent grain. These he caused to be transferred to the Bank, receiving in exchange previously issued receipts *valid in the hands of the Bank.* He then cancelled those previously issued receipts. That discharged the Elevator's liability *on those receipts.*

Now, the Elevator (the State Indemnity and Guaranty Fund) says to the Bank, in effect: "We are not liable to you on the new receipts because they were issued without authority and we are not liable to you on the old receipts, which our agent procured from you in exchange for the new ones, because we have cancelled them." This the Elevator cannot do, because when, with full knowledge of Woodcock's acts, it took back and cancelled the previously outstanding receipts, the Elevator ratified Woodcock's issuance of the new ones on which the Bank now claims. Thus, the liability of the Elevator (and the State Indemnity and Guaranty Fund) is the same as it would be if Woodcock had been expressly authorized by the Elevator to issue the receipts upon which the Bank now claims.

In their petition for rehearing, the defendants assert two grounds for reconsideration and reversal of our original opinion. First, they assert that our original opinion is in conflict with G.S. 25-7-504, a provision of the Uniform Commercial Code, in that, in disregard of the Official Comment upon that section of the Code, we applied "the doctrine of equitable estoppel" to "enlarge the rights of a transferee [without due negotiation] of a document of title beyond the rights provided by G.S. 25-7-504." Second, they assert that our original opinion impairs the commercial usefulness of warehouse

receipts by exposing the holder to the risks of equities in favor of others.

The present majority opinion does not refer to or rest upon either of these two asserted grounds for withdrawing our former decision. In this, the present majority opinion is correct, for each of these bases on which rehearing was sought and allowed is completely unsound.

The latter of the defendants' contentions is patently without any semblance of foundation in fact or law. How could the commercial usefulness of warehouse receipts be impaired by a decision permitting a transferee thereof to enforce such a receipt against the warehouseman? It is the present majority opinion, not our former decision, which impairs the commercial usefulness of warehouse receipts, but that circumstance, in and of itself, is not the basis of my dissent.

An examination of our former opinion will disclose the defendants' other asserted ground for its reconsideration and withdrawal is equally without any foundation. Our former opinion makes no reference whatever to estoppel except a single statement to the effect that *the Bank asserted* that the Elevator was "estopped to challenge the validity of the 13 new receipts in the hands of the Bank." No reference whatever appears in our former opinion to any principle of equity except with respect to the right of the Bank to obtain reformation of the receipts for a mistake in the drafting thereof, a matter relating only to the amount of the Bank's recovery, not to its right to proceed against the warehouseman, and so against the State Indemnity and Guaranty Fund, and a matter not reached or dealt with in the present majority opinion. Our former decision, that the Bank can so proceed successfully, was placed neither on the ground of estoppel nor on principles of equity but on the ground of ratification by the warehouseman of an act of its agent through acceptance by the warehouse of benefits derived therefrom with knowledge of the circumstances. Ratification by a principal of an unauthorized act of his agent is, of course, a doctrine of the common law, not of equity.

The Uniform Commercial Code provides in G.S. 25-1-103:

> "*Supplementary general principles of law applicable.*— Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, *principal and*

agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (Emphasis added.)

It has been said that this section "is probably the most important single provision in the Code." White and Summers, Uniform Commercial Code (1972), § 1, p. 6.

The right of the Bank to recover from the Elevator (the warehouseman), and so from the State Indemnity and Guaranty Fund, does not stem from the transfer of the 13 new receipts to the Bank by Southeastern, which transfer was otherwise than by due negotiation. It stems from what the Elevator did after that transfer—the acceptance by the Elevator from its agent, Woodcock, of the old receipts (previously held by the Bank and valid in its hands) and its cancellation of those receipts with full knowledge of how its agent, Woodcock, obtained them from the Bank. It is this act of the warehouseman which lifts the right of the Bank under the new receipts above the right thereunder of its transferor, Southeastern. Neither G.S. 25-7-504 nor the Official Comment thereto (relied upon by the defendants in their petition for rehearing, though not by the present majority opinion) is in conflict with our original decision that a warehouseman, who, after such a transfer of a receipt, issued by his agent without authority, accepts, with full knowledge of the circumstances, the proceeds of the previously unauthorized receipt, thereby ratifies the issuance of the receipt and becomes liable thereon to the transferee. The Uniform Commercial Code does not deal with that situation. Consequently, as the Code expressly provides in G.S. 25-1-103, "The principles of law and equity, including * * * principal and agent * * * supplement its provisions" and provide the rule for the decision of this controversy.

Clearly, as we held in our former decision, the Superior Court's Finding of Fact Number 41 is not supported by the evidence. That Finding (summarized) is:

> 41. The plan whereby Southeastern delivered to the Bank the 13 new, fraudulent warehouse receipts in exchange for the surrender by the Bank of the 16 old warehouse receipts was not intented to and did not in fact promote the interest of the Elevator. Since Southeastern had already caused the grain represented by these receipts to be delivered by the Elevator, Southeastern was obligated to surrender the receipts for cancellation and when the Elevator obtained possession of such

receipts "it had a perfect right to cancel them on its records." The Elevator did not benefit from the cancellation of these receipts.

On the contrary, the Elevator, and the Elevator alone, was intended to be benefited and was benefited by the consummation of Woodcock's fraud on the Bank. Southeastern's obligations were not diminished one particle. It is not contended that the 16 old receipts, now cancelled, were not held by the Bank by due negotiation. Therefore, in the hands of the Bank, these were valid, enforceable obligations of the Elevator to deliver grain, irrespective of the fact that the Elevator had already shipped out all the grain represented thereby. Consequently, while the Bank held those receipts, the Elevator's delivery of such grain gave it no right whatever to cancel those receipts. Those receipts were obtained from the Bank by Woodcock's fraud. With full knowledge of this fraud, the Elevator accepted the receipts so obtained and cancelled them, thus eliminating its previous obligation to deliver grain upon their presentment. This is Woodcock's uncontradicted testimony on that point:

> "[Mrs. Carlton] was instructed to deliver this check to Branch Banking and Trust Company on May 6, 1970, to pick up sufficient warehouse receipts, or a number of warehouse receipts. To pick up a quantity of receipts to cancel for the Warehouse Examiner. The purpose of having her pick up these receipts and having them cancelled for the Warehouse Examiner was as related in the statement I just read. The Examiner was there and we needed them for his audit. We needed them for his audit because the warehouse was short of grain. *If we could cancel the receipts that would reduce the amount of grain that the Elevator was charged as having outstanding.*" (Emphasis added.)

Contrary to the finding and conclusion of the Superior Court, the Elevator had, as against the Bank, no right whatsoever to cancel the old receipts, except through ratification of Woodcock's issuance of the new receipts for delivery to the Bank in lieu of the old ones. Thus, as between the Bank and the Elevator, the new receipts must be deemed authorized by the Elevator and its binding obligations to deliver grain.

The State Warehouse Superintendent signed each of these new receipts in blank before it was filled out and completed and, in this condition, turned it over to Woodcock, thus putting it in the power

of Woodcock to complete the receipt and issue it when and as Woodcock saw fit to do so. While I do not rest my dissent on this circumstance, I am constrained to observe that it was this action of the State Warehouse Superintendent in entrusting these receipts, so signed in blank by him, to the local manager of the warehouse, known by the Superintendent to be also the managing officer of an association whose business was the buying and selling of grain, to which association the warehouse manager habitually issued receipts purporting to represent grain stored in the warehouse, which made it possible for these receipts to be issued by Woodcock when no grain had been deposited in the Elevator. It would hardly be surprising if a continuation of such careless practice by the State Warehouse Superintendent should result in continuing depletions of the State Indemnity and Guaranty Fund. For reasons best known to itself, certainly not understood by me, the Bank elected to abandon its appeal from the judgment denying it any recovery from the State Warehouse Superintendent and the surety on his bond, so that question is not presently before us.

Each of these receipts, so signed by the State Warehouse Superintendent and by Woodcock, states upon its face, "*The State of North Carolina guarantees the integrity of this receipt.*" What does that mean? Surely, the integrity of the receipt means that the Elevator has received and holds the grain described therein and will hold it until the receipt is presented to it by the holder thereof and will thereupon deliver that grain pursuant to the holder's direction. That the State of North Carolina guaranteed. That is the guaranty the Bank is suing to enforce.

G.S. 106-435 created the State Indemnity and Guaranty Fund. G.S. 106-441 provides, "[T]he receipts issued under this section for cotton and other agricultural commodities shall be supported and guaranteed by the indemnity fund provided in § 106-435." Thus, the extent of the State's guaranty of the "integrity" of these receipts is the right of recourse to the said fund. That is all the Bank seeks in this case. As we said in our former decision, the State's liability upon this guaranty is secondary to the liability of the Local Manager of the Warehouse (Woodcock) and that of the State Warehouse Superintendent and the sureties on their bonds. See: *Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884 (1953); *Lacy v. Indemnity Co.*, 193 N.C. 179, 136 S.E. 359 (1927); *Lacy v. Indemnity Co.*, 189 N.C. 24, 126 S.E. 316 (1925). Obviously, it is also secondary to the liability of the warehouseman (the Elevator).

The Uniform Commercial Code, G.S. 25-7-203, provides-

"*Liability for non-receipt or misdescription.*—A party to *or a purchaser for value in good faith* of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the *non-receipt* or misdescription of the goods [with specified exceptions not applicable to the present case.]" (Emphasis added.)

The Official Comment upon this section of the Code states:

"The issuer is liable on documents issued by an agent, contrary to instructions of his principal, without receiving goods. *No disclaimer of the latter liability is permitted.*" (Emphasis added.)

In White and Summers, Uniform Commercial Code, § 20-4, p. 690, it is said:

"When one reads [§ 7-203] together with the Code definition of issuer, the Code imposes liability for nonreceipt on a warehouseman 'for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods.' (§ 7-102(1)(g)). This is a salutary departure from pre-Code law in such states as Massachusetts which permitted the issuer to escape liability for nonreceipt where the issuer's agent, having authority to issue receipts, issued a receipt for goods not delivered. It should be noted, too, that the warehouseman's liability runs only to 'a party or purchaser for value in good faith of a document of title * * * relying in either case upon the description therein.' "

I think it obvious that the State's guaranty of the "integrity" of the 13 receipts now held by the Bank is not intended to extend to Southeastern, the party to whom they were issued, for Southeastern necessarily knew no grain had been delivered by it, or for its account, to the Elevator. I think it equally obvious that the State's guaranty of the "integrity" of these receipts is not intended to extend to a transferee of them, if that transferee did not purchase them for value and in "good faith," as that term is used in the Uniform Commercial Code, but it does extend to a transferee of these receipts if the transferee purchased them for value and in "good faith," as that term is used in the Code.

Clearly, the Bank purchased these 13 receipts for value, having surrendered to Southeastern in exchange therefor 16 other receipts the validity of which, in the hands of the Bank, has never been questioned. Thus, the right of the Bank to recover from the State Indemnity and Guaranty Fund on account of these 13 receipts depends upon whether the Bank took them "in good faith," as that term is used in the Uniform Commercial Code. The present majority opinion holds the Bank did not do so. This is where I respectfully part company with the present majority so far as the Bank's right to recover from the State Indemnity and Guaranty Fund is concerned.

It should be observed that the liability imposed by the Uniform Commercial Code (G.S. 25-7-203) upon the warehouseman (the Elevator), and so upon the State as guarantor of the "integrity" of the receipt, when the receipt was issued without any such goods being deposited in the warehouse, runs to "a purchaser for value in good faith." *This section of the Code does not require that such purchaser take by "due negotiation"*; i.e., that he be an indorsee of the receipt. The Code, itself, defines "good faith" as that term is used throughout the Code. It expressly states: " 'Good faith' means honesty in fact *in the conduct or transaction concerned.*" (Emphasis added.) G.S. 25-1-201(19).

Woodcock testified that the Bank did not know the Elevator was short on corn when the arrival of the State Inspector precipitated his fraudulent issuance of these receipts. A careful study of the voluminous record has revealed to me no testimony of any witness to the contrary. Woodcock's testimony is strongly corroborated by the circumstances.

The record clearly shows these circumstances:

(1) The "transaction concerned" began with the unexpected arrival of the State Inspector at the Elevator on 5 May 1970. Nothing indicates it was contemplated earlier, even by Woodcock, certainly not by the Bank.

(2) At that time the Elevator did not have in its facilities enough grain to meet its previously issued and outstanding receipts. Woodcock knew this. The Bank did not.

(3) From 10 February 1970 to 5 May 1970, the Elevator had delivered, pursuant to Southeastern's directions, huge quantities of grain, for which receipts were outstanding, without requiring surrender of such receipts. Woodcock knew this. The Bank did not.

(4) The Elevator was a unit of the State Warehouse System. It engaged in no other business. It did not buy and sell grain. Southeastern was its principal customer. It does not appear that the Elevator was indebted to the Bank or was a customer of the Bank.

(5) For many months prior to 5 May 1970, the Bank, acting through Craven Brewer, Manager of its local branch, conducted banking transactions with Southeastern with an amazing degree of laxity and disregard of what would seem to be elementary principles of good banking, permitting huge overdrafts to remain unpaid for long periods of time and making very large loans in addition. Thus, the Bank knew Southeastern—not the Elevator—was in a precarious financial condition. These banking transactions are not, however, the "transaction concerned."

(6) On 5 May 1970, when the "transaction concerned" was precipitated by the arrival of the inspector at the Elevator, Southeastern—not the Elevator—was indebted to the Bank on its notes in the total amount of $545,424. *There were then no overdrafts.* These notes were secured by pledges by Southeastern of receipts issued by the Elevator, which receipts the Bank had acquired by due negotiation and which were, therefore, valid and enforceable by the Bank against the Elevator and the State Indemnity and Guaranty Fund. Nothing whatever indicates that the security so held by the Bank was not fully adequate to cover these notes.

(7) When the "transaction concerned" began, and throughout it, Craven Brewer, who had conducted the previous transactions with Southeastern, who had permitted the former overdrafts (eliminated prior to the "transaction concerned") and who had made the loans represented by the notes so held by the Bank, was absent on military duty.

(8) The Bank refused to permit Woodcock to take "for the inspector's examination" the receipts it then held, until the notes they secured were paid, and refused to accept another overdraft in payment of the notes.

(9) Thereafter, the Bank surrendered to its customer (Southeastern) the receipts of the Elevator, previously so pledged to the Bank, in exchange for Southeastern's new note and the pledge of 13 new receipts issued by the Elevator. This is the "transaction concerned." According to Woodcock's uncontradicted testimony, the Bank did *not* then know the Elevator was short of grain.

(10) Southeastern surrendered the receipts it so obtained from the Bank to the Elevator, which cancelled them with full knowledge as to how they were obtained from the Bank.

(11) The Bank, by the "transaction concerned," had no purpose to improve its own position and could not possibly have done so. Prior thereto, the Bank held notes, fully secured, of a debtor it knew to be in precarious financial condition. It knew of no shortage at the Elevator. It surrendered those papers in exchange for like notes, secured, as it thought, by like receipts of like validity. Had the new receipts been supported in full by grain in the Elevator, the Bank's position would not have been one whit better than it was prior to the "transaction concerned." The Bank's sole apparent purpose was to accommodate its customer (Southeastern) without changing, in the slightest degree, its right to payment of the latter's indebtedness to it or the security it held therefor.

I see in these facts no indication that the Bank lacked "*honesty in fact* in the transaction concerned"—the only requirement, according to the express provision of the Uniform Commercial Code, for its qualification as a purchaser "in good faith" of the 13 new receipts.

This Court has the advantage of three years' perusal and reperusal of hundreds of pages of testimony. The local employees of the Bank, who handled the "transaction concerned," did so in connection with their other duties, in a short space of time during a single banking day. Looking backward, we see Woodcock has been convicted of criminal fraud in the "transaction concerned." That morning, however, he was a respected businessman in the community and was so regarded by the employees of the Bank. We now know the Elevator was short of grain at the time of the "transaction concerned." Woodcock testified the Bank's employees did not know that. Looking backward, it is apparent they were gullible, but most victims of fraud are gullible, at least at the time of the fraud, and gullibility is not *dishonesty in fact.* Only lack of "honesty in fact" by its employees will prevent the Bank from being a purchaser of these receipts "in good faith," and so justify denial of the Bank's recovery from the State Indemnity and Guaranty Fund.

Surely, the Bank's local manager, Brewer, had been exceedingly lax in his conduct of past banking transactions with Southeastern, but those overdrafts had been paid when the "transaction concerned" took place—in Brewer's absence.

To be sure, one who wilfully shuts his eyes so that he will not see fraud by a transferor of commercial paper (or other property)

cannot thereby qualify as a purchaser "in good faith," but I see no evidence of the Bank's employees so shutting their eyes when they exchanged papers with Southeastern's emissary. That situation is usually found where the purchaser is seeking to grasp for himself an advantage, as where he seeks to buy something for far less than its true value and for fear of losing a good bargain shuts his eyes to its history. As above noted, in the "transaction concerned," the Bank would not have gained anything whatever by the exchange had the Elevator been bursting at its seams with corn.

The majority opinion speaks of credulity. In my view, to conclude that a bank, holding the note for more than $500,000 of a debtor it knows to be in precarious financial condition, which note is fully secured by a pledge of warehouse receipts completely enforceable by the bank, would, without any purpose or hope of gain thereby, give up that security in exchange for receipts it knows to be spurious, or even suspects to be spurious, taxes credulity beyond the breaking point. The circumstances of the exchange of the valid, old receipts for the spurious new ones fully corroborate, in my judgment, Woodcock's uncontradicted testimony that the Bank did *not* know the Elevator was short of grain.

The majority's present decision enables Woodcock, the defrauder, and his surety to go free of liability and the State to renege on its express guaranty of the "integrity" of these receipts. It prevents a purchaser for value and in good faith of the guaranteed receipts from reaching the Indemnity and Guaranty Fund which was set up for this very purpose. I, therefore, am of the opinion that we should adhere to our former decision.

J. W. PENDERGRAST AND WIFE, CATHERINE W. PENDERGRAST v. R. C. AIKEN AND WIFE, M. E. AIKEN, W. L. AIKEN, AND PERRY ALEXANDER CONSTRUCTION COMPANY

No. 48

(Filed 23 August 1977)

1. Waters and Watercourses § 1— drainage problems—surface waters defined

For purposes of analyzing drainage problems, the N.C. Supreme Court has combined diffuse surface waters, watercourses and overflow waters from the ocean into the broader category of surface waters.

2. Waters and Watercourses § 1— surface water drainage—common enemy rule defined

The common enemy rule is that a landowner is privileged to use and improve his land for proper purposes even though the natural flow of surface water is

thereby altered so long as he uses reasonable care to avoid causing unnecessary harm to others.

3. **Waters and Watercourses § 1— surface water drainage—civil law rule defined**

The civil law rule subjects a landowner to liability whenever he interferes with the natural flow of surface waters to the detriment of another in the use and enjoyment of his land; North Carolina has long adhered to this rule.

4. **Waters and Watercourses § 1— surface water drainage—reasonable use rule defined**

The reasonable use rule allows each landowner to make reasonable use of his land even though, by doing so, he alters in some way the flow of surface water thereby harming other landowners, liability being incurred only when this harmful interference is found to be unreasonable.

5. **Waters and Watercourses § 1— surface water drainage—rule of reasonable use adopted—civil law rule abandoned**

The Supreme Court formally adopts the rule of reasonable use with respect to surface water drainage and abandons the civil law rule, since the reasonable use rule is more in line with the realities of modern life, and consistency, fairness and justice are better served through the flexibility afforded by that rule.

6. **Waters and Watercourses § 1— surface water drainage—reasonable use rule—harm to plaintiff weighed against utility of defendant's conduct**

The reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of defendant was unreasonable, reasonableness being a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant.

7. **Nuisance § 7; Waters and Watercourses § 1— surface water drainage—reasonable use rule—alteration reasonable and harmful—compensation required**

Under the rule of reasonable use with respect to surface water drainage, even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility arising from the alteration outweighs the harm to plaintiff, the gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of defendant.

8. **Nuisance § 7; Waters and Watercourses § 1— culvert in bed of stream—reasonable use rule—civil law rule—instructions contradictory**

In an action to recover damages for flooding allegedly caused by defendants' placement of a 36-inch culvert in the bed of a stream flowing from plaintiffs' land onto and through defendants' land, the trial court erred in instructing the jury on the reasonable use rule and the civil law rule with respect to surface water drainage, since the instructions were contradictory and served only to confuse and mislead the jury.

9. **Nuisance § 7; Waters and Watercourses § 1— culvert in bed of stream—nuisance and damages—separate issues—instructions improper**

In an action to recover damages for flooding allegedly caused by defendants' placement of a 36-inch culvert in the bed of a stream flowing from plaintiffs' land onto and through defendants' land, the trial court erred in instructing the jury that it must first determine whether defendants created a nuisance, and then separately decide whether plaintiffs were harmed thereby, and the court erred in stating that the jury could answer the first issue yes and the second issue no,

since the jury could not find that a nuisance existed at all without a finding of substantial damage to plaintiffs.

10. Nuisance § 7; Waters and Watercourses § 1 — culvert in bed of stream — flooding — nuisance — effect of factors downstream — instructions

In an action to recover damages for flooding allegedly resulting when defendants placed a 36-inch culvert in the bed of a stream which crossed plaintiffs' land, then flowed onto and across defendants' land, and then was channeled through two 24-inch culverts under a street, the effect, if any, of the two 24-inch culverts had no legal significance relative to the dispute between plaintiffs and defendants, and the court erred in instructing the jury that it might consider the inadequate drainage through the 24-inch culverts from defendants' land.

PLAINTIFFS appeal from decision of the Court of Appeals, 32 N.C. App. 89, 231 S.E. 2d 183 (1977), upholding judgment of *Martin, J.*, entered at the 19 January 1976 Session, BUNCOMBE Superior Court.

Plaintiffs' evidence tends to establish the following:

Plaintiffs are the owners of a tract of land which borders U.S. Highway 25 in Buncombe County in an area of commercial development known as Skyland. On this tract plaintiffs own a brick and concrete-block building consisting of an upper floor and a basement with a dirt floor. The building measures approximately 50 by 50 feet. At the time of the incidents which precipitated this lawsuit, plaintiffs maintained a laundry and dry-cleaning business in part of the building and leased the remaining area to a hardware company and a beauty salon.

A small branch entered plaintiffs' property from the north through a corrugated iron culvert 30 inches in diameter. A second, smaller branch joined the first branch at the upper end of the property after entering through two 15-inch culverts. The resulting small creek drained a watershed of approximately 90 acres and maintained a continuous flow throughout the year, even during dry spells. The creek flowed in a southerly direction about 30 feet from the rear of the building.

The property immediately to the south, which also adjoins U.S. 25, was undeveloped at the time of this lawsuit and belonged to defendants Aiken. The southern boundary of the Aiken property was Allen Avenue. The stream flowed through this property in a natural drainage ditch or depression and exited through two 24-inch culverts under Allen Avenue.

In 1972 the State Highway Commission began a project to widen U.S. 25 in that area from two lanes to five. Charles Smith was

the general superintendent of defendant Perry M. Alexander Construction Company, the general contractor for the road work. After work began on U.S. 25, Smith contacted defendants and asked them if they would like to have their land filled with excess dirt from the highway project. At the time, the Aiken property was between four and six feet below the level of the road. The Aikens replied that they did not want dirt containing trash, which Smith was offering at no charge, but that they would pay to have "good dirt," free from debris, dumped on their land. Smith pointed out that they would need to have a pipe laid to carry the stream, which otherwise would be filled in. After some negotiation, the Aikens and Smith agreed that Smith would order 274 feet of 36-inch iron corrugated pipe, would place the pipe in the creek and would then fill up the creek and the property with "good dirt." Smith maintains that the Aikens specified 36-inch diameter pipe, while the Aikens testified that Smith recommended that size. In any event, in February 1973 the pipe was installed and the land filled.

Thereafter on 15 or 16 March 1973 there was a rainfall of substantial but apparently normal volume. For the first time since plaintiffs moved onto their property in 1962, the creek backed up and flooded the basement of plaintiffs' building to a depth of approximately 13 inches. Two other rains in April and May 1973 caused similar flooding. On 27 May 1973 Buncombe County experienced an exceptionally heavy rain which exceeded 4 inches in a 12-hour period. Some witnesses testified that was the heaviest rain they had ever seen in the area. According to plaintiffs' expert witness, a civil engineer, that amount of rain "is an extraordinary unexpected downfall of water." The creek again backed up and flooded plaintiffs' basement, this time to a depth of over five feet. Subsequent heavy rains also resulted in flooding. In all, plaintiffs' complaint alleges six separate flooding incidents.

Concerning the drainage at the two properties, plaintiffs testified that before the pipe was installed on the Aikens' land, "[o]ccasionally, the stream would back up behind Allen Avenue [on defendants' property]. There would be a big puddle of water down there, but it just dispersed over that property below me. It never did back up on my property at all." Plaintiffs enlisted the services of Walter C. Bearden, a civil engineer, to study and report on their property's drainage problems. Bearden testified that sound engineering practices required the installation of drainage facilities capable of handling a "twenty-five year flood," that is, the greatest amount of rainfall in a single twenty-four hour period that, accord-

ing to National Weather Service statistics, one might expect in a twenty-five year period. In Asheville, that figure is seven inches of rain. According to Bearden's calculations, the ninety-acre watershed which drained into the small creek would produce a flow of 800 gallons of water per minute during a "twenty-five year flood." According to his calculations, the 36-inch culvert on the Aiken property has a maximum capacity of 260 gallons per minute. Thus, in his opinion, "the culvert, the thirty-six inch culvert, was completely inadequate to carry the water."

Bearden also testified that a single 36-inch culvert carried more water than two 24-inch culverts and that "[g]enerally speaking, it is bad engineering practice to run a pipe with capacity of thirty-six inches into two twenty-four inch pipes." Thus, in Bearden's opinion, the 36-inch pipe was too large to be connected to the two 24-inch pipes and yet was too small to drain the Pendergrast property.

Sometime in the fall of 1974 the State Highway Commission installed two 60-inch culverts underneath Allen Avenue. These culverts each have a capacity of 1,120 gallons per minute. However, the installation of these large diameter culverts did not stop the flooding on plaintiffs' land.

Bearden also inspected plaintiffs' building. "I found two water marks obviously made at two different times. The highest water mark was five and four-tenths feet above the basement floor. The lowest water mark was three and two-tenths feet above the basement floor. These water marks were obviously made at different times. The floor was very wet and covered with mud.... I examined the basement wall. North wall was very badly cracked. There were cracks also in the two other walls." In his opinion, the building "had been badly flooded two different times." The cause of this flooding was the "completely inadequate" capacity of the Aikens' 36-inch culvert to carry the expected run-off from the watershed into the creek.

Immediately before this action came to trial, defendants Aiken sold the property to a third party who promptly dug up the buried culvert. Although the pipe was left in place, the net effect was to restore the original drainage conditions to the Pendergrast property.

Defendants offered no evidence.

Perry Alexander Construction Company's motion for a directed verdict was allowed and plaintiffs did not appeal that decision.

The following issues were submitted to the jury: (1) Did the defendants Aiken create a nuisance by installing and covering a 36-inch drain across their property? (2) If so, did defendants Aiken thereby cause damage to plaintiffs' property? (3) What amount of damages, if any, are plaintiffs entitled to recover of the defendants Aiken? The jury answered the first issue "Yes," the second issue "No" and did not answer the third issue. Judgment on the verdict was entered for defendants and plaintiffs appealed to the Court of Appeals which upheld the judgment, Judge Martin dissenting. Plaintiffs thereupon appealed to this Court as of right, assigning errors noted in the opinion.

Gudger, McLean, Leake, Talman & Stevenson by Joel B. Stevenson for plaintiff appellants

Morris, Golding, Blue and Phillips by Steven Kropelnicki, Jr. and William C. Morris, Jr., for defendant appellees

HUSKINS, Justice.

Plaintiffs assign as error the failure of the trial judge to instruct the jury correctly on the law arising from the evidence. By this assignment plaintiffs present three questions for consideration: (1) Did the court err in its original charge by framing its instructions in terms of nuisance? (2) Did the court err in its instruction to the jury that it must first determine whether defendant created a nuisance and then decide whether plaintiffs were harmed thereby? (3) Did the court err in its supplemental instructions regarding the effect of the two 24-inch culverts installed by the City under Allen Avenue? We shall consider these questions seriatim. Since their resolution lies in determination of applicable law, we commence by examining the development and status of the law governing drainage of surface waters. In that connection we first delineate the scope of the term "surface water," a term which has caused some confusion in the past.

Many jurisdictions have classified drainage problems according to whether the water drained (1) is composed of spring water, rain or snow melt spreading over the land without pattern or order, *i.e.*, "diffused surface water," or (2) travels a clearly defined channel and hence is a watercourse. *See e.g., Garbarino v. Van Cleave*, 214 Or. 554, 330 P. 2d 28 (1958). Based on such classification some courts have applied different rules of law. 5 R. Clark, Waters and Water Rights § 450.5 (1972). We see no basis for such a distinction. "What difference does it make, in principle, whether the water comes

directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower." *Gormley v. Sanford*, 52 Ill. 158 (1869).

[1] Such technical distinctions have unnecessarily complicated the analysis of drainage problems, masking the truly critical issues. Hence, in the past this Court, for purposes of analyzing drainage problems, has combined diffuse surface waters, watercourses and over-flow waters from the ocean into the broader category of *surface waters*. *Compare Davis v. R.R.*, 227 N.C. 561, 42 S.E. 2d 905 (1947), *with City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973), *and Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599 (1963); *accord*, Clark, *supra* § 450.5. We approve of this method of analysis and adhere to it. With this definition of "surface waters" in mind, we now discuss the various legal rules applicable to surface water drainage.

[2] American courts have developed three distinct doctrines governing the disposal of surface waters. The first, *the common enemy rule*, states substantially that "[s]urface water is recognized as a common enemy, which each proprietor may fight off or control as he will or is able, either by retention, diversion, repulsion, or altered transmission; so that no cause of action arises from such interference, even if some injury occurs, causing damage." *Borchsenius v. Chicago, St. P., M.&O. Ry. Co.*, 96 Wis. 448, 71 N.W. 884 (1897); Clark, *supra* § 450.6; *see* Annot., 59 A.L.R. 2d 421 (1958). Grounded in the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* (whose is the soil, his is even to the skies and to the depths below), the doctrine is based on two concepts: "(1) the necessity for improving lands with the recognition that some injury results from even minor improvements, and (2) philosophical preference for freedom of each landowner to deal with his own land essentially as he sees fit." Clark, *supra* § 451.1. Despite these laudable goals the rule created many problems. In the words of one commentator: ". . . landowners are encouraged to engage in contests of hydraulic engineering in which might makes right, and breach of the peace is often inevitable." Maloney and Plager, Diffused Surface Water: Scourge or Bounty?, 8 Nat. Res. J. 73 (1968); *accord, Butler v. Bruno*, 115 R.I. 264, 341 A. 2d 735 (1975). The extreme consequences occasioned by strict application of the common enemy rule soon led many courts to adopt modifications based upon concepts of reasonable use or negligence. Note, Disposition of Diffused Surface Waters in North Carolina, 47 N.C.L. Rev. 205 (1968); *e.g., Stacy v.*

Walker, 222 Ark. 819, 262 S.W. 2d 889 (1953); *Mason v. Lamb*, 189 Va. 348, 53 S.E. 2d 7 (1949). While courts have couched modifications of the common enemy rule in different language, the principle in substance is that a landowner is privileged to use and improve his land for proper purposes even though the natural flow of surface water is thereby altered so long as he uses reasonable care to avoid causing unnecessary harm to others. Kinyon and McClure, Interferences with Surface Waters, 24 Minn. L. Rev. 891 (1940), and cases cited.

[3] The second doctrine, commonly called the *civil law rule*, is, in its purest form, opposed to the common enemy rule. Based on the quoted maxim *aqua currit et debet currere, ut currere solebat* (water flows and as it flows so it ought to flow), the civil law rule subjects a landowner to liability whenever he interferes with the *natural flow* of surface waters to the detriment of another in the use and enjoyment of his land. Kinyon and McClure, *supra*. Various rationales have been advanced in support of this rule. Many courts have simply felt that, as it was necessary to have some rule establishing rights and duties in regard to surface water disputes, it was reasonable and just to follow the law of nature. It was said early in *Gormley v. Sanford*, *supra*, that "[a]s water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces nature's laws. There is no surprise or hardship in this, for each successive owner takes whatever advantages or inconveniences nature has stamped upon his land." Other courts have chosen the civil law rule in order to avoid the element of contest or force inherent in the common enemy rule. *Mayor of Albany v. Sikes*, 94 Ga. 30, 20 S.E. 257 (1894).

Nevertheless, since almost any use of land involves some change in drainage and water flow, courts have found that a strict application of civil law principles discourages proper improvement and utilization of land. Thus courts have modified the rule to permit the reasonable use of land. *See* Annot., 59 A.L.R. 2d 421 (1958). For the most part such changes have been piecemeal responses to specialized situations. One modification frequently found in civil law jurisdictions arises when one owner discharges surface waters on the lands of another by artificial means. Faced with this situation courts have often held, with minor variations, that the upper owner may deposit surface water by artificial means into a natural drainway even though the amount of water flowing into adjoining land is

thereby increased. *E.g., Lambert v. Alcorn*, 144 Ill. 313, 33 N.E. 53 (1893); *Miller v. Hester*, 167 Iowa 180, 149 N.W. 93 (1914); *Mizzell v. McGowan*, 120 N.C. 134, 26 S.E. 783 (1897).

Some courts, however, have announced more general modifications. The Maryland court at one time fashioned a special hardship rule, stating: "[A] strict application of [the civil law rule] might result in very great hardship on the lower land owner, who would thereby be prevented from improving his land or using it as he would otherwise have a right to use it. In cases where such hardship would necessarily ensue to one or the other of the owners, courts have sometimes adopted what may be called a 'reasonableness of use' rule.... The case before us presents a state of facts in which the rule of reasonableness of use is applicable." *Whitman v. Forney*, 181 Md. 652, 31 A. 2d 630 (1943).

Perhaps the most comprehensive modification of the civil law rule was undertaken in the California case of *Keys v. Romley*, 64 Cal. 2d 396, 412 P. 2d 529, 50 Cal. Rptr. 273 (1966). There the court noted that California traditionally adheres to the civil law rule, yet observed that:

> "... [N]o rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and properties involved. No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.
>
> It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface water. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.
>
> If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule."

[4] The third doctrine of surface water disposition is known as the *reasonable use rule.* Briefly, this rule allows each landowner to

make reasonable use of his land even though, by doing so, he alters in some way the flow of surface water thereby harming other landowners. Liability is incurred only when this harmful interference is found to be unreasonable. *City of Franklin v. Durgee*, 71 N.H. 186, 51 A. 911 (1901); *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A. 2d 4 (1956); *Enderson v. Kelehan*, 226 Minn. 163, 32 N.W. 2d 286 (1948); *see generally*, Clark, *supra* § 453. Reasonableness is a question of fact for the jury. Kinyon and McClure, *supra.*

Although sometimes denominated as a "new" or "emerging" doctrine, the rule of reasonable use traces its origin to the mid-nineteenth century. In *Basset v. Company*, 43 N.H. 569 (1862), the New Hampshire Supreme Court first took note of conflicts inherent in any rigid inflexible system of rules applied to drainage issues. The court there said:

> "No land-owner has an absolute and unqualified right to the unaltered natural drainage or percolation to or from his neighbor's land. In general it would be impossible for a landowner to avoid disturbing the natural percolation or drainage, without a practical abandonment of all improvement or beneficial enjoyment of his land. Any doctrine that would forbid all action of a landowner, affecting the relations as to percolation or drainage between his own and his neighbors' land, would in effect deprive him of his property . . ."

For this reason the court held that ". . . in the drainage a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and, from the necessity of the case, the right of each is only to a reasonable user or management. . . ."

After considerable struggle the Minnesota court adopted a similar rule. *See Sheehan v. Flynn*, 59 Minn. 436, 61 N.W. 462 (1894); *Enderson v. Kelehan, supra.* Although these jurisdictions were for many years the sole adherents to the reasonable use rule, a growing number have recently adopted the rule fully, *e.g.*, *Weinberg v. Northern Alaska Development Corp.*, 384 P. 2d 450 (Alaska, 1963); *Rodrigues v. State*, 52 Haw. 156, 472 P. 2d 509 (1970); *Armstrong v. Francis Corp., supra*; *Jones v. Boeing Company*, 153 N.W. 2d 897 (N.D. 1967); *Butler v. Bruno, supra*; *Sanford v. University of Utah*, 26 Utah 2d 285, 488 P. 2d 741 (1971); *State v. Deetz*, 66 Wis. 2d 1, 224 N.W. 2d 407 (1974), or in part, *Lunsford v. Stewart*, 95 Ohio App. 383, 120 N.E. 2d 136 (1953); *Mulder v. Tague*, 85 S.D. 544, 186 N.W. 2d 884 (1971); *City of Houston v. Renault, Inc.*, 431 S.W. 2d 322 (Tex. 1968).

In addition, several states have approved modifications of the common enemy or the civil law rule approaching actual adoption of the reasonable use rule. *See Keys v. Romley, supra*; *Templeton v. Huss*, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974); *Commonwealth, Dept. of Hwys. v. S & M Land Co., Inc.*, 503 S.W. 2d 495 (1972); *Baer v. Board of County Com'rs of Washington Co.*, 255 Md. 163, 257 A. 2d 201 (1969); *Morris v. McNicol*, 83 Wash. 2d 491, 519 P. 2d 7 (1974).

The rising prominence of the reasonable use rule is seemingly attributable to the increasing industrialization and urbanization of the nation. Where people are forced by social and demographic pressures to live in close proximity with each other and with commercial and industrial development, there will be, of necessity, increased conflict over the proper utilization of land. Long and Long, *Surface Waters and the Civil Law Rule*, 23 Emory L.J. 1015 (1974). It is no longer simply a matter of balancing the interests of individual landowners; the interests of society must be considered. On the whole the rigid solutions offered by the common enemy and civil law rules no longer provide an adequate vehicle by which drainage problems may be properly resolved. For this reason courts have responded, first with modifications of existing rules and then, when those proved unwieldy, by the adoption of the rule of reasonable use.

[3] North Carolina has long adhered to the civil law rule. *See* Note, Disposition of Diffused Surface Waters in North Carolina, 47 N.C.L. Rev. 205 (1968). In *Porter v. Durham*, 74 N.C. 767 (1876), this Court held:

> ". . . [A]n owner of lower land is obliged to receive upon it the surface-water which falls on adjoining higher land, and which naturally flows on the lower land. Of course, when the water reaches his land the lower owner can collect it in a ditch and carry it to a proper outlet so that it will not damage him. He cannot, however, raise any dike or barrier by which it will be intercepted and thrown back on the land of the higher owner."

As we have noted, this rule applies whether the drainage technically involves diffuse surface water, *Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950); *Davis v. R.R., supra*; *Winchester v. Byers*, 196 N.C. 383, 145 S.E. 774 (1928); *Staton v. R.R.*, 109 N.C. 337, 13 S.E. 933 (1891); or a natural watercourse, *City of Kings Mountain v. Goforth, supra*; *Midgett v. Highway Commission, supra*; *Clark v. Guano Co.*, 144 N.C. 64, 56 S.E. 858 (1907); *Mizzell v. McGowan*, 120 N.C. 134, 26 S.E. 783 (1897); *Porter v. Durham, supra*; *accord, Jones v. Loan Association*, 252 N.C. 626, 114 S.E. 2d 638 (1960).

Nevertheless, North Carolina has found, like other states, that in a changing society dogmatic adherence to this rule is unfeasible and unwise. Thus the Court early committed itself to a policy of flexible application of the civil law rule. Note, Disposition of Diffused Surface Waters in North Carolina, 47 N.C.L. Rev. 205 (1968). This policy was stated clearly and succinctly by Chief Justice Faircloth in *Mizzell v. McGowan, supra*:

> "The upper owner can not divert and throw water on his neighbor, nor the latter back water on the other with impunity. *Sic utere tuo, ut alienum non laedas.* [Use your own property in such a manner as not to injure that of another]. This rule, however, can not be enforced in its strict letter, without impeding rightful progress and without hindering industrial enterprise. Minor individual interest must sometimes yield to the paramount good. Otherwise the benefits of discovery and progress in all the enterprises of life would be withheld from activity in life's affairs. 'The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure.' Under this principle the defendants are permitted not to divert, but to drain their lands, having due regard to their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural streams through or by the lands of the plaintiff."

Another example of this Court's flexible approach to water law problems is found in *Yowmans v. Hendersonville*, 175 N.C. 574, 96 S.E. 45 (1918). In that case there was evidence tending to show that, by the grading and paving of streets, the City of Hendersonville diverted water onto plaintiff's lot causing damage. The trial court charged the jury that plaintiff should recover if the jury found that defendant had "diverted upon plaintiff's property more water than would naturally flow there, causing damage. . . ." This Court noted that the charge adequately stated the law as between private owners or public service corporations, but pointed out that:

> ". . . in regard to the flow and disposal of surface water incident to the grading and pavement of streets, a different rule is recognized, and a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow of water upon abutting owners unless there has been negligence on their part causing the damage complained of. The right to change the grade of the streets and to improve the same, according to modern and generally approved methods,

passed to the municipality in the original dedication and may be exercised by the authorities as the good of the public may require. It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution. . . ."

As these decisions illustrate, this Court has generally adhered to the civil law rule yet has not hesitated to modify that rule where time and circumstance so required.

A similar situation, demonstrating the Court's willingness to modify water law in response to social change, arose during the development of the law of riparian rights. *See generally* Aycock, Introduction to Water Use Law in North Carolina, 46 N.C.L. Rev. 1 (1967). Like the laws of drainage, riparian rights were early expressed in terms of the "natural flow" rule. By this rule an owner of lands abutting a stream had the right to have the flow continue through his land undiminished in quantity or quality except for such "natural uses" as drinking, bathing, watering farm animals and irrigation of home supportive gardens. Industrial use was permitted only insofar as the water was returned to the stream without substantial diminution in quality or quantity. Although adequate early in our history, this rule was soon outmoded by the needs of a growing urban and industrial society. This Court therefore adopted the "American rule" or rule of reasonable use that a "riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors." *Smith v. Morganton*, 187 N.C. 801, 123 S.E. 88 (1924); *accord*, *Pugh v. Wheeler*, 19 N.C. 50 (1836).

This rule was expounded upon in *Dunlap v. Light Co.*, 212 N.C. 814, 195 S.E. 43 (1938). There the Court said:

> "The right of a riparian proprietor to the natural flow of a stream running through or along his land in its accustomed channel undiminished in quantity and unimpaired in quality, is qualified by the right of other riparian owners to make a reasonable use of such water as it passes through or along their lands. In determining the rights of a lower riparian owner, the question is whether the upper riparian proprietor is engaged in a reasonable exercise of his right to use the stream as it flows by or through his land, whether with or without retaining the

water for a time, or obstructing temporarily the accustomed flow.

. . . The rights of riparian owners in a running stream above and below are equal; each has a right to the reasonable use and enjoyment of the water, and each has a right to the natural flow of the stream subject to such disturbance and consequent inconvenience and annoyance as may result to him from a reasonable use of the waters by others. There may be a diminution in quantity or a retardation or acceleration of the natural flow indispensable for the general valuable use of the water perfectly consistent with the existence of the common right and this may be done so long as the retardation and acceleration is reasonably necessary in the lawful and beneficial use of the stream. . . .

What constitutes a reasonable use is a question of fact having regard to the subject matter and the use; the occasion and manner of its application; its object and extent and necessity; the nature and size of the stream; the kind of business to which it is subservient; and the importance and necessity of the use claimed by one party and the extent of the injury caused by it to the other."

Thus our Court adopted a flexible rule of reasonable use with regard to the rights and duties of riparian owners where such a position was mandated by basic long-term change in the social and economic structure of society.

With this background of the law, we now turn to plaintiffs' first contention, to wit, that the court erred by instructing the jury on the law of nuisance rather than restricting its instructions to the duties of a lower landowner to receive water from the upper owner.

[5] By his charge the judge instructed the jury to determine whether defendants engaged in tortious conduct amounting to a private nuisance. In substance, this part of the charge amounts to an instruction in accord with the rule of reasonable use. As noted previously, North Carolina has traditionally adhered to a modified civil law doctrine. *Midgett v. Highway Commission, supra.* Thus, on its face the charge of the trial judge, with emphasis on the reasonableness of the defendants' actions, is an incorrect statement of the law. Defendants, however, argue that a nuisance analysis is "useful in situations such as this case presents because it requires of the fact finder a consideration of the reasonableness of the defendant's conduct in light of all the circumstances." In effect, de-

fendants argue that this Court should abandon the civil law rule in favor of the rule of reasonable use. For the reasons which follow, we agree.

In this jurisdiction, as already noted, various modifications of the strict civil law doctrine have been made, case by case, to permit the reasonable use of land. Doubtless the evolution of the law could continue in such piecemeal fashion. This method of change, however, has left a legacy of contradiction and confusion in our law regarding the drainage of surface water.

The nature of this confusion and its cause are revealed by examination of the methods by which drainage law problems have been analyzed. The civil law doctrine has historically been regarded as a species of property law. Thus most courts have articulated the doctrine through property law concepts such as rights, servitudes, easements, and so forth. *E.g., Clark v. Guano Co., supra; see* Comment, The Application of Surface Water Rules in Urban Areas, 42 Mo. L. Rev. 76 (1977). These property concepts are rigid and absolute in nature and, while they are appropriate where the civil law doctrine is strictly applied, they serve as an impediment where it becomes necessary to modify the doctrine to accommodate changing social and economic needs. Kinyon and McClure, Interference with Surface Waters, 24 Minn. L. Rev. 891 (1940).

The resulting inflexibility presents a particularly difficult problem in drainage cases. In an era of increasing urbanization and suburbanization, drainage of surface water most often becomes a subordinate feature of the more general problem of proper land use—a problem acutely sensitive to social change. Since property concepts do not easily admit of modification, many courts, *ours included*, have responded by making exceptions to the rule on a case-by-case basis, *e.g., Mizzell v. McGowan, supra*, or by adjusting the theory of the action in a particular case to achieve a just result, *compare City of Kings Mountain v. Goforth, supra, with Midgett v. Highway Commission, supra; Davis v. R.R., supra, and Johnson v. Winston-Salem*, 239 N.C. 697, 81 S.E. 2d 153 (1954).

The adoption of exceptions, most of which incorporate some element of reasonable use, has resulted in uncertainty of the law and reduced predictability which is a chief virtue of the civil law rule. *Butler v. Bruno, supra.* Adjustments in the theory of the action tend to cause confusion when courts are required to pass on the applicability of statutes of limitation or the availability of other defenses such as contributory negligence or easement by prescrip-

tion. Maloney and Plager, Diffused Surface Water: Scourge or Bounty?, 8 Nat. Res. J. 72 (1968). Our decisions seem to provide clear guidance to attorneys and trial courts only in a case where the facts are on "all fours" with the facts of a previously decided case. Hence it is understandable that, as later appears, the able trial judge in the case before us charged on both the civil law rule and the reasonable use rule!

We believe the reasonable use doctrine affords a sounder approach to the problems presented by surface water drainage. It can be applied effectively, fairly and consistently in any factual setting, *Butler v. Bruno, supra*, and thus has the capacity to accommodate changing social needs without occasioning the unpredictable disruptions in the law associated with our civil law rule.

Other advantages of the reasonable use rule, particularly those relating to evidentiary aspects, are less obvious though no less important. Under the civil law rule it is crucial to determine the "natural flow" of the surface water. The continual process of construction and reconstruction, a hallmark of our age, has made it increasingly difficult to determine accurately how surface waters flowed "when untouched and undirected by the hand of man." *City of Houston v. Renault, Inc., supra.* Adoption of the reasonable use rule obviates the necessity of making such a finding. *See* Comment, The Application of Surface Water Rules in Urban Areas, 42 Mo. L. Rev. 76 (1977). In sum, we think the reasonable use rule is more in line with the realities of modern life and that consistency, fairness and justice are better served through the flexibility afforded by that rule.

Accordingly, we now formally adopt the rule of reasonable use with respect to *surface water drainage*. That rule is expressed as follows: Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage. *Armstrong v. Francis Corp., supra; accord, Weinberg v. Northern Alaska Development Corp., supra.*

Analytically, a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action, with liability arising where the conduct of the landowner making the alterations in the flow of surface water is either (1) intentional and unreasonable or (2) negligent, reckless or in the course of an abnormally dangerous activity. *See* Restatement

of Torts, § 833 (1939); Restatement (Second) of Torts § 822 (Tent. Draft No. 17, 1971); *accord, Watts v. Manufacturing Co.*, 256 N.C. 611, 124 S.E. 2d 809 (1962); *Morgan v. Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682 (1953); *City of Houston v. Renault, Inc., supra; Sanford v. University of Utah, supra; State v. Deetz, supra.*

Most nuisances of this kind are intentional, usually in the sense that "the defendant has *created or continued* the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow." (Emphasis added.) W. Prosser, Law of Torts § 87 (4th Ed. 1971). Other nuisances may arise from negligence as, for example, where the defendant negligently permits otherwise adequate culverts replacing natural drainways to become obstructed, *Johnson v. City of Winston-Salem*, 239 N.C. 697, 81 S.E. 2d 153 (1954); *Price v. R.R.*, 179 N.C. 279, 102 S.E. 308 (1920).

[6] Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable. This is the essential inquiry in any nuisance action. *See Watts v. Manufacturing Co., supra; Morgan v. Oil Co., supra.*

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. *Armstrong v. Francis Corp., supra; State v. Deetz, supra;* Restatement (Second) of Torts § 826 (Tent. Draft No. 18, 1972). Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence. *Rodrigues v. State, supra; Armstrong v. Francis Corp., supra; Watts v. Manufacturing Co., supra; Jones v. Boeing, supra;* Restatement of Torts §§ 829-831 (1939); Restatement (Second) of Torts §§ 827, 828 (Tent. Draft No. 17, 1971); Restatement (Second) of Torts § 829A (Tent. Draft No. 18, 1972); Note, 50 Ky. L.J. 254 (1961-62).

[7] We emphasize that, even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility

arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance "if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation." *See* Restatement (Second) of Torts (Tent. Draft No. 17, 1971); Restatement (Second) of Torts §§ 826, 829A (Tent. Draft No. 18, 1972). The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant.

As the New Jersey court perceptively noted in *Armstrong v. Francis Corp., supra*:

> ". . . [W]hile today's mass home building projects . . . are assuredly in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas of our State into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit. Social progress and the common well-being are in actuality better served by a just and right balancing of the competing interests according to the general principles of fairness and common sense which attend the application of the rule of reason."

We do not view the formal adoption of the rule of reasonable use as an innovation in the law of North Carolina. In the past, modifications in drainage water law have been piecemeal as required by time and circumstance. Our action today simply recognizes that fact and approves a rule by which adjustments in the rights and duties of landowners may be made fairly and justly without disrupting the consistency of the law. Thus we adopt the reasonable use rule as an act of clarification—not innovation.

We now consider the charge of the trial judge to determine whether he correctly instructed the jury. In relevant part the judge instructed as follows:

> "Now, the first issue: did the defendants Aiken create a nuisance by installing and covering a 36-inch drain across their property. In order to answer that issue with any intelligent approach to it, you must know what is meant by the use of the word 'nuisance' as applied in that issue. Now I instruct you that the law provides that every owner of land has a right to be free from interference with the use and enjoyment of his land. When one person by the improper use of his land does injury to the

land, property, or rights of another, although he does not actually physically trespass upon such property, that conduct constitutes a private nuisance. In order for the plaintiff in this case to recover for a private nuisance, the conduct complained of, that is, the conduct that the plaintiffs say that the Aikens did, that conduct must be unreasonable, and there must be a substantial invasion of the plaintiffs' interest in the private use and enjoyment of their property although the defendants did not actually trespass upon the plaintiffs' property. It must work some substantial injury to the plaintiffs' property. The law of private nuisance rests upon the concept that every person should use his own property as not to injure the property of another.

As a consequence, a private nuisance exists in a legal sense when one person makes an improper use of his own property and in that way injures the land or property of his neighbor. An invasion of another's interest in the use and enjoyment of his land is intentional in the law of private nuisance when the person whose conduct is in question has a basis for liability actionable in the purpose in causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct. A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury.

Now, members of the jury, conduct may be a nuisance by reason of its location or the manner in which it is constructed, maintained, or operated. For there to be liability, the defendants Aikens' conduct must have been unreasonable, and such unreasonable conduct must have caused substantial injury to the plaintiffs Pendergrasts' property. In determining if the defendants Aikens' conduct was unreasonable, you are to consider all of the circumstances of this case. The question is not whether a reasonable person in the plaintiffs' or the defendants' position would regard the conduct as unreasonable, but whether reasonable persons in general looking at the whole situation impartially and objectively would consider it unreasonable. Some of the circumstances which you should consider on the question of the reasonableness of the defendants' conduct include the defendants' conduct itself, the character of the neighborhood, the relationship of the properties in question, the nature, utility and social value of both plaintiffs' and

defendants' use of their land, the extent, nature and frequency of the alleged harm to the plaintiffs' interest. All of the circumstances in the case must be considered."

To this point the instruction, though somewhat rough, is substantially in accord with the rule of reasonable use as applied to the facts of this case. The trial judge went on, however, to state:

"Now one of the circumstances existing from the evidence in the case is the relationship of the two pieces of property; one being that of the plaintiffs, being an upper property, and that of the defendants being a lower property in speaking of the flow of the water. The water first comes to Mr. Pendergrast's property and then goes to the Aikens' property. So the Pendergrasts own what is known as the upper estate, and the Aikens own the lower estate.

Now the law confers on the owner of an upper estate of land an easement, or servitude, in the lower estate for the drainage of surface waters flowing in its natural course and manner without obstruction or interruption by the owners of the lower estate to the detriment or injury of the upper estate. Each of the lower parcels along the drainway are servient to those on the higher level to the extent that each is required to receive and allow passage of the natural flow of surface water from the higher land. As servient to the upper estate, the defendants are not permitted by law to interrupt or prevent the natural passage of the water in the event it causes damage to the upper estate. Where a lower estate, such as the Aikens' in this case, presumably for their own convenience and for the better enjoyment of their property, closed the natural depression and channel through which the water from the upper dominant tenement had been accustomed to flow and installed in lieu thereof an underground culvert or conduit, the law imposed upon the defendants' ownership the burden of installing a pipe of sufficient size to accommodate the natural flow of surface water from the upper tenement across the defendants' land without injury to the upper tenement's property."

[8] By this latter statement the trial judge departed from the reasonable use rule and, using such property terms as easement and servitude, reverted to the civil law rule. The juxtaposition of reasonable use and civil law concepts placed contradictory instructions before the jury and could have no other effect than to confuse and mislead it. In that respect there was error in the charge. *See*

Hardee v. York, 262 N.C. 237, 136 S.E. 2d 582 (1964); *Hubbard v. Southern R. Co.*, 203 N.C. 675, 166 S.E. 802 (1932).

[9] We now turn to the second issue raised by plaintiffs' assignment of error, that is, did the court err in instructing the jury that it must first determine whether defendant created a nuisance, and then separately decide whether plaintiffs were harmed thereby.

In his original charge the trial judge instructed the jury that it must determine whether defendants created a nuisance. The court then told the jury that, should it answer that issue yes, it would "take up and consider the second issue, that issue being: if so, did the defendants Aiken thereby cause damage to the plaintiffs' property. Another way of saying that issue is: if you find that a nuisance was created, did the nuisance damage the plaintiffs' property." Later, in reply to a direct question from the foreman of the jury, the trial judge stated that the jury could answer the first issue yes and the second issue no.

The court erred in these instructions. The jury could not find that a nuisance existed at all without a finding of substantial damage to plaintiffs. *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E. 2d 121 (1965); *Watts v. Manufacturing Co., supra.* This is so because "[e]ach individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together." *Watts v. Manufacturing Co., supra.* Indeed the judge in one part of his charge instructed the jury that a finding of substantial injury to the plaintiff was a necessary element of a finding that a private nuisance existed.

Thus it was error to instruct the jury that it might answer the first issue yes and the second no. When the jury returned such a verdict it was hopelessly contradictory and its true meaning could not be determined. *See Cody v. England*, 216 N.C. 604, 5 S.E. 2d 833 (1939). Because of the possibility of such a meaningless verdict, this Court has previously noted in *obiter dictum* that a submission of the second issue, in a private nuisance case, is itself error. *Watts v. Manufacturing Co., supra.*

[10] The third issue raised by plaintiffs' assignment of error concerns the court's supplemental instructions on the effect of the two 24-inch culverts under Allen Avenue. These instructions arose from the following colloquy:

> "FOREMAN: . . . Our question really concerns the release of the water from the Aiken property onto Allen Street ver-

sus—in other words, if the release of the water onto Allen Street is limited beyond the limitation placed by the Aiken property, how that would affect it.

COURT: Now let me see if I can answer your question. Is your question this: if there is more water coming off of the Aiken property than the Allen Street culverts can handle, how does that affect the lawsuit?

FOREMAN: Yes, sir.

COURT: Speaking about the two twenty-four inch culverts going under Allen Street.

FOREMAN: If the thirty-six inch culvert releases more water than the two twenty-fours will handle, therefore it's backed up because of that, how does that affect it?

COURT: Well, let me say this: now the plaintiffs have the burden of proof on each issue, and the plaintiffs have the burden to prove that by the installation and covering of the thirty-six inch culvert the defendants created a nuisance, and that the creation of that nuisance is what caused the damage to their property.

COURT: Now, if the jury finds that the plaintiffs have failed to prove that the creation—well, first of all they've got to prove there's a nuisance. If you find that they do prove that there's a nuisance, now then if you fail to find that the plaintiffs have satisfied you that they were damaged as a result of the creation of the nuisance, then the plaintiffs cannot prevail. Now if the jury finds that the plaintiffs' damage is not caused by the creation of a nuisance by the defendant, assuming that you find they have created a nuisance—I don't mean to infer what your verdict should be on that issue, but if you find that the damage was not caused by the creation of a nuisance, but was caused by something further downstream, then the plaintiffs could not recover."

In passing we note the trial judge again erred in instructing the jury that it must determine substantial damages apart from its determination of the existence of a nuisance. Of more immediate concern, however, is that part of the instruction stating ". . . but if you find that the damage was not caused by the creation of a nuisance, but was caused by something further downstream, then the plaintiffs could not recover."

As an abstract concept of law this statement is correct and, were there some evidence that the downstream 24-inch culverts caused the water to back onto plaintiffs' land, the instruction would have been entirely proper. Here, however, there was neither allegation nor proof that the 24-inch culverts under Allen Avenue caused the flooding of plaintiffs' land. In fact, all evidence is to the contrary. John Pendergrast, a named plaintiff, testified that the water had never before backed up on plaintiffs' land although it had flooded the southern part of defendants' land. Numerous witnesses confirmed this testimony. Walter Bearden, an expert in the field of civil engineering, testified that the 36-inch culvert emplaced by the defendant was "completely inadequate to carry the water." Moreover, there is evidence that water continued to back onto the plaintiffs' land after the 24-inch culverts had been replaced by 60-inch culverts.

A court errs in charging upon a principle of law which is not presented by the pleadings and which does not arise from the evidence. *Motor Freight v. DuBose*, 260 N.C. 497, 133 S.E. 2d 129 (1963). Under the pleadings and evidence in this case the effect, if any, of the two 24-inch culverts had no legal significance relative to the dispute between the plaintiffs and defendants and the court erred in instructing the jury that it might consider the inadequate drainage from the Aiken land.

The judge had a positive duty to instruct the jury on all substantial matters arising from the evidence, whether or not requested to do so. *See generally* 7 N.C. Index 2d, Trial § 33. As applied to this case, this principle obligated the court, upon the jury's inquiry, to instruct it not to consider the inadequacies of the Allen Avenue drainage in deciding whether defendants had wrongfully diverted the flow of surface waters upon plaintiffs' land. This the court did not do.

For errors committed, there must be a

New trial.

FRANKLIN L. RUSH (SUBSTITUTED AS PLAINTIFF IN LIEU OF MATTHEW CROSS) v. JAMES W. BECKWITH

No. 97

(Filed 23 August 1977)

1. **Cancellation and Rescission of Instruments § 11; Fraud § 13— rescission of deeds—threats by defendant—instructions proper**

In an action to rescind three deeds allegedly procured through fraud, undue influence and duress, the evidence supported the court's instruction that there was evidence tending to show that at the time of signing of the deeds "or at some earlier time on the same day" defendant told the aged property owner that if he did not sign the deeds defendant would have his wife put in an asylum and would turn him out to root like a hog.

2. **Cancellation and Rescission of Instruments § 9.1; Fraud § 11— rescission of deeds—mental and physical condition of property owners—defendant's behavior—evidence properly admitted**

In an action to rescind three deeds allegedly procured through fraud, undue influence and duress, the trial court did not err in admitting evidence tending to show: (1) the mental and physical condition of the aged landowners before and after the execution of the deeds, since the condition of the landowners bore directly upon their ability to withstand the unfair tactics, threats or blandishments of a stronger will, and the mental condition of the landowner wife also bore upon defendant's alleged threat to place her in an asylum and the probable reaction of the landowner husband to defendant's alleged threat to "put her away"; (2) that defendant gave the landowners no assistance from one year after execution of the deeds, since that evidence reasonably tended to show the probability that defendant never intended to support and care for the landowners as he had promised to do in exchange for the deeds.

ON plaintiff's petition for discretionary review of the unpublished opinion of the Court of Appeals (filed 21 July 1976), which reversed the judgment of *Bailey, J.*, at the 7 July 1975 session of the Superior Court of WAKE. This case was docketed and argued as Case No. 154 at the Fall Term 1976.

Matthew Cross (Cross) and wife, Maggie Cross, the original plaintiffs, brought this action on 14 November 1969 to rescind three deeds dated 5 June 1966 by which they purported to convey three tracts of land containing approximately 44.48 acres to defendant James W. Beckwith. Plaintiffs allege that defendant procured the deeds through fraud, undue influence and duress. The first trial, conducted at the 14 February 1972 session, resulted in a judgment for plaintiffs and defendant appealed. In April 1972, during the pendency of that appeal, Maggie died testate, leaving all her property to Cross. Thereafter the Court of Appeals ordered a new trial. *Cross v. Beckwith*, 16 N.C. App. 361, 192 S.E. 2d 64 (1972).

At the second trial plaintiff Cross again prevailed. The jury found that the execution of the three deeds was "procured by duress exercised by James W. Beckwith over Matthew Cross, as alleged in the complaint." Upon defendant's appeal, the Court of Appeals again ordered a new trial, and it is that unpublished decision which we now review.

Cross died testate on 30 July 1976, nine days after the decision of the Court of Appeals was filed. In his will, which was probated on 21 December 1976, Cross left his entire estate to the Reverend Franklin L. Rush (Rush). In this Court, Rush moved that he be substituted for Cross as the party plaintiff in this action, and this motion was allowed.

At the second trial Cross was present in court but incapable of testifying. Accordingly, Judge Bailey permitted Cross to testify by way of a transcript of his testimony in a former trial.

Evidence for plaintiff tended to show the following facts:

In 1966 Maggie and Matthew Cross, an elderly black couple, were living on their small farm in Wake County, which Matthew had formerly farmed by himself. He was then receiving income from 3.18 acres of tobacco, three dilapidated "rental units," and social security. Maggie, a retired school teacher, was suffering from high blood pressure, diabetes, and hardening of the arteries. In 1964 she had a stroke; in 1965 she had another. Thereafter Maggie was partially paralyzed and her memory was impaired. She could no longer handle the Crosses' business affairs. Her sister, Beulah Clegg, and her niece, Annie Lawrence, helped them with their business affairs "over a number of years." They also provided the Crosses with transportation, cleaned the home, and did their grocery shopping. On 15 April 1964 Matthew and Maggie deeded to Beulah Clegg Maggie's interest in 32 acres of land which she and Beulah had inherited from their mother. Sometime thereafter Beulah and Annie quit handling the Crosses' affairs and did nothing for Matthew and Maggie unless they were asked.

At the time of the first trial in 1972 Cross was "some better than 80 years old." His testimony tended to show that he had not had "much schooling" and could neither read nor write. Since the death of Maggie's sister, Beulah, Rush had helped him with his business affairs and defendant Beckwith, a cousin of Maggie's, had never assisted them in any way or provided them with any support, medical attention or other essentials.

Cross's testimony with reference to the execution of the deeds in suit is set out verbatim below:

"A. . . [Beckwith] Brought a man in there on Sunday morning there while myself and my wife was looking at the radio, there when she got so she couldn't walk up to the church. . . . Mr. Beckwith came to see me with this man who I spoke with.

Q. Well, Matthew, tell in your own words what happened when they came to your house?

A. When he came to the house in there, the lawyer set down to writing on the paper and so then handed it to me and told me if I . . . . Why he was going to take my wife and take her to an asylum and put me out for hogs to root, something like that.

Q. Left you out for what?

A. Out to root like a hog, something like that.

Q. Did Beckwith say that to you?

A. Yes, sir. I did not ask James Beckwith to come to my house that day. I didn't know he was coming. I did not ask for any lawyer to come to my house that day. I did not request anyone to come to see me that day. I did have a lawyer at that time. I had Mr. Harris. He had been handling my legal affairs up to then. Mr. Beckwith did not make any statement to me about the purpose of his visit.

Q. He just handed you the paper to sign?

A. Yes. I did not know what the papers were that he handed to me. He did not explain what the papers were. He did not read them to me. I couldn't read anyhow. I just signed the papers. She could not read. Maggie signed the papers.

Q. And you signed them before or after Maggie signed them?

A. Well, I signed them before then. The reason I did—spoke about taking her away. Done spoke about taking my wife to an asylum and I felt like less a man and let my wife be take to an asylum. Didn't have any business in an asylum."

Cross also testified that at the time he signed the paper which Beckwith brought him, he did not intend to convey his property to him, and that he did not give defendant the authority to look after his affairs at any time. Cross remembered that in February 1966 Mr. Robert Cotten had drawn a will for him and Maggie but he insisted that he had not employed him. He could not recall the contents of the will but thought the beneficiaries named were "next of kin."

Rush's testimony tended to show the following facts:

Prior to 1968 Rush paid monthly visits to Matthew and Maggie Cross, who were members of his church. Matthew was a trustee and Maggie, the "treasurer-administrator of kindness." In 1968 Rush "observed them as individuals who obviously were neglected and needed some attention." The condition of their home was "undesirable," and at times they had no fuel and no food. Maggie, a diabetic, was not receiving proper medication. Therefore, when Maggie asked him to "provide some assistance," he agreed. He found hospital insurance policies which had lapsed because the premiums had not been paid and uncashed social security checks which had accumulated over a period of time. In 1968 and 1969 Rush was handling all their business transactions. He collected their rents, paid their bills, purchased their food and medicine, carried them to the doctor and hospital, and deposited their checks. At that time no one else was doing anything for the Crosses. Although he saw defendant on three or four occasions Rush knows of nothing he did for the Crosses during 1968, 1969, 1970, or thereafter.

In 1968 Cross told Rush that the deeds in suit were executed under the following circumstances: On a Sunday morning when he and Maggie were listening to the radio, defendant, along with some man, came in and asked him to sign papers; that Beckwith said if he did not sign he would be placed in a house "in the edge of the woods" and Maggie would be "put away" in a "crazy house"; that "he would have been less than a man to refuse" under these conditions; so he signed, but he did not know what he was signing.

"In 1970 or thereabouts" the Crosses had become physically unable to care for themselves, and Rush was required to make daily visits to their home. Neither Matthew nor Maggie was then capable of signing checks or reading, and no one but Rush was providing any assistance whatever for them. In consequence they requested him to contact their attorney, Mr. W. C. Harris, "and make it official that [Rush] would care for their affairs." After consulting with Annie Lawrence, who urged him to comply with the Crosses' request, he took them to Mr. Harris's office. In consequence Mr. Harris drew a will which was "fixed so that if Matthew died prior to Maggie, all of the property would in fact go to her and vice versa, and if [Rush] lived longer than either, for [his] services, the remainder . . . would go to [him]."

At the time of the second trial, Cross was in a nursing home, where his expenses exceeded his income, and Rush was spending $160.00 a month of his own money to maintain him.

Rush testified on cross-examination that he would receive a financial benefit from this lawsuit only to the extent that Cross's expenses for the remainder of his life did not exceed the value of Cross's property.

At the close of plaintiff's evidence, defendant's motion for a directed verdict was denied and he offered the evidence summarized below.

On 6 February 1966 James Beckwith had been living in Baltimore for 26 years. On that date he received a telephone call from his relative, Matthew Cross. Without explaining himself, Cross asked Beckwith to come down to Holly Springs. Prior to this time Beckwith had occasionally visited his parents there. On 9 February he went to the Cross home. He found the Crosses without heat and with bursted water pipes. He had the pipes fixed, repaired the heat, and made other minor improvements.

Beckwith testified, "[After that,] Mathie and Maggie asked me to take them down to Fuquay Springs. . . . When we got to Fuquay, they asked me to take them by lawyer Cotten's office. This was on the 10th of February, 1966. They did not tell me the reason they wanted me to go to lawyer Cotten's." Once there, the Crosses asked Cotten to prepare four sets of documents: two wills, each providing that the property of the first Cross to die would pass to the survivor and, upon the death of the survivor, the property would go to Beckwith; a letter, addressed to Beckwith and signed by Matthew and Maggie, naming him their "trustee"; a contract between John Smart and Matthew Cross for the rental of Cross's tobacco allotment; and three deeds conveying certain properties to Beckwith. All the documents were prepared except for the deeds which were delayed, because the description of the property was not then available.

Beckwith returned to Baltimore. However, he returned to North Carolina every other week to check with the Crosses. About a month later, the Crosses gave Beckwith their deeds to the property in suit and they "asked me to have them transferred over into my name. . . . When I got the deeds, I kept them for a couple of weeks and they specified to me, 'Now I don't want you to use lawyer Cotten to have those deeds transferred. I want you to get an attorney that you don't know anything about or we don't know anything about.' " Beckwith secured the services of Mr. Keeter and Mr. Alton Kornegay of Raleigh.

Beckwith had the property surveyed and when the deeds were ready he told the Crosses. Two weeks later, on 5 June 1966, he came

down from Baltimore to complete the conveyance. He arrived at the Crosses' two hours before Kornegay and his legal secretary, Mrs. Ruth Hayner. According to Beckwith he introduced Kornegay, who explained to the Crosses the purpose of the documents and in general made sure that Matthew and Maggie knew what they were doing. No threats were made, and the deeds were signed. Maggie and Matthew wrote Kornegay a check for $385, and "in return I gave Mathie and Maggie $300 in cash and a $150 check. They were deposited in the bank the next day." The bookkeeper of the Fidelity Bank in Fuquay testified that Matthew and Maggie Cross deposited $200 in cash and a $150 check drawn on a Baltimore bank in their account on 6 June 1966. Mrs. Hayner corroborated all the essential details of Beckwith's testimony concerning the Sunday meeting, and Cotten corroborated his testimony with reference to the events which occurred in his law office on or around 10 February 1966.

Beckwith testified that he had promised to look after Matthew and Maggie, and he did "just that" until sometime in September 1968 when Matthew told him he was "going to try to get the land back" and Mr. Harris had told them not to accept anything else from him. Beckwith also testified that "long before September 1968" Mr. Harris had requested him "on behalf of Matthew and Maggie to reconvey this property to them."

Randolph L. Worth and W. C. Harris, Jr., for plaintiff appellant.

Broughton, Broughton, McConnell & Boxley, P.A., by Charles P. Wilkins and Gregory B. Crampton for defendant appellee.

SHARP, Chief Justice.

[1] Plaintiff's appeal presents only the question whether the Court of Appeals erred in holding that the trial judge, in his charge to the jury, misstated the evidence on a material fact to the prejudice of defendant.

The challenged instruction is contained within the bracketed portion of the charge set out below:

"Now, there is evidence in this case, ladies and gentlemen, that in substance tends to show—what the evidence does show is for you to say always—but in substance the evidence tends to show that on the 6th of June, 1966, Mr. Beckwith came to the home of the Crosses on a Sunday morning while they were listening to church on the radio; that after he had been there for some substantial period of

time, I recall his evidence to have been an hour and a half to two hours, but again be guided by your own recollection, a Mr. Kornegay, accompanied by a Mrs. a Miss Ruth Hayner, who was at that time Mr. Kornegay's secretary, and Mr. Kornegay was at that time an attorney at law, that at that time Mr. Kornegay produced three deeds; [that Mr. Beckwith either then or at an earlier time on this same day had told Mr. Cross that if he did not sign the deeds that he would have his wife put in an asylum and would turn him out to root like a hog. Mr. Cross has testified that he signed the document because he didn't think his wife belonged in an asylum; that he knew she was sick; that he felt like he would be less of a man if he permitted that to happen.]"

In due time counsel for defendant objected to the bracketed portion of the foregoing instruction on the ground that there was no evidence tending to show that Beckwith had made any threats to Cross *prior to* the time Mr. Kornegay produced the deeds, and he requested him to correct his charge in this respect. The request was denied. Judge Bailey, however, again instructed the jury "to consider the evidence only as they recalled it and to disregard any recitation of evidence that conflicted with their own memories."

Since the testimony of Mrs. Hayner, who was the legal secretary who typed the deeds and also the notary public before whom they were acknowledged, contains no reference to any threats by any person at the time of their execution and implicitly negates any such threats, defendant contends that the judge should have required the jury to find that if no threats were made in Mrs. Hayner's presence none were made at all. Such an instruction would, of course, have forced the jury to reject the testimony of either Mrs. Hayner or Cross, whereas the instruction given permitted the jury to avoid this dilemma. Thus defendant contends the judge's asserted misstatement was not harmless because it would reasonably have affected the outcome of the trial.

Were we to adopt defendant's premise we would also adopt his conclusion. *See In re Taylor*, 260 N.C. 232, 132 S.E. 2d 488 (1963). *See also State v. McClain*, 282 N.C. 396, 400, 193 S.E. 2d 113, 115 (1972). However, in this case, the record evidence is reasonably conducive to the interpretation that the threats, if made, were made before Mr. Kornegay and Mrs. Hayner arrived at the Crosses' home.

Defendant testified that he had been at the Cross home on 5 June 1966 "for maybe an hour, two hours, something like that," before Kornegay and Mrs. Hayner arrived. The record does not

disclose what he did or might have said to the Crosses during this time. The testimony of Matthew Cross was confused. The old man frequently expressed uncertainty as to times and dates. His testimony is clear and positive only as to these things: (1) Beckwith arrived at his home on the Sunday morning the deeds were signed at a time when he and his wife were listening to a church service on the radio; (2) Beckwith threatened to put Maggie in the asylum and turn him out to root like a hog if he did not sign "the papers," and (3) he signed them only because Beckwith made these threats. Thus, his testimony, if the jury found it to be credible, would support a finding that Beckwith threatened Cross either at the time of signing or at some earlier time on the same day. Since Beckwith arrived from one to two hours before Mrs. Hayner, who testified that no threats were made while she was present, the evidence reasonably supports an inference that the threats, if made, were made before she arrived. We hold that there was no error in the judge's recapitulation of the evidence and that the Court of Appeals was in error in ordering a third trial.

[2] Defendant brings forward for review the nine assignments of error discussed in his brief filed in the Court of Appeals. By assignments of error Nos. 1, 4, 5, 10 and 12 he challenges as irrelevant and prejudicial the admission of evidence tending to show the physical and mental condition of Maggie Cross, whose death in 1972 removed her as a party to the action; evidence as to the Crosses' mental and physical condition after 5 June 1966; and evidence that Beckwith gave them no assistance after 1967.

Evidence "is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Bank v. Stack*, 179 N.C. 514, 516, 103 S.E. 67 (1920). *Accord, State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). "Testimony is relevant if it reasonably tends to establish the probability or improbability of a fact in issue." State *ex rel. Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E. 2d 292, 300 (1951). Applying these principles, we hold that the challenged evidence was properly admitted.

The two issues submitted to the jury in this case were whether defendant procured Cross's signature to the three deeds by (1) fraud and undue influence or (2) by duress. Ordinarily, the complete circumstances surrounding a transaction in which these particular wrongs are alleged are relevant upon the right of a party to avoid the transaction. Thus, the mental and physical condition of each of

the Crosses on 5 June 1966 bore directly upon their ability to withstand the unfair tactics, threats, or blandishments of a stronger will. *See Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Maggie's mental condition also bore upon Beckwith's alleged threat to place her in an asylum, and the probable reaction of a devoted, albeit ignorant and senile, husband to the threat "to put her away."

Likewise, evidence which tended to show that after 1966 defendant did not assist or care for the Crosses despite their obvious need was relevant to the inquiry whether he obtained their deeds by fraud, undue influence, or duress. "Subsequent acts and conduct are competent on the issue of original intent and purpose." *Early v. Eley*, 243 N.C. 695, 701, 91 S.E. 2d 919, 923 (1956). One of the allegations upon which the original plaintiffs based their right to rescission was that defendant, knowing their feeble physical condition and mental deterioration, had procured their signatures to the deeds by fraudulently promising he would rent their land for them, look after all their affairs as their trustee, and care for them the remainder of their lives.

Beckwith testified that on 10 February 1966, when he and the Crosses were negotiating, he promised to "assist them in any and everything that they couldn't do. . . . I promised to look after them, and I did just that, up to '68. . . ." He also testified that his promise was the consideration which supported the conveyances to him. Cross's testimony that defendant never rendered any assistance to him and Maggie, and defendant's testimony that he never provided any assistance or care after 1967, "reasonably tends to establish the probability" that defendant, a resident of Baltimore, never intended to support, maintain, and care for the Crosses, his elderly collateral kin who lived 300 miles from Baltimore and who, in natural course, would need infinite personal care and medical attention for the remainder of their lives.

As defendant points out, the evidence tending to show the sad plight of this disabled elderly couple, whose assets—the fruits of an industrious life—were sufficient to care for them adequately until the end if properly administered, was likely to touch the hearts of the jurors. However, "relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." *State v. Wall*, 243 N.C. 238, 242, 90 S.E. 2d 383, 386 (1955). Finally, since it was not error to admit this evidence, it was certainly not error for the judge to mention it in his recapitulation.

Defendant's assignments Nos. 1, 4, 5, 10 and 12 are overruled.

By assignment No. 3 defendant asserts that the trial judge abused his discretion in permitting plaintiff's counsel to ask Cross a number of leading questions. Counsel concedes, however, that it is within the sound discretion of the trial judge to determine when counsel shall be permitted to ask leading questions. Ordinarily the court will permit leading questions when the witness "has difficulty in understanding the question because of immaturity, age, infirmity or ignorance." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974). On this record we find no abuse of judicial discretion in the rulings here challenged. Assignment of error No. 3 is overruled.

Of defendant's three remaining assignments of error, the two which relate to the charge (Nos. 13 and 14) are entirely without merit and require no discussion. The other (No. 6) challenges three questions on cross-examination which were intended to elicit from defendant an admission that he knew from a deposition which Maggie had made that she had corroborated the testimony of Cross and that he likewise knew in 1969 or 1970 that the status of her property was "driving her crazy." These questions, as framed, assumed facts not supported by any evidence in the case and were, therefore, improper. The judge erred in not sustaining defendant's objections to them. However, in his answers defendant himself pointed out the inherent defect in the questions and emphatically denied the implications they contained. We cannot believe that these questions had any appreciable impact on the trial or that there is a reasonable probability that they influenced the verdict. The error, therefore, was harmless. *Wilson v. Suncrest Lumber Co.*, 186 N.C. 56, 118 S.E. 797 (1923).

On the evidence a jury might have decided this case "either way." However, two juries have decided it the same way. In the second trial we find no error of law entitling defendant to a third trial. Accordingly, the decision of the Court of Appeals is reversed. The cause will be remanded to the Superior Court of Wake County with directions to enter judgment for the substitute plaintiff upon the verdict rendered.

Reversed and remanded.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1977

IN RE INQUIRY CONCERNING JUDGE W. MILTON NOWELL

No. 95

(Filed 12 September 1977)

1. **Judges § 7— nature of proceeding before Judicial Standards Commission**

A proceeding before the Judicial Standards Commission is neither a civil nor a criminal action but is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship; its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice.

2. **Judges § 7— censure or removal of judge—due process**

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual judge, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process.

3. **Judges § 7— censure or removal of judges—passage of statutes prior to enabling constitutional amendment**

Article 30 of G.S. Ch. 7A, which provides a procedure for the censure or removal of a judge, is not unconstitutional because it was enacted prior to the time the constitutional amendment authorizing its enactment was ratified by the people, since the General Assembly had the power to pass a statute in anticipation of a constitutional amendment and to provide that it would take effect upon the adoption of the constitutional amendment, and the General Assembly which enacted Article 30 so provided.

4. **Judges § 7— censure or removal of judge—Judicial Standards Commission—no delegation of legislative authority**

Statutes providing a procedure for the censure or removal of a judge, Article 30 of G.S. Ch. 7A, do not constitute an improper delegation of legislative authority to an administrative agency, the Judicial Standards Commission.

5. Judges § 7— grounds for censure or removal—vagueness of statute

Portions of G.S. 7A-376 providing for the censure or removal of a judge for "wilful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" are not unconstitutionally vague.

6. Judges § 7— censure or removal of judge—Code of Judicial Conduct

The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of the statute providing the grounds for censure or removal of a judge, G.S. 7A-376.

7. Judges § 7— Judicial Standards Commission—discretion to investigate complaints and accept evidence

Statutes providing the procedure for the censure or removal of a judge do not illegally vest unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept.

8. Judges § 7— Judicial Standards Commission—investigative and judicial functions—due process

The combination of investigative and judicial functions in the Judicial Standards Commission does not violate a respondent judge's due process rights under either the federal or North Carolina constitutions, since the Commission can neither censure nor remove a judge but is only an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.

9. Judges § 7— censure or removal of judge—findings by Judicial Standards Commission—scope of review in Supreme Court

In reviewing a recommendation of the Judicial Standards Commission, the Supreme Court is not bound by findings of the Commission supported by substantial evidence but will make an independent evaluation of the evidence adduced before the Commission.

10. Judges § 7— proceedings before Judicial Standards Commission—quantum of proof

The quantum of proof in proceedings before the Judicial Standards Commission is proof by clear and convincing evidence—a burden greater than that of proof by a preponderance of the evidence and less than that of proof beyond a reasonable doubt.

11. Judges § 7— wilful misconduct in office defined

"Wilful misconduct in office" is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith.

12. Judges § 7— wilful misconduct in office—bad faith

While the term "wilful misconduct in office" necessarily would encompass conduct involving moral turpitude, dishonesty, corruption and any knowing misuse of the office, whatever the motive, these elements are not necessary to a finding of bad faith, since a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith.

13. Judges § 7— conduct prejudicial to the administration of justice

Wilful misconduct in office of necessity is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"; however, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute and may also commit indiscretions, or worse, in his private life so as to bring the judicial office into disrepute.

14. Constitutional Law § 32— criminal case—disposition in open court

The trial and disposition of criminal cases is the public's business and ought to be conducted in open court. N.C. Const., Art. I, § 18.

15. Judges § 7— failure to give prosecutor opportunity to be heard—Code of Judicial Conduct

A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant are entitled to be present and to be heard, and failure to accord the prosecutor such opportunity violates the North Carolina Code of Judicial Conduct, Canon 3A(4).

16. Judges § 7— censure of judge—ex parte disposition of criminal cases—"waiverable" offenses—actions not furtive or corrupt—practice of other judges

There is no merit in a judge's contention that he should not be censured for his ex parte disposition of two traffic cases out of court by ordering a deputy clerk of court to enter in each case "a prayer for judgment continued upon payment of the costs" because (1) the traffic offenses were "waiverable" before the clerk or a magistrate; (2) he could have entered the same judgments in open court; (3) his conduct was not directed toward any personal gain; and (4) it had been the practice of other judges in the district to dispose of cases out of court.

17. Judges § 7— ex parte disposition of criminal case—conduct prejudicial to administration of justice

The ex parte disposition of a criminal case out of court, or the disposition of any case for reasons other than an honest appraisal of the facts and law as disclosed by the evidence and the advocacy of both parties, will amount to conduct prejudicial to the administration of justice.

18. Judges § 7— misconduct in office—ex parte disposition of criminal cases outside courtroom—censure by Supreme Court

A district court judge is censured by the Supreme Court for wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute because of his disposition of two traffic cases outside the courtroom by entry of prayers for judgment continued when the court was not in session and without notice to the district attorney since he (1) improperly deprived the district attorney of the opportunity to participate in the disposition of the cases; (2) improperly removed the proceedings from the public domain; and (3) violated Canon 3A(4) of the North Carolina Code of Judicial Conduct.

Justice LAKE dissenting.

THIS matter is before the Court upon the recommendation of the Judicial Standards Commission (Commission) that Judge W.

Milton Nowell, a judge of the General Court of Justice, District Court Division, Eighth Judicial District, be censured for "wilful misconduct in office" and "conduct prejudicial to the administration of justice which brings the judicial office into disrepute," as these phrases are used in Article IV, § 17(2) of the North Carolina Constitution and in N.C. Gen. Stats. 7A-376 (Cum. Supp. 1975). The recommendation, filed in the Supreme Court on 30 March 1977, was argued on 14 July 1977 as Case #119.

Duke and Brown; Hulse and Hulse; and Thomas J. White, Jr., for Judge W. Milton Nowell, respondent.

Attorney General Rufus L. Edmisten; Deputy Attorney General Millard R. Rich, Jr.; and Associate Attorney James E. Scarbrough for the Judicial Standards Commission.

SHARP, Chief Justice.

A citizen having filed written charges against Judge Nowell (respondent), the Commission directed an investigation in accordance with G.S. 7A-377 and the Commission's Rule 7. Thereafter, on 1 August 1976, this proceeding was begun before the Commission by the filing of a complaint, verified by Millard R. Rich, Jr., Deputy Attorney General, whom the Commission appointed as special counsel (Commission Rule 8, 10). The complaint alleged that respondent had engaged in wilful misconduct in office and in conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The charges were that on 10 May 1976, prior to the opening of the criminal session of the District Court of Wayne County over which respondent was to preside, he disposed of two specified cases in the office of the Clerk of the Superior Court without notice to the prosecuting attorney for the State and in his absence. In each case the defendant was charged with a violation of the motor vehicle law and, as to each, respondent ordered the deputy clerk of the court to enter "a prayer for judgment continued upon payment of the costs."

In his answer, respondent's first defense was a motion to dismiss the complaint on the ground that the statute under which the Commission was attempting to proceed violated N.C. Const., Art. I, § 19 and U.S. Const. amend. XIV. As a second defense he denied the allegations of the complaint. As a third, or "further defense," he averred that the defendant Grantham was a high school student whose mother was employed and that he desired to minimize the time the boy and his mother would lose from school and work respectively. As to the defendant West, he alleged that a deputy sheriff had given him a "high recommendation."

In accordance with its rules, promulgated in 283 N.C. 764, *et seq.* (1973) and 288 N.C. 738 *et seq.* (1975), on 15 October 1976 the full Commission conducted a plenary hearing upon the charges contained in the complaint. Special Counsel Rich presented the evidence in support of the charges. Respondent, represented by his attorney of record, offered evidence and testified in his own behalf.

Thereafter the Commission made written findings of fact from which it concluded "as a matter of law" that the conduct of respondent detailed therein "constituted wilful misconduct in office and conduct prejudicial to the administration of justice, which brings the judicial office into disrepute." The specific findings upon which the Commission based these findings are the following:

"7. That Respondent was scheduled to preside over the District Court of Wayne County, Criminal Division, on May 10, 1976. That prior to the opening of court on said date, while in the office of the Clerk of Superior Court of Wayne County, Respondent, in Case #76CR3975, STATE v. DON CHRISTOPHER WEST, wherein Don Christopher West was charged with unlawfully and wilfully operating a motor vehicle on a public street or highway at a speed of 50 miles per hour in a 35 mile per hour zone, directed Mrs. Evelyn Edgerton, Deputy Clerk of Superior Court, who works in the Criminal District Court Division of the Clerk's Office, to enter a prayer for judgment continued upon the payment of costs and that Mrs. Edgerton did so enter said judgment. That at the time Respondent directed Mrs. Edgerton to enter said Judgment, and at the time said judgment was entered, the defendant Don Christopher West was not present, the defendant was not represented by counsel, the entry was not made in open court, the Assistant Solicitor who was prosecuting the criminal document on said date, Paul Wright, was not present and had no prior knowledge that such entry would be made.

"8. That Respondent, on May 10, 1976, in the offices of the Clerk of Superior Court of Wayne County, prior to the opening of the Criminal Division of the District Court of said County on said date, directed Mrs. Evelyn Edgerton, Deputy Clerk of Superior Court, to enter a prayer for judgment continued upon the payment of costs in Case #76CR4219, wherein James Randall Grantham was charged with unlawfully and wilfully operating a motor vehicle on a public street or highway 70 miles per hour in a 55 mile per hour zone. That the said entry was made by Mrs. Edgerton as directed by Respondent. That at the time said entry was made by Mrs. Edger-

ton at the direction of Respondent, said entry was not made in open court, was not made in the presence of the defendant James Randall Grantham, nor in the presence of an attorney representing Grantham, and was made without the knowledge and consent of Assistant Solicitor Paul Wright, who was prosecuting the criminal docket in District Court in said County on said date.

"9. That the aforesaid FINDINGS and this RECOMMENDATION were concurred in by five or more members of the Judicial Standards Commission."

Upon the foregoing findings and conclusions, the Commission recommended to the Supreme Court "that respondent be censured for said conduct."

In our consideration of the Commission's recommendation we begin with respondent's "first defense," *i.e.*, that the statutory authority under which the Commission proceeded, Art. 30, ch. 7A, N.C. Gen. Stats. (G.S. 7A-375, -377, (1975 Cum. Supp.)), hereinafter referred to as Article 30, violates the constitutional guarantees of due process, N.C. Const., Art. I, § 19, and U.S. Const., amend. XIV. Respondent contends:

(a) Article 30 is invalid because it was enacted prior to the time the constitutional amendment authorizing its enactment was ratified by the people.

(b) Article 30 constitutes an attempt by the General Assembly to abrogate "its legislative duties by unconstitutionally delegating them to an administrative agency, the Judicial Standards Commission," without providing any standards for the censure and removal of judges.

(c) The terms "wilful misconduct" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" are so vague as to be meaningless.

(d) The Commission combines the roles of prosecutor, judge and jury.

Before considering the foregoing contentions seriatim, we deem it appropriate to note the following pertinent facts:

At the general election on 7 November 1972 the voters of the State approved an amendment which rewrote N.C. Const. Art. IV, § 17. As rewritten, Art. IV, § 17(1) authorizes the General Assembly, after notice, to remove a Justice or Judge of the General Court of Justice for mental or physical incapacity by joint resolution

of two-thirds of all the members of each house. It further provides that removal from office by the General Assembly for any other cause shall be by impeachment. Article IV, § 17(2) *requires* the General Assembly to prescribe a procedure, in addition to impeachment and address set forth in (1), for the removal of a Justice or Judge for permanent mental or physical incapacity "and for the censure and removal of a Justice or Judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." In compliance with the foregoing constitutional mandate the General Assembly created our Judicial Standards Commission by the enactment of Article 30.

Over twenty jurisdictions have established commissions similar to ours. *See In re Diener*, 268 Md. 659, 662, 304 A. 2d 587, 589 (1973); Note, *Judicial Discipline—The North Carolina Commission System*, 54 N.C. L. Rev. 1074 (1976); American Judicature Society, Judicial Disability and Removal Commissions, Courts and Procedures (1972). The supreme courts of a number of these states have previously met the contentions made by respondent, and we are aided by their decisions.

[1] As pointed out in our previous decisions, a proceeding begun before the Commission is neither a civil nor a criminal action. *In re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1975); *In re Edens*, 290 N.C. 299, 226 S.E. 2d 5 (1975). *Compare In re Gilliand*, 248 N.C. 517, 103 S.E. 2d 807 (1958). Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. *In re Diener, supra*; *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970); *Sharpe v. State ex rel.* Oklahoma Bar Association, 448 P. 2d 301 (Okla. 1968); *In re Brown*, 512 S.W. 2d 317 (Texas 1974). *See Memphis & Shelby County Bar Association v. Vick*, 40 Tenn. App. 206, 290 S.W. 2d 871, 875 (1955). Albeit serious, censure and removal are not to be regarded as punishment but as the legal consequences attached to adjudged judicial misconduct or unfitness. *Sharpe v. State ex rel.* Oklahoma Bar Association, *supra*.

[2] Notwithstanding, because of the severe impact which adverse findings by the Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the

basic requirements of due process. *In re Diener, supra.* "The Commission's procedures are required to meet constitutional due process standards since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation." *In re Hanson*, 532 P. 2d 303, 305 (Alas. 1975); *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970). We therefore consider respondent's due process contentions seriatim:

[3] (a) Respondent's contention that the General Assembly was without authority to enact Article 30 in advance of the ratification of N.C. Const., Art. IV, § 17 is untenable. This Court had previously ruled that "[t]he General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such constitutional amendment." *Fullam v. Brock*, 271 N.C. 145, 149, 155 S.E. 2d 734, 739-40 (1967). The legislature which enacted Article 30 so provided. 1971 Sess. Laws, ch. 590, § 3. Thus the Act became effective 1 January 1973.

[4] (b) In view of the constitutional mandate in N.C. Const. Art. IV, § 17(2) that the General Assembly *shall prescribe* a procedure for the censure and removal of judges in addition to impeachment and address as provided in § 17(1), respondent's contention that the General Assembly in enacting Article 30 "abrogated its legislative duties by unconstitutionally delegating them to the Commission, a creature of the General Assembly," is obviously without merit. It is, of course, a fundamental principle of constitutional law that the General Assembly may not delegate its law-making authority to a subordinate administrative agency. However, it is equally well settled that "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." *Hospital v. Davis*, 292 N.C. 147, 158, 232 S.E. 2d 698, 705 (1977).

[5] (c) Respondent insists, however, that the General Assembly failed to provide *any* standards for the guidance of the Commission in determining whether a judge has been guilty of either "wilful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"; that a recommendation of censure or removal is a matter left to the Com-

mission's absolute and unguided discretion. We have previously said without elaboration in *In re Edens*, *supra* at 305-306, 226 S.E. 2d at 9, that the phrases quoted above are not unconstitutionally vague or overbroad. We now point out that they are "no more nebulous or less objective than the reasonable and prudent man test which has been a part of our negligence law for centuries." *In re Foster*, 271 Md. 449, 476, 318 A. 2d 523, 537 (1974).

In *Sarisohn v. Appellate Division*, 265 F. Supp. 455 (D.C. 1967), a case in which a section of the New York Constitution was unsuccessfully attacked as void for vagueness, Judge Bartels emphasized the futility of an attempt to enumerate in any statute or rule all the possible grounds for removal of a judicial officer. "Guidelines," he said, "may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community.... 'Cause' and similarly broad standards have been upheld against the charge of vagueness as used in numerous statutes, to justify removal from office or denial of license privileges." *See Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3rd 778, 532 P. 2d 1209, 119 Cal. Rptr. 841 (1975); *In re Diener*, 268 Md. 659, 671, 304 A. 2d 587, 594.

[6] Specific guidelines for judicial officers of North Carolina are to be found in the North Carolina Code of Judicial Conduct, adopted by this Court on 26 September 1973 and published in 283 N.C. 771. (Subsequent amendments with reference to compensation for extrajudicial activity and political activity, adopted on 30 December 1974 and 16 March 1976, are published in 286 N.C. 729 (1975) and 289 N.C. 733 (1976).) The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of the statute. *See* North Carolina Courts Commission, Report to the General Assembly 28 (1971) and also Note, 54 N.C. L. Rev. *supra* at 1081 (1976).

Surely respondent cannot seriously maintain that he, a lawyer licensed in 1960 and a judge with six years' experience, had no notice of what conduct was expected of him. Respondent's contention that Article 30 is unconstitutionally vague is overruled.

[7] There is likewise no merit in the contention that Article 30 illegally vests unguided and absolute discretion in the Commission to choose which complaints to investigate and what evidence it will accept. Any administrative agency empowered to investigate com-

plaints and allegations of wrongdoing must have a broad discretion if it is to function at all. The General Assembly is no more required to hobble the Commission with statutory guidelines for the exercise of its investigative powers than it is to prescribe such limitations for our district attorneys. Further, it is necessary to keep in mind that the penalties ultimately assessed against any judge under Article 30 are not criminal and that it is this Court, not the Commission, which assesses them.

[8] (d) Respondent's contention that Article 30, which allows the Commission to conduct a preliminary investigation, find facts, and make a recommendation to the Supreme Court, denied him the impartial tribunal which is an essential of due process has been rejected by all jurisdictions which have considered it. It is well settled by both federal and state court decisions that a combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff. *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1947); *Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); *In re Hanson*, 532 P. 2d 303, 306 (Alas. 1975); *In re Kelly*, 238 So. 2d 565 (Fla. 1970); *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970); *In re Diener*, 268 Md. 659, 304 A. 2d 587 (1973); *In re Brown*, 512 S.W. 2d 317, 321 (Tex. 1974); 2 K. Kavis, Administrative Law § 13.02 (1968); 54 N.C. L. Rev. *supra* at 1079.

We again emphasize, as have all the courts which have considered this identical contention, that the Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon. *In re Kelly, supra* at 569; *Keiser v. Bell, supra* at 616. Its recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In the words of the Texas Supreme Court, "Any alleged partiality of the Commission is cured by the final scrutiny of this adjudicatory body." *In re Brown, supra* at 321. We also note that the Commission's investigator and special prosecutor are employees of the Commission and not voting members. Accordingly, we hold that the combination of investigative and judicial functions in the Commis-

sion did not violate respondent's due process rights under either the federal or North Carolina constitutions.

Additionally, our review of the entire record discloses no procedural irregularity upon which a claim of denial of procedural due process could be maintained. The findings and recommendation of the Commission were made after an investigation and with such notice, opportunity to answer, and hearing as would constitute due process. Finally, we note that neither allegations nor evidence adduced disclose elements of discrimination or improper classification which suggest a denial of the equal protection of the laws. *See Keiser v. Bell*, 332 F. Supp. 608, 615-16 (E.D. Pa. 1971).

We now consider respondent's contentions that the evidence does not support the Commission's findings of fact and that its findings do not justify its recommendation that he be censured for wilful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

In *In re Crutchfield, supra*, *In re Edens, supra*, and *In re Stuhl*, 292 N.C. 379, 233 S.E. 2d 562 (1977), the three cases which have heretofore come to us upon the Commission's recommendations of censure, the conduct for which the judges involved were censured was either admitted or established by uncontradicted "substantial evidence." In these cases we either "accepted" or "affirmed" the Commission's findings without discussing the force and effect of these findings upon the Court's consideration of the recommendation or the quantum of proof applicable in an inquiry into the conduct of a judge. However, we now deem it appropriate to consider and determine both the standard of proof and the effect of the Commission's findings.

The first judicial standards (or qualification) commission was established in California by constitutional amendment in 1960 (Cal. Const. Art. VI, §§ 8, 18). Like many other jurisdictions, North Carolina used the California plan as the model for its own Commission. 54 N.C. L. Rev. *supra* at 1075. Since there is no material difference between our Article 30 and the corresponding sections of Cal. Const. Art. VI, § 18, it is fitting that before we determine any question arising under Article 30, we ascertain how California has answered it.

[9] In deciding "the appropriate standard" for the Court to employ in reviewing a recommendation by the Commission, the California Court rejected the substantial evidence test, that is, the proposition

that Commission findings are binding upon the Court if supported by substantial evidence, even though other record evidence would support findings to the contrary. The Court said:

"Under such a standard of review, we would not be free to disregard the Commission's findings merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. . . . [S]ince the ultimate, dispositive decision to censure or remove a judge has been entrusted to this court, we conclude that in exercising that authority and in meeting our responsibility we must make our own, independent evaluation of the record evidence adduced below. After conducting such a review we may then decide as a question of law whether certain conduct, which we may have found as fact to have occurred, was 'wilful misconduct in office' or 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' . . . Finally, it is to be our findings of fact and conclusions of law, upon which we are to make our determination of the ultimate action to be taken, to wit, whether we should dismiss the proceedings or order the judge concerned censured or removed from office." *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3rd 270, 276, 515 P. 2d 1, 4, 110 Cal. Rptr. 201, 204 (1973).

The Supreme Court of Texas followed the California Court's rationale. The Texas constitution, it said, "empowers the Commission to 'recommend to the Supreme Court the removal, or retirement, as the case may be, of the person in question. . . .' It is the Supreme Court which makes the ultimate decision. The master can hear, take evidence and make a report to the Commission. The findings of the master as well as those of the Commission lead to a recommendation by the Commission, but the term 'recommend' manifests an intent to leave the court unfettered in its adjudication. This court's constitutional responsibility cannot be abandoned by the delegation of the fact-finding power to an administrative agency or the master. This court must make its own independent evaluation of the evidence adduced below. *Geiler v. Commission on Judicial Qualifications, supra.*" *In re Brown*, 512 S.W. 2d 317, 320 (Tex. 1974). *See In re Tally*, 238 So. 2d 569, 571 (Fla. 1970).

[9] After the decision in *Geiler, supra*, Alaska, which had initially adopted the substantial evidence test (*In re Robson*, 500 P. 2d 657 (Alas. 1972)), reviewed the decisions of other states. Upon this review it ascertained that Alaska was the only jurisdiction which had followed the substantial evidence test in reviewing commission

factual findings and concluded that the scope of Supreme Court review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. *In re Hanson*, 532 P. 2d 303 (Alas. 1975). We have reached this same conclusion.

With reference to the quantum of proof applicable to an inquiry into the fitness and conduct of a judge, the Alaska court stated: "of the courts of other jurisdictions which have considered the question of the appropriate standard of proof, all have rejected the beyond-a-reasonable-doubt standard that controls criminal prosecutions. Most of these same courts have also declined to adopt the civil preponderance-of-the-evidence standard in favor of the seemingly higher burden of proof by clear and convincing evidence." *Id.* at 307-308. In adopting this standard the Alaska court reasoned that the serious nature of proceedings which may result in the censure or removal of a judge from office requires proof by clear and convincing evidence. *Id. Accord, In re Haggerty*, 257 La. 1, 31, 241 So. 2d 469, 479; *In re Diener*, 268 Md. at 670, 304 A. 2d at 594 (1973).

[10] In *Geiler, supra* at 275, 515 P. 2d at 4, 110 Cal. Rptr. at 204, California declared the standard of proof in an inquiry before the Commission to be "proof by clear and convincing evidence *sufficient to sustain a charge to a reasonable certainty.*" (Italics ours.) In our view proof by "clear and convincing evidence" would per se be proof sufficient to sustain a charge to a reasonable certainty, and that the quantum of proof required in California is, in effect, no different from that required in Maryland and Alaska. Adopting the rationale of the Supreme Court of Alaska, we declare the quantum of proof in proceedings before the Judicial Standards Commission of this State to be proof by clear and convincing evidence—a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt.

Having determined the quantum of proof for findings upon an inquiry into the conduct of a judicial officer and the scope of our review of the Commission's findings, and having made a detailed review of the record evidence in light of these determinations, we conclude that these findings are established by clear and convincing evidence. We adopt them as our own and additionally make the following findings:

1. Judge Nowell disposed of case #76CR4219 after having received a telephone call at home from Mrs. Vernell T. Grantham, the mother of James Randall Grantham. She told him the boy was guilty; she wanted him punished but didn't want any points on his

driver's license, and somebody had told her that a judge could save points by prayer for judgment or some words to that effect. She asked him to assist her son in the matter of his speeding ticket. Judge Nowell believed Mrs. Grantham to be a poor and deserving widow; and as a result of this telephone call, he resolved to assist her, "if the circumstances warrant." He advised her to meet him before court on the next Monday morning. (This finding is in accord with respondent's testimony.)

2. Judge Nowell acted in case #76CR3975 at the behest of Deputy Sheriff L. E. Martin, who told him he understood it was the boy's first ticket; that he'd "known the boy a right good while, and if there was any way he could help him it would be appreciated." Defendant West worked for Martin's friend, Wilbur, who furnished the money with which Martin paid West's court costs after respondent had disposed of the case. Judge Nowell did not personally know Don Christopher West and testified at the hearing that he had no recollection whatever about the West case.

We have heretofore interpreted and defined the crucial terms of N.C. Const., Art. IV, § 17(2) and Article 30, which are the gravamen in any proceeding to censure or remove a judge. Therefore we advert to principles and definitions heretofore enunciated in determining the disposition of the Commission's recommendation in this proceeding.

[11, 12] *Wilful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. *In re Edens, supra* at 305, 226 S.E. 2d 5, 9. *See Spruance v. Commission*, 13 Cal. 3d 778, 796, 532 P. 2d 1209, 1221, 119 Cal. Rptr. 841, 853; *Geiler v. Commission on Judicial Qualifications, supra* at 287, 515 P. 2d at 11, 110 Cal. Rptr. at 211; *In re Haggerty*, 257 La. 1, 39, 241 So. 2d 469, 478.

[13] Wilful misconduct in office of necessity is *conduct prejudicial to the administration of justice that brings the judicial office into disrepute.* However, a judge may also, through negligence or ig-

norance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. *In re Edens, supra.* Likewise, a judge may also commit indiscretions, or worse, in his private life which nonetheless brings the judicial office into disrepute. *See, e.g., In re Haggerty, supra* (judge was arrested during a police raid on a party at which, *inter alia,* prostitutes were present and obscene films were being shown.)

The following precepts from our decisions in two similar proceedings are pertinent and controlling here:

[14] "The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. *See* N.C. Const., Art. I, § 18. 'The public, and especially the parties are entitled to see and hear what goes on in the court. [That courts are open is one of the sources of their greatest strength.] *Raper v. Berrier,* 246 N.C. 193, 195, 97 S.E. 2d 782, 784 (1957).' " *In re Edens, supra* at 306, 226 S.E. 2d at 9-10.

[15] "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 the 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.' " *In re Stuhl,* 292 N.C. 379, 389, 233 S.E. 2d 562 (1977).

In the two cases referred to above each of the two judges involved was censured (1) for having improperly excluded the district attorney from participating in the disposition of criminal cases by accepting pleas of guilty and entering judgment outside the courtroom, at a time when court was not in session and without notice to the district attorney; and (2) for having improperly removed the case from the public domain. This, of course, is just what respondent did in the two cases specified in the complaint filed against him. He argues, however, that "assuming he was without authority to act as he did, there was nothing in this behavior to warrant the conclusions of law of the Judicial Standards Commission." He asserts that his conduct "falls far short of censurable behavior," and far short of the conduct for which Judge Edens and Judge Stuhl were censured.

[16] Respondent contends: (1) The charges against both Grantham and West were traffic violations for which, under the authority of G.S. 7A-146(8) and G.S. 7A-148, the chief district court judge had authorized magistrates and clerks of court to accept written appearances, waivers of trial, and pleas of guilty upon the payment of the specified fine and court costs. (2) His actions were not done furtively with intent to conceal the disposition he made of the two cases; that he could have entered the same judgment in open court. (3) His motives were not corrupt: in the Grantham case he was motivated by sympathy for a young boy and his widowed, working mother; in the West case, a deputy sheriff had given him a "high recommendation." (4) It had been the practice of other judges in the District to do the same thing.

It is quite true, as respondent contends, that the offenses of Grantham and West were "waiverable" before the clerk or a magistrate. However, had they pled guilty as charged before the clerk he would have entered judgment on their plea, collected from each a fine of $10.00 and $27.00 in court costs, and reported the transaction to the Department of Motor Vehicles. The Department, upon receipt of the records showing the offenses committed, would have assessed three points against Grantham's driver's license and two against West. Under G.S. 20-16 (1975 Supp.), when a licensee accumulates 12 points within a three-year period (fewer under certain circumstances), the Department has authority to suspend his operator's license. Thus, in this instance, the difference in doing business with the judge rather than the clerk was the nonpayment of the ten-dollar fine and the avoidance of the points which the statute specified for the respective offenses.

It is also true that respondent could have pronounced in open court the same judgments he entered in the clerk's office prior to the opening of court. *See State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966); *State v. Griffin*, 246 N.C. 680, 100 S.E. 2d 49 (1957). This contention, however, misses the point and denotes insensitivity to the basic principle that the disposition of any criminal case should be made in open court, where the district attorney, if he desires, may be heard. The gravamen of this matter is that the State was not allowed its day in court and that the public was excluded. In each case, had it been regularly heard, the district attorney might have offered evidence which would have disclosed that a "pjc judgment" was inappropriate. In any event after Grantham and West had chosen to bypass the magistrate and the clerk and let the

judge pass on their cases, the district attorney was entitled to be heard and the public was entitled to hear the judgment rendered.

[17] We are in accord with respondent's assertion that the record contains no evidence that his conduct was directed toward any personal gain and that it does not amount to moral turpitude, dishonesty, or corruption. Indeed, the complaint against him contains no such charge. However, that respondent derived no financial benefit from his actions is wholly irrelevant to the charge filed. Nor do we see any merit in his plea that it has been the practice of other judges in the district to dispose of cases out of court. We are entirely convinced that the *ex parte* disposition of a criminal case out of court, or the disposition of any case for reasons other than an honest appraisal of the facts and law as disclosed by the evidence and the advocacy of both parties, will amount to conduct prejudicial to the administration of justice. In due course such conduct cannot fail to bring the judicial office into disrepute.

The treatment accorded defendants West and Grantham, had the disposition of their cases been made in open court, might well have caused "the objective observer" to wonder why Grantham, guilty of speeding 70 MPH in a 55 MPH zone, and West, speeding 50 MPH in a 35 MPH zone were "given a pjc" when others no more culpable paid the fine and accumulated the points prescribed for the offense. The objective observer, however, upon learning that these judgments had been entered *ex parte* and out of court, would surely think he had reasonable cause to believe that those who knew the judge, or knew a deputy sheriff who knew the judge, could receive more favorable treatment than the average traffic offender. Indubitably, the conduct of any judge which leaves such an impression is prejudicial to the administration of justice and brings the judicial office into disrepute.

As the Maryland court pointed out in *In re Diener*, the court which handles traffic offenses is the place where the average citizen is most likely to have, if not his first, certainly his most frequent contact with our judicial system and to form his lasting opinion of it. "If we give credence to the notion that because an individual parking [or speeding] ticket is of minor importance and that it is somehow permissible for a judge hearing a traffic case to engage in personal or political favoritism, then we condemn the whole judicial system to suspected corruption." *Id.* at 682, 304 A. 2d at 599.

In this State the district court judge fulfills a most important role in our judicial system. He handles more cases than any other

judge and wields great power in the exercise of his court's jurisdiction. The district court has original jurisdiction of all misdemeanors. This means that the judge can sentence a general misdemeanant to prison for a term not to exceed two years. The district court has original jurisdiction of all juvenile matters. *Inter alia*, the judge conducts preliminary examinations to determine probable cause upon felony warrants to make orders as to bail or commitment, to conduct inquiries into the involuntary hospitalization of mentally disordered persons and the appropriateness of sterilization. He hears and passes upon appeals from all magistrates' judgments. In civil matters the district court has concurrent jurisdiction with the superior court, but the district court division is the proper division for the trial of all civil actions in which the amount in controversy is five thousand dollars or less. It is the proper division for the trial of proceedings for annulment, divorce, alimony, child support and child custody, and appeals in these matters go directly to the Court of Appeals.

The power of the district court over the lives and everyday affairs of our citizens makes it imperative that the district court judges of the State not only be fully capable but also dedicated to carrying out their official responsibilities in accordance with the law and established standards of judicial conduct.

[18] For the reasons stated herein we conclude that respondent's disposition of criminal cases No. 76CR3975 and No. 76CR4219 constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he (1) improperly deprived the district attorney of the opportunity to participate in their disposition; (2) improperly removed the proceedings from the public domain; and (3) violated Canon 3(A)(4) of the North Carolina Code of Judicial Conduct. For this conduct respondent merits censure in accordance with the recommendation of the Judicial Standards Commission.

Now, therefore, it is ordered by the Court in Conference that Judge W. Milton Nowell be and he is hereby censured by this Court for the conduct specified in the Commission's recommendation.

This the 12 day of September 1977.

Justice LAKE dissenting.

I dissent for the reasons stated in my dissenting opinion in *In Re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1975).

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

FORD MARKETING CORP. v. INSURANCE CO.

No. 183 PC.

Case below: 33 N.C. App. 297.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

INDIAN TRACE CO. v. SANDERS

No. 190 PC.

Case below: 33 N.C. App. 386.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

IN RE ETHERIDGE

No. 7 PC.

Case below: 33 N.C. App. 585.

Petition for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. BALDWIN

No. 191 PC.

Case below: 32 N.C. App. 599.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 23 August 1977.

STATE v. BAUM

No. 211 PC.

Case below: 33 N.C. App. 633.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. BELL

No. 14 PC.

Case below: 33 N.C. App. 607.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 23 August 1977.

STATE v. BOOMER

No. 203 PC.

Case below: 33 N.C. App. 324.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 23 August 1977.

STATE v. BOONE

No. 51.

Case below: 33 N.C. App. 378.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 23 August 1977.

STATE v. BOST

No. 21 PC.

Case below: 33 N.C. App. 673.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. DAILEY

No. 202 PC.

Case below: 33 N.C. App. 551.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 August 1977.

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

STATE v. ELLIS

No. 8 PC.

Case below: 33 N.C. App. 667.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1977.

STATE v. FLYNN

No. 184 PC.

Case below: 33 N.C. App. 492.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. FOSTER

No. 209 PC.

Case below: 33 N.C. App. 145.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals denied 23 August 1977.

STATE v. FOSTER

No. 207 PC.

Case below: 33 N.C. App. 405.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 23 August 1977.

STATE v. GREEN

No. 189.

Case below: 33 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. HILL

No. 201 PC.

Case below: 33 N.C. App. 636.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. LOCKETT

No. 197 PC.

Case below: 33 N.C. App. 401.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. McKOY

No. 181 PC.

Case below: 33 N.C. App. 304.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 24 August 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 24 August 1977.

STATE v. MEDLIN

No. 193 PC.

Case below: 33 N.C. App. 636.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. MONTGOMERY

No. 210 PC.

Case below: 33 N.C. App. 693.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 August 1977. Appeal dismissed ex mero motu 4 August 1977.

STATE v. PEACOCK

No. 200 PC.

Case below: 33 N.C. App. 637.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 23 August 1977.

STATE v. SANDERS

No. 188 PC.

Case below: 33 N.C. App. 284.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. SORRELLS

No. 196 PC.

Case below: 33 N.C. App. 374.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. STATON

No. 195 PC.

Case below: 33 N.C. App. 270.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 23 August 1977.

STATE v. VAWTER

No. 166 PC.

Case below: 33 N.C. App. 131.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. VINSON

No. 205 PC.

Case below: 33 N.C. App. 638.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 23 August 1977.

STATE v. WILLIAMS

No. 187 PC.

Case below: 33 N.C. App. 397.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

STATE v. YANCEY

No. 198 PC.

Case below: 33 N.C. App. 637.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1977.

TRUST CO. v. MORGAN-SCHULTHEISS and POSTON v. MORGAN-SCHULTHEISS

No. 185 PC.

Case below: 33 N.C. App. 406.

Petition by defendants for discretionary review under G.S. 7A-31 denied 23 August 1977.

UTILITIES COMM. v. FARMERS CHEMICAL ASSOC.

No. 199 PC.

Case below: 33 N.C. App. 433.

Petition by Utilities Comm. for discretionary review under G.S. 7A-31 denied 23 August 1977 pursuant to Appellate Procedure Rule 15(h).

State v. Brower and Johnson; State v. Crowder

STATE OF NORTH CAROLINA
v.
BROWER AND JOHNSON

ORDER DENYING MOTION FOR RECONSIDERATION

No. 27 PC

INASMUCH as defendants did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Brower & Johnson*, 289 N.C. 644 (1976), they have waived their right now to complain about such errors. *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendants' motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA
v.
ALBERT CROWDER, JR.

ORDER DENYING MOTION FOR RECONSIDERATION

No. 26 PC

INASMUCH as defendant did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Crowder*, 285 N.C. 42 (1974), he has waived his right now to complain about such errors. *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendant's motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
JOHNNIE B. HANKERSON)

No. 4 PC

ON remand from the Supreme Court of the United States and in conformity with the opinion of that Court, *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306 (1977), it is

ORDERED by the Court in Conference that the defendant be and he is hereby awarded a new trial. [*See* original opinion reported at 288 N.C. 632 (1975).]

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA)
) ORDER DENYING MOTION
v.) FOR RECONSIDERATION
)
BENNY L. JACKSON)

No. 38 PC

INASMUCH as defendant did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Jackson*, 284 N.C. 383 (1973), he has waived his right now to complain about such errors. *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendant's motion for reconsideration be and it is hereby denied.

This the 12th day of September 1977.

James G. Exum, Jr.
Associate Justice
For the Court

State v. May; State v. Riddick

STATE OF NORTH CAROLINA)
)
v.) ORDER DENYING MOTION
) FOR RECONSIDERATION
MICHAEL ANTHONY MAY)

No. 32 PC

INASMUCH as defendant did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Michael Anthony May*, 292 N.C. 644 (1977), he has waived his right now to complain about such errors. *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendant's motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA)
)
v.) ORDER DENYING MOTION
) FOR RECONSIDERATION
HERMAN LEROY RIDDICK, JR.)

No. 29 PC

INASMUCH as defendant did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Riddick*, 291 N.C. 399 (1976), he has waived his right now to complain about such errors. *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendant's motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA)
) ORDER FOR NEW TRIAL UPON
v.) REMAND FROM THE SUPREME
) COURT OF THE UNITED STATES
KELLY DEAN SPARKS)

No. 90

HAVING reconsidered this case on remand from the Supreme Court of the United States in the light of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), and *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306 (1977), the defendant having properly raised on appeal to this Court the question of the constitutionality of the trial judge's instructions placing the burden on the defendant to show that the killing was done in the heat of a sudden passion and that it was done in self-defense, *see State v. Sparks*, 285 N.C. 631 (1974), and being of the opinion that in light of *Mullaney* and *Hankerson*, these assignments of error should have been sustained and defendant awarded a new trial, now, therefore, it is

ORDERED by the Court in Conference that defendant be and he is hereby awarded a new trial.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA)
) ORDER FOR NEW TRIAL UPON
v.) REMAND FROM THE SUPREME
) COURT OF THE UNITED STATES
ROGER LAWRENCE WETMORE)

No. 94

HAVING reconsidered this case on remand from the Supreme Court of the United States in the light of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), and *Hankerson v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 306 (1977), the defendant having properly raised on appeal to this Court the question of the constitutionality of the trial judge's instructions placing the burden on the defendant to show that the killing was done in the heat of a sudden passion, *see State v. Wetmore*, 287 N.C. 344 (1975), and being of the opinion that in light of *Mullaney* and *Hankerson*, these assignments of error

should have been sustained and defendant awarded a new trial, now, therefore, it is

ORDERED by the Court in Conference that defendant be and he is hereby awarded a new trial.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

STATE OF NORTH CAROLINA v. CLAUDE EDWARD DAMMONS

No. 81

(Filed 11 October 1977)

1. **Criminal Law § 91— prisoner—trial upon detainer charges**

The State complied with G.S. 15-10.2(a) when a defendant confined in the State prison system was brought to trial upon charges which formed the basis of a detainer against him within eight months after defendant requested disposition of the charges.

2. **Criminal Law § 91— prisoner—trial of pending charges after request**

G.S. 15A-711 does not require that a defendant who is confined in a penal institution be tried upon charges pending against him within six months after defendant files a written request for disposition of the charges; rather, the statute requires that trial be held within eight months after the written request —the six-month period provided by subsection (c) within which the district attorney must request defendant's temporary release for trial plus the sixty-day release period provided by subsection (a).

3. **Criminal Law § 91— Interstate Agreement on Detainers—inapplicability**

Provisions of the Interstate Agreement on Detainers, G.S. Ch. 15A, Art. 38, do not apply to a North Carolina prosecution of a defendant incarcerated in North Carolina.

4. **Kidnapping § 1.3— instructions not supported by evidence or indictment**

In a trial upon an indictment alleging that defendant kidnapped the victim by "removing" her from one place to another for the purpose of feloniously assaulting her with a deadly weapon and terrorizing her, the trial judge erroneously presented to the jury possible theories of conviction which were either not supported by the evidence or not charged in the indictment when he (1) read the kidnapping statute in its entirety without pointing out to the jury which parts of the statute were material to the case; (2) reiterated "holding this girl as a hostage" as being one of the "purposes" the jury could consider; (3) permitted the jury to consider whether defendant removed the victim for the purpose of sexually assaulting her; (4) instructed that defendant could be found guilty if he "confined or restrained or removed" the victim; and (5) instructed that defendant

could be found guilty if he removed the victim "for the purpose of facilitating the commission of any felony." G.S. 14-39.

5. **Kidnapping § 1; Criminal Law § 26.5— felonious assault as purpose of kidnapping — conviction of felonious assault and kidnapping**

In a prosecution for kidnapping by removing the victim from one place to another for the purpose of committing a felonious assault upon her, the felonious assault itself was not an element of the offense of kidnapping, since it was not necessary for the State to prove the felonious assault but only that the *purpose* of the removal was a felonious assault; therefore, the felonious assault was a separate and distinct offense, and defendant could properly be convicted and sentenced for both kidnapping and felonious assault.

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

DEFENDANT appeals from judgment of *Crissman, J.*, at the 30 August 1976 Session of Guilford Superior Court. He was tried and convicted, upon proper bills of indictment, of aggravated kidnapping (76-CR-22707) and assault with a deadly weapon with intent to kill inflicting serious injury (76-CR-41561). The two cases were consolidated for trial. Sentences were imposed of 25 years to life imprisonment in the kidnapping case and 20 years imprisonment in the assault case. Although initially filed in the Court of Appeals, the case was transferred to this Court because life imprisonment was imposed as the maximum term of an indeterminate sentence on the kidnapping conviction. We allowed defendant's motion to bypass the Court of Appeals on the felonious assault conviction. Argued as No. 51 at the Spring Term 1977.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the State.

Anne B. Lupton, Assistant Public Defender, Attorney for defendant appellant.

EXUM, Justice.

Most of defendant's nineteen assignments of error argued in his brief are directed to his contentions that the trial court erred in: (1) denying his motion to dismiss all charges on the ground that certain of defendant's statutory rights to a speedy trial had been denied; (2) instructing the jury; and (3) denying his motion for arrest of judgment in the assault case. We find no merit in defendant's arguments regarding speedy trial, no error prejudicial to him in the court's instructions on the felonious assault charge, and no error in the denial of his motion for arrest of judgment. We do, however, find error prejudicial to defendant in the court's instructions on ag-

gravated kidnapping under the new statute, General Statute 14-39. We hold, therefore, that defendant is entitled to a new trial in the kidnapping case.

I

Defendant urges error in the trial court's denial of his pre-trial motion to dismiss all charges on the ground that his right to a speedy trial was denied under applicable statutory provisions. He relies essentially upon General Statute 15-10.2(a) which provides:

> "*Mandatory disposition of detainers—request for final disposition of charges; continuance; information to be furnished prisoner.*—(a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Secretary of Correction stating the term of the sentence or sentences under which the prisoner is being held, the date he was received, and the time remaining to be served; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court may grant any necessary and reasonable continuance."

The record reveals these events leading up to defendant's trial, which began on 30 August 1976: On 9 December 1975 a warrant was issued charging defendant with kidnapping Colia Thomas on 20 September 1975. On 22 December 1975 a warrant was issued charging him with assault with a deadly weapon, to wit, a small caliber pistol, with intent to kill, inflicting serious injury on Mrs. Thomas. Defendant was at the time serving a prior sentence for voluntary manslaughter. On 14 January 1976 a detainer was filed with the Department of Correction against defendant in the kidnapping and assault cases. On 23 January defendant sent a handwritten petition addressed to the "Judge Presiding of Guilford County, District Court Division: Greensboro, North Carolina. ATTENTION: District Solicitor." The petition, received and filed in Guilford County on 28 January, liberally construed, requested that defendant be speedily tried or that all charges against him be dismissed. This petition was

accompanied by an application to proceed in forma pauperis and by a certificate signed by Ben L. Baker, Supervisor of Combined Records, and stating the defendant's existing sentence, his approximate release date and his location. On 8 April a new warrant was issued charging the same assault as before, but with a shotgun. Charges under the older warrant for assault with a pistol were dismissed. On 16 April a writ of habeas corpus ad prosequendum was issued requesting delivery of defendant to Guilford County on 21 April for trial calendared to begin on 22 April. Defendant was apparently brought to Guilford County and the new warrant for assault served upon him there on 22 April. On 29 April a preliminary hearing was held and probable cause found in the kidnapping case and the assault case. Indictments were returned in those cases on 3 May. However, a *new* indictment in the kidnapping case was returned on 7 June alleging for the first time the elements of aggravated kidnapping. On 30 August the cases proceeded to trial.

During the argument on 30 August on defendant's speedy trial motion, it appeared that the cases had been earlier calendared for trial on 1 June 1976 but on the state's motion a continuance was allowed on the ground of the absence of James Willie Dammons, a crucial state's witness then in FBI custody in Washington, D.C., on two armed robbery charges.

[1] We note first that defendant's *pro se* request for trial was not sent by registered mail. Even if it had been, defendant was tried within eight months of the request. The state therefore complied with General Statute 15-10.2(a).

[2] Defendant next invokes the provisions of General Statute 15A-711 which provide in pertinent part as follows:

> "*Securing attendance of criminal defendants confined in institutions within the State; requiring solicitor to proceed.*—(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the solicitor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the solicitor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.
>
> . . . .

"(c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the solicitor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the solicitor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the solicitor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed."

Defendant's contention is that this statute required him to be tried within six months of his 23 January petition. Assuming, without deciding, that defendant's petition constitutes a "written request" within the meaning of General Statutes 15A-711(c) served in accordance with this subsection, we nevertheless conclude that the state has complied with this statute. The statute provides that following defendant's request the state must proceed within six months "pursuant to subsection (a)," that is, not to trial but to request a defendant's temporary release for trial which "temporary release may not exceed 60 days." The legislature envisioned that trial following a request under General Statute 15A-711(c) would be held within *eight* months—the six-month period provided by subsection (c) plus the 60-day release period provided by subsection (a). This coincides with the eight-month period set out in General Statute 15-10.2(a). Here the state requested the appearance of the defendant for trial well within six months following defendant's request for trial. Defendant's trial was initially scheduled to begin on 1 June. This was within the 60-day maximum authorized for a temporary release. After the trial was continued defendant was presumably returned to the custody of the State Department of Correction. In any event he does not complain on appeal that the temporary release provisions of General Statute 15A-711(a) were violated.

[3] Finally defendant contends that Article 38 of Chapter 15A entitled "Interstate Agreement on Detainers" required that he be brought to trial within six months of his written request. He relies on Article III of the Interstate Agreement which provides:

"Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer

has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner."

Suffice it to say that this statute has no application to these proceedings, which involve a North Carolina prosecution and a defendant incarcerated in North Carolina.

II

[4] We next consider defendant's contentions that the court erred in its instructions to the jury on the kidnapping charge. Defendant was tried under the new kidnapping statute, General Statute 14-39, effective 1 July 1975. That statute provides in pertinent part:

"*Kidnapping.*—(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield, or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than

25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court."

The kidnapping indictment under which defendant was tried charged:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Claude Edward Dammons late of the County of Guilford on the 20th day of September 1975 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously kidnap Jay Colia Thomas, a person who had attained the age of 16 years, by unlawfully removing her from one place to another, for the purpose of facilitating the commission of a felony, to wit: Assault With a Deadly Weapon, With Intent to Kill, Inflicting Serious Injury, for the purpose of doing serious bodily injury to her, and for the purpose of terrorizing her. After the commission the Assault With a Deadly Weapon, With Intent to Kill, Inflicting Serious Bodily Injury, the said CLAUDE EDWARD DAMMONS did not release Jay Colia Thomas in a safe place, and as a result of the said action, the said Jay Colia Thomas was seriously injured against the form of the statute in such case made and provided and against the peace and dignity of the State."

The state produced evidence tending to show that defendant initially accosted the victim, Mrs. Jay Colia Thomas, from his automobile as she walked with her brother toward her mother's home in Greensboro. She kept walking, but he pulled up in front of her mother's house and introduced himself as Reverend Nathaniel Davis. Dammons was at that time an escapee from incarceration following a plea of guilty to a manslaughter charge. During the week following this meeting, defendant saw Colia Thomas several times, almost always in the company of others, including her two young children and defendant's nephew, Willie. In the early afternoon of Saturday, 20 September 1975, about a week after their first meeting, Dammons, Mrs. Thomas, her children, Willie and defendant's brother visited a farm or country house on Ritters Lake Road. Defendant's brother and Willie left the others to feed the dogs and mow the lawn but returned later to pick them up.

That evening Mrs. Thomas left her two children with her mother and returned with defendant to her own apartment for some

canned goods. She told Dammons she could not go out with him that night because she had to prepare for a church activity the next day. When the two returned to the home of Mrs. Thomas' mother, she requested that they go to the store for some soap. Mrs. Thomas left with Dammons and Willie, but they returned to her apartment rather than proceeding to the store, since defendant claimed to have left something there. Dammons and Mrs. Thomas went inside and, for the first time, he proposed having sexual relations with her. She rejected his advances. Dammons then told her he would take her to the store for the soap, and they and Willie returned to the car. Dammons, instead of going to the store, began driving into the country. Mrs. Thomas asked him where he was going. He refused to say. She asked to be let out of the car. Dammons refused. Dammons asked Willie whether he should shoot Mrs. Thomas. Willie told him not to, that she was a nice girl.

When they reached the farm on Ritters Lake Road, Dammons tried to force Mrs. Thomas from the car, pulling her and beating her about the face. She attempted to walk away toward the dog-house, then turned and saw Dammons point a shotgun, first at the dog, then at her. Saying nothing, Dammons shot Mrs. Thomas who fell to the ground. He told her then that she was "too pure to live," that "didn't no woman turn him down." Immediately he shot her again. Willie saw him fire the gun the second time, standing directly over the victim's body.

Wrapping Mrs. Thomas in a blanket, the two men put her in the trunk of the car, apparently believing her dead. They drove to Sanford, stopping once for gas. When Mrs. Thomas began beating on the trunk and calling out Dammons threatened to blow her head off. He took her to the home of his so-called "common-law" wife, Gladys, who persuaded him to allow Mrs. Thomas to be taken to a hospital by Willie, Gladys and her daughter.

The victim's injuries were extensive, requiring several surgical operations and many months' hospitalization. She was left a partial paraplegic, losing the use of both legs and being partially deprived of the use of one arm.

Dammons' evidence tended to conform in most respects to that of the state until the events of the day of the shooting. He said he gave a false name because he was an escapee and added "Reverend" because he was taking a Bible study correspondence course and had purchased a minister's certificate. Dammons testified that another man, whom he had met once but whose name he did not know, was at

Mrs. Thomas' apartment that Saturday when they returned to look for his necklace. When they prepared to leave, this other man asked for a ride to town but agreed to ride first to the farm on Ritters Lake Road so that Dammons could feed his dogs. At the Ritters Lake Road property, when Dammons was inside getting water, he heard two shots. Willie ran inside and told Dammons that the man had shot Colia. Dammons found her, wrapped her in a bedspread and put her in the trunk to avoid her being seen by police on their way to Sanford to get help from Gladys. He said he knew of no hospital nearby in Greensboro and, being an escapee, feared questioning if he took Mrs. Thomas to the hospital himself. He did not look for the other man, who had disappeared when Dammons came outside, but he did find on the ground a shotgun which he had borrowed from a friend.

The court instructed the jury in part as follows:

"Members of the jury, the Court then charges you that if you find from the evidence beyond a reasonable doubt that on this night of September 20, 1975, that the defendant, Claude Edward Dammons, unlawfully *confined* or *restrained* or removed Colia Thomas and that when he did so, that he did it for the purpose of committing an assault, a felonious assault, that he did so for the purpose of *either assaulting her sexually* or assaulting her with a shotgun, and if you are further satisfied, members of the jury, that she had not consented to being removed in the manner in which she was removed out to this Ritters Lake spot and that *she did not consent to any sexual assault* or any other type of assault on this occasion and that she was serious injured as a result of this then it would be your duty to return a verdict of guilty of aggravated kidnapping as charged in this bill of indictment.

. . . .

"[F]or the defendant to be found guilty of aggravated kidnapping, the State must prove beyond a reasonable doubt that the defendant *confined* or *restrained* or removed Colia Thomas from one place to another and that he did it unlawfully and that he did it for the purpose of committing an assault upon her.

"Perhaps I should add that if he did this *for the purpose of facilitating the commission of any felony*, or if he did it for the purpose of doing a serious bodily harm on her, and if, when he put her in the trunk of the car, confining her and restraining her in that way, terrorizing her by such act, and by that means

> restrained her and removed her, and if you are further satisfied that he did that contrary to her will and wishes, that would amount to kidnapping under our statute . . . . " (Emphases added.)

During their deliberations the jury returned to court to request further explanation of the kidnapping offense, whereupon the trial judge read General Statute 14-39(a) *in its entirety*. He then said, "That, within itself, might be explanation enough. That is the statute upon which it is based." The court then charged:

> "Now, the court charged you that the State must satisfy you beyond a reasonable doubt that this defendant did *confine or restrain* in some manner or remove from one place to another the person of Colia Thomas and the defendant did this unlawfully, and, third, that *he did this for the purpose of holding this girl as a hostage* . . . . " (Emphases added.)

To those portions of the foregoing instructions rendered in italics defendant assigns error.

These assignments of error to the instructions are well taken. The instructions present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment. It is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the evidence, *State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965); *State v. Gurley*, 257 N.C. 270, 125 S.E. 2d 445 (1962), or by the bill of indictment, *State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946); *State v. Rush*, 19 N.C. App. 109, 197 S.E. 2d 891 (1973); *see State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960), *cert. denied*, 365 U.S. 855 (1961), *rev'd on other grounds*, 384 U.S. 737 (1966); *but compare State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974).

In reading General Statute 14-39(a) in its entirety without pointing out to the jury which parts of it were material to the case, *see State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967), the trial court permitted the jury to consider various theories of kidnapping such as holding "for ransom or as a hostage" or "facilitating flight." Immediately thereafter he reiterated "holding this girl as a hostage" as being one of the "purposes" the jury could consider. These theories of the crime were neither supported by the evidence nor charged in the bill of indictment. The instructions also permitted the jury to consider whether defendant removed the victim for the purpose of sexually assaulting her. While this theory of the case might be supported by the evidence, it is not charged in the indict-

ment. The trial judge repeatedly told the jury that the defendant could be found guilty if he "confined or restrained or removed" the victim. As an abstract legal proposition the instruction is correct. There was, furthermore, evidence of confinement, restraint, and removal. The indictment, however, charged only that defendant kidnapped the victim "by unlawfully removing her from one place to another."

It seems clear that the theory of the state's case *as charged in the indictment* in light of the evidence adduced was that defendant kidnapped Mrs. Thomas by "removing" her from an area near her apartment to the farm on Ritters Lake Road where he proceeded to terrorize and feloniously assault her, which, the state alleged, were the purposes of the removal. Had the state desired to prosecute on the theory that defendant confined and restrained the victim by, perhaps, placing her in the trunk of the car, it should have so alleged by way of an additional count in the indictment. General Statute 15A-924(a) provides, in part:

"A criminal pleading must contain:

. . . .

(2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.

. . . .

(5) *A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof* with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." (Emphasis added.)

In *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968), the indictment for first degree burglary alleged that defendant intended to "feloniously ravish and carnally know" the person who occupied the dwelling. This Court held it was error to instruct the jury that defendant would be guilty if he entered with "the intent to commit a felony." The Court said, 274 N.C. at 464, 164 S.E. 2d at 176, "[t]he indictment having identified the intent necessary, the State was held to the proof of that intent." In this case the indictment charged that defendant's purposes in removing the victim were to facilitate "the commission of a felony, to wit: Assault With a Deadly Weapon, With

Intent to Kill, Inflicting Serious Injury . . . doing serious bodily injury to her, and . . . terrorizing her." It was prejudicial error, therefore, for the trial court to instruct that if defendant "did this for the purpose of facilitating the commission of any felony . . . that would amount to kidnapping."

For these errors in the charge defendant is entitled to a new trial in the kidnapping case.

III

[5] We next consider defendant's contention that his motion for arrest of judgment on the charge of assault with a dangerous weapon with intent to kill inflicting serious injury should have been granted because, he argues, the assault is an essential element of the aggravated kidnapping offense. He relies on *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967). In *Midyette* two separate indictments were consolidated for trial. One indictment charged defendant with assaulting W. I. Robertson with a deadly weapon, to wit, a .22 caliber pistol, with intent to kill inflicting serious injuries. The second indictment charged him with resisting a public officer, W. I. Robertson, in the discharge of his duty, namely, attempting to arrest the defendant, by firing at and hitting the officer with bullets from a .22 caliber pistol. Defendant was convicted of both offenses. Sentences of imprisonment on each offense were ordered to run consecutively. This Court arrested judgment in the resisting arrest case, saying, 270 N.C. at 233-34, 154 S.E. 2d at 70:

> "The defendant was convicted and sentenced in Pamlico County Case No. 483 for the crime of assault with a deadly weapon upon W. I. Robertson, on 25 June 1966, by shooting him with a .22 caliber pistol. He could not thereafter be lawfully indicted, convicted and sentenced a second time for that offense, or for any other offense of which it, in its entirety, is an essential element. *State v. Birckhead*, 256 N.C. 494, 497, 124 S.E. 2d 838, 6 A.L.R. 3rd 888.
>
> "By the allegations it elects to make in an indictment, the State may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery. In such case, a showing that the defendant has been previously convicted, or acquitted, of the robbery so charged will bar his prosecution under the murder indictment. *State v. Bell*, 205 N.C. 225, 171 S.E. 50. In *State v. Overman*, *supra*, we said:

> " 'Where * * * the prosecution, under the second indictment, proceeds upon the theory that the offense charged therein was committed *by means of another offense* for which the defendant has previously been put in jeopardy, as where an indictment for murder charges that the murder was committed in the commission of another felony, for which the defendant has been previously tried and acquitted, the State has made the first alleged offense an element of the second and the defense of former jeopardy bars the subsequent prosecution.' " (Emphasis added.)

Conviction upon the former charge would, of course, lead to the same result.

> "In the present instance, the State has, by the allegations in the indictment in Pamlico County Case No. 484, made the identical assault for which the defendant was convicted in Case No. 483, an element of the offense, resistance of a public officer, charged in the second indictment. It has alleged this same assault was the means by which the officer was resisted. Under this indictment, the State could not convict the defendant of resistance of a public officer in the performance of his duty without proving the defendant guilty of the exact offense for which he has been convicted and sentenced in Case No. 483, the shooting of W. I. Robertson with bullets from a .22 caliber pistol on 25 June 1966."

The principles relied on in *Midyette* have no application here. In the kidnapping case the felonious assault was alleged in the indictment as being one of the purposes for which defendant removed the victim from one place to another. The felonious assault itself is, therefore, not an element of the kidnapping offense. It was not necessary for the state to prove the felonious assault in order to convict the defendant of kidnapping. It need only have proved that the *purpose* of the removal was a felonious assault. The assault itself vis-a-vis the kidnapping charge is mere evidence probative of the defendant's purpose. The purpose proved would, without the assault itself, sustain conviction under the kidnapping statute but not under the assault statute. The felonious assault is, consequently, a separate and distinct offense. The fact that it was committed during the perpetration of a kidnapping does not deprive it of this character. *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966); *see also State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

The indictments in this case present a situation analogous to cases in which the indictment charges felonious breaking and entering by alleging that the breaking was done with the intent to commit a specified felony inside the building or dwelling. Often, on appropriate facts, such indictments also allege in a separate count that the felony intended to be committed at the time of the breaking was in fact committed. In such cases it is not necessary to prove that the felony intended to be committed at the time of the breaking was actually accomplished in order to convict of the felonious breaking. *State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973); *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966). Moreover, if the defendant is convicted of both offenses, he may be sentenced on both as they are separate and distinct offenses. *See State v. Johnson*, 18 N.C. App. 338, 196 S.E. 2d 612, *cert. denied*, 283 N.C. 668, 197 S.E. 2d 877 (1973).

Because of the unlikelihood of their recurrence in a new trial, we need discuss no more of defendant's assignments of error in the kidnapping case. We have carefully reviewed the remaining assignments of error and find them of no merit.

In Case No. 76-CR-41561 — No error.

In Case No. 76-CR-22707 — New trial.

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

STATE OF NORTH CAROLINA v. THOMAS L. NICCUM

No. 21

(Filed 11 October 1977)

1. **Habeas Corpus § 3; Criminal Law § 156 — life imprisonment imposed — habeas corpus denied — certiorari in Supreme Court**

G.S. 7A-27(a), G.S. 15-180.2, and App. R. 21(b) are applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment; therefore, defendant, who was restrained under a judgment imposing imprisonment for life and whose application for a writ of habeas corpus was denied by the superior court, should have filed his petition for certiorari in the Supreme Court, not in the Court of Appeals.

2. Criminal Law § 134.4 — death or life imprisonment mandatory — youthful offender statutes inapplicable

Neither Article 3A (repealed) nor 3B of N.C. Gen. Stats. Ch. 148 providing for Programs for Youthful Offenders was intended to apply to convictions or pleas of guilty of crimes for which death or a life sentence is the mandatory punishment.

ON certiorari to review the judgment of *Peel, J.*, rendered at the 6 January 1977 Session of the Superior Court of CRAVEN County in a habeas corpus proceeding.

Petitioner, Thomas L. Niccum, is presently in the custody of the Department of Correction, serving a sentence in the State Prison System under the terms of a judgment entered and commitment issued thereon in case No. 72 Cr 6664 on 7 November 1972 by the Superior Court of Craven County.

On 6 November 1972 petitioner was 17 years of age. On that date, after having been fully apprised of his rights by both his court-appointed counsel and the presiding judge, the Honorable Walter W. Cohoon, he freely, voluntarily and understandingly entered a plea of guilty to a charge of first degree murder. Upon this plea the court entered the following judgment: "It is adjudged that the defendant be imprisoned as required by law, for the term of his natural life in the State prison, assigned to do labor under the supervision of the North Carolina Department of Correction. The court recommends that this defendant be placed in some youthful camp, segregated from other older and long-time prisoners."

On 21 December 1976, pursuant to N.C. Gen. Stats., ch. 17, § 17-3 *et seq.* (1975), petitioner applied to Judge Hamilton Hobgood for a writ of habeas corpus to inquire into the legality of his imprisonment. In addition to the basic facts summarized above he alleged: (1) that under the judgment upon which he was committed, by virtue of N.C. Gen. Stats., ch. 148, Art. 3A (Cum. Supp. 1971) (Article 3A), he is "a committed youthful offender"; (2) that the life sentence imposed upon him "is inconsistent with G.S. 148-49.4 and, more particularly, G.S. 148-49.8(b), and is therefore illegal"; and (3) that "having been held in custody for a term exceeding four years [he] is now and has been illegally in custody since September 9, 1976."

On 6 January 1977 Judge Peel conducted a hearing as provided by G.S. 17-32, Judge Hobgood having transferred petitioner's application to the judge presiding in Craven County. Judge Peel ruled as a matter of law (1) that under the judgment entered by Judge

Cohoon on 7 November 1972 petitioner was not a "committed youthful offender," and (2) that the provisions of G.S. 148-49.1 *et seq.* had no application to offenses for which imprisonment for life is the mandatory sentence. Upon "the entire record" he concluded that petitioner "as a matter of law is not entitled to be discharged from the custody of the North Carolina Department of Correction." Whereupon he denied petitioner's application for the writ of habeas corpus.

On 21 March 1977 the Court of Appeals denied petitioner's application for a writ of certiorari to review Judge Peel's judgment. He then sought the writ from this Court. His petition was allowed on 3 May 1977.

Attorney General Rufus L. Edmisten; Associate Attorney Patricia B. Hodulik for the State.

Pearson, Malone, Johnson, DeJarmon, and Spaulding and Clayton, Myrick & Oettinger for petitioner appellant.

SHARP, Chief Justice.

Preliminarily, we note the procedural posture of this case. Niccum first petitioned the Court of Appeals to issue its writ of certiorari to the superior court to review Judge Peel's judgment decreeing the legality of his imprisonment and remanding him to the custody of the Commissioner of Correction to complete his sentence. Upon the Court of Appeals' denial of his petition, Niccum filed a second and substantially identical petition for certiorari with this Court.

In this jurisdiction the rule is firmly established that no appeal lies from an order made in a habeas corpus proceeding instituted under N.C. Gen. Stats., ch. 17 by a prisoner to inquire into the legality of his restraint. The remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court. *In re Palmer*, 265 N.C. 485, 144 S.E. 2d 413 (1965); *In re Renfrow*, 247 N.C. 55, 100 S.E. 2d 315 (1957). Such a petition should be filed with the clerk of the appellate court to which an appeal of right might have been taken from the judgment imposing the sentence which is the subject of inquiry in the habeas corpus proceeding. In this proceeding the petition for certiorari to review Judge Peel's judgment should have been filed in the Supreme Court and not the Court of Appeals.

G.S. 7A-27(a) (Cum. Supp. 1975) provides: "From any judgment of a superior court which includes a sentence of death or imprison-

ment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies directly to the Supreme Court." G.S. 15-180.2 (1975) denies the right of appeal to a defendant who has pled guilty or nolo contendere to a charge pending in the superior court but allows him to petition the Appellate Division for review by certiorari. "In the event the sentence imposed is life imprisonment the petition shall be directed to the Supreme Court; in all other cases it shall be directed to the Court of Appeals."

Obviously neither G.S. 7A-27(a) nor G.S. 15-180.2 refers to the appellate review of a judgment entered in a habeas corpus proceeding such as this. G.S. 7A-27(a) refers to appeals entered at the time the sentence is imposed or within the time prescribed by G.S. 1-279 (1975), and G.S. 15-180.2 refers to petitions for certiorari filed "without unreasonable delay" after the sentence has been imposed upon the plea. App. R. 21(b).

Rule 21(b) of the Rules of Appellate Procedure provides: "Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought." 287 N.C. 679, 728 (1975). This rule, *ipsissimis verbis*, cannot be related to petitions for certiorari to obtain appellate review of a judgment in a habeas corpus proceeding determining the legality of a prisoner's restraint for it designates the court to be petitioned as the one to which an *appeal of right* could have been taken from the judgment imposing the sentence, and review of habeas corpus proceedings can be had only by certiorari.

[1] By analogy, however, G.S. 7A-27(a), G.S. 15-180.2 and App. R. 21(b) are logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment, and we make that application, G.S. 7A-32(b) (1969). The judgment under which Niccum is restrained is one imposing imprisonment for life. The Supreme Court, therefore, is the Court in which he should have filed his petition for certiorari—not the Court of Appeals. This error, however, has caused no unreasonable delay, and we have concluded that a definitive decision of the questions presented by Niccum's petition for certiorari would serve the public interest and aid the superior court judges to whom applications for writ of habeas corpus are addressed.

Niccum was 17 years old when, on 6 November 1972, he pled guilty to murder in the first degree and Judge Cohoon sentenced

him to imprisonment for life in the State's prison "as required by law." He now contends: (1) that under the terms of that judgment he is "a committed youthful offender" because the judge (a) "recommended" in the judgment that he "be placed in some youthful camp, segregated from other and long term prisoners" and (b) failed to incorporate in the judgment a specific finding that he would "not derive benefit from treatment and supervision" pursuant to Article 3A; and (2) that having served over four years, G.S. 148-49.8 mandates his conditional release.

For the reasons hereinafter stated, we conclude that the contentions upon which petitioner bases his claim for release are without merit, and that Judge Cohoon correctly construed Article 3A as having no application to youthful offenders committing crimes for which the mandatory punishment was death or life imprisonment. Accordingly, we affirm Judge Peel's judgment remanding him to the custody of the State Department of Correction.

We begin our analysis of petitioner's contentions with a consideration of the pertinent provisions of Article 3A as it was written in 1972.

In summary, the purposes of Article 3A as stated in G.S. 148-49.1 were to improve the chances of rehabilitating youthful offenders: (1) by segregating them, as far as practicable, from older and more experienced criminals; and (2) by providing the court with "an additional sentencing possibility" to be used for correctional punishment and treatment in cases where, in its opinion, a youthful offender required imprisonment only for the time necessary for the Board of Paroles to determine his suitability for a return to supervised freedom. Article 3A, *ipsissimis verbis*, could have no application to capital cases.

As defined in Article 3A, "a 'youthful offender' is a person under the age of 21 at the time of conviction, and a 'committed youthful offender' is one committed to the custody of the Commissioner of Correction under the provisions of this article." G.S. 148-49.2.

Upon a youthful offender's conviction of an offense punishable by imprisonment G.S. 148-49.4 authorized the court, "in lieu of the penalty of imprisonment otherwise provided by law," to sentence him to the custody of the Commissioner of Correction for supervision and treatment pursuant to Article 3A until discharged at the expiration of the maximum term imposed or released conditionally or unconditionally by the Board of Paroles. If the youthful offender

was not put on probation at the time of his commitment the court was required to fix a maximum term, not to exceed the limit otherwise prescribed by law for the offense of which he was convicted. The statute provided that "[w]hen the maximum permitted penalty for the offense is imprisonment for one year or longer, the maximum term imposed shall not be for less than one year." However, it further provided that "[i]f the court shall find that the youthful offender will not derive benefit from treatment and supervision pursuant to this Article [3A], then the court may sentence the youthful offender under any other applicable penalty provision."

G.S. 148-49.8(a) specified that when the Commissioner of Correction deemed a committed youthful offender ready for conditional release under supervision he should report his recommendations to the Board of Paroles. Notwithstanding, the Board of Paroles was authorized to release a committed youthful offender under supervision at any time after reasonable notice to the Commissioner. It is section (b) of G.S. 148-49.8, however, upon which petitioner bases his hope of release. This section provided: "A committed youthful offender *shall be released conditionally under supervision on or before the expiration of four years from the date of his commitment* and may be discharged unconditionally before the expiration of the maximum term imposed." (Emphasis added.) Section (c) permitted the Board of Paroles to revoke or modify any of its orders respecting a committed youthful offender except an order of unconditional discharge.

Having briefed Article 3A in the preceding paragraphs we first note that Judge Cohoon did not purport to commit petitioner, as provided in G.S. 148-49.4, "to the custody of the Commissioner of Correction for treatment and supervision under this Article as a committed youthful offender." Had he so intended the learned judge would not have deemed it necessary to *recommend* that "this defendant be placed in some youth camp . . .," for G.S. 148-49.7 spelled out the "treatment of committed youthful offenders" and, *inter alia*, required the Commissioner of Correction to segregate them from other offenders "according to their needs . . . insofar as practical."

[2] In his judgment and commitment Judge Cohoon recited that he was sentencing Niccum to imprisonment "*as required by law* for the term of his natural life in the State Prison assigned to do labor under the supervision of the North Carolina Department of Correction." (Emphasis added.) In other words, he sentenced and committed Niccum just as he would have any adult defendant who, at that time, had pled guilty to felony murder. The inclusion of the ex-

planatory phrase, "required by law," denotes that Judge Cohoon construed Article 3A as having no application to youthful offenders who had committed a crime for which the punishment mandated by the General Assembly was either death or life imprisonment. We agree with this construction.

In reaching the conclusion that Article 3A is inapplicable to Niccum's sentence, we have considered the General Assembly's repeated manifestations that it intended to require the maximum punishment of death or life imprisonment for first degree murder. When Article 3A was enacted in 1967, N.C. Sess. Laws, ch. 996, § 10, the punishment for first degree murder in this State was death except in two situations when the punishment would be life imprisonment: When a plea of guilty was accepted by the State and approved by the judge (G.S. 15-162.1 (1965 Cum. Supp.)) and when the jury, at the time of rendering its verdict so recommended. (G.S. 14-17 (1969)).

On 25 March 1969 G.S. 15-162.1 was repealed by 1969 N.C. Sess. Laws, ch. 117 after the United States Supreme Court had held that sentences of death could not constitutionally be imposed under G.S. 14-17 for first degree murder committed while a statute allowed a defendant to plead guilty to a capital crime and receive a life sentence. *See State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972).

In June 1972 the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, invalidated the death penalty in North Carolina on the ground that it could not be constitutionally inflicted if the applicable statute (G.S. 14-17) authorized either the judge or jury to impose it as a matter of discretion.

Thereafter, until the decision of this Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, decided 18 January 1973, life imprisonment was the only permissible punishment for first degree murder in this State. It was during this interim that Niccum pled guilty to first degree murder and received a sentence of life imprisonment.

By the enactment of 1973 N.C. Sess. Laws, ch. 1201, sec. 1, the General Assembly rewrote G.S. 14-17. By eliminating the discretionary provision condemned by *Furman v. Georgia, supra*, which had permitted the jury to fix the punishment at life imprisonment, it mandated the death penalty for all persons convicted of the crime. Section 1 also increased the maximum punishment for second degree murder from 30 years to life imprisonment. Section 5 provides that all prisoners shall be eligible to have their cases considered for parole after they have served a fourth of their sentence,

and that any prisoner serving a life sentence shall be eligible for such consideration after he has served 20 years. In Section 6 by an amendment to G.S. 14-2 (1969) it provided that "a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's Prison."

On 1 June 1977 the General Assembly rewrote G.S. 14-17 to make the punishment for murder in the first degree "death or imprisonment for life in the State's prison as the court shall determine pursuant to G.S. 15A-2000." 1977 N.C. Sess. Laws, ch. 406. G.S. 15A-2000 outlined the proceedings and listed some of the "aggravating" and "mitigating circumstances" which the jury should consider in determining whether the punishment should be death or life imprisonment. Among the mitigating circumstances militating in favor of a life sentence is "[t]he age of the defendant at the time of the crime." G.S. 15A-2000(f)(7).

Having consistently mandated death or life imprisonment for first degree murder, and having made a prisoner serving a life sentence eligible for parole when he has served 20 years of his sentence, it is inconceivable to us that the General Assembly intended to liberalize the punishment to the extent authorized by the Programs for Youthful Offenders contained in N.C. Gen. Stats. ch. 148. If Article 3A were held applicable to youthful offenders guilty of murder in the first degree, G.S. 148-49.4 would have required the judge, if he did not suspend the imposition or execution of a sentence of life imprisonment and place the offender on probation, to fix a maximum term not to exceed the limit otherwise prescribed by law. Obviously the court could not impose a term in excess of life imprisonment! However, G.S. 148-49.4 also provided that "[w]hen the maximum permitted penalty for the offense is imprisonment for one year or longer, the maximum term imposed shall not be for less than one year."

Thus, according to petitioner's construction of Article 3A, a superior court judge, in his discretion, could have put any youthful offender convicted of first degree murder *on probation*, or sentenced him as a committed youthful offender from one year to life imprisonment. Further, notwithstanding the trial court's imposition of a life sentence, under G.S. 148-49.8 the Board of Paroles could have released the committed youthful offender at any time after reasonable notice to the Commissioner of Correction; and it was required to release him conditionally under supervision on or before the expiration of four years!

In civilized society, first degree murder is universally regarded as one of the most heinous of all crimes. We cannot believe that the General Assembly of this State ever contemplated that any person guilty of first degree murder might be placed on probation or discharged, either conditionally or unconditionally, after serving only one year of a life sentence. Nor can we be persuaded that it intended to *require* his conditional release under supervision "on or before the expiration of four years from the date of his commitment."

After its enactment in 1967, the General Assembly made no substantive changes in Article 3A prior to the enactment of 1977 N.C. Sess. Laws, ch. 732. This act, which became effective while this case was pending in this Court (on 1 October 1977), repealed Article 3A (G.S. 148-49.1 to G.S. 148-49.9) and, in lieu thereof added to N.C. Gen. Stats. ch. 148 a new article, 3B, to be codified as G.S. §§ 148-49.10 to G.S. 148-49.16. The purpose of new Article 3B as stated in G.S. 148-49.10 is the same purpose stated in G.S. 148-49.1 of the old Article 3A, and any rights accrued by persons under Article 3A remain unaffected. G.S. 148-49.11. Since we hold that petitioner acquired no rights under Article 3A there are none to be affected by Article 3B. However, a comparison of the two articles will corroborate our conclusion that they were not intended to apply to youthful offenders guilty of first degree murder.

As used in Article 3B "a 'youthful offender' is a person under 21 years of age in the custody of the Secretary of Correction. A 'committed youthful offender' is a youthful offender who shall have the benefit of early release under the provisions of G.S. 148-49.15." G.S. 148-49.11. To the extent practicable, considering the needs of the youthful offenders and the resources of the prison system, G.S. 148-49.12 directs the Secretary of Correction, *inter alia*, to house youthful offenders separate from prisoners over 21 years of age and to provide specified methods of treatment. Under section (c) of this statute the Secretary of Correction may authorize a youthful offender, "under prescribed conditions," to leave his place of confinement "unaccompanied by a custodial agent for a prescribed period of time for any purpose consistent with the public interest."

With reference to sentencing committed youthful offenders, G.S. 148-49.14 provides: "As an alternative to a sentence of imprisonment as is otherwise provided by law, when a person under 21 years of age is convicted of an offense punishable by imprisonment and the court does not suspend the imposition or execution of sentence and place him on probation, the court may sentence such

person to the custody of the Secretary of Correction for treatment and supervision as a committed youthful offender. *At the time of commitment the court shall fix a maximum term not to exceed the limit otherwise prescribed by law for the offense of which the person is convicted or 20 years, whichever is less. When the maximum permitted penalty for the offense is imprisonment for one year or longer, the maximum term imposed shall be for not less than one year.* If the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such 'no benefit' finding on the record." (Emphasis added.)

With reference to the parole of committed youthful offenders, G.S. 148-49.15 provides that it shall not be necessary for a committed youthful offender to have served one-fourth of his sentence before becoming eligible for parole. It also authorizes the Parole Commission, at any time after reasonable notice to the Secretary of Correction, to parole a committed youthful offender under supervision of agents and employees of the Department of Correction. The Secretary of Correction "may also recommend such action to the Parole Commission." This section omitted the requirement contained in its counterpart in Article 3A (G.S. 148-49.8(b)) that a "committed youthful offender shall be released conditionally under supervision on or before the expiration of four years from the date of his commitment and may be discharged unconditionally before the expiration of the maximum term imposed."

The foregoing changes in the law substantiate our view that the Programs for Youthful Offenders cannot logically be related to youthful offenders serving mandatory life sentences. Under G.S. 15A-2000(f)(7) the age of a person guilty of first degree murder is only a mitigating factor to be considered in determining whether the punishment should be death or life imprisonment. Yet, under petitioner's argument the age of the offender, if less than 21 years, could reduce the maximum sentence which could be imposed to 20 years (G.S. 148-49.14). By 1973 N.C. Sess. Laws, ch. 1201, § 5, amending G.S. 148-58, the General Assembly made a first degree murderer eligible for *consideration* for parole after he serves 20 years; however, if Article 3B applied to a youthful offender guilty of first degree murder, he would be eligible for parole at any time (G.S. 148-49.15).

We note that a few jurisdictions have concluded that their respective legislative bodies intended their youthful offender statutes to apply to mandatory life sentences. *See United States v. Howard*, 449 F. 2d 1086 (C.A.D.C. 1971); *People v. Reyes*, 60 Cal.

App. 3d 227, 131 Cal. Rptr. 340 (1976); *United States v. Stokes*, 365 A. 2d 615 (D.C. App. 1976). Nevertheless, until the General Assembly specifically makes Article 3A and 3B applicable to youthful offenders who have been convicted or have judicially admitted their guilt of first degree murder, we remain unconvinced that the General Assembly intended to authorize superior court judges to fix the punishment for a first degree murderer under 21 years of age at not less than one nor more than 20 years and to render him eligible for parole at any time. To withdraw sentencing discretion with one hand and then restore it with another *sub silentio* under the guise of a youthful offender program appears utterly incongruous, and we do not attribute such an intent to the General Assembly.

We hold that neither Article 3A (repealed) nor 3B of N.C. Gen. Stats. ch. 148 was intended to apply to convictions or pleas of guilty of crimes for which death or a life sentence is the mandatory punishment. Petitioner Niccum, therefore, is not a committed youthful offender entitled to the benefits of the Youthful Offenders Program.

This holding makes it unnecessary to decide the question debated in the briefs, whether the decision of the Court of Appeals in *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645, bore upon Niccum's right to conditional release. This case, decided 5 February 1975, held that the trial judge could not sentence a youthful offender as an older criminal without specifically finding he would receive no benefit from treatment and supervision as a "committed youthful offender." We note, however, that since 1 October 1977 such a finding is mandated by 1977 N.C. Sess. Laws, ch. 732, art. 3B (G.S. 148-49.14), quoted above.

The judgment of Judge Peel is affirmed, and this cause is remanded to the Superior Court of Craven County.

Affirmed.

STATE OF NORTH CAROLINA v. RONNIE WALLACE LONG

No. 2

(Filed 11 October 1977)

1. **Criminal Law § 66.12— pretrial courtroom identification—no impermissible suggestiveness**

A rape victim's identification of defendant at an unrelated district court proceeding was not the result of impermissibly suggestive procedures, testimony of

the pretrial identification was properly admitted, and the pretrial identification did not taint the victim's in-court identification of defendant where officers asked the victim to sit in the courtroom and see if she could recognize the man who raped her; the officers made no suggestion that defendant or anyone else in particular would be in the courtroom; there were approximately sixty people in the courtroom and as many as a dozen black males; when defendant walked down the aisle past her to approach the bench, the victim immediately recognized him as her assailant and, without prompting, she mentioned to police that defendant was the man.

2. **Criminal Law § 66.9— photographic identification—no impermissible suggestiveness**

A rape victim's photographic identification of defendant at the police station was not the result of impermissibly suggestive procedures where officers showed her six or eight photographs; the victim identified defendant's photograph without prompting; officers did not point out any particular picture to her; and the victim testified that she recognized defendant from seeing him at the time of the assault.

3. **Criminal Law §§ 66.9, 66.12— pretrial confrontation—no likelihood of mistaken identification**

There was no likelihood of mistaken identification in a rape victim's photographic and pretrial courtroom identifications of defendant where the victim positively identified defendant as her assailant; she testified that lights were on in her den, bedroom and hall, and that she got a clear look at defendant's face in all three rooms; her description of defendant on the evening of the crime was similar to his actual appearance; at her initial confrontation of defendant in the district courtroom, she recognized defendant as soon as he walked past her to approach the bench; and the lapse of time between the crime and the initial confrontation was fifteen days.

4. **Searches and Seizures § 2— consent to search—burden of proof**

For a consent search to be valid, the State has the burden of proving that consent was freely and voluntarily given, without coercion, duress or fraud.

5. **Searches and Seizures § 2— in-custody consent for search—warning of right to refuse consent**

Officers are not required to advise a suspect of his right to refuse consent for a search in order to validate either pre-custody or in-custody consent for the search; however, the added factor of custody is a circumstance to be taken into account with all other surrounding circumstances in determining whether consent was freely and voluntarily given in the absence of coercion.

6. **Criminal Law § 61.2— shoe prints**

Evidence of shoe prints leading to or from the scene of the crime and corresponding with those of the accused may be admitted into evidence as tending more or less strongly to connect the accused with the crime.

7. **Criminal Law § 61.2— shoe prints—time of impression**

Testimony that a shoe print lifted from the front porch banister of a rape victim's home corresponded with shoes taken from defendant at the time of his arrest was competent as tending to connect defendant with the rape, although officers admitted on cross-examination that the shoe print could have been made

a month prior to the crime, since the question whether the shoe print could have been impressed only at the time of the crime was a question of fact for the jury, not a question of law to be determined by the court prior to the admission of the evidence.

APPEAL by defendant from *Wood, J.*, 27 September 1976 Criminal Session of CABARRUS Superior Court.

Defendant was charged in separate bills of indictment with first degree rape and first degree burglary. The cases were consolidated for trial and defendant entered pleas of not guilty. The jury returned verdicts of guilty as charged and the trial judge entered judgments imposing a life sentence on each charge.

The State offered evidence tending to show that on the evening of 25 April 1976, Mrs. Gray Bost, a fifty-four-year-old widow, was alone in her home at 158 South Union Street, Concord. She walked into her den around 9:30 p.m. and was grabbed from behind by a black man wearing a black leather jacket, black gloves, and a green toboggan cap covering his ears but not his face. He threw her onto the floor, put a knife at her throat, and demanded money. He pushed her into her bedroom to her bed, where she rummaged through her pocketbook only to find that her money was gone. He then shoved her into a lighted hall, threw her onto the floor, and raped her. Other sordid details concerning defendant's acts, not necessary to decision, are omitted. The assault continued until the phone rang, at which time the assailant jumped up and left. Mrs. Bost then ran unclothed out the back door to her neighbor's home, and was rushed by ambulance to the hospital.

A gynecologist found live active spermatozoa in her vagina, as well as numerous scratches and bruises on her face and body.

Defendant offered evidence tending to show that on Sunday, 25 April 1976, Ronnie Long attended a class reunion planning meeting. He made arrangements with friends to go to Charlotte later that night. Mrs. Elizabeth Long, defendant's mother, testified that her son was at home from around 8:30 p.m. until after 10:00 p.m. Mrs. Long, the defendant and defendant's girl friend, Janice Spears, participated in a phone conversation which lasted about forty-five minutes. Ms. Spears indicated that she called the Long residence at 9:00 p.m. She said that she and her son talked with the defendant and Mrs. Long until 9:45 p.m. Shortly after 10:00 p.m., defendant's father returned home with the car and defendant left for a party in Charlotte.

Other facts relevant to the decision will be set out in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Ben G. Irons, II for the State.

Karl Adkins for defendant appellant.

MOORE, Justice.

[1] Appellant's first assignment of error is based on the contention that pretrial identification procedures were so impermissibly suggestive that admission of the in-court identification violated due process of law. This contention questions the admissibility of testimony concerning Mrs. Bost's identification of the defendant at an unrelated district court proceeding, as well as the admissibility of Mrs. Bost's in-court identification of defendant. The defendant contends that the circumstances surrounding the extrajudicial identification procedures used by police to procure his identification were so unduly prejudicial and suggestive as fatally to taint his conviction. "This is a claim which must be evaluated in light of the totality of surrounding circumstances." *Simmons v. United States*, 390 U.S. 377, 383, 19 L.Ed. 2d 1247, 1252-53, 88 S.Ct. 967, 970 (1968).

In *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), and in *Simmons v. United States, supra*, the United States Supreme Court set forth the standard for determining whether an in-court identification following an allegedly suggestive pretrial identification procedure satisfies the demands of due process: "[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 . . . will be set aside on that ground only if the . . . 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. at 384, 19 L.Ed. 2d at 1253, 88 S.Ct. at 971.

In *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), this Court set forth the standard as follows:

> ". . . The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. [Citations omitted.]"

In present case, Mrs. Bost testified that on 5 May 1976 officers came to her house and requested her to come and sit in district court to see if there might be a man she could recognize as her assailant. The officers told her that they did not know who would be in court, and that she may have to come to court on two or more occasions before she could identify anyone. Mrs. Bost went to the courthouse on 10 May and talked with officers before entering the courtroom. Again, they made no suggestion to her that the defendant or anyone else in particular would be in the courtroom. They simply told her to sit in the courtroom and look around and see if she could recognize the man who raped her. Mrs. Bost entered the courtroom with her friend, a Mrs. Pfennell, and sat apart from the officers. There were as many as sixty people in the courtroom, and as many as a dozen black males. Mrs. Bost testified that when the judge called the name Ronnie Wallace Long, a name she had never heard before, a man she recognized as her assailant walked down the aisle past her. She testified that she immediately recognized him, and that, without prompting, she motioned to police that the defendant was the man. Having reviewed the totality of the circumstances surrounding the pretrial courtroom identification, we conclude that there was no constitutional violation in the manner in which it was conducted.

[2] Mrs. Bost further testified on *voir dire* that after the courtroom identification the police took her to the station and showed her six or eight photographs, and once again, without prompting, she identified the defendant. She also testified that officers did not point out any particular picture to her, and that she recognized the defendant from seeing him at the time of the assault. Considering this testimony, we hold that there was nothing "impermissibly suggestive" surrounding the circumstances of the photographic identification of the defendant.

In *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972), the United States Supreme Court set forth certain factors to be considered in evaluating the likelihood of mistaken identification. These are: (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 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. *See also State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Henderson, supra.*

[3] A review of the uncontradicted testimony of Mrs. Bost on *voir dire* in light of the factors set forth in *Neil v. Biggers, supra*, in-

dicates little likelihood of mistaken identification. On *voir dire*, Mrs. Bost positively identified the defendant as her assailant. She testified that lights were on in her den, bedroom and hall, and that she got a clear look at the defendant's face in all three rooms. This testimony indicates that she had ample opportunity to view the criminal at the time of the crime, and that she carefully noted his appearance and the features of his face. Her description of the defendant on the evening of the crime was similar to his actual appearance. At her initial confrontation with the defendant in district court, she recognized the defendant as soon as he walked by her to approach the bench. She did not identify another person as her assailant and did not fail to identify the defendant at her initial confrontation with him. The lapse of time between the crime and the confrontation was fifteen days. On *voir dire* she averred that she had "no doubt in her mind whatsoever" that Ronnie Long was the man who raped her, and she said that her "identification was based on seeing him in my home."

At the conclusion of the *voir dire* hearing, the trial judge found as a fact: "[T]hat her [Mrs. Bost's] identification here in this courtroom today is free and independent of her viewing of the defendant on May the 10th, in the courtroom on that occasion, and not tainted by her viewing the defendant on that occasion; that nor was it tainted by her viewing of the photographs on May the 10th, 1976."

When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). Here, the court's findings were amply supported by competent evidence and are therefore conclusive on this Court.

The competency of the testimony concerning Mrs. Bost's pretrial courtroom identification and her photographic identification of defendant is a separate question. "[T]he introduction of testimony concerning an out-of-court . . . identification must be excluded where . . . the procedure used is impermissibly suggestive, even though that suggestiveness does not require exclusion of the in-court identification itself under the *Simmons* test. [Citations omitted.]" *State v. Knight*, 282 N.C. 220, 227, 192 S.E. 2d 283, 288 (1972). Since we have found that there was nothing "unnecessarily" or "impermissibly" suggestive about the pretrial identification procedures used in the present case, the evidence of the out-of-court identifications was properly admitted.

We next turn to defendant's contention that the search of his automobile at the police station was illegal and that the evidence relating to the discovery of the leather gloves and toboggan cap, and the gloves and toboggan cap themselves, were therefore erroneously admitted into evidence. Upon defendant's objection to this evidence, the trial judge correctly excused the jury and conducted a *voir dire* hearing, found facts, entered conclusions of law and ruled on the admissibility of the evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755, *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157.

On *voir dire*, police officers Taylor and Lee testified that they went to defendant's home on the evening of 10 May 1976 without an arrest warrant, and requested defendant to come to the police station to answer some questions. Defendant asked if he could drive his own car to the station, and the officers agreed. Defendant then drove to the station and parked his car in the parking lot. When defendant entered the station, Officer Taylor read him his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and informed him that he was a suspect in a rape case. Defendant signed a form waiving his *Miranda* rights and agreed to submit to questioning without the presence of a lawyer. After the questioning, Officers Taylor and Vogler asked defendant for consent to search his automobile. Defendant agreed to the search and gave Vogler the car keys. Upon search, Vogler found a green toboggan cap under the front seat, and a pair of black leather gloves over the sun visor. At the time of his arrest, defendant was wearing a black leather jacket. Mrs. Bost described the jacket, the toboggan cap and the gloves as similar or identical to those worn by defendant at the time of the assault. Officers Taylor and Vogler further testified that defendant was not subjected to any pressure or threats by them and that Long expressed no hesitancy or uncertainty about allowing them to search the vehicle.

Defendant Long testified on *voir dire* that the officers came to his house on the evening of 10 May 1976 and told him to come down to the station to clear up a trespassing matter. He said that while at the police station Officer Vogler asked him to empty his pockets. He did so, and Vogler took his keys and left. Defendant testified that at no time did officers request permission to search his automobile, and that he did not give anyone permission to search the vehicle. He further testified there was no coercion or pressure used on him at any time by the officers.

The trial judge found that the defendant "gave his permission to Officers Vogler and Taylor to search his automobile . . . that this search was made with his permission, and the Court concludes . . . that it is proper to allow that evidence to be introduced here before the jury; [the court] denies the motion of the defendant to suppress this evidence."

Defendant recognizes that when a person voluntarily consents to a search by officers, he cannot later complain that his constitutional and statutory rights were violated, *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976), and that one who so consents waives the necessity of a valid search warrant. *State v. Vestal, supra.* However, defendant contends that because he was in custody at the stationhouse, consent was not voluntarily given, and since there was no probable cause to search the vehicle, the warrantless search was unconstitutional and the evidence incompetent.

[4] For a consent search to be valid, the State has the burden of proving that consent was freely and voluntarily given, without coercion, duress or fraud. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973); *State v. Vestal, supra*; *State v. Little*, 270 N.C. 234, 154 S.E. 2d 61 (1967). Although the State has the burden of proving that consent was voluntarily given, the United States Supreme Court and this Court have held that *Miranda* is inapplicable to searches and seizures, and that it is not necessary to inform a suspect that he has the right to refuse consent. *Schneckloth v. Bustamonte, supra*; *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Vestal, supra.*

[5] In holding that advice as to the right to refuse consent to search is not necessary, the Court in *Schneckloth* said:

> "The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. . . .
>
> ". . . And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. . . ." 412 U.S. at 242-43, 36 L.Ed. 2d at 871-72.

The defendant contends, however, that there is a difference between the non-custody consent given without advice of rights upheld in *Schneckloth*, and the in-custody consent involved in the present case. Defendant argues that the very facts and circumstances surrounding a suspect in custody are inherently coercive and tend to render any consent given by him nonvoluntary.

In *Schneckloth*, the Court noted that its holding applied to the limited facts of that case, a pre-custody consent search, and said that a determination of the proper standard for the validity of in-custody consent searches was not required by the facts of that case. 412 U.S. at 240, 36 L.Ed. 2d at 870-71, n. 29.

In a more recent case, *United States v. Watson*, 423 U.S. 411, 46 L.Ed. 2d 598, 96 S.Ct. 820 (1976), the United States Supreme Court appears to have extended *Schneckloth* to consent searches when the suspect is both in custody and under arrest. There the Court said:

> ". . . Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. . . .
>
> "[T]o hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* and would distort the voluntariness standard that we reaffirmed in that case." 423 U.S. at 424-25, 46 L.Ed. 2d at 609-10.

This Court held in *State v. Frank*, *supra*, that a specific warning as to Fourth Amendment rights is not necessary to validate consent to a search after the defendant is in custody, and that this is especially so where, as in the present case, a defendant has been warned of his right to remain silent and right to counsel under *Miranda*. *See also United States v. Smith*, 543 F. 2d 1141 (5th Cir. 1976); *United States v. Green*, 525 F. 2d 386 (8th Cir. 1975); *United States v. Cage*, 494 F. 2d 740 (10th Cir. 1974); *United States v. Fike*, 449 F. 2d 191 (5th Cir. 1971). Therefore, in accord with the United States Supreme Court decision in *Watson*, we make no definitive distinction between pre-custody and in-custody consent searches. Rather, we hold that the added factor of custody is a circumstance to be taken into account with all other surrounding circumstances in determining whether consent was freely and voluntarily given in the absence of coercion. Upon the *voir dire* to determine the voluntariness of defendant's consent to a search of his property, the weight to be given the evidence is peculiarly a determination for the trial judge, and his findings are conclusive when supported by competent evidence. *State v. Little*, *supra*. In our opinion, the evidence in present case supports the trial judge's findings, and the findings

support the conclusions and rulings. This assignment of error is overruled.

[7] Defendant alleges that the trial court committed error by admitting evidence and testimony as to a shoe print lifted from the banister of the front porch of the victim's home. On *voir dire*, Officer Van Isenhour testified that he lifted the shoe print from the banister the day after the crime. He further testified that there were numerous other scuff marks in the painted surface of the banister and on up the post leading to the roof of the house. Earlier, there was testimony by Mrs. Bost and officers that the defendant probably entered the house by way of an unlocked second story window above the front porch. The window was found opened by police the evening of the crime. Officer Isenhour testified on cross-examination that the shoe print could have been made as much as a month prior to the crime. During the trial, S.B.I. Agent Dennis Mooney, an expert on prints, testified that the shoe print could have been made by shoes worn by and taken from defendant at the time of his arrest.

At the conclusion of the *voir dire*, the trial judge found facts as follows:

> "At this time, I find that these footprints, from the testimony of this officer on voir dire, were found on the corner of the bannister column which is eight and a half to ten feet above the ground; four and a half feet above the porch; one and a half feet to one and three quarter feet above the bannister on the corner of the porch post; that this is a place ordinarily where footprints would not appear on a house; that in addition, there were scuff marks on the post leading up to the corner of the roof of the porch, near the roof of the porch; that this roof is the roof from which the person who assaulted Mrs. Bost on the 25th day of April . . . made the entry into the house. . . ."

The trial court then concluded that the evidence of the shoe print was admissible.

Defendant insists that since the shoe print could have been made as much as a month prior to the crime, its admission was error, and that under *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949), it was nonprobative evidence which should not have been presented to the jury. Defendant's reliance on *Palmer* is misplaced. *Palmer* dealt with the weight to be assigned the evidence of the shoe print in determining a motion for nonsuit, not its admissibility. The

admissibility of the evidence of the shoe print was not raised on appeal.

[6, 7] Evidence of shoe prints leading to or from the scene of the crime and corresponding with those of the accused may be admitted into evidence as tending more or less strongly to connect the accused with the crime. Stansbury, North Carolina Evidence § 85, pp. 263-65 (Brandis rev. 1973); *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216 (1972); *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Warren*, 228 N.C. 22, 44 S.E. 2d 207 (1947). Although both Officers Van Isenhour and Mooney admitted on cross-examination that the shoe print could have been made a month prior to the crime, Officer Mooney's testimony on direct examination that the shoe print corresponded with shoes taken from defendant at the time of his arrest was clearly competent as tending to connect the accused with the crime. The question whether the shoe print could have been impressed only at the time the crime was committed is a question of fact for the jury, not a question of law to be determined by the court prior to the admission of the evidence. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). We therefore hold that this evidence was properly admitted.

Evidence of defendant's guilt was clear. His convictions result from a trial free from prejudicial error. The verdicts and judgments of the trial court must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. JOHN VAN CROSS

No. 3

(Filed 11 October 1977)

1. **Criminal Law § 98.2— sequestration of witnesses—discretionary matter**

It is the general practice in N.C. in both civil and criminal cases to separate the witnesses and send them out of the hearing of the court when requested, but this is discretionary with the trial judge and may not be claimed as a matter of right.

2. **Criminal Law § 101.4— sequestration of jury—denial proper**

The trial court did not abuse its discretion in denying defendant's motion to sequester the jury where defendant argued that the courtroom facilities were crowded, the trial was heavily publicized, and the potential was great for jurors to come in contact with outside sources, but there was no suggestion of any impropriety on the part of any juror.

3. **Criminal Law § 87.3— written statement to refresh recollection—examination by defendant not required**

Where a witness admitted that he used a written statement to refresh his recollection while at home prior to trial but left the statement at home, the trial court did not err in not requiring the State to produce the statement so that defendant could view it.

4. **Criminal Law 66.3— composite sketch—identification from sketch—admission error**

Although it was error to allow a witness to express her past opinion as to the identity of the individual depicted in sketches which were based on descriptions given by eyewitnesses to a shooting when the sketches themselves were not introduced into evidence, such error was harmless in view of the overwhelming evidence of defendant's guilt.

5. **Bills of Discovery § 6— discovery of exculpatory evidence—photographs withheld—no order to produce—no error**

Where the request for discovery made by defendant's attorney prior to trial asked the district attorney to disclose any exculpatory evidence in the possession of the State, the State provided no information about a photographic identification procedure in which nine people failed to identify a photograph of defendant, and defendant learned about the procedure during cross-examination of a witness, the trial court did not err in not requiring the State to produce the photographs used, since the desired information concerning the photographs was fully disclosed to defendant by stipulation; defendant did not request additional information, a continuance, a recess or other action at the time; and the record did not show that the photographs should or could have been provided to defendant since they were never requested.

6. **Homicide § 21.5; Robbery § 4— first degree murder—armed robbery—sufficiency of evidence**

In a prosecution for armed robbery and first degree murder, evidence was sufficient to be submitted to the jury where it tended to show that witnesses identified defendant as the man they saw shoot a supermarket cashier with a pistol and take money from the cash register; other witnesses testified concerning conversations with defendant about the robbery; doctors testified that the victim died as the result of a gunshot wound inflicted on this occasion; and the operator of the supermarket testified that $830 was taken from the cash register.

7. **Criminal Law § 98— possibility of jury viewing defendant in handcuffs—no new trial**

Defendant was not entitled to a new trial where he was required to wait in a holding area with handcuffs on, and there was a possibility that he might have been seen by the jury in handcuffs, but there was no showing that the jury in fact saw him so bound.

APPEAL by defendant from *Clark, J.*, at the 18 October 1976 Criminal Session of CUMBERLAND Superior Court.

Upon an indictment, proper in form, defendant was tried and convicted of first degree murder and armed robbery. He was

sentenced to life imprisonment on the murder charge. Judgment was arrested on the armed robbery charge.

The State's evidence tends to show the facts as follows: On the evening of 1 November 1975, at approximately 8:00 p.m., a black male, later identified as defendant, entered the V-Point Supermarket on Murchison Road in Fayetteville, North Carolina. He was wearing a blue denim jacket, dark pants and a red toboggan cap covering his head but not his face. Upon entry, the man immediately walked up to the check-out counter and took his place in line. Approximately ten to twelve customers were present in the store at the time, and several of them observed the man enter the store and take his place in line.

William Victor Tally, the son of the storeowner, was operating the cash register at the middle check-out line. The black male approached Tally, said the word "Robbery," and immediately pulled a pistol from the left side of his coat and shot Tally in the chest. Tally fell back to a rack and slid to the floor. The assailant grabbed a handful of money from the opened cash register drawer and ran out the front door, dropping money as he ran. He ran through the parking area and across Murchison Road into a wooded area. Several witnesses observed the assailant grab money from the cash register and rush out the door.

William Victor Tally was rushed to Cape Fear Valley Hospital where he was pronounced dead on arrival. A subsequent autopsy revealed that the bullet which caused his death had entered his abdominal region, heart and lungs.

That same evening two black males, eyewitnesses to the crime, went to the Law Enforcement Center in Cumberland County and gave a description to police from which artist sketches were drawn. Ruth Cartrette, a witness who was acquainted with defendant but who was not present at the crime, later told police that the sketches looked like the defendant.

Witnesses for both the State and the defense testified that John Van Cross was present in Fayetteville on 1 November 1975. On 3 November 1975, the defendant appeared in district court to have a marijuana charge against him continued. On the same day, defendant, and State's witnesses Ronnie Crumpler and Jonathan Robinson, left Fayetteville in Crumpler's 1971 gold Cadillac automobile, and traveled to defendant's home in Birmingham, Alabama. They remained at this location for approximately ten days to two weeks, and then traveled to Miami, Florida. Witnesses Crumpler and

Robinson testified that upon hearing that the three of them were wanted for the Fayetteville robbery and murder, defendant told them that he had done it. Both witnesses admitted that they had discussed robbing the store with defendant in October 1975.

Around 1 December 1975, defendant flew back to his home in Birmingham, and remained there until the day of his arrest, 17 January 1976. He voluntarily waived extradition and traveled back to Fayetteville with police.

Defendant testified in his own behalf. He denied committing the robbery and murder and denied any participation in the crime. He further testified that he first heard of this matter in late November 1975 in Miami, when Crumpler told him that police were looking for them in connection with the crime. Several witnesses testified that State's witness Jonathan Robinson told them that defendant had not committed the robbery and murder, but that he (Robinson) was responsible for the acts.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Elisha H. Bunting, Jr. for the State.

Charles H. Burgardt for defendant appellant.

MOORE, Justice.

Defendant moved to sequester the State's witnesses prior to presentation of the evidence. The motion was overruled, and defendant assigns this as error, contending that the denial of the motion was an abuse of the trial judge's discretion. The record does not disclose any reason given by defendant for this motion. In his brief, defendant argues that this motion was crucial to his defense in order to show inconsistencies in the testimony of Ronnie Crumpler and Jonathan Robinson as well as certain eyewitnesses' testimony concerning the identification of defendant. The State called twenty-one witnesses during the trial, but of these defendant named only Crumpler and Robinson. Defendant had copies of the written statements made to the officers by these two witnesses, and he had the opportunity to, and did, thoroughly cross-examine each of them.

[1] It is the general practice in North Carolina in both civil and criminal cases to separate the witnesses and send them out of the hearing of the court when requested, but this is discretionary with the trial judge and may not be claimed as a matter of right. "A

judge's refusal to sequester the State's witnesses is not reviewable unless an abuse of discretion is shown." *State v. Sparrow*, 276 N.C. 499, 511, 173 S.E. 2d 897, 905 (1970); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); 1 Stansbury, North Carolina Evidence § 20 (Brandis rev. 1973). The record fails to show any prejudice to defendant or abuse of discretion by the trial judge. This assignment is overruled.

[2] Next, defendant assigns as error the failure of the trial judge to sequester the jury during the trial. The record indicates that some argument took place, but does not state what grounds defendant presented to support this motion. Defendant argues that the courtroom facilities were crowded, the trial was heavily publicized, and the potential was great for jurors to come in contact with outside sources. Nothing in the record indicates or even suggests any impropriety on the part of any juror. Sequestration is a discretionary matter for the trial judge, and here no abuse of discretion appears. *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976); *State v. Bynum* and *State v. Coley*, 282 N.C. 552, 193 S.E. 2d 725 (1973). This assignment is without merit and is overruled.

[3] By Assignments of Error Nos. 3 and 5, defendant insists that the trial judge erred in not requiring the State to produce the written statement made by witness Michael Anthony Dunham after he had referred to it while testifying. Defendant argues that this was a writing the witness used to refresh his recollection and that he was entitled to view it. With reference to writings used by a witness to refresh his memory, 1 Stansbury, North Carolina Evidence § 32, p. 88 (Brandis rev. 1973), states:

> "The witness may refresh his memory before the trial, in which case he need not produce in court the writings used for that purpose. If the writings are in court, however, or the witness attempts to use them while testifying, the opposite party is entitled to their production for inspection."

In present case, the witness admitted that he used the statement to refresh his recollection while at home prior to trial. The statement was not used to refresh his recollection while he was on the stand. In fact, the statement had been left at the witness's home. In the case cited by defendant, *State v. Carter*, 268 N.C. 648, 151 S.E. 2d 602 (1966), the witness did refer to his notes to refresh his recollection while testifying, and this Court held it was error for the trial judge to refuse defense counsel the right to view the notes. *Carter* is not on point with the case before us. The record in the case

at bar clearly shows that the witness Dunham did not refer to the statement while testifying, but that this statement was at his home. This case is quite similar to the case of *Gustafson v. Gustafson*, 272 N.C. 452, 457, 158 S.E. 2d 619, 623 (1968), in which Justice Pless stated:

> "The defendant further excepts to the failure of Judge Mintz to allow him to inspect the 'notes that were relied upon by a witness during his testimony,' citing *State v. Carter*, 268 N.C. 648, 151 S.E. 2d 602. However, the facts of that case are quite distinguishable from the situation here. The defendant called Dr. R. H. Fisscher as a witness in his behalf. He testified that he saw Mrs. Gustafson on two occasions and that he took notes relating to them. . . . Upon inquiry it appeared that the doctor was not using the notes at the time of his examination, although they were in the possession of someone else in the courtroom. Had the doctor been refreshing his memory from the use of his notes as he testified, *State v. Carter, supra*, might be applicable; but the very fact that he had notes somewhere under his control would not require that the defendant be allowed to inspect them. . . ."

These assignments are overruled.

[4] State's witness Mrs. Bobbie Joyner testified that immediately after the crime she made two sketches of an individual based on descriptions given her by two eyewitnesses. State's witness Ruth Cartrette, not present at the crime, testified that in November or December of 1975 officers showed her these sketches, and she told the officers that the individual depicted looked like the defendant. She said she had known the defendant for about one year.

Although the two sketches were properly authenticated, marked as State's Exhibits Nos. 11 and 12, and were shown to State's witnesses Joyner and Cartrette, they were not introduced into evidence. Defendant argues that the testimony of Ms. Cartrette should not have been admitted for the reason that it was irrelevant, immaterial and prejudicial.

Concerning composite pictures and sketches based on an eyewitness's description and prepared for investigatory purposes, *State v. Montgomery*, 291 N.C. 91, 100, 229 S.E. 2d 572, 578 (1976), says:

> ". . . At this stage, none of these witnesses knew the defendant and nothing in the record indicates that he was then

suspected by the artist or any other police officer. The purpose of this picture was not to convict the defendant but to describe the offender. It was merely a recording of the image of the offender then fresh in the minds of each of these witnesses. Clearly, there was nothing improper in this portion of the out-of-court identification, or in the admission of the photograph of the composite in evidence."

Since the sketches were not introduced into evidence in the present case, admission of Ms. Cartrette's testimony was error. Her testimony amounts to a report of her past opinion as to the identity of the individual depicted in the sketch. Thus, her testimony is lay opinion concerning a matter within the province of the jury. Opinion testimony is inadmissible whenever a witness can relate the facts so that the jury will have an adequate understanding of them, and the jury is as well qualified as the witness to draw inferences and conclusions from the facts so related. 1 Stansbury, North Carolina Evidence § 124, p. 388 (Brandis rev. 1973); *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975); *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). Here, the jury could have gained an understanding of the facts by simply viewing the sketches. And, the jury was as well qualified as the witness to determine whether the sketches resembled the defendant.

Although it was error to allow Ms. Cartrette to express her opinion when the sketches were not presented to the jury, we believe that under the facts of this case the error was harmless. Defendant's attorneys had the opportunity to see the sketches and to examine the witness concerning them. The evidence of defendant's guilt was overwhelming. 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. In light of such overwhelming evidence of guilt, there is no reason to believe that another trial would produce a different result in this case. *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969). This assignment is overruled.

During the testimony of Ronnie Crumpler, defense counsel moved to have two witnesses, Jonathan Robinson and Brenda Wolfe, sequestered. He contends the trial court abused its discretion by denying that motion. Both of those witnesses had made prior written statements and defendant had copies of these statements.

At the time of the motion, both witnesses had heard the testimony of Crumpler for approximately an hour and a half. This was the complete direct examination of this witness. If the testimony of Crumpler in the presence of Robinson and Wolfe was prejudicial, it could not be erased by sequestering the witnesses at the time this motion was made. As previously stated, a motion to sequester witnesses is addressed to the discretion of the trial court and the court's refusal of the motion will not be disturbed in the absence of a showing of abuse. *State v. Sparrow, supra; State v. Barrow, supra; State v. Tatum, supra.* Defendant has failed to show either prejudice or abuse of discretion in the denial of his motion. This assignment is overruled.

[5] In the request for discovery made by defendant's attorney prior to trial, the district attorney was asked:

> "You are further requested to provide me with any exculpatory evidence in the possession of the State. This will include:
>
> a) The names and addresses of any witnesses to a lineup which was held for the purpose of identification of the defendant, who failed to identify the defendant, or who identified some other person."

The district attorney responded:

> "The following information concerning the lineup is provided:
>
> (a) Benjamin McCoy identified another person in the lineup.
>
> (b) Richard Bradford failed to identify anyone in lineup; Michael Dunham indicated to officers outside the lineup that it was #7 — Van Cross — but said he was scared in the lineup itself. Andrew McLaughlin failed to identify anybody for sure. John McLaughlin failed to recognize anyone. Bernard Heyward failed to recognize anyone."

During trial, on cross-examination of Rufus Jenkins McClaurin, defendant learned that the witness had been shown some photographs in 1975 but could not identify the defendant from them. Defendant now argues that the trial court should have required the State to produce the photographs used and that the failure to do so was prejudicial error. The photographs were shown to nine witnesses in November 1975, immediately after the offense in ques-

tion, and two months before defendant was arrested. There is nothing to show that the photographs existed when discovery was made or that they were in the custody or control of the State. In addition, these photographs had never been requested by defendant even though defendant did request the names of persons who had viewed a lineup. When defendant learned of the pictorial lineup, he did not object, move for a mistrial, or in any manner bring this to the attention of the trial judge. Instead, when the State rested its case, he moved for nonsuit on other grounds. Defendant then agreed to a stipulation dated 27 October 1976 that nine named persons were shown six photographs in November 1975 and that none of these nine persons identified the defendant or anyone else. The next day defendant proceeded to introduce evidence and examine twelve witnesses. Five of the nine persons named in the stipulation testified for the State. Defendant elected not to recall any of those five witnesses for further cross-examination and elected not to call as witnesses any of the other four persons named in the stipulation. Defendant had the information that he desired as well as the opportunity to use it. He chose to use it only by means of the stipulation.

G.S. 15A-910 provides:

"(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders."

In present case, the desired information was fully disclosed to defendant by stipulation. Defendant did not request additional information, a continuance, a recess or other action at the time. The record does not indicate that the photographs should or could have been provided to defendant since they were never requested. Under these circumstances, defendant has failed to show any prejudicial error on the part of the trial judge. This assignment is overruled.

[6] By Assignments of Error Nos. 11 and 12, defendant insists that the trial court erred in overruling his motion as of nonsuit at the

close of the State's evidence and at the close of all the evidence. Upon defendant's motion for judgment as of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971). Motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the bill of indictment, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference fairly deducible therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967).

Three witnesses for the State, Michael Anthony Dunham, Tanger Haywood, and Rufus Jenkins McClaurin, testified that the defendant was the man they saw shoot William Victor Tally with a pistol, take money from the cash register, and leave the V-Point Supermarket in Fayetteville, North Carolina, about 8:00 p.m. on 1 November 1975. A fourth witness, Ann Douglas Miller, identified the defendant as the man she saw at the cash register taking cash and leaving, and a fifth witness, Sabrina Lynn Thomas, testified that defendant looked like the man she saw at the cash register that night. Other witnesses testified concerning conversations with defendant about this robbery. Ronnie Crumpler testified that defendant borrowed his automobile about 7:00 p.m. on 1 November 1975 and returned it about 9:00 p.m. the same evening. Two doctors testified that William Victor Tally died as the result of a gunshot wound inflicted on this occasion. Victor Tally, who operated the V-Point Supermarket, testified that approximately $830 was taken from the cash register. This evidence is clearly sufficient to support a finding that William Victor Tally died as the result of the gunshot wound inflicted by defendant during the course of an armed robbery. The motions for nonsuit were properly denied.

Defendant next questions his arraignment, contending it was error to arraign him on the armed robbery charge after he had been arraigned on the murder charge. There is no merit to this assignment. It is stipulated in the record that defendant was arraigned in superior court on 18 October 1976 for first degree murder and felonious armed robbery. He was represented by counsel at the time and entered a plea of not guilty to both charges. There is no allega-

tion of surprise, nor is there any allegation that he did not understand the charges or his pleas. The arraignment took place before any jury selection or any evidence was presented. Defendant has shown no prejudice and no basis to preclude the action taken. *See* G.S. 15A-941.

[7] Finally, defendant alleges that he was brought into the courtroom in handcuffs in front of the jury and was required to wait in a holding area in plain view of the jury. He argues that this was prejudicial to his case, and that his motion for mistrial was improperly denied. The record does not support defendant's allegations. During argument on his motion, the court asked if defense counsel was contending that the defendant was brought into the courtroom with shackles and with prison guards. Defense counsel responded: "No, sir, but he was in the holding cell. He was wearing a black suit and a bow tie [and a white shirt]." The district attorney stated that he was not aware of any time that defendant was brought into the courtroom in any form of shackles. The record does disclose that the defendant seated himself in a holding area, but it does not show that defendant appeared in front of the jury in handcuffs. Defendant himself testified that he was presently residing in the Cumberland County Jail. Although defendant could be seen in the holding area, and assuming the possibility that he might have been seen by the jury in handcuffs, we do not think this is sufficient to require a new trial. As we said in *State v. Montgomery*, 291 N.C. 235, 252, 229 S.E. 2d 904, 913-14 (1976):

> "The record indicates that some of the jurors may have momentarily viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse. It is common knowledge that bail is not obtainable in all capital cases and the officer having custody of a person charged with a serious and violent crime has the authority to handcuff him while escorting him in an open, public area. Indeed, it would seem that when the public safety and welfare is balanced against the due process rights of the individual in this case, such action was not only proper but preferable. Under the circumstances of this case, the trial judge correctly denied defendant's motion for a mistrial."

The case cited by defendant in support of his position, *Estelle v. Williams*, 425 U.S. 501, 48 L.Ed. 2d 126, 96 S.Ct. 1691 (1976), is not on point. There, the defendant was tried while wearing prison clothes; here, defendant was not. This assignment is overruled.

Other assignments of error have been considered and are found to be without merit.

An examination of the entire record discloses that defendant has had a fair trial, free from prejudicial error. Therefore, the verdicts and judgment must be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLIAM DEEMS BAGGETT

No. 17

(Filed 11 October 1977)

Homicide § 21.5— premeditation and deliberation—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant, with malice, intentionally shot and killed the victim after premeditation and deliberation, and thus was guilty of first degree murder, where it tended to show that defendant left his home after a dispute with his wife with a loaded shotgun and a loaded pistol; before leaving he consumed a substantial amount of whiskey; after picking up four companions defendant stopped beside the road and shot the pistol at a highway sign; defendant indicated to his companions that he had a loaded shotgun in the car and gave each of them a shotgun shell to use if needed; upon arriving at a dance hall and poolroom, defendant purchased a beer and went into the poolroom; deceased approached defendant three times, insisting that he knew defendant, and was pushed away by defendant on all three occasions; on the last occasion, defendant struck deceased in the mouth and asked if he wanted to do anything about it, and deceased answered "no"; defendant, without any justification or excuse, then pulled a pistol from his rear pocket and shot the deceased at least three times; some of the shots struck deceased's body as he fell to the floor; and, as defendant walked away, he turned, looked at the victim's body and smiled.

Justice EXUM dissenting.

Justice LAKE joins in the dissenting opinion.

DEFENDANT appeals from judgment of *Barbee, S.J.*, January 1977 Session, SAMPSON Superior Court.

Upon an indictment, proper in form, defendant was found guilty of first-degree murder and sentenced to imprisonment for life. The court submitted the lesser offenses of second-degree murder and voluntary manslaughter to the jury.

The evidence for the State tended to show the following:

That on or about the evening of October 24, 1976, said to be a Saturday night, the defendant left his home in his 1973 Plymouth automobile and drove to the home of Edgar Williams and invited Ralph Junior Carter, John Walter Carter, Jr., Roy Lee Hayes and George Williams to ride with him to Salemburg. The defendant told them that he had already consumed a pint of liquor and indicated he was mad with his wife. He said that before leaving home he started to go through the whole house and "kill everything there."

On the way to Salemburg, the defendant stopped his car, got out, pulled a silver-colored .22 caliber pistol from his pocket and started shooting at a road sign. Apparently some people started shooting back and the defendant returned to his car, reloaded the pistol, and drove off. He told the others that he had a shotgun in the back seat of the car. He gave each of his companions a shotgun shell and told them the shotgun could be used if needed.

On the edge of Salemburg they stopped at a combination poolroom and dance hall called "Sam's Place." The defendant bought a beer and entered the poolroom. When he entered, James Dee Williams, who apparently had been drinking, approached the defendant and said, "don't I know you?" The defendant responded, "No" and pushed the man away. Williams approached the defendant two more times and was pushed away. The fourth time Williams approached, the defendant struck him in the mouth. Williams grabbed his mouth and the defendant rubbed his hands and asked Williams if he wanted to do anything about it. Williams said "No." The defendant then took the silver-colored .22 caliber pistol from his rear pocket and fired at Williams four times, apparently striking him at least three times. Some of the bullets from the defendant's pistol struck Williams while he was falling to the floor. After Williams fell, the defendant looked at him, *smiled*, and ran from the poolroom. When outside the defendant went to his car, pulled out the shotgun, fired once into the air, and drove off.

The evidence disclosed that the deceased was unarmed, did not curse or touch defendant, and offered no resistance. He died from internal hemorrhaging as a result of the gunshot wounds.

Officers from the sheriff's department arrived on the scene soon thereafter. They observed three bullet holes in the body of the deceased. An autopsy was later performed in which the blood from the victim's body was found to contain .31 percent by weight of alcohol.

The defendant was later arrested at his home asleep in bed. The silver-colored .22 caliber pistol was found under the mattress, fully loaded. Elsewhere in the room, a loaded shotgun was found. The defendant appeared to be in a stupor when awakened, but the arresting officer did not notice the odor of alcohol on his breath, and was of the opinion that he was not drunk.

The 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 Claude W. Harris for the State.

David J. Turlington, Jr. for the defendant.

COPELAND, Justice.

The questions for our consideration relate to defendant's two assignments of error, maintaining (1) there was insufficient evidence to support a verdict of first-degree murder and further contending (2) that the trial judge should have set aside the verdict of guilty. We find no merit in either of these assignments of error.

In order for the trial court to submit a charge of first-degree murder to the jury, there must be evidence tending to show that the defendant, with malice, after premeditation and deliberation, intentionally shot and killed the victim. Our court defines premeditation as "thought beforehand for some length of time, however short. *State v. Benson*, 183 N.C. 795." *State v. Reams*, 277 N.C. 391, 401, 178 S.E. 2d 65, 71 (1970); *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977); *see State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973).

> " 'Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of 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. Faust* 254 N.C. 101, 106-07, 118 S.E. 2d 769, 772 (1961); *see State v. Biggs, supra; State v. Britt, supra; State v. Reams, supra.*

" 'No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing.' " *State v. Perry*, 276 N.C. 339, 347, 172 S.E. 2d 541, 547 (1970).

In *Perry*, the defendant was riding in the righthand passenger seat of an automobile on Wilmington and Peace Streets in the City of Raleigh. He and his two companions had been riding around Raleigh all day drinking. Defendant's vehicle was in the left lane and the victim's vehicle was in the right lane. Apparently they rode side by side for some distance. The victim was black and the defendant was white. There were words between them. After these words defendant pulled out his pistol and shot three times. One of the bullets struck the victim in the mouth, and he died as a result. One of the companions said to the defendant "you have killed that man." The defendant replied "if you will back up I will finish it." While in jail awaiting trial, defendant told a fellow prisoner "that black son-of-a-bitch told me to behave myself and go home and I shot him." Our Court held this evidence to be sufficient to establish premeditation and deliberation.

We have held that premeditation and deliberation are not usually susceptible of direct proof but may be shown by the circumstances. *State v. Van Landingham, supra*; *State v. Perry, supra.*

"Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled." *State v. Van Landingham, supra* at 599, 197 S.E. 2d at 545.

The State's evidence is sufficient to support the following findings: (1) The defendant left his home after a dispute with his wife with a loaded shotgun and a loaded pistol; (2) Before leaving he consumed a substantial amount of whiskey; (3) After picking up his companions and proceeding towards Salemburg, he stopped beside the road and shot the pistol at a highway sign; (4) He indicated to his companions that he had a loaded shotgun in the car and gave each of them a shotgun shell to use if needed; (5) Upon arriving at "Sam's Place," defendant purchased a beer and went into the poolroom; (6) The deceased approached the defendant and was pushed away on

three occasions, and on the last occasion the defendant struck him in the mouth; (7) Defendant asked if he wanted to do anything about it and the deceased answered "No"; (8) At this point the defendant without any cause or justification reached into his rear pocket, pulled out the silver-colored pistol and shot the deceased at least three times; (9) Some of the shots struck the deceased's body as he fell to the floor; (10) As the defendant walked away, he turned, looked at the body of his victim and *smiled.*

Clearly the circumstantial standards which Chief Justice Sharp listed in *State v. Landingham, supra,* are met in this case. There was a want of provocation on the part of the deceased; the conduct of the defendant before and after the killing indicated a total disregard for human life; the defendant used grossly excessive force; and lethal blows were struck by bullets that entered the victim's body as he fell to the floor. Here there was clearly sufficient time after defendant struck the victim in the mouth for him to form a fixed intent to kill. There was time for him to ask the victim if he wanted to do something about it and for deceased to answer "No." There was time after that for defendant to reach into his rear pocket, pull out the pistol and fire it at least four times.

It is elementary that upon a motion for judgment of nonsuit all the evidence must be considered in the light most favorable to the State. In the instant case, the evidence introduced by the State, when so considered, is sufficient to raise a legitimate inference and to permit the jury to find that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished this purpose. *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. McCall, supra, State v. Britt, supra, State v. Van Landingham, supra; see State v. Witherspoon,* 293 N.C. 321, 237 S.E. 2d 822 (1977), decided this date. It would appear that when the defendant left his home he did so with the intention to do violence to or murder someone before he returned. He departed looking for trouble and as is usually the case, he found it. This assignment of error is without merit and overruled.

The defendant's motion to set aside the verdict on the ground that it was contrary to the weight of the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in the absence of manifest abuse of discretion. *State v. Witherspoon, supra.* No abuse of discretion is shown; therefore, this assignment is overruled.

We thus conclude that the evidence supports a finding that the defendant with malice, premeditation and deliberation, shot and killed James Dee Williams. Because of the serious nature of the case, we have searched the record for other errors and have found none. In the verdict and judgment, we find

No error.

EXUM, Justice, dissenting.

I respectfully dissent from the majority's view that the evidence in this case supports a verdict of guilty of murder in the first degree.

The evidence shows that both defendant and the deceased had been drinking heavily immediately prior to the shooting and were at a tavern of some sort apparently continuing to consume alcoholic beverages. With neither protagonist in full possession of his mental or physical faculties, the deceased began to annoy the defendant by approaching him several times in succession insisting that he knew the defendant. After pushing the deceased away three times defendant, upon the deceased's fourth approach, hit him in the mouth. Words passed between them, and defendant shot the deceased four times with a .22 caliber pistol he had in his pocket and smiled upon observing his handiwork.

While the evidence is clearly sufficient to convict the defendant of an intentional killing with malice, *i.e.*, murder in the second degree, I find it wanting on the element of deliberation. Deliberation means that defendant formed the intent to kill after "reflection, a weighing of the consequences of the act in more or less calmness" or "from a fixed determination previously formed after weighing the matter." *State v. Exum*, 138 N.C. 599, 617-18, 50 S.E. 283, 289 (1905). Deliberation has also been defined as forming the intent to kill "in a cool state of blood, in furtherance of a fixed design." *State v. Faust*, 254 N.C. 101, 106, 118 S.E. 2d 769, 772 (1961). All the evidence shows here, without contradiction, that defendant did not kill in a cool state of blood in furtherance of any fixed design or after any reflection or weighing of the consequences of his act in calmness. The shooting itself was a sudden event and brought on by the actual provocation of the deceased himself.

The deceased's acts do not constitute that "legal provocation" which would reduce murder in the second degree to manslaughter. They do, in this case, constitute that kind of actual provocation

which negates the element of deliberation. Before 1893 there were no degrees of murder in North Carolina. In that year murder was divided into two degrees: first degree murder, punishable by death, consisted only of murder committed in the perpetration of another felony and murder which was premeditated and deliberated. All other murder was murder in the second degree. N.C. Public Laws 1893, Chapter 85; *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793, 803, 804 (1970). Speaking of the elements of premeditation and, particularly, deliberation, this Court said in an early case construing the new statute, *State v. Thomas*, 118 N.C. 1113, 1122, 1124, 24 S.E. 431, 434, 435 (1896):

> "The innate sense of justice implanted in the breast of every good man demanded that a distinction should be drawn between cases where there was actual though not legal provocation and those where a fixed purpose was shown . . . .
>
> . . . .
>
> "If . . . there was a quarrel or argument, and in the heat of sudden passion, engendered by disagreeable language, which would not have been provocation sufficient to bring the offense within the definition of manslaughter, the crime . . . was murder in the second degree."

In the very first case construing the new murder statute, *State v. Fuller*, 114 N.C. 885, 902, 19 S.E. 797, 802 (1894), this Court said:

> "The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts *one who is provoked by insulting words* (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge." (Emphasis supplied.)

The majority relies heavily on *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970). In *Perry*, however, there is absolutely no evidence of any provocative behavior on the part of the deceased prior to the shooting. He was riding in his own vehicle, minding his own business, when the vehicle in which the defendant was riding pulled up alongside and the defendant shot the deceased. Only the defendant, himself, was the provocateur. The only words spoken by the deceased, according to the evidence, were those admonishing the defendant to "behave" himself.

Neither do I believe that those circumstances delineated in *State v. Van Landingham*, 283 N.C. 589, 599, 197 S.E. 2d 539, 546 (1973), which may be considered on the question of deliberation, avail the state in this case. Here there was, all the evidence shows, actual provocation on the part of the deceased. Defendant's conduct after the killing is consistent with his having killed with malice after being provoked. Apparently the four shots were fired in rapid succession, one of them missing the deceased, and three striking him while he was falling. There is no evidence of the dealing of lethal blows after the deceased was felled.

The killing in this case, in essence, is the unfortunate but not altogether uncommon result of what, except for the killing, would have been a minor imbroglio between two strangers thrown together by happenstance. To me these kinds of killings generally support prosecutions for second degree murder and no more. *See, for example, State v. Richardson*, 280 N.C. 178, 184 S.E. 2d 841 (1971); *State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971); *State v. White*, 271 N.C. 391, 156 S.E. 2d 721 (1967); *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198 (1967); *State v. Moore*, 236 N.C. 617, 73 S.E. 2d 467 (1952). In *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899) the evidence tended to show that the defendant had been engaged in an argument with one of the deceased's employees at the deceased's cotton gin. Upon hearing of the argument, the deceased, owner of the gin, went to the defendant and inquired about the argument. The deceased said, "[A]re you the man that has been fussing here with Frank Parish?" When defendant made no answer the deceased asked him a second time. The deceased then put his left hand on the defendant's right shoulder or arm and asked defendant to come into the light so that he, the deceased, could find out what the fuss was all about. Suddenly the defendant stabbed the deceased saying, "[H]ands off." The deceased jumped back three or four feet. This Court held that the evidence was insufficient to show premeditation and deliberation and reversed a jury verdict of guilty of murder in the first degree. To the same effect *see State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902).

I vote to vacate the verdict of guilty of murder in the first degree and the judgment based thereon and to remand for entry of a verdict of guilty of murder in the second degree and the pronouncement of a new judgment on that verdict. *See State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977).

Justice LAKE authorizes me to say that he joins in this dissent.

STATE OF NORTH CAROLINA v. GILBERT M. SHOOK, JR.

No. 83

(Filed 11 October 1977)

1. **Criminal Law § 22— arraignment—one week interim before trial—waiver necessary**

G.S. 15A-943(b) created a right in defendant not to be tried without his consent during the week following his not guilty plea at his arraignment in Cumberland County, and the infringement of this right, where there was no waiver by defendant, was reversible error.

2. **Criminal Law § 22— arraignment—necessity for calendaring—waiver of time by defendant**

In order to effect the intent of the legislature, G.S. 15A-943(a) must be construed to require not only that the solicitor "calendar arraignments" as provided but also that *every* arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared.

3. **Assault and Battery § 5.3; Weapons and Firearms— discharging firearm into occupied building—assault with deadly weapon—defendant charged with both crimes—no double jeopardy**

The two offenses of which defendant was convicted, (1) discharging a firearm into an occupied building and, (2) assault with a deadly weapon inflicting serious injury, are entirely separate and distinct offenses, and defendant was not subjected to double jeopardy when he was charged with both crimes, convicted and given consecutive sentences.

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

ON petition for further review of the decision of the Court of Appeals, reported without published opinion, 31 N.C. App. 749, 230 S.E. 2d 702 (1976), upholding judgment of *Bailey, J.*, 2 February 1976 Session of CUMBERLAND Superior Court. Argued as No. 58 at the Spring Term 1977.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Seavy A. Carroll, Attorney for defendant appellant.

EXUM, Justice.

Defendant was convicted of discharging a firearm into an occupied building and assault with a deadly weapon, inflicting serious injury. He was sentenced to two consecutive ten-year terms. Evidence was adduced at trial tending to show that on the night of 27 July 1975 defendant waited outside the Charcoal Tavern in Fayetteville, anticipating a confrontation with one Yarborough,

whose car he thought he saw outside. Finally becoming impatient, defendant fired his .22 rifle several times into the building, then occupied by a number of patrons. One shot penetrated a piece of plywood and hit Robert Louis Johnson, who was sitting inside the tavern. The wound resulted in the victim's nearly total paralysis.

The important issue presented by this appeal is whether the trial court erred in allowing defendant's trial to begin, over his objection, on 17 September 1975, the same day on which he was arraigned. Defendant asserts this procedure contravened General Statute 15A-943, which provides, in pertinent part:

> "§ 15A-943. *Arraignment in superior court—required calendaring.* — (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the solicitor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.
>
> "(b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned."

We take judicial notice of the dates and terms of superior court and that Cumberland County is one of those in which at least 20 weeks of trial sessions at which criminal cases are heard are regularly scheduled. 3 Strong's N.C. Index 2d, Evidence § 1.

The Court of Appeals noted a violation of subsection (b) but found that no prejudice to defendant was shown and therefore overruled the assignment of error.

[1] We hold that General Statute 15A-943 (b) created a right in defendant not to be tried without his consent during the week following his not guilty plea at his arraignment in Cumberland County. The infringement of this right, where there was no waiver by defendant, was reversible error.

The record in this case indicates that defendant Shook's arraignment was originally calendared on 17 September 1975 but was continued until 6 October 1975. The reason for the continuance is not shown. The case was again calendared on the Motions and Arraignment Docket for Monday, 6 October 1975. Some controversy as

to the nature of the proceedings on that date is revealed in the record. The settlement of the record on appeal by Judge Bailey, the trial judge, indicates that defendant's counsel appeared on 6 October and moved for defendant's commitment for pre-trial examination. No further disposition of the case on that date appears of record, although an entry on 21 October 1975 shows a petition and order for pre-trial commitment to Dorothea Dix Hospital. Defendant was at all times represented by attorney Seavy A. Carroll and had been early apprised of the charges against him.

The case was calendared for trial on Monday, 2 February 1976, no formal arraignment having been held. Defendant appeared at the appointed time but objected when the court instructed the assistant district attorney to arraign the defendant. His objection having been overruled, defendant was arraigned. He pleaded not guilty to both counts of the indictment. Immediately thereafter, Mr. Carroll advised the court of his objection "to the proceeding of the trial immediately after the arraignment." Judge Bailey's response was, "All right, the defendant moves for a continuance. Motion is denied. Put a jury in the box, please Ma'am."

General Statute 15A-943(a) is not a model of legislative draftsmanship. On its face it seems to require, in those larger counties to which it applies, only two things: (1) that the solicitor calendar arraignments on at least the first day of every other week in which criminal cases are heard, and (2) that no jury trial may be calendared on a day upon which arraignments are calendared. By its terms the statute mandates nothing whatever regarding arraignments which, like this one, are held without having been *calendared* at that time.

We must, of course, construe the meaning of the statute in accordance with the ascertainable intent of the legislature. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). In construing a statute to determine its legal effect, we may infer the legislative intent by looking to the purpose of the statute, the evils which it is designed to remedy and the effects of alternative constructions. *In re Arthur, supra.*

The official commentary to General Statutes, Chapter 15A, Article 51, Arraignment, declares:

> "It is the purpose of this Article not only to define arraignment in any court but also to provide for a separate time of arraignment in superior court. Time for jurors and witnesses will be saved if matters not requiring their presence can be dis-

posed of before they are brought in. The Commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided. Thus, in the more populous counties here defined as those having as much as 20 weeks of criminal court (and others which the Chief Justice may designate), a separate time for arraignment will be required. In other counties it is authorized on an optional basis."

Obviously the financial interest of the state as well as the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called. Those interests do not, however, furnish a persuasive rationale for the enactment of General Statute 15A-943(b), which provides a week's interim between arraignment and trial in those counties large enough to allow frequent criminal sessions so as to come within the calendaring provisions of subsection (a).

Subsection (b) is apparently designed to insure both the state and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the state nor defendant may know whether the case need proceed to trial. The state may not know since no formal entry of plea has been made. Defendant himself may not know since prior to arraignment he may have been considering entering a guilty plea to the charge or pursuant to some plea negotiation which has taken place between him and the state. The week's interim provided in General Statute 15A-943(b) assures an opportunity for trial preparation and thereby helps to avoid preparation which may well be not only extensive but also unnecessary.

With these purposes in focus it becomes evident that the statute requires more than is apparent on its face. If General Statute 15A-943(a) is interpreted to require only that arraignments be calendared in superior court, *if at all*, on the separate days provided, then its purpose could be readily undermined by the simple failure to place any given case on the arraignment calendar. Under such an interpretation cases need not be calendared for arraignment at all, leaving arraignments to be held, as defendant Shook's was held, uncalendared and on the same day as trial. This would result in easy circumvention of the week's interim required by subsection (b). Such a construction too readily deprives the statute of its intended effect.

We have held that where one construction would lay an act open to easy evasion and nullification, this circumstance is to be con-

sidered in ascertaining the act's meaning. *Trust Co. v. Young*, 172 N.C. 470, 90 S.E. 568 (1916). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *Freeland v. Orange County*, 273 N.C. 452, 160 S.E. 2d 282 (1968); *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

[2] In order to effect the intent of the legislature, this statute must be construed to require not only that the solicitor "calendar arraignments" as provided but also that *every* arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. Such a construction does no violence to the explicit language of the statute; it rather lends substance and meaning to the act in order to facilitate its purposes.

When subsection (a) is so construed, the language of subsection (b) is more comprehensible. That subsection provides, "When a defendant pleads not guilty *at an arraignment required by subsection (a)*, he may not be tried without his consent in the week in which he is arraigned." We have construed subsection (a) to require all arraignments in the affected counties to be held in accordance with the calendaring provisions there set forth. Thus the words italicized above in subsection (b) signify its application to all defendants pleading not guilty at arraignments to which subsection (a) applies. So understood, subsection (b) clearly sets forth a statutory right of each such defendant "not [to] be tried without his consent in the week in which he is arraigned."

The provisions of General Statute 15A-943(b) are more than directory. "[A] statute which affects the public interest or the claims *de jure* of third persons or promotes justice is construed with practical unanimity to be more than directory . . . . " *Davis v. Board of Education*, 186 N.C. 227, 119 S.E. 372 (1923). This statute "promotes justice" and "affects the public interest." Moreover, the provision vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. To require a defendant to show prejudice when asserting the violation of this statutory right which he has insisted upon at trial would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him *unless he consents* to an earlier trial. Prejudice under these circumstances must necessarily be presumed.

Of course, a defendant may waive the benefit of a statutory right. *State v. Young*, 291 N.C. 562, 567, 231 S.E. 2d 577, 580 (1977). But this defendant has not waived the statutory right. Rather he asserted the right and raised the issue before the trial court—a prerequisite for his assertion of the right on appeal. *State v. Young, supra.*

We find, then, that the trial court violated the provisions of General Statute 15A-943(a) in failing to require that defendant's arraignment be calendared and held on a day provided by that subsection when no jury trial was scheduled. We also find that the court violated the provisions of General Statute 15A-943(b) by proceeding with defendant's trial over his objection on the same day as his arraignment. The result was to deprive defendant of at least a week's interim between arraignment and trial. This constitutes reversible error. We do not reach the issue whether a violation of subsection (a) alone would necessitate a new trial.

Because of the unlikelihood of their recurrence at the new trial, the remainder of defendant's arguments, except for one, need not be dealt with.

[3] We do find it advisable to address briefly defendant's contentions that his motion in arrest of judgment should have been granted on the ground that the two offenses of which he was convicted constitute only one offense, thus exposing defendant to double jeopardy. It is manifest that the two offenses of which defendant Shook was convicted, (1) discharging a firearm into an occupied building and, (2) assault with a deadly weapon inflicting serious injury, are entirely separate and distinct offenses. To prove the one, the state must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge.

In *State v. Hill*, 287 N.C. 207, 215, 214 S.E. 2d 67, 73 (1975), we set forth a comparative analysis of the "same evidence test" quoting 8 Wake Forest L. Rev. at 248:

> " 'For an offense to be the same in law as another offense, there must be at least partial reciprocity of the elements required by the legislative enactments. Therefore, in proving the required elements A, B, and C under one statute in the first indictment, and in proving the required elements A, B, and D under another statute in the second indictment, one will not run afoul of the former jeopardy rule. C, an element of the first

is not an element of the second. D, an element of the second, is not an element of the first indictment. Therefore *each* offense required proof of an element which the other did not. It is of no consequence that element C resembles element D, nor that element D was less heinous than element C.' "

See also State v. Barefoot, 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Robinson*, 116 N.C. 1046, 21 S.E. 701 (1895). Defendant's convictions and the imposition of consecutive sentences were proper. This assignment of error is overruled.

The verdicts and judgments are vacated and the case remanded to the Court of Appeals with directions to remand to the Superior Court of Cumberland County for further proceedings in accordance with this opinion and a new trial.

Error and remanded.

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

STATE OF NORTH CAROLINA v. ROBERT LEE WITHERSPOON

No. 15

(Filed 11 October 1977)

1. **Criminal Law § 104— nonsuit motion—consideration of evidence**

Upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

2. **Rape § 5— second degree rape—sufficiency of evidence**

Evidence was sufficient for the jury in a second degree rape prosecution where it tended to show that defendant conversed with his victim in a brightly lit laundromat; defendant left the laundromat but returned five minutes later; he told the victim that he had a knife; defendant then grabbed the victim, choked her, dragged her outside and had sexual intercourse with her.

3. **Criminal Law § 66.3— in-court identification of defendant—proper pretrial lineup—evidence competent**

Evidence in a rape prosecution was sufficient to support the trial court's conclusion that the in-court identification of defendant by the victim was competent where it tended to show that the victim observed defendant for several minutes in a brightly lit laundromat before being dragged outside where the crime was

committed, and the victim identified defendant as her assailant from a pretrial lineup which was properly conducted.

4. **Criminal Law § 66.20— voir dire—oral ruling—written findings subsequently entered in record—no error**

There was no error where the trial court orally stated its ruling that the objection of the defendant to the proposed in-court identification by the rape victim was overruled, the court stated that it would enter written findings of fact and its order in accord with the ruling orally announced, and such findings were entered during the course of the trial.

APPEAL by defendant from *Lupton, J.*, at the 15 November 1976 Session of STANLY.

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

The evidence for the State was to the following effect:

At 7:30 p.m. on 28 January 1976, the prosecuting witness was alone in the laundromat in Albemarle doing her laundry, she being a resident of that city. A Negro male, positively identified in court by her as her assailant, entered the laundromat and, after a brief conversation with her, went out. In about five minutes, he returned and said, "I have got a knife and you are going to help me." She saw no knife. He then grabbed her by the arm, choked her and dragged her out of the back door and down some steps where he threw her to the ground, had sexual intercourse with her and then fled. She bit him on the hand before she was thrown to the ground. She had never seen her assailant before. She ran to the home of her father-in-law, half a block from the laundromat, where she "blacked out." She sustained bruises in the assault. She was carried to the Stanly County Hospital and there, on the same evening, was interviewed by an investigating police officer who did not observe any bruises upon her but found her "very emotional." Her statement to this officer was in accord with her testimony as above related.

She described her assailant to the officer as a Negro man dressed in a green Army jacket, printed polyester pants, a turtle neck sweater and a toboggan cap that was "mostly red with little specks of other colors." Subsequently, she conferred with an agent of the State Bureau of Investigation who, based upon her description of her assailant, prepared an Identi-kit composite picture of her assailant. Subsequently (on 13 June 1976), she viewed a lineup composed of seven men at the Stanly County Jail and picked the defendant therefrom as her assailant, to which testimony there was no objection.

At the time of the offense, the defendant was living in Mount Gilead with his mother-in-law and working in Charlotte. Albemarle is on the direct route from Mount Gilead to Charlotte. With the permission of the defendant's mother-in-law, investigating officers obtained from her home a toboggan cap which was introduced in evidence as the State's Exhibit No. 8. It was the same size, shape and color as the one worn by the perpetrator of the offense. It was owned by the defendant's brother-in-law, who lived in the same house. The brother-in-law, who was away in college at the time of the offense, also owned an Army field jacket but no such jacket was found. The brother-in-law did not recall that the defendant had ever worn either the jacket or the toboggan cap, but he frequently wore other clothing belonging to the brother-in-law, who had not seen either the toboggan cap or the Army jacket since the fall of 1975 (some months prior to the alleged offense). Three other males lived at the same residence and from time to time wore clothing, including the Army jacket, belonging to the brother-in-law. The defendant wore a toboggan cap most of the time but, according to the brother-in-law, it was not the one so introduced in evidence by the State. The defendant's mother-in-law had observed him wear a green toboggan cap but had never seen him wear one of any other color.

The defendant did not testify in his own behalf but offered the testimony of his employer and two fellow employees. Their testimony was to the effect that the defendant worked nine hours on 28 January 1976, it not being known precisely when he stopped work that day. None of these witnesses had seen the defendant wear a green Army jacket. They had seen him wearing a green toboggan cap but not a toboggan cap of any other color. One of the fellow employees rode to work with the defendant during the month of January 1976.

Upon objection to testimony by the prosecuting witness as to the identity of her assailant, a voir dire was conducted in the absence of the jury. Upon it, the prosecuting witness testified that the defendant was the Negro man who entered the laundromat and, at that time, she had a clear, well-lighted view of his face. Following a conversation with her, lasting two or three minutes, the man left the laundromat but soon returned. On the second occasion, he was in her presence from five to ten minutes. He wore a green Army jacket, a turtle neck sweater, printed polyester pants and a toboggan cap. A considerable time after the offense (actually on 13 June 1976), she viewed a lineup, composed of seven men, and identified

the defendant therein as the man who had so entered the laundromat. The defendant's court-appointed counsel was present at this lineup. When the prosecuting witness arrived at the Stanly County Jail to view the lineup, the Assistant Chief of Police escorted her into a small office and had a brief conversation with her, during which she believes the defendant's counsel was present.

The Assistant Chief of Police, called as a witness by the defendant upon such voir dire, testified that the prosecuting witness viewed only one lineup and, immediately prior thereto, he had a conversation with her in a small office but he does not recall whether the defendant's counsel was present. At the lineup, she identified the defendant as the man who assaulted her. No one suggested to her whom she should identify. Another officer, also called as a witness for the defendant on the voir dire, testified that he was present at the lineup and he and the defendant's counsel stood together while the Assistant Chief of Police and the prosecuting witness talked to each other inside a small office and that he did not hear the conversation between them.

At the conclusion of the voir dire, the trial judge overruled the objection to the in-court identification. He then stated, "I will enter a [sic] written findings of fact on this and conclusions of law." The record shows that the trial was held on November 15, 16, 17 and 18, 1976. In a document dated 16 November 1976, the trial judge made written findings of fact and entered an order overruling the objection to the in-court identification. Nothing in the record indicates that this document was not entered by the judge on the date so stated therein.

The findings so made by the court (summarized) were: At the time of the alleged offense, the prosecuting witness was in the laundromat which was well-lighted with fluorescent over-head lights; she had no trouble with her vision; while she was in the laundromat, the defendant entered it; she had a clear view of his face while he was in the laundromat the first time, and when he returned five or ten minutes later, she had ample opportunity to observe him in the laundromat, he coming to within two feet of her on this occasion, she having a "very close-up look at him"; when she saw the defendant in the lineup of seven people on 13 June 1976, the defendant's counsel was present; before she observed the lineup, she was told by the Assistant Chief of Police that there would be seven people in it, that each would be given a number and that if she saw in the lineup the person who had assaulted her she should tell the officers the number of that person; that no one said anything or made any sug-

gestion to her as to whom she should identify and no one described any clothing that any person in the lineup would be wearing; she was positive of her identification of the defendant in the lineup and is positive of her in-court identification; the lineup, attended by the defendant's attorney, was in all respects fairly conducted in accordance with fundamental standards of decency, fairness and justice and the total circumstances surrounding it do not reveal procedures unnecessarily suggestive or conducive to irreparable mistaken identification. Upon these findings, the court overruled the objection to the in-court identification.

In his statement of the case on appeal, the defendant makes eight assignments of error, as follows (summarized):

(1) The court erred in overruling the objection to the in-court identification of the defendant; (2) the court erred in overruling the motion to dismiss at the close of the State's evidence; (3) the court erred in overruling the defendant's motion for nonsuit at the close of all of the State's evidence; (4) the court erred in overruling the motion of the defendant to set aside the verdict as being against the greater weight of the evidence; (5) the court erred in overruling the defendant's motion for judgment notwithstanding the verdict; (6) the court erred in overruling the defendant's motion for a new trial for errors committed during the trial and in the court's charge [which charge is not set forth in the record and to which charge the record shows no exception]; (7) the court erred in entering the judgment; and (8) "The Court erred in making Findings of Fact and entering FINDINGS OF FACT AND ORDER as appears of record, it being defendant's contention that although the Trial Judge announced his intention to enter a written FINDINGS OF FACT AND CONCLUSIONS OF LAW, said Trial Judge did not do so in open Court or in the presence of the defendant or defendant's counsel, nor was the defendant or defendant's counsel informed of the entry of said FINDINGS OF FACT AND ORDER or furnished a copy thereof until counsel received a copy thereof from the court reporter on December 28, 1976, the same being attached at the end of the transcript of evidence."

Rufus L. Edmisten, Attorney General, by David S. Crump, Assistant Attorney General, for the State.

Fred Stokes for defendant.

LAKE, Justice.

The defendant's brief brings forward only his Assignment of Error No. 8. Consequently, Assignments 1 through 7 are deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 741. However, due to the serious nature of the offense and the sentence of the defendant to life imprisonment, we have, nevertheless, reviewed the entire record and considered all of the assignments of error. We find no merit whatever in any of them.

[1, 2] It is elementary that, upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974); *State v. Davis*, 284 N.C. 701, 719, 202 S.E. 2d 770 (1974), *cert. den.*, 419 U.S. 857 (1974); *State v. Holton*, 284 N.C. 391, 200 S.E. 2d 612 (1973); *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973); Strong's N.C. Index 3d, Criminal Law, § 104. In the present case, the evidence introduced by the State, so considered, is ample to show the commission of the offense of rape in the second degree and that the defendant was the perpetrator of the crime. Thus the motions to dismiss and for nonsuit were properly denied. *State v. Poole*, supra; *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[3] Upon objection by the defendant to the admission of testimony of the prosecuting witness identifying the defendant as the perpetrator of the offense, the trial court properly excused the jury from the courtroom and, in its absence, conducted a voir dire to determine the admissibility of such proposed evidence. The evidence taken upon the voir dire fully supports the findings of fact made by the trial court and disclosed no impropriety whatever in the pretrial lineup at which the prosecuting witness picked the defendant as her assailant. The court's findings of fact, so supported by the evidence on the voir dire, are conclusive. Strong's N.C. Index 3d, Criminal Law, § 66.20. These findings fully support the ruling that the in-court identification of the defendant by the prosecuting witness was competent. There was no objection to the testimony by this witness before the jury that she had identified the defendant as her assailant at the pretrial lineup. Had such objection been interposed, it would have been without merit in view of the evidence

with reference to such lineup taken at the said voir dire and the findings of the court.

The defendant's motion to set aside the verdict on the ground that it was contrary to the weight of the evidence was addressed to the sound discretion of the trial judge whose ruling is not reviewable on appeal in absence of manifest abuse of discretion. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (19784); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Massey*, 273 N.C. 721, 161 S.E. 2d 103 (1968); *State v. Bridgers*, 267 N.C. 121, 147 S.E. 2d 555 (1966); Strong's N.C. Index 3d, Criminal Law, § 132. Obviously, there was no such abuse of discretion in the present case.

There was no error in denying the defendant's motion for judgment notwithstanding the verdict. The Court of Appeals, in *State v. Brown*, 9 N.C. App. 534, 176 S.E. 2d 907 (1970), has said a motion for judgment notwithstanding the verdict is not proper in a criminal action. Even if it be, its allowance is governed by the same considerations as apply to a motion for a directed verdict and a motion for judgment of nonsuit. *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). As above noted, the evidence for the State is ample to survive such a motion.

The judgment of the court is supported by the verdict and the sentence imposed is within the limits prescribed by the statute. G.S. 14-21.

[4] Assignment of Error No. 8 is also without merit. At the conclusion of the voir dire, the court clearly stated its ruling that the objection of the defendant to the proposed in-court identification by the prosecuting witness was overruled. At that time, the court stated that it would enter written findings of fact and its order in accord with the ruling orally announced. The record indicates that such findings were entered during the course of the trial. In this there was no error. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). Strong's N.C. Index 3d, Criminal Law, § 66.20.

No error.

STATE OF NORTH CAROLINA v. FRED JULIUS COLE, JR.

No. 4

(Filed 11 October 1977)

1. **Criminal Law § 75.8— Miranda warnings in Georgia—repetition not necessary upon interrogation in Fayetteville**

It was not necessary for officers to repeat *Miranda* warnings and have defendant execute a waiver of rights when he was questioned in Fayetteville some seven hours after he had been given the *Miranda* warnings in Georgia and had signed a waiver of rights form in that state where the same officer gave the initial warnings and conducted the subsequent interrogation; defendant signed a consent to be questioned form in Georgia but stated that he did not want to be questioned in Georgia and that he would make a statement when he returned to Fayetteville; defendant was advised prior to the interrogation in Fayetteville that he was still covered by his constitutional rights as originally explained to him in Georgia, and defendant acknowledged the earlier waiver of rights by stating that he would live up to his agreement to make a statement; nothing in the record indicates that defendant was so emotionally unstable or intellectually deficient that he had forgotten his constitutional rights as explained to him in Georgia; and nothing in the record indicates that anything occurred in the interval between the warnings in Georgia and the interrogation in Fayetteville to dilute the initial warnings.

2. **Criminal Law § 75— transcription of defendant's oral statements—failure to sign before request for counsel**

Defendant's oral statements, made and transcribed prior to any violation of his constitutional rights, were not rendered inadmissible merely because he failed to sign them until after he asked for an attorney.

3. **Constitutional Law § 45— assistance of counsel—right to conduct own defense**

A criminal defendant is entitled to the assistance of competent counsel in the preparation and conduct of his defense; however, a defendant is constitutionally guaranteed the right to carry out his own defense without an attorney when he voluntarily and intelligently elects to do so.

4. **Constitutional Law §§ 45, 46— motion to dismiss appointed counsel—advice of right to conduct own defense**

The trial court did not err in denying defendant's motion during trial that his court-appointed attorney be dismissed without advising defendant of his right to conduct his own defense, although it is the better practice for the court to inquire of defendant whether he wishes to conduct his own defense.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgments of *Bailey, J.*, 1 November 1976 Session, WAKE County Superior Court. On indictments proper in form, defendant was charged with and convicted of murder in the first degree, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant's conviction of assault with a deadly

weapon with intent to kill inflicting serious bodily injury was certified for review pursuant to G.S. 7A-31(a).

Defendant was sentenced to life imprisonment on the first degree murder conviction, and to twenty years, to run consecutively with the life sentence, on the assault with a deadly weapon conviction. The court did not pass judgment on the robbery with a firearm verdict, presumably because it merged with the first degree murder conviction.

The evidence for the State tended to show the following: Lester Bulla, a black man, was killed in the course of a robbery on 21 February 1976 at the Colonial Ice House, where he was employed, in Fayetteville, North Carolina. In the commission of the robbery, defendant, carrying a sawed-off shotgun and accompanied by his brother, entered the Ice House and demanded money. When one of the employees, Earl McMillian, another black man, turned to get money for the robbers, he was shot in the back. As McMillian lay on the floor, he heard the deceased say that they did not have to shoot him, that he would get the money for them. McMillian last saw the deceased alive at the cash register. He then heard a shot and all was quiet. McMillian later described the robbers as two black men, one tall and one short. Defendant was six feet tall and his brother was five feet five inches.

During the police investigation, it was determined that the cash register had a reading of $378.75 on it. Twelve dollars and sixty cents in loose change and eleven dollars in currency was found on the floor at the scene.

Sometime between 9:30 and 10:00 on the evening of the crime, defendant went to the home of his sister, Martha Jones, who lived near the Ice House. He sought unsuccessfully to call a cab and then left. The next day Martha's husband found a sawed-off shotgun under a shed in the backyard of their home. This gun was later turned over to the police and identified as the one used in the robbery and killing at the Ice House.

On 3 March 1976 defendant and his brother were apprehended in Richmond County, Georgia. The next day, Officer Cook, Sergeant House and SBI Agent Parker were dispatched to Georgia to return the suspects to Cumberland County in North Carolina.

The officers talked to defendant in Georgia about 1:00 p.m. that day. At that time defendant was fully advised of his *Miranda* rights and stated that he understood each of the rights explained to him

and signed a warning and advice of rights form. The second half of this form contained a "consent to be questioned," which was read to defendant. He stated that he understood its meaning, but did not want to be questioned in Georgia. He further said that he would make a statement when he returned to Fayetteville, whereupon he signed the consent to be questioned form, on which a notation was made that defendant "refused to be questioned." No interrogation was made of defendant in Georgia.

The officers left Richmond County at approximately 2:30 p.m. that day and arrived in Fayetteville about 7:30 p.m. Upon arrival, defendant was taken immediately to a squad room in the Law Enforcement Center.

Shortly thereafter, Sergeant House asked defendant whether he was going to live up to his agreement to make a statement, since Sergeant House had lived up to his by not questioning defendant in Georgia. Sergeant House advised defendant he was still covered by his constitutional rights as read to him and signed in Georgia. Defendant then stated that he understood his rights and wanted to make a statement. At this point, defendant proceeded to make incriminating and inculpatory statements relative to the charges against him. As defendant made these statements, Sergeant House took them down in longhand and passed them out to Sergeant Conerly, who in turn typed them.

The questioning continued until approximately 9:00 p.m. About this time, defendant's brother saw Mr. James D. Little, the Public Defender, who asked whether defendant's brother wanted a lawyer. Defendant's brother responded that he did not, but indicated that defendant wanted to see Little.

At approximately 9:20 p.m., Little went to the squad room where he was informed that defendant was in the interview room making statements to Sergeant House. Little asked to see Sergeant House immediately. At this time, defendant had already made an inculpatory statement. He had not asked to see a lawyer, nor had he requested to use the telephone or indicated that he wished to stop talking.

Little asked to see defendant in order to determine whether he was indigent and wanted counsel. Sergeant House refused and informed Little that he would call the District Attorney, Edward Grannis, and subsequently did so. Meanwhile, no questioning took place. Defendant later told SBI Agent Parker that he wanted to see

Little and still later said that he was tired and did not want to answer any more questions.

About 10:20 p.m., District Attorney Grannis arrived. He told the officers to advise defendant of his rights again and this was done at 10:26 p.m. Defendant signed the warning and advice of rights form. After he read the "consent to be questioned" form, defendant was told that if he signed it he would not be permitted to see Little. Defendant hesitated momentarily and then signed it at 10:30 p.m. District Attorney Grannis informed Little that he would not be allowed to see defendant, and the officers continued the interview.

At a suppression hearing before Judge Giles Clark, the portion of the confession given by defendant prior to 9:30 p.m. was found to be "part of the same transaction in which he was advised of his rights in Richmond County, Georgia, and that the consent of the defendant to waive his rights was a part of the same transaction and related back to the waiver and consent which he had made in Richmond County, Georgia . . ." The portion of the confession made after defendant requested to see Public Defender Little and after defendant indicated that he did not want to continue was ruled inadmissible. At trial, the portion of the confession taken from defendant before 9:30 p.m. was admitted into evidence over the objection of counsel.

In addition, the State presented substantial direct and circumstantial evidence implicating defendant in the robbery and murder.

The defendant presented no evidence.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Roy A. Giles, Jr. for the State.

Joseph B. Cheshire, V and William J. Bruckel, Jr., for the defendant.

COPELAND, Justice.

This case presents two questions for our consideration.

(1) Did the trial court commit error in admitting the signed statement of the defendant into evidence? (2) Did the trial court commit error in denying defendant's motion to dismiss his court-appointed counsel?

For the reasons outlined below, it is our decision that no error was committed by the trial court in either instance.

[1] Defendant contends that the confession made by him before 9:30 p.m. on 4 March 1976 should not have been received into evidence. Relying on *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975), defendant argues that his refusal to make a statement in Georgia rendered the waiver signed by him at that time a nullity. He further argues that under the standard applied in *White* the interrogation that occurred in Fayetteville, North Carolina, was not a part of the same transaction in which he was advised of his rights in Georgia; therefore, it is asserted that it was necessary for the investigating officers to repeat the warnings under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and have waivers executed again upon defendant's return to Fayetteville.

Chief Justice Sharp, speaking for our Court in *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), said:

> "[A]lthough Miranda warnings, once given, are not to be accorded 'unlimited efficacy or perpetuity,' where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. However, the need for a second warning is to be determined by the 'totality of the circumstances' in each case. '[T]he ultimate question is: Did the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquish them?' " 288 N.C. at 433-434, 219 S.E. 2d, at 212. (Citations omitted.)

Thus, we must determine whether the original warnings had become so stale and remote that defendant had lost sight of his constitutional rights. In deciding this, we must consider the following circumstances:

> "(1) the length of time between the giving of the first warnings and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; (5) the apparent intellectual and emotional state of the suspect.' " *State v. McZorn*, *supra*, at 434, 219 S.E. 2d, at 212. (Citations omitted.)

In the instant case there was at most an interval of seven hours between the first warnings given in Georgia and the subsequent interrogation in Fayetteville. The same officer gave the initial warnings and conducted the subsequent interrogation. The confession was not inconsistent with any previous statements by defendant, since he refused to be questioned at the initial interview in Georgia. There was nothing in the record to indicate that defendant was so emotionally unstable or intellectually deficient that he had forgotten his constitutional rights which had been fully explained to him a few hours earlier.

Other jurisdictions have held intervals of seven to twelve hours to be insufficient to require repeated warnings. *See, Watson v. State*, 227 Ga. 698, 182 S.E. 2d 446 (1971); *State v. Gilreath*, 107 Ariz. 318, 487 P. 2d 385 (1971) (applying *Escobedo* principles). We find nothing in the record to indicate that anything occurred in the interval between the warnings in Georgia and the later interrogation in Fayetteville to dilute the initial warnings. Further, defendant was advised prior to the questioning in Fayetteville that he was still covered by his constitutional rights as originally read to him in Georgia. At this time, defendant stated that he understood these rights and wanted to make a statement. Thus we find that the mere separation of time and distance between the first warnings and the subsequent questioning at which defendant made inculpatory statements was insufficient to support a holding that, under the totality of the circumstances, the warnings had become so stale and remote that there was a substantial possibility that defendant was unaware of his constitutional rights at the time he confessed.

Moreover, defendant's reliance on *State v. White, supra*, is misplaced since the case *sub judice* is clearly distinguishable. In *White*, the defendant was arrested in New Jersey and made a confession to police officers while being transported to North Carolina by automobile. Prior to the confession, he was fully advised of his *Miranda* rights and expressly waived them. Later, while the defendant was in custody in Laurinburg, North Carolina, he was again given full *Miranda* warnings, after which he was placed in a room with his girl friend, who proceeded to make a statement implicating him in the crime in question. After the statement was made, the police officers asked the defendant if he disagreed with anything the girl said. He responded that he did not, that she had told the truth.

We held that the second statement should have been suppressed because, "[T]here was neither evidence nor finding by the trial judge that defendant waived his right to remain silent or his

right to have counsel present during this particular in-custody interrogation." *State v. White, supra*, at 52, 215 S.E. 2d, at 562. We further held that the State was not entitled to rely upon defendant's earlier waiver in New Jersey because, "His confession after waiver at that time 'exhausted the procedure' to which the waiver applied." *Id.*, at 52-53, 215 S.E. 2d, at 562.

However, in the instant case there was no confession after the waiver in Georgia which "exhausted the procedure" to which the waiver applied. In addition, the record clearly discloses that defendant intended the waiver signed in Georgia to apply to the interrogation in Fayetteville. When he signed the waiver, defendant indicated that he did not want to make a statement at that time, explaining that he wanted to wait until he got to Fayetteville.

Thus, there was a direct connection between the waiver in Georgia and the statement made in Fayetteville. When back in North Carolina, defendant acknowledged the earlier waiver by saying that he would live up to his agreement to make a statement. This was done after defendant had been advised that he was still entitled to the same rights explained to him in Georgia, at which point he stated that he understood those rights and wanted to make a statement.

[2] Further, because he did not sign the written statement until after 9:30 p.m., defendant asserts that the trial court erred in permitting a portion of it to be read into evidence. It is argued that since defendant did not sign or acknowledge the correctness of the statement until after he had requested to see the Public Defender, the entire writing was inadmissible.

Defendant relies heavily on *State v. Walker*, 269 N.C. 135, 152 S.E. 2d 133 (1967), in which our Court held that a written statement which was an interpretative narration of defendant's confession and was signed by defendant without being read by or to him, was inadmissible. We find *Walker* is not controlling, for as was pointed out in that case, "There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretative narration of what the officer understood to be the purport of statements made by the accused." *Id.*, at 141, 152 S.E. 2d, at 138.

In the instant case, the statement in question was taken down in longhand in defendant's own words by Sergeant House and typed by Sergeant Conerly. It was not merely the officers' impressions of

the import of defendant's statements. " '[T]here is no requirement that an oral confession be reduced to writing or that the oral statement, after transcription by another, be signed by the accused.' " *State v. Fox*, 277 N.C. 1, 25, 175 S.E. 2d 561, 576 (1970). In the case *sub judice*, the initial recordation of defendant's words was done by means of the officer's longhand transcription, rather than by tape recorder, as in *State v. Fox, supra.* This is an insufficient distinction on which to bar admission of the statement where, as here, there is sworn testimony that these were the actual words of the accused.

Thus, defendant's oral statements, made and transcribed prior to any violation of his constitutional rights, were not rendered inadmissible merely because he failed to sign them until after he asked for an attorney. This assignment of error is overruled.

Defendant also assigns as error the denial of his motion that his court-appointed counsel be dismissed. A *voir dire* hearing was conducted on defendant's motion during the trial. At this hearing the court determined that defendant was adequately represented by counsel who, of the court's personal knowledge, was competent to defend him. Consequently, the court refused to replace defendant's counsel.

[3] A criminal defendant is entitled to the assistance of competent counsel in the preparation and conduct of his defense. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). However, a defendant is constitutionally guaranteed the right to carry out his own defense without an attorney when he voluntarily and intelligently elects to do so. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965).

[4] Defendant contends that the trial court erred in failing to advise him of his right to conduct his own defense before denying his motion to withdraw defense counsel. The United States Supreme Court in *Faretta* did not speak to this question since the defendant there had requested well before trial that he be permitted to represent himself. In the case under consideration, defendant did not seek to have his counsel removed until the trial was well under way and at no time indicated a desire to represent himself.

Nonetheless, defendant argues that *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976), required the trial court to advise defendant of his right to proceed without counsel upon denial of his motion to replace his attorney. *Robinson*, however, involved a situation in which the court, after denial of a motion to withdraw, allowed

defense counsel to limit his examination of a defense witness and permitted defendant to conduct portions of the examination. This was done to permit defense counsel to avoid eliciting what he believed to be perjury from this witness. We held that this appearance of less than vigorous advocacy by defendant's counsel implied to the jury that defendant and his attorney were at odds and was so prejudicial as to require reversal. While defendant in the case under consideration did complain at *voir dire* of his attorney's advice to potential witnesses to tell the truth, whatever it might be, counsel here continued to be a vigorous advocate for defendant and in no way exhibited a lack of zeal to the jury.

We find no merit in this assignment of error. Still, we wish to reiterate that, as we said in *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976), it is the better practice for the court to inquire of defendant whether he wishes to conduct his own defense. *See also, State v. McNeil, supra.*

The defendant has had a fair trial and we find

No error.

STATE OF NORTH CAROLINA v. ROGER LEE CALDWELL

No. 12

(Filed 11 October 1977)

1. Criminal Law § 5— defense of insanity—burden of proof on defendant

In this jurisdiction insanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it, and *Mullaney v. Wilbur*, 421 U.S. 684, does not require reallocation of the burden of proof with respect to insanity so that the burden must rest upon the State.

2. Burglary and Unlawful Breakings § 6.3; Rape § 18— first degree burglary—underlying felony of assault with intent to rape—instruction proper

In a prosecution for first degree burglary, the trial court's instruction that "the choking and kissing and the straddling of a female person by a male person without her consent intending at the time to use whatever force might be necessary to have sexual intercourse with her, notwithstanding resistance she might make" was a correct definition of the offense of assault with intent to commit rape, and the court properly instructed the jury that in order to convict defendant of first degree burglary the State must prove beyond a reasonable doubt that defendant intended, at the time he entered the victim's apartment, to commit an assault with intent to rape.

State v. Caldwell

DEFENDANT appeals from judgment of *Thornburg, J.*, at the 8 November 1976 Criminal Session, BURKE Superior Court.

Defendant was tried upon a bill of indictment charging that on 24 September 1975 in the nighttime defendant broke and entered the occupied sleeping apartment of Betty Barnette located at 106 Virginia Street, Morganton, North Carolina, with intent to commit a felony therein, to wit: assault with intent to commit rape.

The State's evidence tends to show that Betty Barnette, 26-year-old wife of Ernest (Eddie) Barnette, lived in an apartment at 106-C Virginia Street in Morganton with her husband and two small children. Her husband worked at Greak Lakes Carbon Company and usually came home about midnight. The Barnette apartment had three rooms on the ground level and three rooms on the second level.

Around midnight on 23 September 1975 Betty Barnette was asleep in an upstairs bedroom while her two children were sleeping in a separate room. She heard a knock at the front door and, thinking it was her husband, went downstairs to open the door. She asked "Who is there?" and a voice said "This is Eddie." She cracked the door and defendant was standing outside. She quickly pushed the door shut despite his efforts to prevent it. Defendant then entered the Barnette apartment through a front window located beside the door. Mrs. Barnette started screaming, ran upstairs and left the house through a window in the children's bedroom. Jumping from the roof to the ground, she injured her foot and could not get up. The defendant then jumped off the roof and, in the words of Mrs. Barnette, "he got me down on the ground and was half choking me to death and I had bruises all over me where he grabbed me. He kissed me and then he told me we had better leave, to get up and leave and at that time the next door neighbor came out. I saw the next door neighbor. The defendant just told me that I had better get up and to keep my mouth shut or he would kill me.... He was on top of me and choking me and he put his hand around my neck. He was in between my legs ... and holding me down and he threatened me if I moved. He said he would kill me if I moved.... He kissed me on the mouth. I hit the ground after I jumped. I was hurt on the bottom of my foot. It was cut. I could not walk. Roger Michaux was the neighbor that came out there to see me. I was on the ground about five minutes with the defendant before Mr. Michaux came out there. I don't know what time the defendant left me there. He left because this Roger came out and told him to leave; that he had better leave

and get out of there, to leave me alone. After Roger Michaux told him that, the defendant just walked off."

Roger Michaux, 24-year-old black man, lived with his wife in Apartment 106-D Virginia Street in Morganton on 23 September 1975. The Michaux apartment was next door to Mrs. Barnette's. Roger Michaux had known defendant all his life. On two or three occasions defendant had passed through that area asking who lived in the neighborhood, and Mr. Michaux had mentioned the names of those living in the apartments, including the name of Betty Barnette and her husband. Roger Michaux testified that on the night in question, about midnight, he heard a lot of scuffling and opened his door to see what was happening. He saw Roger Caldwell who had Mrs. Barnette up against a wall and was pressing up against her. He told defendant to leave her alone but he ignored the warning and "went back to what he was doing." Mr. Michaux told him again to quit "before I have to stop you." Defendant then backed off and as he walked past Michaux he said: "Don't mention anything about this, man. Don't mention anything about what I saw. . . . You have not seen me, don't say anything about it." Defendant then disappeared and Michaux's wife came out of the Michaux apartment, "saw Betty and helped her."

Detective Dennis Short received a call at his home at approximately 1 a.m. on 24 September 1975 as a result of which he talked with Mrs. Barnette and she gave him a description of her assailant and told him what had occurred. Defendant was apprehended on the afternoon of the same day, taken to the police station and advised of his rights. Officer Short observed defendant walking around the police department and observed his expressions. Defendant walked normally and had a worried expression on his face. There was no odor of alcohol about him.

Defendant did not testify but offered evidence. Dr. James Groce, a psychiatrist at Dorothea Dix Hospital, testified that he examined defendant on 16 October 1975 and observed him over a period of time. Defendant's IQ was 91, and on the Competency Screening Test he scored 36, "well within the range of competency to stand trial." It was Dr. Groce's expert opinion, however, that it was "unlikely" that defendant knew the difference between right and wrong and the nature and consequences of his behavior on the night of 24 September 1975. Defendant's mother and Robert Hodges, an attorney who had previously represented defendant in other matters, testified that defendant appeared to be confused

following the episode in question, could not say why he was in jail, seemed unable to converse intelligently or to relate any of the facts concerning the incident.

The court submitted four permissible verdicts: Guilty of first degree burglary, guilty of non-felonious breaking or entering, not guilty by reason of insanity, or not guilty. Defendant was convicted of first degree burglary and sentenced to life imprisonment. He appealed to the Supreme Court assigning errors noted in the opinion.

Rufus L. Edmisten, Attorney General, by James Wallace, Jr., Assistant Attorney General, for the State of North Carolina.

C. Gary Triggs, attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends the trial court erred by placing upon him the burden of proving to the satisfaction of the jury that he was insane at the time of the offense. This constitutes his first assignment of error.

[1] In this jurisdiction insanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it. "Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crime, but it is rebuttable. . . . These considerations give rise to the firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury." *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). The quoted rule has been applied in numerous decisions of this Court including *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975); *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975).

Defendant argues, however, that *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), requires reallocation of the burden of proof with respect to insanity so that the burden must henceforth rest upon the State. The argument is unsound. The constitutional correctness of our decisions is reinforced by the following language of the United States Supreme Court in *Patterson v.*

New York, --- U.S. ---, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (decided 17 June 1977):

> "[I]n *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court further announced that under the Maine law of homicide, the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation. The Chief Justice and Mr. Justice Rehnquist, concurring, expressed their understanding that the *Mullaney* decision did not call into question the ruling in *Leland v. Oregon*, supra, with respect to the proof of insanity.
>
> Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case to which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Rivera v. Delaware*, 429 U.S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdend the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney*. We dismissed the appeal as not presenting a substantial federal question. Cf. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)."

Thus enlightened, we conclude that the burden of proof with respect to defendant's plea of insanity was correctly placed upon the defendant. His first assignment of error is overruled.

[2] Judge Thornburg instructed the jury that "the choking and kissing and the straddling of a female person by a male person without her consent intending at the time to use whatever force might be necessary to have sexual intercourse with her, notwithstanding resistance that she might make," would be an assault with intent to commit rape. Defendant contends the court thereby erroneously defined the crime of assault with intent to commit rape and assigns the quoted instruction as error.

We note from the record that the court further instructed the jury that in order to convict defendant of first degree burglary the State must prove beyond a reasonable doubt that defendant intended, at the time he entered Mrs. Barnette's apartment, to commit an assault with intent to rape.

An examination of the challenged portion of the charge reveals no error. Immediately following the quoted portion, the jury was specifically instructed:

> "So I instruct you, members of the jury, that if you find from the evidence, beyond a reasonable doubt, that on or about the 23rd and 24th of September 1975, the defendant Roger Lee Caldwell, broke and entered the sleeping apartment of Betty Jo Barnette without her consent in the nighttime and intending at that time to commit the crime of assault with intent to commit rape, and that Betty Jo Barnette was in the house when defendant broke and entered the sleeping quarters or apartment house, it would be your duty to return a verdict of guilty of burglary in the first degree. However, if you do not so find or if you have a reasonable doubt as to one or more of those things, you will not return a verdict of guilty of burglary in the first degree. If you do not find the defendant guilty of burglary in the first degree, then you will consider whether or not the defendant is guilty of non-felonious breaking or entering."

In our view the charge of the court correctly defined the offense of assault with intent to commit rape and properly applied the law relevant thereto with respect to the burglary charged in the bill of indictment. "Whether the ulterior criminal intent existed in the mind of the person accused, at the time of the alleged criminal act, must of necessity be inferred and found from other facts, which in their nature are the subject of specific proof. It must ordinarily be left to the jury to determine, from all the facts and circumstances, whether or not the ulterior criminal intent existed at the time of the breaking and entry. In some cases the inference will be irresistible, while in others it may be a matter of great difficulty to determine whether or not the accused committed the act charged with the requisite criminal purpose." *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923); *accord, State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). Defendant's second assignment is overruled.

Examination of the entire record impels the conclusion that defendant received a fair trial free from prejudicial error. Hence the verdict and judgment must be upheld. The sentence pronounced is within statutory limits. G.S. 14-52. If the punishment is deemed excessive, relief may be sought through the Board of Paroles.

No error.

JAMES W. SMITH v. EDWARD L. POWELL, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA

No. 5

(Filed 11 October 1977)

Automobiles § 122— driving under bridge within right-of-way lines— refusal to take breathalyzer test

A petitioner who drove a motor vehicle only within the limits of the area beneath a highway bridge did not drive on a "highway" as that term is used in the statute dealing with the breathalyzer test, G.S. 20-16.2; therefore, the Division of Motor Vheicles had no authority to revoke the driver's license of petitioner for his refusal to take a breathalyzer test after his arrest for driving in such an area while under the influence of intoxicating liquor.

APPEAL by petitioner, Smith, from the Court of Appeals which reversed *James, J.*, who, at the 29 March 1976 Criminal Session of NEW HANOVER, ordered the respondent to reinstate the petitioner's driver's license.

The facts are not in dispute. On 2 October 1975, Deputy Sheriff Willis of New Hanover County went to the area underneath the bridge by which U.S. Highways 74 and 76 cross the Intercoastal Waterway to investigate a report of a shooting of a firearm, with which matter the petitioner Smith had no connection whatever. Employees of the State mow the grass and, occasionally, pick up trash beneath the bridge, but the State does not maintain any roadway, driveway or parking lot beneath the bridge and has never designated that area as a public vehicular area. From time to time, members of the public drive their vehicles under the bridge and launch small boats into the water from this area.

On the occasion in question, Deputy Willis observed the petitioner Smith back Smith's automobile a distance of about four feet directly under the center of the bridge so that the petitioner's vehicle almost struck the automobile of Deputy Willis. At no time did Deputy Willis observe the petitioner operate his automobile anywhere else. The deputy approached the petitioner, observed his condition, concluded, with reasonable cause, that he was under the influence of intoxicating liquor, and placed him under arrest for driving under the influence thereof. He requested the peitioner to take a breathalyzer test, the request being made in compliance with all procedural requirements of G.S. 20-16.2. The petitioner refused to take the test. For that reason, the respondent Commissioner of Motor Vehicles revoked the petitioner's driver's license for six

months, in reliance upon G.S. 20-16.2. The petitioner requested an administrative hearing, which was granted. Following the hearing, the Division of Motor Vehicles reaffirmed the suspension.

Thereupon, the petitioner filed his petition in the Superior Court of New Hanover County requesting the court to order the respondent to reinstate his driver's license immediately. A hearing was had in the Superior Court before Judge James who found the facts to be as above summarized and concluded that the area beneath the bridge is not a "public vehicular area" as that term is used in G.S. 20-16.2 and that the petitioner was not operating his vehicle upon a "highway" as that term is used in the said statute. For this reason, Judge James concluded that the arresting officer did not have authority under the said statute "to request or require the petitioner to take a breathalyzer examination" and, therefore, the petitioner had the right to refuse to do so. Consequently, he ordered the petitioner's driver's license reinstated immediately.

The Commissioner appealed to the Court of Appeals, which reversed the order of Judge James, the majority holding that the area under the bridge is part of a "highway" as that term is defined in Chapter 20 of the General Statutes. Judge Clark dissented, by reason of which dissent the petitioner appealed to the Supreme Court as a matter of right.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General, and William B. Ray, Assistant Attorney General, for Appellee.

Cherry and Wall by James J. Wall for Appellant.

LAKE, Justice.

G.S. 20-16.2 provides:

> "(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle *on a highway or*

public vehicular area while under the influence of intoxicating liquor.

* * *

"(c) * * * [U]pon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Department *shall* revoke the driving privilege of the person arrested for a period of six months.

* * *

"(h) As used in this section, the term 'public vehicular area' shall mean and include any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the isntitutions maintained and supported by the State of North Carolina, or any of its subdivisions, or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business or municipal establishment providing parking space for customers, patrons, or the public." (Emphasis added.)

The petitioner's driver's license was not suspended by the Division of Motor Vehicles upon the theory that his presence under the bridge, in the condition described by the arresting officer, constituted reasonable ground for the officer to believe that the petitioner, prior to reaching the area under the bridge, had driven his vehicle upon a highway in that condition. The theory upon which the Division acted was that driving a motor vehicle entirely within the limits of the area beneath the bridge, while in such condition, justified the arresting officer in requesting the petitioner to take a breathalyzer test and the wilful refusal of the petitioner to take such test required the Division to revoke his driver's license.

We are not here concerned with the authority of the Legislature to make it a criminal offense for any person, while under the influence of intoxicating liquor, to drive a motor vehicle within the limits of such an area, or at other places than upon a highway or a public vehicular area, and to authorize the Division of Motor Vehicles to suspend such person's driver's license upon his wilful refusal to take a breathalyzer test. Upon that question, *see*:

Flanders v. State, 97 Ga. App. 779, 104 S.E. 2d 538 (1958); *State v. Carroll*, 225 Minn. 384, 31 N.W. 2d 44 (1948); *People v. Taylor*, 202 Misc. 265, 111 N.Y.S. 2d 703 (1952).

The above quoted statute authorizes the suspension of a person's driver's license for refusal to take a breathalyzer test only if such person was requested to take the test by an officer who arrested him or her with reasonable grounds to believe he or she, while under the influence of intoxicating liquor, drove or operated a votor vehicle on a highway or a public vehicular area. Thus, the issue for determination upon this appeal is whether one who drives a motor vehicle only within the limits of the area beneath a highway bridge is driving "on a highway or public vehicular area" as those terms are used in this statute.

Obviously, the above quoted definition of "public vehicular area" set forth in Paragraph (h) of G.S. 20-16.2 does not include the area under this bridge, for the area in question is not "upon the grounds and premises" of an institution or establishment of a type specified in that definition. Thus, the question for decision narrows to: When a person drives a motor vehicle only upon the ground beneath a highway bridge, is he driving "on a highway?" We hold he is not.

G.S. 20-4.01 provides:

> "Unless the context otherwise requires, the following words and phrases, *for the purpose of this Chapter*, shall have the following meanings: (Emphasis added.)
>
> * * *
>
> "(13) Highway or Street. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. * * *"

While the record shows people, with some frequency, drive motor vehicles beneath the bridge here in question, nothing in the record indicates that they have a right to drive upon any part of this area.

It is elementary that when a statute contains a definition of a word or term used therein, such definition, unless the context clearly requires otherwise, is to be read into the statute wherever such word or term appears therein. *See*: *Yacht Co. v. High*, 265 N.C. 653,

144 S.E. 2d 821 (1965); *Trust co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956); 73 Am. Jur. 2d, Statutes, § 225. Thus, the determination of the issue presented by this appeal requires the construction of this definition of "highway."

The term "highway" and the synonymous term "street" appear many times, and in varying types of provisions, in Chapter 20 of the General Statutes, the Motor Vehicle Law. Clearly, the Legislature has provided that, unless the context requires otherwise, the word "highway" is to be given the same connotation in all of these provisions, whether they be penal, remedial, or otherwise. Thus, the well known principles of statutory construction that a penal statute is to be strictly construed (*State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968)) and a statute designed to promote safety is to be liberally construed (*State v. Lipkin*, 169 N.C. 265, 84 S.E. 340 (1915)) have no application to this matter. The definition of "highway" in G.S. 20-4.01(13) is, therefore, to be construed so as to give its terms their plain and ordinary meaning. *State v. Wiggins*, 272 N.C. 147, 158 S.E. 2d 37 (1967); *Yacht Co. v. High, supra*; *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433 (1951).

In 39 Am. Jur. 2d, Highways, Streets and Bridges, § 1, it is said:

> "In some instances, and for particular purposes, the term 'highway' has been defined to encompass the entire right of way, including the shoulder and other places open to travel, but in other instances and for other purposes, the term has been defined narrowly so as to exclude the exterior boundaries of the right of way and confine its meaning to that part of a public road open to the use of the public for the purpose of vehicular travel."

See also: 39A C.J.S., Highways, § 1(1)b.

In Paragraph (38), G.S. 20-4.01 also defines the term "Roadway." That definition is as follows:

> "That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. * * *"

These two definitions, considered together, show that the Legislature in defining "highway" intended to put at rest the question noted in the above quotation from American Jurisprudence and to make it clear that the entire "width" between the right-of-way lines is included in a "highway" as distinguished from a "roadway."

It is, of course, true that a "highway" or a "street" is not limited to its surface so far as the right of the State to use, maintain and protect it from damage and private use are concerned. In this sense, it includes not only the entire thickness of the pavement and the prepared base upon which it rests but also "so much of the depth as may not unfairly be used as streets are used" for the laying therein of drainage systems and conduits for sewer, water and other services. Elliott, Roads and Streets, § 20 (1926); 39 Am. Jur. 2d, Highways, Streets and Bridges, § 258. Nevertheless, the primary concern of the Legislature in defining "highway" as used in Chapter 20 of the General Statutes was with the "width," not the depth. "Width" means "the lineal extent of a thing from side to side." Century Dictionary; Webster's New International Dictionary.

In ordinary speech, the expression "driving or operating a motor vehicle *on* a highway" connotes driving on the top surface of the highway, not the ground beneath a bridge over which the "roadway" portion of the highway runs. In ordinary speech, one thing is said to move or rest "on" another when it moves or rests upon the top surface of the second thing, as when a book is said to lie *on* a table as compared with lying *in* the table drawer.

The contention of the Division of Motor Vehicles that G.S. 20-16.2, dealing with the breathalyzer test, applies to any operation of a motor vehicle, at whatever depth or level beneath the surface, so long as it is within the right-of-way lines is an ingenious argument, born of a commendable desire to promote safety of persons and property, but in our opinion the Legislature did not have areas beneath bridges in mind when it enacted this statute. If the dry land under a bridge is part of the "highway" which crosses a stream upon the bridge, then so is the water under the bridge and the bed of the stream or pond so crossed. It would be carrying legal logic a bit far to say that one fishing from a boat anchored beneath this bridge over the Intercoastal Waterway is fishing "on a highway."

The record indicates that there is a considerable stretch of level land under this bridge, to which people have relatively easy access by motor vehicle and which they use for launching boats and related activities. Obviously, it would be dangerous to drive a motor vehicle in this area while the driver is under the influence of intoxicating liquor. The Legislature, if it sees fit to do so, may deal with this danger by appropriate legislation. We simply hold that it has not undertaken to do so by providing for the giving of a breathalyzer test to one who, under the influence of intoxicating liquor, drives a motor vehicle "on a highway."

The decision of the Court of Appeals is, therefore, reversed and the matter is remanded to that court for the entry of a judgment affirming the judgment of the Superior Court.

Reversed and remanded.

GRIER G. NEWLIN, ADMINISTRATOR OF THE ESTATE OF WILLIAM HENRY KIMREY, DECEASED v. EDWIN GILL, TREASURER OF THE STATE OF NORTH CAROLINA, THE ESTATE OF THOMAS PRESTON KIMREY, ET AL.

No. 11

(Filed 11 October 1977)

1. **Descent and Distribution § 1.1— determination of intestate succession**

In North Carolina the devolution of property by descent and distribution is entirely within the province of the General Assembly.

2. **Descent and Distribution § 9— succession by collateral kinsmen—limitation**

G.S. 29-15 limits succession of an intestate's estate to collateral kinsmen who are descended from a parent or grandparent of the intestate.

3. **Descent and Distribution § 9— succession by collateral kinsmen—prevention of escheat—effect of statute**

The limitation upon collateral succession to heirs within five degrees of kinship to the intestate contained in G.S. 29-7 is a limitation upon succession by heirs descended from parents or grandparents of the intestate as provided in G.S. 29-15, and the effect of the proviso of G.S. 29-7 is to provide for unlimited succession by collateral kinsmen descended from the intestate's parents or grandparents in the event there are no collateral kinsmen of the fifth degree in such lines of descent.

4. **Escheats— collateral kinsmen—no descendant of intestate's parent or grandparent**

The estate of an intestate escheated where the intestate was survived only by collateral kinsmen who did not descend from the intestate's parents or grandparents.

ON certiorari to review the decision of the Court of Appeals (reported in 32 N.C. App. 392, 232 S.E. 2d 213) which reversed the judgment of *Lupton, J.*, at the 1 June 1976 Session of RANDOLPH County Superior Court.

Plaintiff administrator filed this action for a declaratory judgment on 12 November 1975, seeking instructions as to the distribution of the estate of William Henry Kimrey, deceased.

William H. Kimrey died intestate on 15 March 1975 leaving a net estate in excess of eighty-four thousand dollars ($84,000). He died without a surviving wife, without lineal descendants, and without surviving parents, grandparents or lineal descendants thereof. The closest surviving relative was Thomas P. Kimrey, a grandson of the intestate's great-grandparents and an heir of the fifth degree. Thomas Kimrey died subsequent to the date of the intestate's death and is represented in this action by his executors. With the exception of the defendant Treasurer, the remaining defendants are also descended from the intestate's great-grandparents and are heirs of the sixth degree.

The trial court held that the estate of William H. Kimrey is not subject to the escheat provisions of G.S. 29-12 and that the estate should be distributed according to the provisions of G.S. 29-7 to all surviving heirs without regard to their degree of relationship to the intestate. On appeal, the Court of Appeals reversed, stating that "G.S. 29-7 has no application unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent." The court then held that the estate escheated under G.S. 29-12.

Morgan, Byerly, Post, Herring and Keziah by J. V. Morgan, for the Estate of Thomas Preston Kimrey.

Lacy L. Lucas, Jr., and J. Thomas Keever, Jr., for Floyd Ray Kirkman, et al.

Moser and Moser by D. Wescott Moser, for Grier G. Newlin, Administrator of the Estate of William Henry Kimrey.

Rufus L. Edmisten, Attorney General, by Charles J. Murray, Assistant Attorney General, for Edwin Gill, Treasurer of the State of North Carolina.

BRANCH, Justice.

[1] In North Carolina, the devolution of property by descent and distribution is entirely within the province of the General Assembly. *Edwards v. Yearby*, 168 N.C. 663, 85 S.E. 19; *Hodges v. Lipscomb*, 128 N.C. 57, 38 S.E. 281. The rights of relatives to inherit are set forth in G.S. 29-14, G.S. 29-15, G.S. 29-21, and G.S. 29-22. We are not here concerned with illegitimates, and the provisions of G.S. 29-21 and G.S. 29-22 are, therefore, not pertinent to decision.

G.S. 29-14 defines the shares of the surviving spouse in case of intestacy and G.S. 29-15 delineates the shares of all others except those taking from an illegitimate intestate.

After setting forth the shares to be taken by children, lineal descendants, parents, brothers and sisters of the intestate or the lineal descendants of the intestate's brothers and sisters, G.S. 29-15, in pertinent part, provides:

(5) If there is no one entitled to take under the preceding subdivisions of this section or under G.S. 29-14,

a. The paternal grandparents shall take one half of the net estate in equal shares, or, if either is dead, the survivor shall take the entire one half of the net estate, and if neither paternal grandparent survives, then the paternal uncles and aunts of the intestate and the lineal descendants of deceased paternal uncles and aunts shall take said one half as provided in G.S. 29-16; and

b. The maternal grandparents shall take the other one half in equal shares, or if either is dead, the survivor shall take the entire one half of the net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take one half as provided in G.S. 29-16; but

c. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the paternal side, then those of the maternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole; or

d. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the maternal side, then those on the paternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole. (1959, c. 879, s. 1.)

The General Assembly has carefully named the persons who take in cases of intestacy. G.S. 29-14; G.S. 29-15; G.S. 29-21; and G.S. 29-22. In so doing, the Legislature used words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles." We must presume that the Legislature intended that these words bear their ordinary and

usual meaning. *Lafayette Transportation Service v. County*, 283 N.C. 494, 196 S.E. 2d 770. *Greensboro v. Smith*, 241 N.C. 363, 85 S.E. 2d 292. We cannot expand the words "brother," "parent," "grandparent" to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim *expressio unus est exclusio alterius* (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents.

[2] Thus, standing alone the plain language of G.S. 29-15 limits succession of a decedent's estate to collateral kinsmen who are descended from a parent or grandparent of the intestate. Relying on the language of G.S. 29-15, appellee, Treasurer of the State of North Carolina, takes the position that none of the appellants take under this statute and that the net estate should escheat pursuant to the provisions of G.S. 29-12 and G.S. 116A-2.

Appellants, on the other hand, argue that the provisions of G.S. 29-7 make it clear that the manifest intent of the Legislature was to prevent any property from escheating. In support of their position, appellants rely upon the well-recognized rule that the foremost principle of statutory construction is to ascertain and declare the legislative intent. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22. *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67. Further, in ascertaining that intent, statutes *in pari materia* should be considered together and reconciled when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the legislative intent. *Commissioner of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98.

G.S. 29-7 provides:

> There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating.

In seeking to determine the intent of the General Assembly in enacting G.S. 29-7, we initially note that the distributive provisions of the Intestate Succession Act provide for succession by close relatives who were in all probability known to the intestate and who would not have been unlikely objects of his bounty had he written a will. In the absence of such relatives, G.S. 29-12 provides for escheat of the estate. Underlying this provision is a logical presumption that

the intestate would not have included distant relatives in his will. Taken as a whole, the Act conveys an intent by the Legislature to write a reasonable will for those residents who have not done so. Had the Legislature desired to provide that no property would escheat, as appellants contend, it would seem that the reasonable method would have been to repeal G.S. 29-12 and G.S. 116A-2. This they did not do.

Another basic fallacy in appellants' contention is that it presupposes that G.S. 29-7 establishes rights of collateral succession. G.S. 29-7, at most, imposes a limitation upon intestate succession, as defined in G.S. 29-15, and by its proviso restates the existing effect of G.S. 29-15, *i.e.*, that collateral descent shall be unlimited when it is within the parentela of an intestate's parents or grandparents. Thus, we conclude that in enacting G.S. 29-7, the Legislature did not intend to eliminate escheats.

[3] The limitation upon collateral succession to heirs within five degrees of kinship to the intestate contained in G.S. 29-7 is a limitation upon succession by heirs descended from parents or grandparents of the intestate. Since Thomas Kimrey was not descended from William Henry Kimrey's parents or grandparents, we must reject the contention of his executors that his status as the only collateral kinsman of the fifth degree entitled Thomas Kimrey to inherit the entire estate of William Henry Kimrey.

The contention of the sixth degree kin that G.S. 29-7 opens to all collateral kin the right to share in the estate of William Henry Kimrey must also be rejected since none of these persons are descended from intestate's parents or grandparents.

We hold that rights of collateral succession are limited to the descendants of the intestate's parents or grandparents. G.S. 29-7 limits such succession to those persons who are within five degrees of kinship to the intestate. The effect of the proviso engrafted upon the statute is to provide for unlimited succession by collateral kinsmen *descended from the intestate's parents or grandparents in the event there are no collateral kinsmen of the fifth degree in such lines of descent.*

[4] This record does not reveal the existence of any collateral kin descended from the parents or grandparents of William Henry Kimrey. Therefore, the Court of Appeals correctly determined that the estate of William Henry Kimrey escheated.

Affirmed.

STATE OF NORTH CAROLINA v. EMMETT L. MARSH

No. 26

(Filed 11 October 1977)

Assault and Battery § 15.5— evidence of self-defense—failure to give instruction—error

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the trial court erred in failing to instruct on self-defense where the State's evidence pointed to defendant as the aggressor, but there was competent evidence which would permit, but not require, the jury to find that defendant did not voluntarily and aggressively enter into an armed confrontation with the victim, but used only such force as was necessary, or appeared to him to be necessary in order to save himself from death or great bodily harm.

APPEAL by defendant from *Gavin, S. J.*, 17 May 1976 Session of UNION Superior Court.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill, inflicting serious injury upon Edmond Bivens. He entered a plea of not guilty.

The State's evidence tends to show that on 1 April 1976, Edmond Bivens stopped to investigate a light that was on in the restroom of his service station. Upon opening the door to the restroom, defendant struck Bivens with a metal object. Bivens received medical treatment for his injuries and had instituted proceedings against defendant which were pending at the time of the shooting which is the subject of this appeal.

On the morning of 8 April 1976, Bivens was seated in his office preparing a bank deposit. He looked up and saw defendant approaching the service station with "hate in his eyes." Bivens then pushed the money he was counting into a drawer, grabbed a pistol, and told defendant to stop. According to Bivens, defendant reached into his back pocket, took out a pistol and fired twice through a glass window. Bivens, who was not wounded, then fired one shot at defendant and retreated through a side door. Defendant fired twice more in Bivens' direction. Bivens further testified that prior to 1 April 1976, he had had no difficulties or problems with defendant.

Bonnie Duncan, testifying for defendant, stated that she was crossing the street in the vicinity of Bivens' service station on the morning of 8 April 1976 and that she heard a single gunshot. She turned and saw defendant reaching into his back pocket at which time she ran to seek a place of safety. She further testified that she

heard two more shots fired. Miss Duncan also testified that defendant was known to habitually carry a pistol.

The jury returned a verdict of guilty of felonious assault with a firearm, and the defendant was sentenced to ten years imprisonment. Defendant appealed. The Court of Appeals, Clark, J., dissenting, found no error in the trial.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

William H. Helms for the defendant.

BRANCH, Justice.

The single question presented by this appeal is whether the trial judge erred by failing to instruct the jury on the law of self-defense.

The trial judge must charge the jury on all substantial and essential features of a case which arise upon the evidence, even when, as here, there is no special request for the instruction. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328. *State v. Todd*, 264 N.C. 524, 142 S.E. 2d 154. Unquestionably, self-defense may become a substantial and essential feature of a criminal case, and when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830, *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769.

The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time. *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249. *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24. However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750. *State v. Johnson*, 278 N.C. 252, 179 S.E. 2d 429. *State v. Davis*, 225 N.C. 117, 33 S.E. 2d 623.

Decision of this appeal turns upon the question of whether there is evidence from which the jury might infer that defendant acted in self-defense. We think there was such evidence.

The witness Bonnie Duncan testified:

> . . . I saw Emmett Marsh on the morning of April 8 of this year around Mr. Bivens' Exxon station. He was at the station prior to the time that I got there. As I approached the service station, I seen Emmett standing up there in front of the service station.
>
> When I was going across the street, I heard a shot and then I turned around and I seen Emmett like he was going in his pocket. Then I turned around and I ran.
>
> I heard the shot prior to the time that I saw Emmett reach for his back pocket. . . .

There is no evidence that defendant was a trespasser or was in the place where he had no right to be, and the record discloses no threats by defendant prior to the shooting.

The evidence is in conflict as to which of the parties is the aggressor. The State's evidence points to defendant as the aggressor; however, we are of the opinion that there was competent evidence which would permit, but not require, the jury to find that defendant did not voluntarily and aggressively enter into an armed confrontation with Bivens, but used only such force as was necessary, or appeared to him to be necessary in order to save himself from death or great bodily harm. It is for the jury to decide whether or not defendant's belief was reasonable. Thus, the trial judge's failure to charge on self-defense constitutes prejudicial error which requires a new trial.

This cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Union County for a new trial in accordance with this opinion.

Reversed.

BRANTLEY LINDSAY SNIDER, PLAINTIFF v. DARRELL WAYNE DICKENS, DEFENDANT—THIRD PARTY PLAINTIFF v. KENNETH DOUGLAS SNIDER, THIRD-PARTY DEFENDANT

No. 20

(Filed 11 October 1977)

Automobiles § 79— intersection accident—right to assume vehicle on servient road will stop

In a passenger's action to recover for injuries received in a collision which occurred when defendant drove his car from a servient road into the path of third party defendant's car on the dominant highway, the trial court erred in failing to grant a judgment n.o.v. in favor of the third party defendant, since, even if the third party defendant did have an unobstructed view of the intersection, his failure to see defendant's vehicle until just before the collision would not be a concurring proximate cause of the accident, the third party defendant being entitled to assume that defendant would yield the right of way to him and allow him to pass safely.

THIS case is before us on petition for discretionary review of the decision of the Court of Appeals, 32 N.C. App. 388, 232 S.E. 2d 289 (1977), (Arnold, J., concurred in by Parker and Martin, JJ.), affirming the judgment of *Kivett, J.*, DAVIDSON County Superior Court.

Original plaintiff, Brantley Lindsay Snider, instituted a tort action to recover for personal injuries received in an automobile accident against Darrell Wayne Dickens. Dickens answered and then filed a third-party complaint against defendant Kenneth Douglas Snider seeking contribution. This appeal involves only the third-party claim.

The evidence adduced at trial tended to show that the original plaintiff was a passenger in a car driven by the third-party defendant Snider, hereinafter defendant, as it traveled northward on Highway 109 in Davidson County, approaching the Kennedy Road intersection. At this point, Highway 109 was a five-lane road having two northbound and two southbound lanes with a turning lane in the center; Kennedy Road was a two-lane rural paved road with a stop sign erected at its entrance to Highway 109. The weather was clear and the pavement dry.

As the defendant approached from the south, the third-party plaintiff, hereinafter plaintiff, was stopped at a stop sign, westbound on Kennedy Road, where he had been waiting for an appreciable time (2-5 minutes) to cross the northbound lanes of Highway 109. The defendant was traveling in the left northbound

lane at a speed of 35 to 45 miles per hour in a 45 miles per hour zone. Ahead of him, a tractor-trailer truck was making a right turn onto Kennedy Road from the right northbound lane of Highway 109. At this time plaintiff's vision of the left northbound lane of Highway 109 was somewhat obscured by the truck; nonetheless, he began to proceed slowly across the northbound lanes until his passengers cried out for him to stop. He then halted his car at once with the front end protruding into the left northbound lane, where it was immediately struck by defendant's car. Defendant later testified by deposition that the tractor-trailer was as much as twice its length down Kennedy Road when the collision occurred.

The case was submitted to a jury which returned a verdict in favor of the original plaintiff for $10,000 and in favor of the defendant third-party plaintiff against the third-party defendant for $5,000 for contribution. This latter verdict and the judgment entered thereon are the subjects of this appeal.

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

Haworth, Riggs, Kuhn, Haworth & Miller by John Haworth for defendant-third party plaintiff.

Walser, Brinkley, Walser & McGirt by Charles H. McGirt and G. Thompson Miller for third-party defendant.

COPELAND, Justice.

The defendant's principal assignment of error is the failure of the trial court to grant a directed verdict or judgment notwithstanding the verdict in his favor. The motion for jugment notwithstanding the verdict under G.S. 1A-1, Rule 50(b) is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury; therefore, we must utilize the same standard of sufficiency of the evidence in reviewing both motions. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). "In passing upon such a motion, the court must consider the evidence in the light most favorable to the non-movant. [citation omitted]. That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973).

Taking the evidence in the light most favorable to the plaintiff, the following facts must be considered as true: The view along Highway 109 south of the intersection was unobstructed. The plaintiff stopped at the stop sign and then proceeded into the intersection a distance of some 20 to 25 feet to the point at which the collision occurred. As he drove into the intersection, the plaintiff's car was traveling so slowing that the speedometer did not register. At this speed he could have stopped almost immediately, and did so before the collision, with the front of his car in the middle of the left northbound lane, some 3 or 4 feet from the center turning lane, which was clear of traffic when the accident occurred. The defendant was traveling between 35 and 45 miles per hour as he entered the intersection on Highway 109, on which the posted speed limit was 45 miles per hour. The northbound tractor-trailer had completed its turn onto Kennedy Road and was as much as twice its own length into Kennedy Road when the defendant reached the intersection. Defendant did not see plaintiff's vehicle until "right before it hit"; thus, he did not blow his horn, apply his brakes or veer from the left northbound lane prior to the collision.

While a driver on a dominant highway has a duty to drive no faster that is safe under the circumstances, to keep his vehicle under control, to maintain a reasonably careful lookout, and to take reasonably prudent steps to avoid a collision whenever necessary, *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373 (1954), he is entitled to assume, *even to the last moment*, that a driver on a servient highway will comply with the law and stop before entering the dominant highway. *Caughron v. Walker*, 243 N.C. 153, 90 S.E. 2d 305 (1955). "It is even more reasonable for him to assume until the last moment that a motorist on the servient highway who has actually stopped in obedience to the stop sign will yield the right of way to him and will not enter the intersection until he has passed through it." *Raper v. Byrum*, 265 N.C. 269, 275, 144 S.E. 2d 38, 42 (1965).

In the instant case plaintiff, while conceding his original negligence, contends that third party defendant was concurrently negligent in failing to maintain a proper lookout, which rendered him unable to take steps to avoid the accident. As evidence of this plaintiff points to defendant's statement that the tractor-trailer was clear of the intersection at the time he reached it. From this we are asked to conclude that defendant had an unobstructed view of the intersection and therefore should have seen plaintiff easing into it in sufficient time to permit him to avoid the collision.

Yet, even if defendant had seen plaintiff's car as it crept into the intersection, he had a right to assume to the last possible moment, that plaintiff would yield the right of way to him. *Raper v. Byrum, supra.* The reasonableness of this assumption would be reinforced by the relative snail's pace of plaintiff's vehicle as he traversed the intersection, since this would seem to indicate that he was on the lookout for oncoming cars and would halt immediately to let them pass. This conclusion is further supported by plaintiff's statement that he was struck almost instantaneously after he stopped, from which we can deduce that defendant was almost upon the plaintiff when the latter entered the left lane and there would have been no time to avoid the collision. Thus, even if we accept plaintiff's assertion that defendant had an unobstructed view of the intersection, on these facts defendant's failure to see plaintiff's vehicle until just before the collision would not be a concurring proximate cause of the accident. Defendant was entitled to assume that plaintiff would yield the right of way to him and allow defendant to pass safely. For this reason, defendant's motion for judgment notwithstanding the verdict on the third party claim should have been granted. Our decision on this issue renders it unnecessary for us to consider defendant's other assignments of error as to the trial court's charge to the jury and its failure to grant new trial.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

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

ACKER v. BARNES

No. 37 PC.

Case below: 33 N.C. App. 750.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1977.

BIG BEAR v. CITY OF HIGH POINT

No. 9 PC.

Case below: 33 N.C. App. 563.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 12 September 1977.

HALL v. PIEDMONT and CRAWLEY v. PIEDMONT

No. 36 PC.

Case below: 33 N.C. App. 637.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 October 1977.

HOOVER v. KLEER-PAK

No. 18 PC.

Case below: 33 N.C. App. 661.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977.

McDOWELL v. DAVIS

No. 17 PC.

Case below: 33 N.C. App. 529.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 12 September 1977. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 12 September 1977.

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

PIPKIN v. THOMAS & HILL, INC.

No. 39 PC.

Case below: 33 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 allowed only as to question of the appropriate measure of damages 4 October 1977.

STATE v. ADAMS

No. 6 PC.

Case below: 33 N.C. App. 637.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1977.

STATE v. AGNEW

No. 1 PC.

Case below: 33 N.C. App. 496.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 12 September 1977.

STATE v. BAILEY

No. 22 PC.

Case below: 33 N.C. App. 756.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977.

STATE v. BANKS

No. 16 PC.

Case below: 33 N.C. App. 637.

Petition by defendants for discretionary review under G.S. 7A-31 denied 12 September 1977.

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

STATE v. BECRAFT

No. 5 PC.

Case below: 33 N.C. App. 709.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 12 September 1977.

STATE v. CONRAD

No. 15 PC.

Case below: 33 N.C. App. 638.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 12 September 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 September 1977.

STATE v. CONYERS

No. 71.

Case below: 33 N.C. App. 654.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 October 1977.

STATE v. DAILEY

No. 68.

Case below: 33 N.C. App. 600.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 September 1977.

STATE v. DUNLAP

No. 12 PC.

Case below: 33 N.C. App. 638.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977.

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

STATE v. FRAZIER

No. 34 PC.

Case below: 33 N.C. App. 757.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977.

STATE v. HARDY

No. 41 PC.

Case below: 33 N.C. App. 722.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 October 1977.

STATE v. HEAD

No. 206 PC.

Case below: 33 N.C. App. 494.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 September 1977.

STATE v. LOCKLEAR

No. 11 PC.

Case below: 33 N.C. App. 647.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977.

STATE v. ROGERS

No. 40 PC.

Case below: 33 N.C. App. 757.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 October 1977.

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

STATE v. ROWE

No. 10 PC.

Case below: 33 N.C. App. 611.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 September 1977.

STATE v. SMITH

No. 2 PC.

Case below: 33 N.C. App. 511.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 September 1977.

STATE v. TOLBERS

No. 208 PC.

Case below: 33 N.C. App. 638.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 September 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, THE TRAVELERS INDEMNITY 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, UNIGUARD MUTUAL INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 89

(Filed 11 November 1977)

1. **Insurance § 79.3— automobile insurance—subclassification surcharges—use of DMV point system**

In this proceeding to revise rate classifications for automobile insurance pursuant to G.S. 58-30.3 and former G.S. 58-30.4, there was material and substantial evidence in the record to support the Insurance Commissioner's approval of subclassification surcharge plans for liability and collision insurance based upon calculations derived from operator license statistics maintained by and a penalty point system used by the Department of Motor Vehicles.

2. **Insurance § 79.1— automobile insurance—rate classifications—Commissioner's approval of proposal by his own staff**

If orders by the Commissioner of Insurance essentially approving a reclassification plan for automobile liability and collision insurance proposed by his staff constituted a disapproval in toto of a filing by the Automobile Rate Administrative Office and the promulgation of an entirely new plan of reclassification, the Commissioner usurped the primary authority of the Rate Administrative Office to make such a promulgation in the first instance. However, if the Commissioner's orders constituted an approval in part, or a modification or revision of the Rate Administrative Office plan, then the orders are authorized by statute provided they do not reduce premiums then being collected under the coverages in question beyond whatever reduction, if any, would result from the Rate Administrative Office plan.

3. **Insurance § 79.1— automobile insurance—rate classifications—Commissioner's approval of proposal by his own staff**

The Commissioner of Insurance did not usurp the rate making function of the Automobile Rate Administrative Office in violation of G.S. 58-248 and 58-248.1 by orders essentially approving an automobile insurance rate reclassification plan proposed by his own staff where the orders constituted an

approval in part of the filing by the Rate Administrative Office and merely revised or modified the plan proposed by the filing.

4. **Insurance § 79.1— automobile insurance—rate classifications—premiums from surcharges**

Former G.S. 58-30.4 required that premiums collected from surcharges provide not less than 25 percent of all automobile insurance premiums which had theretofore been rated, in part, on the basis of age or sex. This would include premiums derived from total limits bodily injury and property damage liability coverages, medical payments coverages, and collision coverages, but would not include comprehensive coverages which have not heretofore been classified for rating purposes on the basis of age or sex.

5. **Insurance § 79.3— automobile insurance—rate reclassification plan—absence of requisite findings**

Orders by the Commissioner of Insurance approving a reclassification plan for automobile liability and collision insurance were insufficient in that the Commissioner failed to make the following ultimate factual findings: (1) the total premiums on affected coverages available to the companies under the present primary and subclassification scheme; (2) the total of such premiums estimated to be generated by the new primary classification plan; and (3) the total of such premiums estimated to be generated by the new subclassification plan.

6. **Insurance § 79.3— automobile insurance—primary classifications—statutory mandate**

Former G.S. 58-30.4 mandated that the four primary, or basic, classifications named in the statute be used in the revised primary classification plan for automobile insurance and prohibited the use of more than those four primary classifications; therefore, the Commissioner of Insurance exceeded his authority under the statute when he divided the "commuter" class into two subclasses for liability insurance and when he established only three primary classifications for collision insurance.

7. **Insurance § 79.3— automobile insurance—rate classification plan—erroneous orders—proceeding superseded by new proceeding—no remand**

Although the Commissioner of Insurance exceeded his authority in ordering into effect primary automobile liability and collision classifications contrary to statutory provisions, and the absence of requisite specific findings of fact in the Commissioner's orders precludes adequate judicial review of the orders, this proceeding will not be remanded to the Commissioner of Insurance for further action since the statutes under which the proceeding took place have been repealed or substantially amended and this proceeding has, in effect, been completely superseded by new proceedings under new statutes.

APPEAL by the Commissioner of Insurance from an unpublished[1] decision of the North Carolina Court of Appeals filed

1. *See* Rule 30(e), N.C.R. App. P., published at 288 N.C. 737 (1975).

18 August 1976 reversing and remanding an order of the Commissioner of Insurance relating to automobile liability insurance and vacating a second order of the Commissioner relating to automobile collision insurance. Since Judge Martin dissented from the decision the appeal comes to us as a matter of right.[2] The case was argued as No. 148 at the Fall Term 1976.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr.; Hunter & Wharton, by John V. Hunter III, Attorneys for plaintiff 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, Attorneys for defendant appellees.

William T. Joyner, Attorney for North Carolina Fire Insurance Rating Bureau as amicus curiae.

EXUM, Justice.

This appeal raises questions regarding the validity of two orders entered by the Commissioner for the purpose of implementing General Statutes 58-30.3 and 58-30.4.[3]

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2. *See* G.S. 7A-30(2).

3. These statutes were ratified by the North Carolina General Assembly on 18 June 1975 as Chapter 666 of the 1975 Session Laws. Codified as G.S. 58-30.3 and 58-30.4 they provide:

"§ 58-30.3. *Discriminatory practices prohibited.* — No insurer shall after September 1, 1975, base any standard or rating plan for private passenger automobiles or motorcycles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured.

"§ 58-30.4. *Revised classifications and rates.* — The North Carolina Automobile Rate Administrative Office shall file with the Commissioner of Insurance for his approval or other action as provided in G.S. 58-248.1 a revised basic classification plan and a revised subclassification plan for coverages on private passenger (nonfleet) automobiles in this State affected by the provisions of G.S. 58-30.3. Said revised basic classification plan will provide for the following four basic classifications, to wit: (i) pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use. The North Carolina Automobile Rate Administrative Office shall file with the Commissioner of Insurance for his approval or other action as provided in G.S. 58-248.1 a revised subclassification plan with premium surcharges for insureds having less than two years' driving experience as licensed drivers, or having a driving record consisting of a record of a chargeable accident or accidents, or having a driving record consisting of a conviction or convictions for a moving traffic violation or violations, or any combination thereof. Said subclassification plan shall be designed to provide not less than one fourth of the total premium income of insurers in writing and servicing the aforesaid coverages in this State.

"The revised basic classification and subclassification plans specified in this section shall supersede the existing basic classification and subclassification plans on the hereinabove specified coverages.

"The Commissioner is authorized and directed to implement the plans provided for in this section on September 2, 1975."

In essence these statutes, introduced in the General Assembly and hereinafter referred to as House Bill 28, sought to prohibit the use of age or sex as criteria for rating operators of private passenger automobiles for automobile insurance purposes and to insure that a larger proportion, "not less than one fourth," of the premium income of automobile insurers be derived from those insureds who either had poor driving records or were inexperienced drivers or who fell in both categories. Pursuant to a notice issued by the Commission on 19 June 1975 the North Carolina Automobile Rate Administrative Office (hereinafter "Rate Office") filed a proposed plan with the Commissioner for implementing House Bill 28. Lengthy hearings were conducted on this plan in the course of which the Insurance Department staff offered an alternative plan for implementing this legislation. Testimony critical and supportive of the Rate Office plan and the staff plan was heard. After the hearings the Commissioner, on 26 August 1975, entered two orders, one relating to automobile liability insurance and the other to automobile collision insurance in which he ordered into effect his staff's plan of reclassification.

By its exceptions and assignments of error to the orders of the Commissioner brought forward in its brief the Rate Office contends: (1) the orders are not supported by competent and sufficient evidence; (2) the orders are not supported by requisite findings of fact; (3) by the entry of these orders the Commissioner exceeded his statutory authority; (4) the orders are unconstitutionally confiscatory; and (5) the Commissioner, by acting arbitrarily and capriciously as a "consumer advocate" rather than as an impartial adjudicator in the conduct of the hearings, denied them due process of law. The Fire Insurance Rating Bureau as *amicus curiae* contends that House Bill 28 is unconstitutional in that it authorizes the Rate Office to make the filing for reclassifying physical damage coverages. The Commissioner contends to the contrary and thus the legal issues are joined before us.

I. FACTUAL BACKGROUND

This is not a proceeding seeking either an increase or a decrease in automobile insurance rates. Rather is it a proceeding instituted for the purpose of reclassifying automobiles and automobile operators for rate making purposes pursuant to the mandates of House Bill 28. To accomplish such a reclassification is necessarily a factually complex undertaking involving dozens of

detailed statistical and mathematical calculations designed to insure that the total premiums collected under the new classifications will be the same, or as nearly the same as is reasonably possible to predict, as the total premiums collected under the old classifications.

The following factual statement may seem tedious. In truth it only touches on the main factual components underlying the principal legal disputes in the case.

A. *Liability Coverages*

The present primary automobile classification plan for liability insurance is sometimes referred to as a "nine class plan." In fact it is essentially a plan whereby automobiles are classified according to four basic uses: (1) strictly pleasure; (2) pleasure except for driving to and from work; (3) trade or business; and (4) farm. To get the lowest rate, however, for each of these uses, the car must not be operated by a male driver who is under 25 years of age. Special and considerably higher rates apply to automobiles which are operated by males under 25.[4] Automobiles used by commuters to and from work are further subdivided into three subclasses. The base rate applies if the automobile is driven less than 10 miles one way and is in a small town. Such an automobile if driven in a larger town carries a rating factor of 1.10 times the base rate; and an automobile driven more than 10 miles one way to work carries a rating factor of 1.45. The farm use rating factor is .75 and the business use rating factor is 1.5. There is also a multi-car discount of 20 percent if two or more automobiles are insured under certain specified conditions.

Superimposed upon this primary classification system is a subclassification known as the Safe Driver Insurance Plan.[5] The present SDIP assigns points up to a total of 10 to drivers with certain motor vehicle offenses and "chargeable" accidents[6] on their records. The points are assessed according to schedules in

4. For example, a rate 3.6 times the base rate applies to any automobile which is owned or principally operated by a male under 25. Somewhat reduced rates apply to automobiles operated by males under 25 if the automobile is used for farming purposes.

5. The statutory authority for the plan is G.S. 58-248.8 and its predecessors.

6. A "chargeable" accident is one caused by the negligence of the operator who is to be "charged" with it.

rate filings made by the Rate Office.[7] Two points are assessed for each chargeable accident involving more than $200 damage to property other than the insured vehicle or bodily injury (hereinafter "serious accident"), and one point for two or more chargeable accidents resulting in similar damage of $200 or less (hereinafter "minor accident"). Drivers accumulate their points during an experience period which is defined as the three years next preceding the driver's date of application or preparation of a renewal for insurance. A driver with no points on his record gets a 10 percent discount off the premium otherwise charged provided the principal operator of the insured car has been licensed for three years or more. There is a gradually increasing rate differential for the accumulation of points up to 10. The differential is expressed in terms of a percentage of the premium otherwise charged which is then figured and added to that premium.[8] The differentials apply separately to each coverage purchased other than comprehensive coverages.[9]

As we have noted, House Bill 28 was designed to eliminate primary classifications utilizing sex or age as a criterion and to give safe drivers a premium reduction to be offset by increasing the premiums to be paid by inexperienced drivers and those drivers with motor vehicle offenses or chargeable accidents on their records. House Bill 28 has three primary mandates: The first is that the primary rating classification plan must use only

7. Under the present plan, as we understand the record in this case, *one point* is assessed for illegal passing, speeding in excess of 55 mph but not in excess of 75 mph, following too closely, driving on wrong side of road, and any other moving traffic violation as a result of which an operator's license was suspended or revoked; *three points* for "hit and run" offense involving only property damage, reckless driving, passing a stopped school bus, and speeding in excess of 75 mph; *six points* for operating a motor vehicle during a period of license suspension; *eight points* for driving under the influence of intoxicating liquor or narcotics, highway racing, and transportation for the purpose of sale of illegal intoxicating liquor; and *ten points* for vehicular manslaughter or negligent homicide, pre-arranged highway racing, and "hit and run" driving involving bodily injury or death. *One point* would be assessed for any other moving traffic violation in excess of two.

8. The rate differentials for the points assessed are as follows:

No. of Driving Points	Rate Differential
0	- 10%
1	+ 5%
2	+ 20%
3	+ 35%
4	+ 50%
5	+ 75%
6	+ 100%
7	+ 125%
8	+ 150%
9	+ 175%
10 or more	+ 200%

9. The differentials would apply separately to coverages for bodily injury liability, property damage liability, medical payments, and collision.

four classifications, to wit, pleasure use only; commuter use; business use; and farm use. Second, the safe driver plan must provide premium surcharges for insureds having (1) less than two years driving experienced as licensed operators, (2) a driving record consisting of "one or more chargeable accident or accidents" or (3) a conviction of "one or more moving violations." Third, the safe driver plan shall be designed so that it produces not less than 25 percent of the "total income premiums" collected by automobile insurers.

The Rate Office plan for implementing House Bill 28 provided for four primary classifications based on automobile use. The classes and their rating factors were: pleasure use (1.00), commuter use (1.15), business use (1.50), and farm use (.80). The plan provided for a multi-car discount of 15 percent. The Rate Office proposed a subclassification plan similar to the one already in effect in that it utilized a point system contained in the rate filings.[10] Two points would be assessed for each serious chargeable accident and one point for each minor chargeable accident. Two points would be given for each inexperienced operator (an operator licensed less than two years) of the vehicle. The points may be accumulated up to a total of 12 under the new plan for the same experience period as defined under the present plan.

Having thus purported to comply with the first two mandates of House Bill 28, the Rate Office's proposed plan then sought to assign dollar values to the base rate (pleasure use) on minimum limits liability (bodily injury and property damage) coverage and to the surcharges which would be assessed for operator points. The calculations began with the total premiums realized from minimum limits liability rates from all primary classifications. The amount was $223,446,003. Seventy-five percent of this amount was then used as the sum which the primary classification minimum limits liability rates must produce. After accounting for differentials due to the multi-car discount and assigning certain percentages of distribution to each of the four

10. The new plan provided that *two points* would be assessed for illegal passing, speeding in excess of 55 mph but not in excess of 75 mph, following too closely, or driving on the wrong side of the road; *four points* for "hit and run" driving involving only property damage, reckless driving, passing a stopped school bus or speeding in excess of 75 mph; *eight points* for operating a motor vehicle during a period of license suspension or revocation; *ten points* for driving a motor vehicle while under the influence of intoxicating liquor or narcotics, transporting illegal intoxicating liquors by motor vehicle for the purpose of sale, and highway racing; *twelve points* for vehicular manslaughter or negligent homicide, pre-arranged highway racing or "hit and run" driving involving bodily injury or death. *One point* would be assigned for any other moving traffic violation.

primary classifications and relating these to all carrier exposures[11] for the year ending 30 June 1974, the figure of $65 was mathematically calculated as the base rate (pleasure use) for minimum limits liability coverages.

The Rate Office plan then calculated the dollar amount which would have to be surcharged for each operator point under the safe driver plan in order to produce the remaining part, or 25 percent, of premiums collected for minimum limits liability coverages. The calculated amount was $25 per point. In calculating this amount the Rate Office proposal used various data: (1) the number of exposures in each point category under the present SDIP for the year ended 30 June 1974 redistributed under point categories in its proposed plan; (2) data supplied by the National Driving Center based on a 10 percent sample of North Carolina Department of Motor Vehicle operator license records; (3) a sample of drivers insured by Nationwide Insurance Company; and (4) the Rate Office's own "estimates" and "actuarial judgments." The surcharge amount of $25 per point was calculated to be 38 percent of the base premium of $65. From this calculation the Rate Office's proposal provided for a subclassification rating factor of .38 for each point accumulated. The base premium, i.e., $65 would, in other words, be multiplied by a factor of .38 for each point accumulated under the surcharge plan. The result would be added to whatever premium was otherwise applicable.[12]

11. An "exposure" was defined by Rate Office testimony as "one unit of automobile coverage for a one year period, in other words, one car insured for twelve months. That's not the same thing as the driver."

12. The rating factors are shown in a tabular form submitted by the Rate Office as follows:

RATING FACTORS
AND STATISTICAL CODES

	Primary Classifications			
Driving Record Sub-Classification	Pleasure Use (1A-111)	Driven to or from Work (1B-112)	Business Use (3-130)	Farm Use (1AF-115)
0	1.00	1.15	1.50	0.80
1	1.38	1.53	1.88	1.18
2	1.76	1.91	2.26	1.56
3	2.14	2.29	2.64	1.94
4	2.52	2.67	3.02	2.32
5	2.90	3.05	3.40	2.70
6	3.28	3.43	3.78	3.08
7	3.66	3.81	4.16	3.46
8	4.04	4.19	4.54	3.84
9	4.42	4.57	4.92	4.22
10	4.80	4.95	5.30	4.60
11	5.18	5.33	5.68	4.98
12	5.56	5.71	6.06	5.36
NE	1.38	1.53	1.88	1.18

Two or More Automobiles Credit – A factor of .15 shall be subtracted from the Rating Factors indicated above if the company insures two or more four-wheel private passenger automobiles (other than antique automobiles) owned by an individual or husband and wife resident in the same household.

Under the Rate Office plan total premiums derived from minimum limits liability coverage rates under the new primary classifications would be $167,584,501. While the Rate Office breakdown was not presented in this fashion, for easier comparison with the staff plan, surcharges under the new Rate Office subclassification plan could be broken down as follows: (1) inexperienced drivers, $10,000,000;[13] (2) serious chargeable accidents, $6,711,845;[14] (3) minor chargeable accidents, $1,250,000;[15] (4) exposures not eligible for lowest rate, $703,900;[16] and (5) other motor vehicle offenses, $37,195,757. These figures when added constitute the sought for total premium revenue of $223,446,003 on minimum limits rates plus surcharges.

The Insurance Department staff recommended a primary classification plan which differed from that proposed by the Rate Office in these respects: the plan divided the commuter use class into two subdivisions, large towns and small towns. The small town use class paid the same base rate as those in the pleasure use class. The rating factor for large town use, however, was 1.10. The rating factor for farm use was .75, and the multi-car discount was 20 percent. Using the base rate now in effect of $70.24 for minimum limits liability coverages (bodily injury and property damage) and accounting for a multi-car discount of 20 percent, and using primary classification differentials and distributions similar to those used by the Rate Office, the department staff arrived at a "present average rate" for each of its new primary classifications. It multiplied these present average rates by the number of cars, respectively, insured in each class, to arrive at present total premiums produced under these rates of $163,884,397. It then subtracted this figure from the total required revenue of $223,446,003 to arrive at the revenue which must be produced under House Bill 28 from surcharges, the result of which was $59,561,606, or more than the required 25 percent.

To produce this amount of revenue from its safe driver plan, the department staff recommended using essentially the same point system for licensed operators as that maintained by the

13. An estimated 200,000 such drivers multiplied by $50 (two surcharge points).

14. An estimated 134,236 such drivers multiplied by $50 (two surcharge points).

15. An estimated 50,000 such drivers multiplied by $25.

16. 28,156 exposures multiplied by $25.

Department of Motor Vehicles pursuant to General Statute 20-16(c).[17] The staff's plan, in addition, assigned 12 points for any violation which resulted in suspension of a driver's license by the Department of Motor Vehicles, the greater of 9 points or the sum of the violation points for three moving violations within a 12-month period, the greater of 6 points or the sum of violation points for two moving violations in a 12-month period, and the greater of 8 points or the sum of violation points for the accumulation of 8 or more points within the three-year period immediately following the reinstatement of a license which had theretofore been suspended or revoked for traffic violations.

The staff plan then assigned a surcharge in terms of a flat dollar amount for each point category,[18] a surcharge of $60 for each serious chargeable accident, $25 for *two* or more minor chargeable accidents, and $40 for each operator of an insured vehicle with less than two years driving experience. The staff calculated the anticipated premium revenues from its surcharge plan as follows: (1) inexperienced drivers, $8,000,000;[19] (2) major

17. This statute provides for assessment of points as follows:

Driving Offense	Points
Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No operator's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
All other moving violations	2

18. The dollar values assigned were:

Points	Surcharge
2	$ 10.00
3	20.00
4	30.00
5	60.00
6	90.00
7	120.00
8	160.00
9	200.00
10	240.00
11	280.00
12	320.00

19. 200,000 (the estimated figure used by the Rate Office) × $40.

chargeable accidents, $21,000,000;[20] (3) minor chargeable accidents, $400,000;[21] (4) other driving record point surcharges, $30,389,300.[22] It was figured that the total premium revenues from surcharges would amount to $59,789,300, or somewhat more than the $59,561,606 determined to be required from the subclassification plan by House Bill 28.

The Commissioner's final order on the liability aspect of the case adopts essentially his staff's recommended reclassification plan. It sets a base premium for minimum limits liability at $61 and establishes rating factors as follows: Pleasure use, 1.00; commuter use (small towns) 1.00; commuter use (large towns), 1.10; business use, 1.50; and farm use, .75. It also puts into effect the point system and surcharges proposed by his staff.

B. *Physical Damage Coverages*

Reclassification of physical damage coverages was marred by a peculiar difficulty. House Bill 28 requires that the filing for both physical damage and liability coverages be made by the Rate Office. Other statutes in effect in 1975,[23] however, gave to the North Carolina Fire Insurance Rating Bureau (hereinafter "Rating Bureau"), the duty of maintaining statistical data and filing rates having to do with first party physical damage insurance including automobile collision and comprehensive coverages. G.S. 58-125, *et seq.* Under these statutes the Rating Bureau has traditionally made filings for automobile physical damage coverages including collision and various comprehensive type coverages. *See, e.g., Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977). The record in this case indicates that while many insurance companies belong to both the Rate Office and the Rating Bureau, some companies write only physical damage coverages. These companies would be members of the Rating Bureau but not the Rate Office. House Bill 28, therefore, created a novel situation in automobile rate making in North Carolina which naturally perplexed both the Rate Office and the Rating Bureau vis-a-vis this particular filing.

20. 350,000 (an estimated figure testified to by a department staff witness) × $60.

21. 16,000 (an estimated figure testified to by a department staff witness) × $25.

22. This amount was figured by multiplying the number of licensed drivers in each point category as determined by Department of Motor Vehicles statistics by the dollar surcharge for that point category and adding the results.

23. These statutes were repealed effective 1 September 1977 by Chapter 828, 1977 Session Laws.

In any event, counsel for the Rating Bureau was present during the hearings on this filing. Both he and counsel for the Rate Office stated during the course of the hearings that in their opinion House Bill 28 did give responsibility for the physical damage filing to the Rate Office. The Commissioner made it clear at the outset of the hearings that in his opinion it was the duty of the Rate Office to make the filing. The Rate Office did include a proposal for reclassifying collision and comprehensive coverages at the same time it made its proposal for reclassifying liability coverages. The information relating to these physical damage coverages, however, was qualified by the statement that it was submitted "for information purposes only." At the conclusion of the hearing on liability coverages the Rate Office moved to delete this qualification on its original filing and asked to be allowed to submit additional exhibits in connection with those already submitted as its proposal for reclassification of physical damage coverages. There were stipulations entered by the Rate Office and the Insurance Department staff to the effect that neither party objected, on the ground of lack of notice, to the collision exhibits offered by the respective parties at the close of these hearings; that all evidence presented by both parties in connection with the liability coverage filing could also apply to the physical damage filing; and that each party had the right to submit at the close of the evidence certain late filed exhibits with respect to calculations in the physical damage exhibits offered by the other party.

Very little evidence was heard on the physical damage phase of the case. The record is sparse. As best we can tell from it, however, there is presently in effect a basic classification plan for *collision* coverages consisting essentially of five classes.[24] The base rate is applied to the pleasure use class. The other classes and their rating factors are: business use (1.25); farm use (.70); and automobiles used by males under 25 (1.19 if the male is married or not the owner or principal operator, and 2.25 if the male is unmarried and the principal operator). The farm use category has a rating factor of 1.19 if the automobile is operated by a male driver under 25 who is either married or not the owner or principal operator, and 1.58 if the male driver is unmarried and owns

24. Apparently comprehensive coverages have never in the past been classified according to automobile use or operator status.

or principally operates the car. There is, furthermore, a multi-car discount of 10 percent.

The Rate Office proposed a basic classification scheme for collision *and* comprehensive coverages using four classes with rating factors as follows: pleasure use (1.00); commuter use (1.15); business use (1.50); and farm use (.80). The Rate Office also proposed that its subclassification, or surcharge, plan for liability coverages be applied to collision and comprehensive coverages.[25] It proposed a multi-car discount of 15 percent.

The department staff, on the other hand, proposed a basic classification scheme for *collision* coverages only with rating factors as follows: pleasure and commuter use (1.00); business use (1.25); and farm use (.70). It also proposed a multi-car discount of 10 percent. The department staff's position was that since comprehensive coverages had never been classified nor were they subject to safe driving surcharges, House Bill 28 simply had no application to comprehensive coverage premiums. The staff, consequently, proposed surcharges in flat dollar amounts for each point category from two to twelve for collision coverages only.[26] The amount of the surcharges was calculated as follows: Using the number of licensed drivers in each point category as obtained from Department of Motor Vehicles statistics and assuming that 55 percent of these drivers buy collision insurance (37 percent, $100 deductible, 18 percent, $50 deductible), the number of insureds in each point category for each type coverage was derived. The amount of premiums necessary under the collision surcharge plan was calculated by figuring 25 percent of the total premiums earned at present premium levels. Using then the distributions in

25. It is not clear how the plan would be so applied. Apparently the Rate Office intended that premiums otherwise applicable be multiplied by the factor of .38 per point, and the result added to the premiums. There are no calculations submitted, however, to show the result of this application.

26.

Description	$50 Deductible	$100 Deductible
2 points	$ 7	$ 4
3 points	14	8
4 points	21	12
5 points	42	24
6 points	63	36
7 points	84	48
8 points	112	64
9 points	140	80
10 points	168	96
11 points	196	112
12 points	224	128
Inexperienced	28 each	16 each
2 or more Chargeable Accidents Less than $200	18	10
Major Accident	42 each	24 each

each point category for each type coverage, the amount of the surcharge for each point category was calculated so as to produce the required 25 percent of total premium volumes on collision coverages.

The Commissioner in his collision reclassification order adopted his staff's plan.

II. THE ORDERS OF THE COMMISSIONER

Both the liability insurance order and the collision insurance order contain almost identical preliminary recitations. In both orders there are findings of fact which compare the different mathematical approaches and the different kinds of statistical data used, respectively, by the Rate Office and the department staff in arriving at the reclassifications which each proposed.

In the liability order the Commissioner found as a fact that the primary classification plan proposed by the Rate Office would increase by 7 percent the rates for those automobiles in the primary commuter use category driven less than 10 miles to work in small towns (the largest single primary class of insured automobiles), decrease the multi-car discount from 20 percent to 15 percent, and decrease the farm use discount from 25 percent to 20 percent. On the other hand he found that the department plan retained the present multi-car and farm use discounts and did not increase the present safe driver rates for any primary class.

With regard to the surcharge proposals he found that the Rate Office plan used the Rate Office's own system for assessing points according to its judgment of the seriousness of the various kinds of driving offenses. It also placed the same value on each point. The department staff's plan, on the other hand, used the point system devised by the General Assembly, tracking, therefore, the General Assembly's judgment regarding the seriousness of various driving offenses. This plan also used "a progressive surcharge scale" which placed a greater burden "upon the habitual offender."

He found that the overall result of the Rate Office plan would be to "produce rates and classifications . . . which are unreasonable, unfairly discriminatory, unwarranted, improper, and otherwise not in the public interest"; but that overall the department staff plan "is actuarially sound and will produce rates

and classifications . . . which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

In the collision order the Commissioner found that the Rate Office plan would increase the safe driver rate for automobiles used in commuting to work, decrease the farm discount from 30 percent to 20 percent, and increase the multi-car discount from 10 percent to 15 percent. On the other hand he found that the department staff plan would result in no increase in existing safe driver rates and no change in the farm use or multi-car discounts. Regarding the overall result of the respective collision surcharge plans, he made findings identical to those in his liability insurance order.

In both orders the Commissioner concluded that House Bill 28 required the Rate Office to file revised classification plans for automobile liability and collision insurance with the Commissioner for his approval "or other action as provided in General Statute 58-248.1"; that General Statute 58-248.1 authorized him to alter or revise any rate or classification so as "to produce rates and classifications which are reasonable, adequate, not unfairly discriminatory, and in the public interest"; that General Statute 58-248.1 authorized him to proceed on his own motion to revise rates and classification systems so as to produce those which are reasonable, adequate, not unfairly discriminatory and in the public interest; that the Rate Office plan would not produce such rates and classifications; that the department plan was actuarially sound and would produce such rates and classifications; that the Rate Office plan should be altered to the extent set forth in the department plan; and the department plan met the requirements of House Bill 28 and G.S. 58-248.1.

In his collision insurance order the Commissioner also concluded:

> "That no automobile physical damage coverage except collision is subject to that part of House Bill 28 codified as G.S. 58-30.4, because collision is the only automobile physical damage coverage, for which the rates are currently based upon the age or sex of the persons insured."

III. RECENT LEGISLATION

Before discussing the legal challenges to the Commissioner's orders, we note that the 1977 General Assembly enacted new and comprehensive legislation for the purpose of regulating insurance rate making. The caption of House Bill 658, enacted as Chapter 828 of the 1977 Session Laws, indicates the scope of its provisions. It is entitled,

> "AN ACT TO REPEAL ARTICLES 13, 13A, 13B AND 25 OF GENERAL STATUTES CHAPTER 58 RELATING TO THE FIRE INSURANCE RATING BUREAU, FIRE AND CASUALTY INSURANCE RATE REGULATIONS, AND REGULATION OF AUTOMOBILE LIABILITY INSURANCE RATES; TO PROVIDE A NEW METHOD OF RATE REGULATION; AND TO AMEND CHAPTERS 58 AND 97 TO CONSOLIDATE THE FUNCTIONS OF THE FIRE INSURANCE RATING BUREAU, THE COMPENSATION RATING AND INSPECTION BUREAU, AND THE AUTOMOBILE RATE ADMINISTRATIVE OFFICE; AND TO ASSURE THE PROPER OPERATION OF THE NORTH CAROLINA REINSURANCE FACILITY ON A SUSTAINING BUT NONPROFIT BASIS."

Chapter 828 did repeal those articles of Chapter 58 mentioned in its caption.[27] It amended General Statute 58-30.4 substantially.[28] Thus Chapter 828 either repealed or substantially amended the very statutes upon which both the Rate Office and the Commissioner rely in this proceeding, the Commissioner to find the source of his authority, and the Rate Office to find limitations it contends he has exceeded.

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27. Article 13 created and delegated duties and power to the North Carolina Fire Insurance Rating Bureau. Article 13A was devoted to casualty insurance rating regulations. Article 13B dealt with rate regulations of miscellaneous lines. Article 25 dealt specifically with regulation of automobile liability insurance rates.

28. The new version of this statute, with amendments emphasized, reads:

"The North Carolina *Rate Bureau shall promulgate* a revised basic classification plan and a revised subclassification plan for coverages on private passenger (nonfleet) *motor vehicles* in this State affected by the provisions of G.S. 58-30.3. Said revised basic classification plan will provide for the following four basic classifications to wit: (i) pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use. The North Carolina *Rate Bureau shall promulgate* a revised subclassification plan *which appropriately reflects the statistical driving experience and exposure of insureds in each of the four basic classifications provided for above, except that no subclassification shall be promulgated based, in whole or in part, directly or indirectly, upon the age or sex of the person insured. Such revised subclassification plan may provide for* premium surcharges for insureds having less than two years' driving experience as licensed drivers, *and shall provide for premium surcharges for drivers* having a driving record consisting of a record of a chargeable accident or accidents, or having a driving record consisting of a conviction or convictions for a moving traffic violation or violations, or any combination thereof, *and the premium income from insureds subject to this premium surcharge* shall provide not less than one-fourth of the total premium income of insurers in writing and servicing the aforesaid coverages in this State. *The classification plans and subclassification plans so promulgated by the bureau shall be subject to the filing, hearing, disapproval, review and appeal procedures before the Commissioner and the courts as provided for rates and classification plans in G.S. 58-128, G.S. 58-129, and G.S. 58-130.*"

Chapter 828 prohibits excessive, inadequate, or unfairly discriminatory rates and defines these terms. It provides for criteria to be considered in determining whether any rate complies with the statute. It establishes the North Carolina Rate Bureau which is

> "To assume the functions formerly performed by the North Carolina Rating Bureau, the North Carolina Rate Administrative Office, and the Compensation Rating and Inspection Bureau of North Carolina, with regard to the promulgation of rates, for insurance . . . for theft of and physical damage to private passenger (nonfleet) motor vehicles . . . for liability insurance for such motor vehicles, automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of such liability insurance . . . . "

Chapter 828 took effect on 1 September 1977. Section 58-127 of Chapter 828 directs the North Carolina Rate Bureau "to establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction within 90 days of the effective date hereof. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured."

We judicially note, *Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976), that the newly established Rate Bureau filed with the Commissioner on 1 September 1977 a new and comprehensive classification scheme purporting to comply with G.S. 58-30.4 as amended. The proposed effective date of the newly filed classification plan as provided therein is 1 December 1977. On 30 September 1977 the Commissioner gave notice that he would begin public hearings on the plan on 31 October 1977. Presumably these hearings are now in progress.

Our decision in this proceeding must, of course, be based on law as it existed in 1975. What we decide here may have some bearing on the proceedings presently before the Commissioner. These proceedings are not now before us and we make no determination of the extent to which our decision here may control them. Suffice it to say that it will control only to the extent that

the provisions of Chapter 828 of the 1977 Session Laws are similar to those provisions of Chapter 58 of the General Statutes under which these 1975 proceedings were conducted.

We proceed now to consider the legal contentions raised in this case.

IV. LEGAL CHALLENGES TO THE COMMISSIONER'S ORDERS

A. *Sufficiency of Supporting Evidence*

[1] General Statute 58-9.6(b)(5) provides that a court reviewing a decision of the Commissioner may reverse if the decision is "unsupported by material and substantial evidence in view of the entire record as submitted." The Rate Office contends that the orders here are unsupported by such evidence. The Rate Office's argument is that the Commissioner's orders are based on calculations derived from statistical data maintained by the Department of Motor Vehicles relating to the number of *licensed drivers* in the state broken down into the various point categories maintained by that department.[29] The Rate Office would have preferred calculations based on its own data which is keyed to the number of insurance exposures in various point categories.[30] The Rate Of-

29. The staff's calculations upon which the Commissioner's orders are based are as follows:

Points	No. of Drivers 1-1-75	Surcharge	Revenue
2	178,645	$ 10	$ 1,786,450
3	223,306	20	4,466,120
*4	70,922	30	2,127,660
5	41,571	60	2,494,260
*6	35,381	90	3,184,290
*7	18,196	120	2,183,520
*8	10,100	160	1,616,000
*9	5,434	200	1,086,800
*10	2,977	240	714,480
*11	1,677	280	469,560
*12	32,063	320	10,260,160
Revenue from point of surcharges using 1-1-75 cut-off date			30,389,300

*Using defined points as per ID22 Section II

30. The Rate Office figures are:

Insurance Points	Exposures
1	0
2	227,282
3	0
4	73,075
5	0
6	19,527
7	0
8	22,819
9	1,482
10	9,585
11	687
12	6,619
	361,076

fice argues that by using Department of Motor Vehicles statistics the staff has overstated premiums available from surcharge points. This is so, it contends, because not every licensed driver owns a private passenger, nonfleet automobile. Many of them operate automobiles owned by others, for example, taxicab drivers, truck drivers, and employees of companies who drive company cars. Furthermore, it contends that the lack of insurance experience with a surcharge system based upon motor vehicle points makes it impossible accurately to estimate the amount of surcharge premiums which can reasonably be expected.

The staff's position, however, was based on the testimony of one Phillip K. Stern, the property liability actuary in the New Jersey Department of Insurance. Stern has been in his present position since December, 1970. He had also been employed as an actuary for twenty years by the Mutual Insurance Rating Bureau and for four years with the National Bureau of Casualty Underwriters, a predecessor of the Insurance Services Office. He is an associate of the Casualty Actuarial Society and a member of the American Academy of Actuaries. He was qualified, without objection, as an expert in the field of automobile insurance rate making and classification plans.

Stern justified the use of motor vehicle statistics to derive an actuarially sound classification plan. He said that while many licensed operators did operate cars owned by someone else they generally also owned a personal car for themselves, their spouses, or other family members which would be insured under private passenger, nonfleet, coverages and operated by the licensed drivers in question. Their motor vehicle operator points would be reflected on the policies.

He also defended the use of a surcharge system based on point penalties assessed by the Department of Motor Vehicles pursuant to applicable public statutes enacted by the General Assembly. His view was that such a system came nearer to serving the public interest than an "insurance point" option. The public, he said, could better understand it. Stern was critical, moreover, of the industry generally for not assiduously policing the surcharge system now in effect. He claimed that if the companies would properly police the system, they would find that the figures upon which the staff relied did not overstate the premiums available.

Rate Office witnesses claimed that it cost too much to run drivers' license checks on everyone who applied for automobile insurance. They relied, for the most part, on the applicant's truthfulness in making out an application. Most of the companies relied on a spot check type system. Some of the smaller companies apparently did a more thorough job of checking the driving records of new applicants.

We had occasion to criticize the use of motor vehicle statistics in *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). The criticism, however, was not directed to the statistics per se. It was directed to the use there made of them. We concluded that the statistics as used in that case did not support the conclusions of the Commissioner. Here the motor vehicle statistics used by the staff were shown by the testimony of Stern to have viability in these proceedings. The credibility of his testimony was for the Commissioner to determine.

There is nothing sacrosanct about so-called "insurance statistics." Rate Office witnesses conceded that some of their data regarding the number of insureds in point categories was based largely on estimates and "actuarial judgments" of their experts. For example, one witness conceded that the data from which they derived the number of insureds presently in point categories 6 through 10 was based on a sample submitted by one company which was so small that it would not normally be considered "creditable." The Rate Office had no data with regard to the number of inexperienced operators licensed less than two years or the number of insureds with one or two minor traffic violations. For these figures it relied on data supplied by the National Driving Center, which in turn was taken in part from operator statistics maintained by the Department of Motor Vehicles.

Witnesses for both sides conceded that in establishing any new classification system, particularly one in which motor vehicle violations had to be differentially rated for surcharge purposes, a large amount of judgment must be exercised. Estimates must, of necessity, be used. There is no way precisely to predict the result of a new classification scheme. Results obtainable must, in the final analysis, await experience.

Insurance data compiled by the Rate Office, insofar as it is shown to be reliable and fairly compiled, is valuable and should be

considered. The Commissioner may also consider evidence, otherwise competent, from other sources. *Comr. of Insurance v. Automobile Rate Office*, *supra*, 287 N.C. 192, 203, 214 S.E. 2d 98, 105 (1975). *See generally, In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E. 2d 207 (1969).

It is true, of course, that the insurance industry in this state has had no experience with a surcharge system based on points assessed by the Department of Motor Vehicles. Lack of such experience should not preclude changing the system if the changes can be justified. There is evidence in this record that the change inaugurated by the Commissioner is in the public interest. Common sense tells us, and the witness Stern testified, that the public will better understand and accept a point system for insurance surcharges which is based on points accumulated on driving records assessed by the Department of Motor Vehicles. Both insureds and insurers then have equal access to and knowledge of surcharge points. The present system in which "insurance points" differ from "motor vehicle points," and are ascertainable only by a check of the latest rate filing, may encourage a feeling among insureds that they are being subjected to a kind of mysterious, secret point code known only to the initiated.

We decline, then, to disturb the Commissioner's orders on the ground that they were based in part on calculations derived from operator license statistics maintained by and a penalty point system used by the Department of Motor Vehicles.

B. *The Usurpation Question: General Statutes 58-248 and 58-248.1*

The Rate Office contends the Commissioner exceeded his statutory authority in that by approving essentially the reclassification plan proposed by his staff he usurped the rate making function of the Rate Office in violation of General Statutes 58-248 and 58-248.1.

In several recent decisions we have considered the authority of the Commissioner vis-a-vis that of the Rate Office in fixing automobile insurance rates. The principles in these decisions apply equally to proceedings designed to fix rate classifications. The

operative statutes are 58-248 and 58-248.1, the provisions of which apply with equal force to rates and rate classifications.[31]

In determining that the Commissioner had exceeded his authority under these statutes in *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975), we noted that Chapter 58 of the General Statutes vested the Rate Office "with primary authority to fix, adjust and propose rates subject to the approval or disapproval of the Commissioner." We said that although this Chapter gave the Commissioner "broad regulatory and supervisory powers for overseeing the faithful execution of the insurance laws," it did not give him "concurrent authority with the Rate Office to fix or reduce rates."

In *Comr. of Insurance v. Rating Bureau*, 291 N.C. 55, 229 S.E. 2d 268 (1976), the Rating Bureau had filed for a reduction in certain extended coverage and windstorm insurance rates. The final order of the Commissioner required a reduction in these rates in excess of that proposed by the Rating Bureau. Applying General Statutes 58-131.1 and 58-131.2,[32] statutes similar to 58-248 and 58-248.1, we said, "[t]he two methods overlap in the sense that in passing upon a proposal submitted by the Bureau the Commissioner need not approve or disapprove such proposal in its entirety but upon proper findings of fact supported by substantial

31. These statutes provide in pertinent part:

"G.S. 58-248. *Personnel and assistants; general manager; submission of rate proposals to Commissioner of Insurance; approval or disapproval.* —

. . . .

"The Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

"G.S. 58-248.1. *Order of Commissioner revising improper rates, classifications and classification assignments.* — Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing . . . 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 clastification 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."

32. These statutes provide in pertinent part:

"G.S. 58-131.1. *Approval of rates.* — No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the Rating Bureau until it shall have been first submitted to and approved by the Commissioner."

"G.S. 58-131.2. *Reduction or increase of rates.* — The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.

"If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit."

evidence, may fix premium rates at a level such as to allow part but not all of the increase [or decrease] proposed by the Bureau." 291 N.C. at 65, 229 S.E. 2d at 274.

In *Comr. of Insurance v. Automobile Rate Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977), this Court had before it a filing by the Rate Office on 1 July 1974 seeking a reduction of 13.3 percent for bodily injury automobile liability insurance and an increase of 22.5 percent for property damage liability insurance, or an overall average increase of .9 percent. Hearings were conducted. The Commissioner finally ordered a reduction of 23.8 percent in bodily injury rates and an increase of 2.5 percent in property damage rates for an overall average reduction of 13 percent. We held the Commissioner was authorized to approve a part only of a proposed increase in rates but that he lacked authority to order a decrease in rates in excess of that proposed by the Rate Office. We said that under General Statutes 58-248 and 58.248.1 the Commissioner's authority was "to approve the filing in toto, approve the filing in part, or disapprove the filing." If he disapproved the filing in toto, he must under General Statutes 58-248.1 order the Rate Office to "alter or revise" existing rates so as to produce rates which are, in the language of G.S. 58-248, "reasonable, adequate, not unfairly discriminatory, and in the public interest." We said:

> "By so doing he would have left the matter open so that the Rate Office, the agency which possessed the primary authority to fix a just and adequate rate, might have an opportunity to propose adjustments in conformity with his decision." 292 N.C. at 11, 231 S.E. 2d at 873.

[2] Applying these principles to the case, we conclude that if the Commissioner's orders constituted a disapproval in toto of the Rate Office filing and the promulgation of an entirely new plan of reclassification, then he has usurped the primary authority of the Rate Office to make such a promulgation in the first instance. On the other hand if his orders constitute an approval in part, or a modification or revision of the Rate Office plan, then the orders are authorized by the applicable statutes provided they do not reduce premiums then being collected under the coverages in question beyond whatever reduction, if any, would result from the Rate Office plan.

[3] We conclude, after careful examination of the Rate Office filing and the Commissioner's orders, that the orders constitute an approval in part of the filing. The orders revise, or modify, the plan proposed by the Rate Office. There are many similarities in both proposals. The plans are the same, for example, with regard to the distribution of overall and multi-car exposures among the primary classifications, the number of inexperienced operators subject to a surcharge, and the use of an additive rather than a multiplicative surcharge plan (at least with regard to minimum limits liability coverages). Many rule changes and definitions relating to methodology by which premiums are figured under the reclassifications are the same. The plan adopted by the Commissioner differs from the filing, for the most part, in that it (1) retains rather than increases present rates for the primary classifications; (2) uses a method for assessing points which tracks a method already promulgated by the General Assembly rather than that traditionally used and found only in filings by the Rate Office; and (3) assigns different dollar values to the various point categories.

Whether the Commissioner's orders will result in a substantial premium shortfall to the industry we find, for the reasons given below, impossible to answer on this record.

C. *Adequacy of the Commissioner's Findings of Fact*

We agree with the Rate Office's contention that the Commissioner's orders do not contain adequate factual findings.

If the Commissioner's orders result in a decrease in total premiums collected for coverages in question beyond whatever reduction, if any, is proposed by the Rate Office, he has acted in excess of his authority under the authorities just discussed. If they result in a decrease in such premiums which were being collected at the time of the filing, then he has exceeded his authority under House Bill 28. This bill provides, as we noted at the outset of this opinion, for a reclassification, not a reduction or an increase, overall, in rates. Hence premiums collected under the new classifications should be, as nearly as can be reasonably predicted, the same as those collected under the old classifications. Both the Commissioner and the Rate Office agree on this proposition. Both the Rate Office filing and the staff plan ostensibly use data and calculations designed to produce this result.

House Bill 28 also requires that subclassification surcharges produce "not less than" 25 percent of the "total premium income" of insurers.

The Rate Office contends that the Commissioner's orders will result in a premium shortfall of $18,900,000 or 5.6 percent of the companies' "total premium revenue" of $336,800,000 and will not produce surcharges comprising 25 percent of the total premium income. These shortfalls will result, it says, because (1) the subclassification surcharges approved by the Commissioner will not apply to increased limits, but only to minimum limits liability coverages, nor will they apply to medical payments coverages, and (2) the orders are based on overstatements of the number of insureds who buy collision coverages and the number of serious chargeable accidents available for surcharges.

There was evidence offered by the Rate Office to support the existence of these overstatements. The staff offered evidence to the contrary. Whether the surcharge plan approved by the Commissioner would apply to medical payments coverages and if so, how, is a question left hopelessly confused by the Commissioner's orders.

[4] It seems reasonably clear that neither the Rate Office filing nor the plan approved by the Commissioner was designed to take into account *increased limits* liability premiums. Liability calculations supporting both plans were designed to produce surcharges which would constitute 25 percent of *minimum limits* liability premiums. Insofar as bodily injury and property damage liability premiums are concerned, the surcharges under both plans would not vary, whether the insured purchased the minimum or the highest possible liability limits. Both plans were touted in testimony and in the briefs as using "additive-type" rather than "multiplicative-type" surcharges so that all insureds in the same point category would pay the same surcharge on any type coverage purchased regardless of the amount of the coverage. While this is a laudable achievement, it should not be based on the assumption that House Bill 28 requires that surcharges produce 25 percent of premiums attributable to minimum limits coverages only, or 25 percent of some, but not all, kinds of coverages affected. We interpret the act to mean that premiums collected from surcharges must provide *not less than* (they may provide more) 25 percent of all premiums realized from all

coverages which had theretofore been rated, in part, on the basis of age or sex. This would include premiums derived from total limits bodily injury and property damage liability coverages, medical payments coverages, and collision coverages. It would not include comprehensive coverages which have not heretofore been classified by rating purposes on the basis of age or sex.

Regarding the applicability of the approved surcharge plan to medical payments coverages, the state of the record is this: The staff witness, Stern, the only witness who explained the staff's plan, testified that the "intent" of the plan was that the applicable surcharges would be applied once against an "entire line" of insurance. He defined "line" as being the "liability line" on one hand and the "collision line" on the other. Under this interpretation an insured with, for example, four points who purchased any amount of bodily injury and property damage liability coverage and medical payments coverage would pay a surcharge of $30. *See* n. 18, *supra.* The Commissioner's order may not so provide. While it recites the adoption of the staff's plan, in both the liability and collision orders the rule relating to the applicability of the surcharge plan provides, "The provisions of this rule apply separately to premiums for bodily injury, property damage, medical payments and collision." We interpret this to mean that under the Commissioner's order an insured with four points who buys bodily injury, property damage, and medical payments coverages would pay a surcharge of $90.[33] The different methods of applying the surcharge plan will thus result in a considerable difference in the amount of premiums to be ultimately recovered.

Because, therefore, of the evidentiary conflict compounded by the ambiguity in the Commissioner's orders, there are certain fundamental factual issues which need to be, but haven't been, resolved by the Commissioner as a prerequisite for any kind of meaningful judicial review.

[5] We said in *In re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 39-40, 165 S.E. 2d 207, 224 (1969):

> "The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a 'fair and reasonable profit' in the im-

33. The $30 surcharge would apply to all three coverages rather than only once to the entire liability "line." *See* n. 18, *supra.*

> mediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and, if so, how much increase is required for that purpose. This 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 percent of Earned Premiums which will constitute a 'fair and reasonable profit' in that period."

The ultimate factual findings which should have been but were not made by the Commissioner in this proceeding were: (1) the total premiums on affected coverages available to the companies under the present primary and subclassification scheme; (2) the total of such premiums estimated to be generated by the new primary classification plan; and (3) the total of such premiums estimated to be generated by the new subclassification plan. The Commissioner's orders find simply that the plans approved "will produce rates and classifications . . . which are reasonable, adequate, not unfairly discriminatory and in the public interest . . . ." Any revision of rates or rate classifications must ultimately produce such rates because of the mandate of General Statute 58-248.1. This finding, though, standing alone, is insufficient to enable us to determine on this record whether the Commissioner has also complied with House Bill 28.

D. *Compliance with House Bill 28: Primary Classifications*

[6] We agree with the Rate Office's contention that the Commissioner exceeded his authority under House Bill 28 by establishing five instead of four primary classes in his liability order, and three instead of four classes in his collision order. House Bill 28 requires that the new classification plan "will provide for the following four basic classifications, to wit: (i) pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use." In his liability order the Commissioner subdivided the second named class into large town and small town commuters. In his collision order he provided for, in effect, only three classes: pleasure and commuter use, business use, and farm use.

The question is one of statutory construction. Specifically, what did the General Assembly intend by the use of the word "basic" in the phrase "four basic classifications." Is "basic" used in the sense that subdivisions less than "basic" are permitted? Or is it used to distinguish the four primary classifications from the surcharge subclassifications? We are confident that the word is used in the latter sense.

The primary function of a court in construing legislation is to insure that the purpose of the legislature in enacting it, sometimes referred to as legislative intent, is accomplished. *In re Filing by Fire Insurance Rating Bureau, supra*, 275 N.C. 15, 34, 165 S.E. 2d 207, 220 (1969). The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). A court may also consider "the circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E. 2d 548, 555 (1967).

Clearly one of the purposes of the act was to simplify the primary classification scheme for automobile insurance. The proliferation of primary classifications was one of the evils sought to be remedied by House Bill 28. To permit more than four primary, or basic, classifications under the guise of subclassifications would be directly contrary to both the letter and spirit of this enactment. The Commissioner exceeded his authority by dividing the commuter class into two subclasses.

Since the statute mandated *four* primary, or basic, classifications, the Commissioner likewise exceeded his authority thereunder when he established only three such classifications in his collision order.

E. *The Constitutional Issues*

The Rate Office contends finally that it was denied due process of law in a substantive sense because the Commissioner's orders resulted in confiscatory insurance rates. It claims further that it was denied procedural due process of law because the Commissioner acted not as an impartial hearing officer but rather as a consumer advocate whose mind from the outset of the hear-

ing was closed to any other proposal than that of his own staff.[34] The Commissioner contends, on the other hand, that he is entitled as an elected public official to protect the public's interest in these kinds of proceedings so long as rates and classifications ultimately approved meet statutory mandates.

The North Carolina Fire Insurance Rating Bureau as amicus curiae contends that House Bill 28 was unconstitutional in that it gave authority to the Rate Office, rather than the Rating Bureau, to make the filing for reclassifying automobile collision and other physical damage coverages.

For the reasons stated in our conclusion, we determine to vacate the orders of the Commissioner. Consequently, we deem it unnecessary to determine the constitutional questions raised.

CONCLUSION

[7] The Commissioner exceeded his authority in ordering into effect primary liability and collision classifications contrary to the provisions of House Bill 28. The absence of requisite specific findings of fact precludes adequate judicial review of the orders. These kinds of errors would normally result in our vacating these orders and remanding the case to the Commissioner for further proceedings. *Comr. of Insurance v. Automobile Rate Office*, *supra*, 292 N.C. 1, 231 S.E. 2d 867 (1977); *Comr. of Insurance v. Automobile Rate Office*, *supra*, 287 N.C. 192, 214 S.E. 2d 98 (1975); *In re Filing by Fire Insurance Rating Bureau*, *supra*, 275 N.C. 15, 165 S.E. 2d 207 (1969). Since, however, the statutes under which this proceeding took place have been either repealed or substantially amended effective 1 September 1977 and a new classification plan has been filed by the newly created North Carolina Rate Bureau, hearings on which are presumably now in progress, it would be futile to remand this case. This proceeding has, in effect, been completely superseded by the new proceedings under new statutes. *See Utilities Commission v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976).

Because, however, some similarities remain between the old and new statutes, particularly the provisions of House Bill 28 and its amended version contained in Chapter 828 of the 1977 Session

34. We rejected a similar argument made by the Rate Office in *Comr. of Insurance v. Automobile Rate Office*, 292 N.C. 1, 27, 231 S.E. 2d 867, 881 (1977).

Laws, we did not conclude, as we did in *Southern Bell*, that the controversy was, in all respects, moot. A decision on those aspects of the case we have discussed would, we felt, be helpful in the new proceedings.[35]

For the reasons given herein the decision of the Court of Appeals vacating the orders of the Commissioner is

Affirmed.

STATE OF NORTH CAROLINA v. ROY ROGER WILLARD

No. 66

(Filed 11 November 1977)

1. **Criminal Law § 113.9— jury instructions—misstatement of evidence—necessity for calling judge's attention to**

Slight inadvertences by the judge in his recapitulation of the evidence in his charge to the jury must be brought to the attention of the judge in time for him to make a correction, and an objection thereto after the verdict comes too late.

2. **Criminal Law § 113.1— first degree murder—jury instructions—recapitulation of evidence—no error**

In a first degree murder case defendant was not prejudiced where: (1) the trial court in recapitulating the evidence stated where defendant went when he was absent from his work on the night before the murder, since such evidence was immaterial; (2) the trial court stated that the victim's blood ran into the rear floor of defendant's automobile and defendant removed carpet from the car after the victim was buried, even if such instruction was based on improperly admitted evidence, since defendant had made no objection to the evidence; (3) the court instructed that a witness testified that a bullet was taken from the head of deceased and it was badly deteriorated, since there was no objection to that testimony and it could not have prejudiced defendant; (4) there was a slight variance between a witness's testimony concerning his finding defendant asleep in an automobile at defendant's place of employment and the trial court's recapitulation of that testimony; and (5) the trial court's recapitulation of defendant's testimony was subject to a different construction than that intended by defendant, since defendant's own testimony was more prejudicial to him than the court's recapitulation.

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35. After this opinion was prepared and the day before it was filed the Commissioner apparently approved the 1 September 1977 filing of the Rate Bureau. *News and Observer*, 11 November 1977 at 1, col. 4.

3. Homicide § 17— defendant's statements prior to crime—admissibility to show motive

The trial court in a first degree murder prosecution did not err in allowing a witness to testify that, shortly before the disappearance of the victim, defendant discussed with the witness what he would do in the event the victim broke up with him, saying that he had picked out the spot in which to bury her and that he would "rather see her dead if he couldn't have her," since a defendant's own statements to another tending to show jealousy, malice or ill will toward the person with whose killing he is charged and tending to show that he was contemplating the killing of such person are admissible to establish motive.

4. Criminal Law § 162.5— objectionable evidence—no motion to strike

Testimony by a witness with whom defendant discussed the possibility of committing the crime in question that defendant, at the time of such conversation, "was very nervous" and that "he was not even attending to his job" was properly admitted, since this was testimony as to facts observed by the witness; however, the trial court properly sustained defendant's objection to further testimony by the witness that when the witness would ask as to defendant's whereabouts, "They would say that he was laying up or something," but the court did not err in failing to instruct the jury to disregard such testimony, since defendant made no motion to strike and made no request for such an instruction.

5. Criminal Law § 88.4— murder suspect's behavior after crime—cross-examination proper

The trial court in a first degree murder prosecution did not err in allowing the prosecuting attorney to question defendant concerning his reasons for continuing to phone the victim's mother right up until the time the victim's body was exhumed two months after her death, although defendant testified that he had been told two days after the murder that the victim had been shot.

6. Criminal Law § 117.4— accomplice testimony—jury instructions proper

The trial court in a first degree murder prosecution properly instructed the jury as to the consideration to be given to an accomplice's testimony where the court instructed that other offenses and convictions could be considered with other evidence of the witness's truthfulness in deciding whether the jury would believe the witness, and the court instructed that the accomplice's testimony should be carefully scrutinized.

7. Criminal Law §§ 113.5, 161.1— alibi evidence—no request for instruction—no exception—issue first raised in brief

Defendant's contention that the trial court erred by failing to give the jury specific instructions as to the legal principles applicable in consideration of alibi evidence is without merit since defendant failed to request such an instruction, and the court is not required to give such instruction absent a request; moreover, defendant failed to comply with Rule 10 of the Rules of Appellate Procedure providing that the scope of review on appeal is confined to consideration of exceptions set out and made the basis of assignments of error in the record on appeal.

State v. Willard

APPEAL by defendant from *Seay, J.*, at the 28 February 1977 Session of SURRY.

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

The following facts, shown by the evidence, are not in controversy:

On 23 July 1976, Barbara Evans, a 26 year old Negro woman, who had for several years been the mistress of the defendant, a 52 year old white man, was living in the home of her mother in Mount Airy. On that date, she disappeared and was not thereafter seen alive. On 21 September 1976, her body, identified by her high school class ring and clothing, was found in a shallow grave in a wooded area in Carroll County, Virginia. During the morning of 23 July, she left her mother's home in a Chrysler automobile owned and driven by the defendant, Randall Tolbert, a 17 year old white boy, being also a passenger in the car.

On 25 July, at approximately 11:00 p.m., the defendant was taken to the hospital with a severe bullet wound in his abdomen and the police were advised that he had been robbed of his automobile and shot at the Miller Fairlane Market in Surry County by two Negro men. After the defendant was shot, his car was driven over the State line into Virginia and burned, the interior being virtually destroyed but it being still apparent that parts of the carpet in the rear had been cut out.

On the morning of 23 July, prior to picking up Barbara Evans at her home, the defendant traded a .22 rifle for a Derringer pistol. After test firing the Derringer and ascertaining that it did not fire dependably, the defendant took it back to the man from whom he had acquired it and exchanged it for a .32 H & R revolver, which was introduced in evidence.

Subsequently, Tolbert was arrested for a burglary unrelated to any of these matters. While in custody on that charge, he gave a statement to police officers concerning the killing of Barbara Evans and the shooting of the defendant. Thereupon, he directed the officers to Barbara Evans' grave and accompanied them thereto, at which time her body was exhumed.

In addition to evidence showing the foregoing facts, which are not controverted, the evidence for the State included testimony of Roy Lee Flippin and Tolbert.

Flippin testified:

The defendant discussed with him "right much" his relationship with Barbara Evans for whom the defendant "really cared a whole lot." The defendant told Flippin on one occasion prior to the disappearance of Barbara Evans, "You know, I even drove out to the parkway where it was not close to anyone's house and picked out a spot to bury Barbara," and also said, "I even got a shovel and mattocks in my car," and "he would rather see her dead if he couldn't have her."

Randall Tolbert testified:

Over a period of approximately one month prior to 23 July 1976, he and the defendant discussed the killing of Barbara Evans, the defendant agreeing to pay Tolbert $500.00 therefor. Three times they planned for the defendant to bring Barbara Evans to one of their customary parking places and for Tolbert to conceal himself in the surrounding undergrowth and shoot her upon a signal from the defendant. On each of these occasions, "something went wrong" and the attempt was not made. They then decided upon the plan which was carried into effect on 23 July. This plan was to "lure Barbara away" on the pretext that her car radio needed repair.

Pursuant to this plan, the defendant, as above stated, procured first the Derringer and then the .32 caliber pistol actually used to kill Barbara Evans, both of which guns Tolbert tested in the defendant's presence, finding the .32 pistol satisfactory. On the morning of 23 July, the defendant and Tolbert went to the Evans home in the defendant's car. The defendant obtained Barbara Evans' car and drove it away, Tolbert following in the defendant's car. Parking Barbara Evans' car in another area of the city, they then proceeded to get the .32 caliber pistol as above mentioned.

The defendant then telephoned Barbara Evans that some mechanical work was to be done on her car radio and she should be present to approve it. Thereupon, they returned to the Evans home in the defendant's Chrysler car, Tolbert posing as a radio

repairman. They picked up Barbara Evans, who got into the front seat with the defendant, Tolbert sitting in the rear seat and having with him the fully loaded .32 caliber pistol. Pursuant to their plan, the defendant drove along a street where there were few houses and, at a point where there were no automobiles or pedestrians in view, Tolbert brought the pistol up to approximately an inch behind Barbara's head and fired one shot. She fell over toward the defendant, who was the driver, and apparently death was instantaneous.

Pursuant to the prearranged plan, the defendant, without stopping, drove on into the State of Virginia (approximately 20 miles from the point where the shooting occurred) and they buried the body in a grave which they had previously prepared, wrapping it in a quilt which they had in the trunk of the car and filling the grave with a shovel which they had in the car. They then returned to Mount Airy and Tolbert removed Barbara Evans' car from the place where he had parked it and hid it near his own home in Virginia. The next day they decided to and did move her car to Winston-Salem and parked it at a housing development in that city.

On the following day, the second day after the killing of Barbara Evans, the defendant decided that, in order to divert suspicion from him, Tolbert should shoot him and stage a robbery of the defendant, who would then report that he had been robbed and shot and his automobile stolen. For that service, the defendant offered to pay Tolbert an additional sum. That plan they carried out at the Miller Fairlane Market in Surry County, Tolbert shooting the defendant in the abdomen at the point designated by the defendant. Prior to the shooting, the defendant telephoned the telephone operator and told her that a man had been shot and she should send an ambulance to the described location. Following the shooting of the defendant, Tolbert, also pursuant to the defendant's plan, drove the defendant's Chrysler car into Virginia and there burned it. For all of these services, Tolbert received approximately $180.00.

After Tolbert's arrest on the unrelated robbery charge, he told the police about the killing and burial of Barbara Evans and took them to her grave because these things "bothered him." His signed statement so given to the police was introduced in evidence to corroborate his testimony.

When Barbara Evans was shot, a substantial quantity of blood ran into the floor of the back part of the car. The defendant told Tolbert that he, the defendant, had cut out part of the carpet so as to remove evidence of bloodstains. Tolbert observed that part of the carpet had been so cut out before he burned the car.

The State also introduced evidence to the effect that an autopsy was performed on Barbara Evans' body and a bullet was removed therefrom.

The defendant, a witness in his own behalf, testified:

He had been going with Barbara Evans for approximately four years and thought a great deal of her. He did not have anything to do with her murder. He did not cut the carpet out of his car. He did not go with Tolbert to the gravesite and knows nothing about the grave. He acquired first the Derringer and then the .32 caliber pistol for the purpose of giving it to Barbara Evans pursuant to her previous request that he get a gun for her. He did not make the statement attributed to him by Roy Lee Flippin.

When he, himself, was shot by Tolbert, he had met Tolbert and his companion pursuant to a telephone call from Tolbert stating that he had information concerning Barbara Evans. Tolbert told the defendant that he, the defendant, would not have to worry about Barbara any more. When the defendant asked Tolbert what he meant by that, Tolbert replied, "You know, the place where I carried you to meet her several times" (referring to the place in Virginia which the defendant and Barbara had frequently used for their meetings). Tolbert then said that Barbara Evans was over there and she was dead. When Tolbert so stated, the defendant reached "to get him" and at that time Tolbert shot the defendant. Tolbert then took the defendant's billfold and watch and told the defendant that if the defendant ever said anything about this shooting and robbery Tolbert could pin the Evans murder on the defendant. When the police officers came as the result of the shooting of the defendant, the defendant told them that two black men had shot him, his reason being that he knew Tolbert and his companion could "pin it on him."

On 23 July, the defendant and Tolbert went to the Evans home about 6:15 a.m. and the defendant drove Barbara Evans' car to the parking lot of the mill where the defendant was employed, Tolbert following in the defendant's car. The defendant, a super-

visor in the mill, went in to see that his department was operating satisfactorily. After so doing, he requested and received permission to leave for the better part of the day. He and Tolbert then left the mill and procured the pistols above mentioned.

They then went back to the mill, telephoned Barbara Evans and returned to the Evans home shortly after 9:00 a.m. After talking to Barbara Evans a few minutes the three of them left together. As they passed the post office, Tolbert got out and the defendant carried Barbara Evans to her car where the defendant had parked it and Barbara Evans got in it. At that time, another automobile came by with a Negro man in it and Barbara Evans said that she needed to see him and drove away, telling the defendant that she would meet him at the bank at 11:00 a.m. She failed to keep that appointment.

The defendant then returned to the mill and, at approximately 11:50 a.m., Barbara Evans telephoned him saying that she would meet him at the bank at 4:00 p.m. She did not keep that appointment. Thereupon, the defendant called her mother and they decided to try to find Barbara. Until about 1:00 a.m. he searched unsuccessfully for her in the Negro section of Winston-Salem where Barbara Evans frequently went to visit. He never saw Barbara Evans again after she drove away from the parking lot of the mill that morning. His purpose in getting Barbara Evans' car that morning was to have a radio placed in it. He went back to get Barbara because, after telephoning several people concerning the proposed installation of the radio, he decided to take her to a store in Dobson to see a radio he had located there. He could not drive her car back to her house because, after putting the gun in her car, he had locked the door and the switch key would not fit the door lock. The purpose of Barbara's accompanying him back to the mill parking lot was to enable her to get her car, she not having time to see about the radio that day.

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Associate Attorney, for the State.

Charles M. Neaves for Defendant.

LAKE, Justice.

The defendant assigns as error the denial of his pretrial motion to sequester the witnesses for the State. He correctly concedes that this was a matter in the discretion of the trial court. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 641, 157 S.E. 2d 386 (1967); *State v. Hamilton*, 264 N.C. 277, 286, 141 S.E. 2d 506 (1965), cert. den., 384 U.S. 1020 (1966); Stansbury, North Carolina Evidence (Brandis Rev., 1973), § 20. Nothing in this record suggests abuse of discretion by the trial court in this respect. There is no suggestion of collusion among the witnesses for the State. This assignment of error is without merit.

The defendant's two assignments of error directed to the denial of his motions for judgment of nonsuit at the close of the State's evidence and at the close of all of the evidence are likewise without merit. It is elementary that, for the purpose of ruling upon such a motion, only the evidence offered by the State is considered, except insofar as the evidence for the defendant clarifies and strengthens it, and any discrepancies therein are disregarded, the evidence for the State being deemed true and interpreted in the light most favorable to the State. Strong, N.C. Index 3d, Criminal Law, § 104. "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged [or a lesser included offense] has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578 (1975); Strong, N.C. Index 3d, Criminal Law, § 106.2. The evidence of Randall Tolbert alone is sufficient to comply with this test. The credibility of his testimony was for the jury.

The defendant's motion to set the verdict aside on the ground that it is against the weight of the evidence was directed to the discretion of the trial court. *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975); *State v. Britt*, 285 N.C. 256, 264, 204 S.E. 2d 817 (1974) (new trial allowed on other grounds); Strong, N.C. Index 3d, Criminal Law, § 132. No abuse of discretion appears in the denial of this motion. This assignment of error is, therefore, also without merit.

The defendant's assignment of error based upon the overruling of his motion for arrest of judgment is abandoned, no argument or citation of authority therefor appearing in the brief. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 671, 741.

[1] The defendant's Assignments of Error 9, 10, 11, 12 and 13 relate to alleged errors by the trial court in recapitulating testimony of certain witnesses in the court's charge to the jury. It is well settled that slight inadvertences by the judge in his recapitulation of the evidence in his charge to the jury must be brought to the attention of the judge in time for him to make a correction, and an objection thereto after the verdict comes too late. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Cornelius*, 265 N.C. 452, 144 S.E. 2d 203 (1965); Strong, N.C. Index 3d, Criminal Law, § 113.9. Nothing in the record suggests that any alleged inaccuracy in the court's recapitulation of the evidence was brought to the attention of the trial judge. The defendant contends in his brief that these alleged misstatements of the evidence in the charge were not slight inaccuracies but were statements of material facts not shown in evidence or shown only by improperly admitted evidence and, therefore, not within the above mentioned rule. He further contends that three of these alleged errors constituted expressions of opinion by the court as to whether "a fact is fully or sufficiently proven," in violation of G.S. 1-180. We now turn to these alleged misstatements individually.

[2] Roy Lee Flippin was a foreman in the hosiery mill in which the defendant and Randall Tolbert worked, Tolbert working under Flippin's supervision. Flippin testified, without objection:

> On Monday, the beginning of the week of July 24 (Saturday) when Tolbert went out he said that he had to go to Hillsville, Virginia (approximately 25 miles from the mill). Tuesday night he did the same thing. He and the defendant went back to Hillsville, or so they told Flippin. On Wednesday, Tolbert worked eight hours. On Thursday night, the defendant came to Flippin's department and said that he had a favor to ask of Flippin, that he had to move some furniture and needed Tolbert to help him with it. When they left, it was before 7:00 o'clock. Then after supper, about 7:30 p.m., Tolbert returned and told Flippin that he had no other choice, that he had to go. Flippin gave him permission, say-

ing: "Randall you have definitely got to punch out if you leave tonight. I have given you two nights but you definitely have to punch out tonight." Tolbert returned at 10:15 p.m. and worked until quitting time. On Friday night, July 23, Tolbert worked a full eight-hour shift.

Previously, Flippin had testified:

On one occasion, a short time prior to July 23, possibly in the early part of that week, pursuant to an incoming telephone call, one of the mill employees told Tolbert a man from the parole office in Hillsville, Virginia, had called and left a message for Tolbert to meet him in Hillsville at 9:00 o'clock that night. Tolbert told Flippin that he did not have a way to get there. The defendant came walking in at that time and told Tolbert that he could carry him there, and they left about 8:00 o'clock and were back about 9:00 o'clock. When they got back, Tolbert said that the parole officer did not get to see him and that he had to go back the next night. . . The defendant said that he would carry Tolbert to Virginia the next night. On the next night, the defendant came to Flippin about 8:00 o'clock and said that he would go ahead and carry Tolbert and that they had to be there at 9:00 o'clock. They left and it was probably 11:00 o'clock when they came back. Flippin does not remember the exact date but believes that this was on Thursday (July 22). When Tolbert returned to the mill, about 11:00 o'clock that night, he was very nervous and told Flippin, "I'll tell you what, I wish that I never got involved with Roy Willard [the defendant]. I wish that I never saw him."

The record does not indicate an objection to any of the foregoing evidence. The court's recapitulation of this portion of Flippin's testimony, which the defendant assigns as error was:

"On Thursday night before July the 23rd, the defendant * * * carried Randy Tolbert to Hillsville, and when they returned it was after 11:00 o'clock and Randy was very nervous and that the next night after that the defendant Willard asked a favor of him and of Randy and that they had left at 8:00 o'clock and it was late when they came back and Randy was also very nervous and stated that he wished he had never gotten involved with Roy Willard."

We find no merit in this assignment of error. Whether the defendant and Tolbert actually went to Hillsville while they were away from the mill on Thursday night is immaterial. Flippin's testimony was that on Thursday night (July 22) Tolbert was absent from his work at the mill from approximately 7:30 p.m. to approximately 10:15 p.m. or 11:00 p.m., having left with the defendant.

The defendant next assigns as error the following portion of the court's recapitulation of the evidence: "That Randy Tolbert was recalled for further testimony that tends to show that when Barbara Evans was shot that she bled in such a way that the blood went between the seat on the rear deck and the defendant removed the carpet after the burial." The defendant asserts that this is a summary of improperly admitted evidence.

Tolbert, on recall, testified that when barbara Evans was shot, she bled and the blood accumulated in the rear floor of the car. With reference to the removal of the carpet from the floor of the back compartment of the car, Tolbert testified, "From all that I know Mr. Willard [the defendant] removed those some time after she was buried." Tolbert testified that he, himself, had nothing to do with the removal or cutting out of parts of the carpet of the car, but the defendant stated that he removed them so that in case anyone looked in the car there would be no evidence of bloodstains.

The record does not indicate any objection to the foregoing testimony by Tolbert. "Evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have." Stansbury, North Carolina Evidence (Brandis Rev., 1973), § 27. Furthermore, "Anything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admission." Stansbury, North Carolina Evidence (Brandis Rev.), § 167. Thus, there is no merit either in the defendant's Assignment of Error 4, relating to the admission of this testimony by Tolbert, or in his Assignment of Error 10 concerning the court's recapitulation of it in the charge to the jury.

The defendant next assigns as error the following portion of the court's recapitulation of the evidence in his charge to the

jury: "The witness Beal was recalled and testified that the bullet was taken from the head of the deceased but that it had badly deteriorated." In his Assignment of Error 11, the defendant contends that this is a summarization of improperly admitted evidence.

The witness Beal, presently Clerk of the Superior Court of Surry County, but, at the times in question, an agent of the State Bureau of Investigation, testified that he observed the exhumation of the body of Barbara Evans and described the grave and condition of the body. Upon recall he testified, without objection, "An autopsy was performed on Barbara's body. A bullet was removed from her person." When he was asked as to the condition of the bullet, objection was interposed by the defendant. The court inquired as to whether the witness had seen the bullet. The witness replied: "Not when it was removed. I received it in my possession from the pathologist. After it was removed I saw it, yes." Objection to this testimony was overruled. The witness was then asked what was the condition of the bullet and testified, "It was very badly deteriorated in that the body fluids had consumed most of the striation and marking on it."

Since there was no objection thereto, there was no error in admitting this witness' testimony that an autopsy was performed and a bullet removed from the "person" of Barbara Evans. The testimony to which objection was interposed related solely to the condition of the bullet so removed. The testimony that the bullet was badly deteriorated (two months having intervened since the shooting of Barbara Evans) could not possibly have affected the verdict of the jury or been prejudicial to the defendant. Its admission was, therefore, at the most, harmless error and so was the court's statement to that effect in its recapitulation of the testimony of this witness. Actually, the witness did not testify that the bullet was taken from the head of the deceased, but the testimony of Tolbert was quite specific that he shot Barbara Evans only one time and shot her in the back of the head. This variance between the court's recapitulation and the properly admitted testimony of the witness concerning the removal of a bullet from the "person" was clearly an inadvertent misstatement and the defendant does not make any point thereof or refer to it in his brief. Consequently, neither Assignment of Error 5, relating to the admission of the testimony of this witness, nor Assign-

ment of Error 11, relating to the court's recapitulation thereof in its charge to the jury, is basis for a granting of a new trial and these assignments are overruled.

The defendant's witness, Paul Glenn, testified that he also works at the mill where the defendant and Tolbert were employed and on the morning of Saturday, July 24, he observed the defendant asleep in the back seat of the defendant's Chrysler car in the mill parking lot between 7:30 a.m. and 8:00 a.m. Glenn went to the car, knocked on the side glass and the defendant rose up out of the back seat. The sun was shining into the car and Glenn looked at the back floorboard but did not see any piece of the carpet cut out or any blood on the floor. He had a good look at the floor in the back of the car and did not see anything out of the ordinary in the front part of the car. He further testified that there was nothing unusual about the defendant's car being in the parking lot as it was there almost every morning, but on this morning "something hit his mind" and he said to Randy Penn that he wondered if the defendant was asleep in his car. He then testified:

> It was on the Monday following the Saturday on which he saw the defendant asleep in his car that he heard about the defendant's being suspected of murder. He (Glenn) did not know that nobody knew what happened to Barbara until September 21st. He (Glenn) did not remember that her body was not dug up until then. He has some difficulty in remembering people and dates. On Monday morning after he saw the defendant asleep in the car, Tolbert told him that the defendant had been shot.

After correctly recapitulating the testimony of Glenn concerning his awakening the defendant, looking into the back of the car and observing no blood and no cut out place in the carpet, the charge of the court continued as follows:

> "On cross-examination he testified that he was late going to work as he went to the late show and that he just happened to ask somebody whether or not they would believe that Kay Ro [the defendant's nickname] was sleeping in the car there before he went into work and he remembered it being a Saturday morning and remembers that the next Monday following that Saturday that the defendant had been

arrested and suspected of murder. He did not know that the body had been dug up on September the 21st, and did not know what Saturday except it was the Saturday morning following the defendant being arrested for murder. On cross-examination, he said that he recalls that was the Saturday following the defendant being shot. That on that occasion that the defendant was in the blue Chrysler."

The defendant contends that the variance between the court's recapitulation and the testimony of Glenn as shown in the record constitutes prejudicial error. We do not so regard it. We observe no material variance. If the defendant deemed such variance as appears in the record to have been prejudicial to him, he should have directed this to the attention of the court in time for a correction prior to the verdict. In this assignment of error we find no merit.

The defendant, himself, testified that while he was in the hospital as the result of his being shot by Tolbert, he had a visit from Tolbert who said that the defendant was "doing well," and told him "to just keep up the good work and that he wouldn't have any problems"; "to keep up what he was doing and everything would be fine." Immediately prior to this testimony, the defendant had testified that, at the time Tolbert shot him, Tolbert told him that if he ever said anything about that shooting and robbery, Tolbert "had him where he wanted him" and "he could pin it on" the defendant. In consequence of this, the defendant told the officers who were investigating the shooting that two black men shot him. On cross-examination, the defendant testified that when Tolbert visited him at the hospital, Tolbert asked the defendant not to say anything, to keep it up and he (Tolbert) wouldn't pin anything on the defendant. By this remark, said the defendant, Tolbert "was talking about Barbara."

In recapitulating this testimony by the defendant, the court said that the defendant had testified that, at the time the defendant, himself, was shot, Tolbert told him "that he would not have to worry about Barbara Evans any more as she was dead and when Randy told him that, that he, the defendant, reached to get him and Randy shot him in the stomach and took his wallet and left in the car and said if he told anything about it why he could pin this killing on him * * * and when the police arrived that he told the police it was two black men that shot him and he was at

the hospital some time and Tolbert came to see him at the hospital and said that he was doing real well."

In his Assignment of Error 13, the defendant asserts that, in this recapitulation of his testimony, the court erred for the reason that the court's statement of the testimony was misleading or subject to misleading construction. The defendant asserts in his brief that the court's charge "might be construed as summarizing Tolbert's statement that the defendant 'was doing real well' as referring to the state of the defendant's health in recovery from the gunshot wound inflicted by Tolbert," while the testimony of the defendant "does not leave open the possibility for such ambiguous construction." We find no substantial variance between the testimony of the defendant and recapitulation thereof by the court, but if the court's recapitulation could have been construed by the jury as the defendant, in his brief, has construed it, we do not see how that could possibly have been detrimental to the defendant. Surely, the defendant's own testimony that he withheld from the officers the identity of his own assailant because he knew that Tolbert "could pin" the shooting of Barbara Evans on him and that this was what Tolbert meant by saying the defendant was "doing real well" and by telling him to "keep up the good work" and "not to say anything" was more prejudicial to the defendant than would have been the alleged possible construction of the court's recapitulation of the defendant's testimony. There is no merit in this assignment of error.

[3] The defendant's Assignments of Error 2 and 3 relate to the admission, over objection, of the testimony of Roy Lee Flippin that, shortly before the disappearance of Barbara Evans, the defendant had discussed with Flippin what he would do in the event that Barbara "broke up with him," saying that he had picked out the spot in which to bury Barbara and that he would "rather see her dead if he couldn't have her."

In the admission of this evidence, there clearly was no error. The defendant's own statements to another tending to show jealousy, malice or ill will toward the person with whose killing he is charged and tending to show that he was contemplating the killing of such person are clearly admissible in evidence. Such admissions constitute a well established exception to the Hearsay Rule. Stansbury, North Carolina Evidence (Brandis Rev.), § 161. As Justice Branch, speaking for this Court, said in *State v. Rob-*

bins, 275 N.C. 537, 546, 169 S.E. 2d 858 (1969): "It is well settled law in this jurisdiction that in a criminal prosecution admissions of fact by a defendant pertinent to the issue which tend to prove his guilt of the offense charged are competent against him. *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10; *State v. Woolard*, 260 N.C. 133, 132 S.E. 2d 364; *State v. Abernethy*, 220 N.C. 226, 17 S.E. 2d 25; *State v. Lawhorn*, 88 N.C. 634. * * * The testimony here offered tended to establish motive on the part of defendant to commit the crime and to otherwise establish his guilt."

[4] The testimony of Flippin that at the time of this conversation the defendant "was very nervous" and that "he was not even attending to his job" was properly admitted, even if the defendant objected to the question in answer to which this testimony was given, which the record does not indicate. This was testimony as to facts observed by Flippin. The court sustained the defendant's objection to Flippin's further testimony in response to this question to the effect that when he (Flippin) would ask as to the defendant's whereabouts, "They would say that he was laying up or something." This statement was inadmissible hearsay and, as to that part of the answer, the court properly sustained the objection. The defendant did not, however, move to strike this statement of the witness nor did he request the court to instruct the jury to disregard it. Consequently, the failure of the court to so instruct the jury was not error. *State v. Lefevers*, 216 N.C. 494, 496, 5 S.E. 2d 552 (1939). In these assignments of error, we find no merit.

[5] The defendant testified that he continued to make telephone calls to the mother of Barbara Evans right up to the time when Barbara's body was exhumed in September, although Tolbert, according to the defendant, had told him just prior to shooting him on July 25 that he (Tolbert) had killed and buried Barbara at the place in Virginia where the defendant and Barbara frequently met. He testified that in these telephone conversations he did not intimate to Barbara Evans' mother where Barbara's body was. The prosecuting attorney then asked, "After you had been assured that she was dead and buried why did you continue to call Mrs. Evans leading her to believe, by inference at least, that Barbara might be alive?" The defendant objected "to the solicitor's statement," which objection was overruled. The prosecuting attorney then asked if the defendant did not intend by his

continuing telephone calls "to imply that she was still alive and there was a possibility that she might be found." The defendant replied, "No, sir, I went to her house several times." He then testified that on these visits he talked to Barbara Evans' mother, asked if she had heard from Barbara and told her that he had heard nothing from her and would be "making inquiries."

In his Assignment of Error 7, the defendant asserts that the court erred in the admission of these "statements" of the prosecuting attorney. In this contention we find no merit.

Also in his Assignment of Error 7, the defendant contends that the court erred in permitting the prosecuting attorney to ask the defendant, on cross-examination, "On two or three occasions was Randy [Tolbert] in ambush when you were bringing Barbara to one of the parking spaces for the purpose of having her shot?" To this the defendant answered, "Absolutely not." The defendant now contends that this question was framed so as to assume a fact not in evidence, namely, that the defendant on two or three occasions took Barbara to such places for the purpose of having her shot. There are two independently sufficient answers to this assignment of error. First, the defendant did not object to the question. Second, Tolbert had previously testified that, pursuant to the plan he and the defendant had made, he twice concealed himself near the defendant's "favorite parking place" in order to shoot Barbara Evans when the defendant brought her there and signaled to him to do so. There is no merit in this assignment of error.

Tolbert testified that he, himself, was, at the time he was so testifying, indicted and charged with the murder of Barbara Evans, that his attorney was then present in the courtroom, that he had been fully advised of his rights in this matter and was voluntarily testifying as a witness for the State without any promises having been made as to what might happen in his case when he should be brought to trial. He also testified that he, himself, was then under an indictment for another, unrelated robbery, that he had committed still another robbery in Galax, Virginia, and that sometimes he stole money from the mill where he was employed for the purpose of buying drugs.

The court instructed the jury:

> "Now the witness Randy Tolbert has testified that he has been charged in this case with the murder of Barbara

Evans and he has been charged with the armed robbery of the Millers and certain other offenses and you may consider the matter of any previous convictions, members of the jury, as it may bear on the truthfulness of this witness and you may consider it together with all of the other facts and circumstances bearing on the witness' truthfulness in deciding whether you will believe or disbelieve his other testimony at this trial. Except as it may bear on this decision this evidence should not be considered by you in your determination of the truthfulness of the witness in this case.

"There is, insofar as the testimony of Randy Tolbert is concerned, members of the jury, there is evidence in this case which tends to show that he, Randy Tolbert, was an accomplice in the commission of the crime charged in this case. An accomplice is a person that joins in with another in the commission of a crime. The accomplice may actually take part in the acts necessary to accomplish the crime or he may knowingly help or encourage another in the crime, either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of this witness Randy Tolbert with the greatest care and caution and scrutinize his testimony fully. If after doing so you believe his testimony in whole or in part you will treat what part you believe the same as any other believable evidence."

[6] For his Assignment of Error 14, the defendant contends that the second above quoted paragraph of this instruction is correct but the first paragraph above quoted is erroneous and "tends to negate" the second paragraph of the instruction. The defendant asserts in his brief, "The jury might well have construed the excepted portion of the instruction to mean that they were to consider the fact of Tolbert's being charged with the same murder for which the defendant was standing trial as relating only to Tolbert's veracity." We find no error in either of these two paragraphs quoted from the judge's charge to the jury and no merit in this assignment of error.

[7] In his statement of the case on appeal, the defendant made only the 16 assignments of error above discussed. In his brief he makes, for the first time, Assignment 17, which is not based upon any exception in the record. Rule 10 of the Rules of Appellate

Procedure, 287 N.C. 679, 698, provides the scope of review on appeal is confined to consideration of exceptions set out and made the basis of assignments of error in the record on appeal, except as otherwise provided in that rule. Nevertheless, the defendant requests this Court, in its discretion, to find that the trial court erred by failing to give the jury "specific instructions as to the legal principles applicable in the consideration of alibi evidence."

The defendant testified as to his activities within the Town of Mount Airy during the morning of July 23, and introduced other evidence designed to show his presence therein during parts of that morning, the purpose of such evidence being to show that he was not then engaged, with Tolbert, in the killing and burial of Barbara Evans. The jury was properly and fully instructed by the court as to the State's burden of proof beyond a reasonable doubt that the defendant is guilty of the crime charged.

In *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), a new trial was awarded because of the trial court's failure to charge the jury as to the legal principles applicable in their consideration of alibi evidence, even though there was no request for such an instruction, there having been evidence offered by the defendant in that case tending to show he was elsewhere when, according to the State's evidence, the crimes for which he was indicted were committed. However, in *State v. Hunt, supra*, we overruled former decisions of this Court declaring it to be the duty of the trial court so to instruct, even in the absence of a request for such an instruction, when there is alibi evidence and we expressly stated that in cases arising thereafter (i.e., in the present case) "the court is not required to give such an instruction unless it is requested by the defendant." In the present case, there was no such request by the defendant. Consequently, this contention of the defendant is without merit, even apart from Rule 10 of the Rules of Appellate Procedure.

The defendant's counsel has zealously, and at great length, endeavored in his brief to substantiate his contentions that in his trial errors were committed entitling him to a new trial. In that endeavor, he has grasped at 17 straws which, individually and collectively, fail to support him. He has had a fair trial in accordance with the law of this State. The conflict between his testimony, asserting his innocence of the charge of murder of Barbara Evans,

and the testimony of Randall Tolbert, the self-confessed trigger man, that the defendant planned the murder, employed Tolbert to perpetrate it, and was present and participated in its accomplishment simply raised a question of fact for the jury, which believed Tolbert and not the defendant.

No error.

STATE OF NORTH CAROLINA v. KATHY MATTHEWS JONES

No. 29

(Filed 11 November 1977)

1. **Criminal Law § 75.10— defendant's statements to police officers—admissibility**

In a prosecution of defendant for the murder of her child, the trial court properly admitted testimony as to statements made by defendant to police officers where evidence presented at a hearing of defendant's motion to suppress supported the following findings of fact made by the trial court: (1) the defendant's initial statement to the effect that an unknown intruder entered her trailer, shot the child while defendant lay asleep on a couch in the living room and then fled from the trailer was made to officers when they first arrived at the trailer and was made voluntarily; (2) when a deputy sheriff, shortly thereafter, took the defendant from the trailer out to his patrol car for an interview, he advised defendant of her constitutional rights in accordance with the *Miranda* formula; (3) the defendant affirmatively indicated that she understood her rights and was willing to make a statement and answer questions without an attorney being present; (4) repeatedly thereafter (on five separate occasions), as the interviewing process was resumed by officers following interruptions, defendant was given the *Miranda* warnings and signed written waivers of her constitutional rights; (5) the interviewing process was frequently interrupted and defendant on several occasions returned to her home or to the home of her parents; and (6) during other interruptions of the interviewing process, defendant was given food and drink and opportunities to retire to the rest room.

2. **Criminal Law § 112.6— refusal to instruct on insanity**

In this prosecution of defendant for the first degree murder of her three year old child, the trial court did not err in refusing defendant's request that he give the jury instructions with reference to insanity where defendant's defense at trial was not insanity but was that it was not she who shot and killed the child, defendant's expert psychiatrist testified that he had made no evaluation of defendant's sanity, and there was no evidence in the record to indicate that defendant was insane, the fact that the State's evidence tended to show that defendant committed a horrible, gruesome crime—the murder of her own sleeping infant daughter—not being evidence of insanity requiring the submission of that question to the jury.

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

The test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act.

4. **Criminal Law §§ 5, 112.6; Homicide § 28.7— refusal to charge on insanity— Fourteenth Amendment**

The Fourteenth Amendment of the U.S. Constitution is not violated by the rule in this State that, in the absence of any evidence of insanity, it is not error for the trial judge to refuse the defendant's request that he instruct the jury upon the law relating to insanity as a defense to a charge of murder.

5. **Criminal Law § 84; Constitutional Law § 21— evidence obtained by use of one-way mirror— unlawfulness— objection on another ground— harmless error**

The trial court in this homicide case did not err in permitting a police officer to testify concerning a statement made by defendant to her father in a conversation in an interview room at the sheriff's office, which conversation was overheard by the officer while observing the participants without their knowledge through a one-way mirror, although the evidence was unconstitutionally obtained, where defendant's objection to the evidence was made upon the ground that the witness was testifying "to the effect" of the conversation rather than to its precise words, and the stated ground for objection was invalid; furthermore, the admission of such testimony was harmless beyond a reasonable doubt in light of the proper admission of defendant's more detailed confession to the police, made immediately prior to the conversation in question, and defendant's incriminating statements made to her lover.

APPEAL by defendant from *McLelland, J.*, at the 13 December 1976 Session of WAKE, at which the defendant was convicted of murder in the first degree and sentenced to imprisonment for life.

The evidence for the State was to the following effect:

At approximately 2:30 a.m. on 27 February 1976, two deputies of the Sheriff of Wake County, in response to a telephone call for assistance, went to the trailer home of the defendant, a 25 year old white woman. They found the defendant's three year old daughter, Tonia, lying in the child's bed at the point of death as the result of three .22 caliber pistol bullets fired into her head at close range. The child died a few minutes after their arrival. The only other persons in the trailer when the officers arrived were the defendant and a female neighbor, who

had come in response to a call from the defendant and who had called the officers.

The defendant then told the officers that, after putting the child to bed, she went into the living room and lay down upon the couch and fell asleep. She was awakened by shots, following which she heard someone, not seen by her, go out the *back* door, whereupon she ran into the child's room, observed the child and then went into her own bedroom to get her pistol but found it missing from the place where she kept it.

The defendant's .22 caliber, six shot revolver was found on the bottom back step of the trailer. It contained three live rounds of ammunition and three shell casings from which the bullets had been fired. In the opinion of a ballistics expert, two of the three bullets removed from the child's head in the course of an autopsy were fired from this pistol, the third bullet bearing some characteristics of a bullet so fired but not enough to make a positive determination.

A bloodhound, promptly called by the investigating officers to the scene, was unable to pick up a scent. The back steps of the trailer were in such bad condition that care had to be used in descending them.

After the investigating officers requested the defendant to allow them to make a test for the presence of gunshot residue upon her hands, she told the officers she had fired her pistol at target practice in her backyard that afternoon. Shortly thereafter, she told them that, following her discovery of the wounded child, she observed the pistol on the floor of the trailer corridor, kicked it out of the back door and then, while hysterical, picked it up and fired it one time.

There was no evidence of a forcible entry of the trailer. The only finger or palm prints found on the frame of the rear door of the trailer and on the nearby wall were those of the defendant and David Stephenson, a married man separated from his wife, who had been living in the trailer with the defendant for several days preceding the shooting but who had departed several hours prior thereto. No fingerprints were lifted from the pistol.

The defendant told the officers she had heard prowlers about her trailer on other occasions and that she had previously so in-

formed the sheriff's office of this by telephone. The sheriff's office had no record of such complaint by her.

The defendant was married to Joel Turner when she was 16. By that marriage she had a son named Timmy. That marriage ended in divorce. She then married Tony Jones, the father of Tonia. Thereafter, Timmy was run over by an automobile and rendered permanently and completely helpless. The defendant being physically unable to care for him regularly, Timmy has lived, since his injury, with her parents.

The defendant's second marriage was an unhappy one and she and Jones separated two years after the birth of Tonia. Shortly thereafter, Jones came to the home of the defendant's grandmother, where the defendant and Tonia were then living, and, while there, was killed by four gunshots. The defendant told the officers that he was killed in a struggle with her grandmother after Jones had drawn a gun from his pocket, pointed it at the defendant and stated he was going to kill her and Tonia. The defendant's relations with her Jones in-laws were not pleasant, they being of the opinion that she had killed Jones.

Soon after her marriage with Jones, the defendant was manager of the toy department at Woolworth's store in the North Hills Shopping Center in Raleigh. Later, she assisted Jones in his business. Following his death, she drew Social Security and veteran's compensation benefits as his widow and the mother of his minor child. After his death, she purchased for $10,000 the trailer in which she and Tonia were living when the child was killed.

As a result of the accident to her son Timmy, the defendant received a settlement payment for Timmy's benefit. Since he was being cared for by her parents, the defendant used part of this settlement money to buy the trailer, to buy a car, to buy herself a diamond ring and to buy clothing and other things for Tonia.

Approximately six weeks prior to the shooting of Tonia, the defendant was negotiating for the purchase of a house for $42,500, telling the realtor handling the sale that she intended to pay for it by the sale of her property plus funds from an insurance policy in the amount of $40,000 upon the life of Jones. In November, 1975, the defendant sought assistance from the State Commissioner of Insurance in the collection of this policy, the company

having refused to pay on the ground that it had lapsed for non-payment of premiums. In December, approximately two months prior to the shooting of Tonia, the Insurance Department advised the defendant that, in all probability, the policy was not going to be paid unless she could produce proof that the premiums had been paid.

In April, 1975, nearly a year prior to the shooting of Tonia, the defendant applied for and procured a policy of insurance on the life of Tonia in the amount of $30,000, payable to the defendant, at the same time taking a similar policy on her own life. Three months thereafter, she applied to a different company for another policy of $20,000, payable to herself, on Tonia's life. No policy was issued on that application because the defendant failed to submit a necessary report to the company. Thereafter, on 5 November 1975, the same date on which she sought aid of the Commissioner of Insurance with reference to the policy upon the life of her husband, Tony Jones, the defendant reapplied for such policy upon the life of Tonia, stating in this application that there was no other insurance on the child.

On the evening of February 26, a few hours prior to the shooting of Tonia, as Stephenson was preparing to leave the trailer to return to his own apartment for the night, the defendant, expressing regret that he was leaving, said, "I feel like I have been burdened with children all my life and there is [sic] just some things I want to do." When Stephenson returned to the trailer after the shooting, he began to cry. The defendant put her arms around him and told him not to cry, saying she needed him and, "That is the last of Tony." Stephenson never saw her cry or give any other indication of being upset concerning Tonia's death.

From the time of the first officers' arrival at the trailer at 2:30 a.m. on February 27 until approximately 6:00 p.m. on March 4, the various investigating officers talked with and questioned the defendant on numerous different occasions, she being in their presence for a total of about 39 hours, including numerous interruptions of the interviews.

During a subsequent interview, she told the officers that she did not know if she had fired the gun when she came upon it after discovering the wounded child. In a still later interview on March 3, the officers told the defendant they had interviewed Stephen-

son and had taken "three empty casings from his gun." The defendant looked a bit startled, paused for several minutes, and then told the officers that Stephenson shot the child, that she, herself, had been struck on the head, had heard shots, had heard Tonia scream, had seen Stephenson come from that area of the trailer and walk through the living room, get in his car and leave. She told the officers that Stephenson knew about the insurance on Tonia's life and, after Tonia was killed, Stephenson said to her: "Now Tony is really gone. All of him."

On the following day, March 4, the defendant again told the officers that Stephenson had killed the child. At that point, the officers brought Stephenson into the interview and she asked him if he did it. Stephenson told the defendant to tell the officers the truth and said that she was trying to cause him, Stephenson, to receive a life sentence for something he did not do. Thereupon, Stephenson and the officers left the interview for the giving of a polygraph test to Stephenson.

Following that interview on March 4, a warrant, charging the defendant with murder, was served upon her and read to her by the officers. At that point, Deputy Sheriff Munn entered the interview and asked the defendant if there was anything she wanted to tell the officers. He told her that the officers had "all the pieces to the puzzle except one and she had that one blocked out" and that Stephenson was not part of the puzzle.

When Deputy Munn asked the defendant to "come out with it," she stated, "I am trying." He then asked her, "Why did you shoot Tonia?" She replied, "I don't know." When asked again, she said, "I don't have a reason." Deputy Munn then asked, "How close were you when you fired the shots?" She replied, "Real close." He asked her, "Did you put the gun to Tonia's temple?" She replied: "Close to it. I don't remember all of it. I don't remember thinking anything. I don't know why I did it. Tonia didn't say anything. I don't remember what I did then. I kicked the gun out the door and remember picking myself up." She continued: "I remember shooting Tonia one time and I remember I could not stop shooting. I remember standing beside her bed. A lot of this, I guess I blocked it out. I'm sorry. Oh, God, I'm sorry." Again, she said: "I loved her. She was all I had. Back in my mind I don't know why I shot her. The only thing I can think of was may-be to save her from the life I have had. I didn't want her to

live in the same hell. I remember laying on the couch thinking about things which have been done to me in the past; heartaches and the pains. I guess I loved her too much. I wanted to spare her from the pain * * * I got up and went through the kitchen and into the bedroom where I got the gun. I went to Tonia's room and started shooting. I then went down the hall to the back door and kicked the gun out the back door. I fell. I then went back to Tonia's room and saw her and I screamed. I then went and locked the back door and called Linda [the neighbor who was present when the first officers arrived at the trailer]."

After the defendant was arrested and charged with the murder on March 4, Stephenson again talked to her with no officers present. He asked her why she had killed Tonia and she replied, "Because I didn't want to see Tonia hurt like I am hurt."

After the warrant was served upon the defendant and she was taken into custody, the officers left her in the interview room in the sheriff's office in the company of her father. Unknown to them, Deputy Stewart observed them through a one-way mirror and heard their conversation. No one else was present in the interview room with the defendant and her father. The defendant was crying when her father entered the room and said, in effect, "Kathy, you did it didn't you?" The defendant replied that she did. When her father asked her why, the defendant replied that she did not know. (Both the defendant and her father, who testified as a witness for her, denied that she made this statement, each saying that her statement was that the officers wanted her to say she did it but she did not.)

On at least six different occasions, scattered through the entire period of interviews from February 27 to March 4, the defendant was informed by the officers of her constitutional rights, pursuant to the Miranda formula, and on at least three different occasions she signed written waivers of those rights.

Initially, the investigating officers did not consider the defendant a suspect but became increasingly suspicious of her complicity in or responsibility for the murder of the child as inconsistencies appeared in her various statements and repetitions of her narrative of the offense. One of the officers who first arrived at the trailer took the defendant out to his patrol car and talked to her there because of the confusion in the trailer incident

to the investigation. This interview was interrupted several times. He gave her the "Miranda warning" after she told him she had fired the pistol once when she found it on the ground behind the trailer, he knowing there were only three spent shells in the revolver and that there were three bullets in the child's head.

Subsequently, this officer took the defendant to the sheriff's office in order to obtain a recorded statement. He and succeeding investigators then interviewed the defendant several times throughout the day, February 27. There were frequent interruptions of these interviews and the defendant had access to water and the rest room, smoked at will and was offered food and coffee, which she declined.

For one of these interviews, late in the afternoon, the officers took her back to her trailer. She fixed herself a "mixed drink" and offered to fix like drinks for the officers, which offer they declined. She went through the trailer with them and into the child's room. She sat on the child's bed, the covers of which were heavily stained with blood. She showed no emotion whatever. (In her own testimony the defendant flatly contradicted this testimony of the officers and said that one of them forced her face down into the blood-stained covers. This the officers, called in rebuttal, categorically denied.)

In between the various interviews with the officers, scattered over the entire week, the defendant was permitted to return to her trailer, or to the home of her parents, and, on at least one occasion, she and Stephenson went to his apartment. During part of the interviews her parents and sister were also in the sheriff's outer office and, between interviews, she talked with them.

On February 28, the officers followed the defendant to the funeral home and into the room where she was arranging her child's hair for burial. When she demanded that they leave, they did so. They also attended the child's funeral on February 29 to observe the defendant's demeanor. According to the officers, she showed very little emotion at the funeral. The officers did not interview the defendant on February 29, March 1 or March 2, she being with her parents in their home.

While interviewing the defendant in the child's bedroom on February 27, as she sat on the bloodstained bed, the officers,

observing her lack of emotion, began to consider her a definite suspect and their interrogations became more vigorous. Nevertheless, she admitted nothing implicating her in the shooting, saying to the interrogating officer: "I haven't admitted anything. I need time to think." The officer then told the defendant he did not believe things had happened the way she told it and did not believe any intruder had come into the house and shot Tonia. She then requested time to take a bath and think. She was permitted to do so.

Throughout all interviews until March 3, when she said Stephenson shot the child, she adhered to her original story that an unknown intruder had done the shooting. No threats or promises were made to the defendant, no one yelled at her, no one accused her of killing her daughter or told her that she was mentally ill in any of the various interviews scattered over the week.

The defendant's own testimony was to the following effect: She denied shooting Tonia, denied any lack of emotion concerning her death, denied making the alleged confession to which the officers testified and charged the officers with harassment of her by making her sit upon the child's bloodstained bed, pushing her face down upon the blood stains, and showing her photographs of the child's body. To the best of her knowledge, the doors of the trailer were locked when she lay down on the couch prior to the shooting. She was lying there hoping that Stephenson would return and she fell asleep. The next thing she remembers is "something coming toward my face" like a cloth. She does not know if she was struck or if anything was put up to her nose. The next thing she remembers was some strange noise. She tried to get up but was unable to do so. She then saw a man "coming at an angle going through my kitchen out my *front* door," who said: "Now, Tony is dead. All of Tony is dead now." In her testimony she did not identify this man as Stephenson. She then ran to the child's bedroom, saw the wounded child and went to get her gun but it was not in her own bedroom where she kept it. As she passed the child's bedroom again, she saw the gun lying in the hallway. She opened the back door and kicked the gun out of the back door, her reason for doing so not being known to her. She positively did not shoot the child.

The defendant's parents and a number of her neighbors, including some who were called as witnesses for the State, testified

to the defendant's affectionate care of Tonia and to her definite display of emotion during the week following the child's death.

Dr. Robert Rollins, an expert psychiatrist, called as a witness for the defendant, testified that, in his opinion, the defendant was under "extreme stress and duress" throughout the course of the interrogation, saying: "It seems to me that the major stressful points would be that she was required to remain alone on occasions. She asked to leave, was not allowed to. There was repeated questioning. The situation was confusing to her; she was required to go into Tonia's bedroom; she was shown photographs; there were intimidating statements, promises made, false assurances, false information, statements about God; the absence of female deputies; the continued interrogations; the failure to inform her of the limits of the restraint and the actual intent of the process. These, I would judge to be the major stressful factors." This testimony by Dr. Rollins was predicated upon his having heard the testimony of the other witnesses, including the investigating officers, and was in response to a lengthy hypothetical question which is not set forth in the record but which the record states, "reviewed the facts of the case as set forth in this record."

Dr. Rollins then testified: "My evaluation of facts that you have put forth would be that this degree of stress would substantially impair the defendant's judgment and reasoning; that she would not be able to make a valid statement and my assessment of the process is that her major motivation was to terminate this harassment and in my assessment at this point she would have done anything to terminate that process."

On cross-examination, Dr. Rollins testified: "I have made no evaluation of the sanity of the defendant. The conclusion I have reached is only as strong as the facts assumed in the hypothetical which took fifteen minutes to read in court. If those facts were in error then I would have to restate my assessment. I was assuming facts as stated on the information in the hypothetical which included promises on the parts of the officers, false assurances and a failure to inform her of the possible termination of this process including specifically the drawing of the warrant."

Prior to trial, the defendant moved to suppress the above mentioned evidence as to statements allegedly made by her, for the reason that such statements were obtained in violation of her

right to counsel and were not understandingly, voluntarily and intelligently made without coercion or duress. A full pretrial hearing upon this motion was conducted by Judge Godwin. At that hearing, the evidence for the State and for the defendant (including testimony by Dr. Rollins), concerning the length, nature and duration of the several interrogations of the defendant, was substantially in accord with the above summary of the evidence given before the jury concerning these matters.

At the conclusion of the pretrial hearing, Judge Godwin entered a formal order, including detailed findings of fact, these findings being substantially in accord with the testimony of the investigating officers. Upon these findings, he concluded that, on the occasion of each interview, the defendant was advised of her constitutional rights and that all statements of the defendant, both those which were inculpatory and those which tended to be exculpatory, were made after she was so advised and that these were made freely, understandingly, knowingly, and voluntarily, with full knowledge of her constitutional rights. Accordingly, Judge Godwin concluded that her statements to the officers were legally competent to be received in evidence and denied the motion to suppress.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, for the State.

Joseph B. Cheshire V and William J. Bruckel, Jr., for Defendant Appellant.

LAKE, Justice.

[1] The defendant's first contention on appeal is that there was error in admitting testimony as to statements made by the defendant during periods of custodial interrogation. In this we find no merit.

The defendant's motion to suppress evidence of all such statements made by her was heard, prior to trial, by Judge Godwin, at which hearing both the State and the defendant presented evidence. As to the statements so made by the defendant and the circumstances and conditions under which they were made, there is no substantial variance between the evidence so introduced at the pretrial hearing on the motion to suppress and that introduced before the jury at the trial.

At the conclusion of the hearing of the motion to suppress, Judge Godwin made numerous and detailed findings of fact. Each of these findings is fully supported by evidence so offered at the hearing. Although the testimony so given by the investigating police officers and that so given by the defendant conflicted in some respects, in such a situation the findings made by the hearing judge and so supported by evidence are conclusive on appeal. *State v. Thompson*, 287 N.C. 303, 317, 214 S.E. 2d 742 (1975); *State v. Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431 (1973); *State v. Gray*, 268 N.C. 69, 78, 150 S.E. 2d 1 (1966), *cert. den.*, 396 U.S. 934, 90 S.Ct. 275, 24 L.Ed. 2d 232; Strong, N.C. Index 3d, Criminal Law, § 76.10.

These findings of fact included the following (summarized and renumbered): (1) The defendant's initial statement to the effect that an unknown intruder entered the trailer, shot the child while the defendant lay asleep on a couch in the living room and then fled from the trailer was made to the officers when they first arrived at the trailer and was made voluntarily; (2) when Deputy Stewart, shortly thereafter, took the defendant from the trailer out to his patrol car for an interview, he advised the defendant of her constitutional rights in accordance with the Miranda formula; (3) the defendant affirmatively indicated that she understood her rights and was willing to make a statement and answer questions without an attorney being present to advise her; (4) repeatedly thereafter (on five separate occasions), as the interviewing process was resumed by the officers following interruptions, the defendant was again so advised of her constitutional rights pursuant to the Miranda formula and signed written waivers thereof; (5) the interviewing process was frequently interrupted and the defendant on several occasions returned to her home, or to the home of her parents, no interviews taking place on February 29, March 1 or March 2; (6) during other interruptions of the interviewing process, the defendant was offered, and given, food and drink and opportunities to retire to the rest room.

These findings of fact fully support the conclusions of the hearing judge to the effect that: (1) The defendant was not in custody at the time of her initial statement to the officers shortly after their arrival at her trailer home; (2) all statements by the defendant to the officers, both inculpatory and exculpatory, were made after she was advised of her constitutional rights and were

"freely, understandingly, knowingly, and voluntarily made with full knowledge" of such rights, which rights she "at those times knowingly, understandingly, and voluntarily waived." These conclusions further support the final conclusion of the hearing judge that the statements made by the defendant to the officers "are legally competent to be received in evidence against the defendant upon her trial." Consequently, there was no error in admitting the officer's testimony concerning these statements.

[2] The defendant's second contention on appeal is that the trial court erred in failing to give to the jury instructions with reference to insanity, though requested to do so by the defendant. In this contention we find no merit.

A careful study of the entire record reveals no evidence whatever to indicate that the defendant was insane. Her defense at the trial was not insanity but was that it was not she who shot and killed the child. Dr. Rollins, the expert psychiatrist called as a witness in her behalf, expressly testified, "I have made no evaluation of the sanity of the defendant." The fact that the defendant, if the evidence for the State be true and the verdict of the jury be correct, committed a horrible, gruesome crime, the murder of her own sleeping, infant daughter, is not evidence of insanity requiring the submission of that question to the jury.

[3] It is thoroughly established in the law of this State, by numerous decisions of this Court, that the test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act. *State v. Cooper*, 286 N.C. 549, 569, 213 S.E. 2d 305 (1975); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Johnson*, 256 N.C. 449, 452, 124 S.E. 2d 126 (1962); *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). There is no evidence whatever in this record that the defendant was, at the time her child was shot, laboring under any disease or deficiency of the mind, or defect of reason, or that she did not comprehend the nature and quality of her act, or that she was incapable of distinguishing between right and wrong in relation thereto.

As Justice Ervin, speaking for this Court, said in *State v. Swink*, supra, "Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear." In the absence of any evidence whatever tending to rebut this presumption, it is not required of the State that it offer evidence to establish the defendant's sanity and it is not incumbent upon the trial judge to instruct the jury with reference to this matter.

"G.S. 1-180 requires only that the trial judge declare and explain the law '*arising on the evidence*' with respect to all substantial features of the case." *State v. Brower*, 289 N.C. 644, 657, 224 S.E. 2d 551 (1976). (Emphasis added.) "The judge is not required to instruct the jury, except on the law of the case." *State v. McKeithan*, 203 N.C. 494, 166 S.E. 336 (1932). "The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law *arising upon the evidence*." *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948). (Emphasis added.) With special reference to the matter of insanity, Justice Bobbitt, later Chief Justice, speaking for this Court in *State v. Mercer*, 275 N.C. 108, 114, 165 S.E. 2d 328 (1968), overruled on other grounds in *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975), said, "It is, however, error to instruct the jury as to legal principles unrelated to the factual situation under consideration." In *Childress v. Motor Lines*, 235 N.C. 522, 530, 70 S.E. 2d 558 (1952), Justice Johnson, speaking for the Court, said, "[I]t is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury."

[4] In *Patterson v. New York*, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977), the Supreme Court of the United States held a New York statute "burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law" does not violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. It necessarily follows that such provision of the United States Constitution is not violated by our rule that, in the absence of any evidence of insanity, it is not error for the trial judge to refuse the defendant's request that he instruct the jury upon the law relating to insanity as a defense to the charge of murder.

[5] The defendant's third contention on appeal is that she is entitled to a new trial because the trial court permitted a police officer, called as a witness for the State, to testify concerning a statement made by the defendant to her father in a conversation between them in the interview room at the sheriff's office, which conversation, unknown to the defendant and her father, was observed and heard by the witness, then in another room, through a one-way glass giving him a view of the interrogation room and the opportunity to hear what was said therein.

After the defendant had been formally arrested and charged with the murder and had orally confessed to the investigating officers that she shot and killed her daughter, the officers left her alone in the interrogation room and then permitted her father to join her there. The only reference in the entire record to this conversation is the following:

"Q. On the date she was charged and after she had been served with a warrant [immediately following which she made her confession to the investigating officers], did you have occasion to observe the defendant and her father, Mr. Matthews, together?

A. Yes, sir, I did.

Q. And where were they at that time?

A. They were in the interview room in the sheriff's office.

Q. And where were you?

A. I was in a view room which is located next to it.

Q. There is a one-way glass in between, is there not?

A. Yes sir, there is.

Q. Could you see both of them and hear both of them?

A. Yes sir, I could.

Q. Did they have any conversation?

A. Yes sir, they did.

Q. Was anyone else present in the room with them?

A. No.

Q. Would you describe that conversation?

A. I did not write down the conversation. It went something to the effect—Kathy was crying—

MR. CHESHIRE [defendant's counsel]: Objection *to something to the effect.* (Emphasis added.)

COURT: Overruled.

EXCEPTION NO. 9

A. Kathy was crying. Her father entered the room and her father said *something to the effect,* Kathy, you did it, didn't you? Possibly not the right word but *something to that effect.* (Emphasis added.)

MR. CHESHIRE: Objection and move to strike.

Q. What was her response?

COURT: Objection overruled. Motion denied.

EXCEPTION NO. 10

Q. What was her response, if any?

A. Her response was that she did.

MR. CHESHIRE: Objection and move to strike.

COURT: Overruled.

EXCEPTION NO. 11

Q. Did the conversation continue?

A. Yes sir. Her father said to her, asked her why. She said she didn't know. Her father told her that if she did not want the child, that she knew that the child had a home; that she could have carried the child to their house.

Q. Now, none of these questions or answers in this conversation you have just described were in response to any questions by any law enforcement officer, were they?

A. There were none present in the room.

Q. All right, sir. And there were no questions by law enforcement officers which invoked them that you saw?

A. No."

It is apparent from the record that the ground for the defendant's objections to this evidence was that the witness was testifying "to the effect" of the conversation rather than to its precise words. It is well settled that "evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have," and the judge is not required to exclude it. Stansbury, North Carolina Evidence (Brandis Rev.), § 27. It is equally well settled that, "although a general objection to obnoxious evidence will be sustained when no ground has been assigned, if upon any ground it ought to have been rejected, yet when the ground of the objection can be fairly inferred from the record as understood by the parties at the time, another cannot be assigned in the reviewing court." *State v. Cumber*, 280 N.C. 127, 131, 185 S.E. 2d 141 (1971); *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597 (1962); *State v. Wilkerson*, 103 N.C. 337, 9 S.E. 415 (1889); *Gidney v. Moore*, 86 N.C. 484 (1882); *Vredenburgh Saw Mill Co. v. Black*, 251 Ala. 302, 37 So. 2d 212 (1948); *Spencer v. Burns*, 413 Ill. 240, 108 N.E. 2d 413 (1952); *Monroe Loan Society v. Owen*, 142 Me. 69, 46 A. 2d 410 (1946); *Kroger Grocery & Baking Co. v. Harpole*, 175 Miss. 227, 166 So. 335 (1936); Strong, N.C. Index 2d, Trial, § 15; Stansbury, North Carolina Evidence (Brandis Rev.), § 27; 1 Wigmore on Evidence (3d Ed.), § 18, p. 339; 75 Am. Jur. 2d, Trial, § 167; 88 C.J.S., Trial, § 125b. The stated ground for the objection by the defendant to this testimony was not valid and, considering the objection on that ground alone, there was no error in overruling it.

Furthermore, the admission of this evidence was harmless, beyond a reasonable doubt, in view of the fact that the evidence of the defendant's much more detailed confession to the police officers, made immediately prior to the conversation here in question, was properly admitted and, in addition, the defendant's lover, David Stephenson, testified as follows:

> "After the warrant was served on her Thursday, March 4th, I talked to her with no officers present. I walked in and Kathy was crying and she grabbed me and I held onto her and we just held each other and I said, 'Why, Kathy? Why?' I said, 'Was it because of me?' And she stated, 'David, I don't want to hurt you no more,' and paused and I said, 'Why?' She

said, 'Because I didn't want to see Tonia hurt like I am hurt.' "

Nothing in the record indicates that the conversation between the defendant and Stephenson was induced or monitored, or otherwise overheard by any police officer.

In view of these two properly admitted confessions, it is inconceivable that the verdict of the jury would have been otherwise had the evidence of the conversation between the defendant and her father not been introduced. Thus, even if a proper ground for objection had been stated by the defendant, we conclude that the admission of this evidence was harmless beyond a reasonable doubt and the defendant is not entitled to a new trial on that account. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Cox*, 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. den.*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed. 2d 112; *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970).

We are not to be understood as condoning this unfair tactic of the investigating officers. Although the defendant had already been arrested and charged with the murder of her child and, thereafter, had confessed to the investigating officers that she was the person who shot and killed the child, when the officers, thereupon, ostensibly withdrew and sent the defendant's father into the room, the defendant had a "reasonable expectation of privacy" throughout her conversation with her father. *See*: *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed. 2d 67 (1973); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). The State was ill-advised in introducing this unfairly obtained evidence so totally unnecessary to the conviction of the defendant. However, since it was so clearly an unnecessary, and so harmless, addition to properly admitted evidence of her confessions and since the defendant's objection to its introduction was not made upon the ground that the evidence was unconstitutionally obtained, the ruling of the trial court is not basis for granting the defendant a new trial.

The defendant's other assignments of error set forth in her statement of her case on appeal not having been brought forward into her brief and no argument or authority in support thereof be-

ing set forth therein are deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 741. Nevertheless, in view of the serious nature of this alleged offense, we have carefully reviewed the entire record, including the abandoned assignments of error, and find therein no error which would entitle the defendant to a new trial. The defendant was represented at her trial by able and diligent counsel, employed by her, which counsel was then appointed by the trial court to represent her on appeal, she being then found indigent. She has received able, diligent and vigorous representation, both in the trial court and in this Court. She was found guilty of the murder of her child by a jury, eleven members of which were women. She has had a fair trial, free from prejudicial error.

No error.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ANDREW CURRIE CHANTOS

No. 10

(Filed 11 November 1977)

1. **Insurance § 112— liability coverage pursuant to statute—reimbursement under policy not required**

Plaintiff insurer's contention that since it was required by statute to provide automobile liability coverage for defendant, a stranger to the insurance contract who was in lawful possession of the insured automobile, it is entitled to reimbursement from defendant in accordance with the reimbursement provisions of the insureds' policy and by reason of G.S. 20-279.21(h) is without merit, since that statute does not compel reimbursement by the insured but merely allows the insurer and the insured to enter into such an agreement; therefore, the policy provision in question is merely a contractual agreement between the parties to the policy and does not have the effect or force of a statute of which defendant could be charged with constructive knowledge.

2. **Insurance § 112— reimbursement of insurer—negligent driver's demand for coverage under policy**

Since the mandatory coverage required by the Financial Responsibility Act does not require an insurer to extend medical payment coverage beyond the terms of the policy to one who receives liability coverage solely by virtue of the Act, the filing of a claim by defendant under the medical payment clause of the policy in question did not amount to seeking protection under the mandatory liability provisions of the policy; nor was a contractual relationship created between insurer and defendant because of defendant's failure to reply

to insurer's letters about settlement of the claim, since silence generally does not result in the formation of a contract between primary parties. G.S. 20-279.21(b)(2).

3. **Insurance § 112— liability coverage pursuant to statute—reimbursement of insurer proper**

An automobile liability insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer has paid as a result of liability imposed by statute.

4. **Insurance § 112— reimbursement of insurer—negligent driver's demand for coverage under the policy—instruction erroneous**

In an action by insurer for reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer paid as a result of liability imposed by statute, the trial court erred by instructing the jury that in order for plaintiff insurer to invoke the reimbursement provisions of the policy, plaintiff had the burden of proving by the greater weight of the evidence that defendant sought coverage and protection under the policy, since contracts implied in law require no expression of assent or agreement by the parties.

5. **Infants § 2— reimbursement of insurer—statutory obligation—infancy of negligent driver—no relief from liability**

In an action by insurer for reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer paid as a result of liability imposed by statute, the trial court erred by instructing the jury that plaintiff insurer had the burden of proving that defendant had accepted benefits and thereafter failed to repudiate them within a reasonable time after reaching his majority, since infancy did not relieve defendant of rights and liabilities imposed upon the parties by the Financial Responsibility Act, the language of that Act making it clear that the Legislature intended to make all financially irresponsible persons, including minors, subject to its provisions.

6. **Insurance § 112— reimbursement of insurer—liability of insurer not determined at settlement—settlement of claim proper**

Where plaintiff insurer sought reimbursement from defendant whose negligence caused the injuries and damages for which the insurer paid as a result of liability imposed by statute, defendant's contention that plaintiff had no right to settle with the injured person and seek reimbursement because at the time of settlement plaintiff was not under legal obligation to make settlement is without merit, since it was not incumbent upon plaintiff to wait until suit was filed or judgment entered before seeking to mitigate the absolute liabilities imposed upon it by statute.

7. **Insurance § 112— reimbursement of insurer—negligence of defendant—determination of both in one action proper**

In an action by insurer for reimbursement from a stranger whose alleged negligence caused the injuries and damages for which the insurer paid as a result of liability imposed by statute, the fact that defendant's negligence had

not yet been determined did not bar insurer from proving it at the same trial in which it made its claim for indemnity. G.S. 20-279.21(f).

APPEAL by plaintiff from *Bailey, J.*, 27 September 1976 Session of WAKE Superior Court. Defendant filed cross assignments of error pursuant to Rule 10(d) of the Rules of Appellate Procedure. We allowed plaintiff's petition for discretionary review prior to determination by the Court of Appeals on 15 April 1977.

This is the third time that this case has been tried. The first trial resulted in a summary judgment in favor of defendant. This judgment was reversed by the Court of Appeals. See 21 N.C. App. 129, 203 S.E. 2d 421. The second trial also resulted in a summary judgment for defendant which was again reversed by the Court of Appeals. 25 N.C. App. 482, 214 S.E. 2d 438. *Cert. denied*, 287 N.C. 465, 215 S.E. 2d 624.

Plaintiff instituted this action seeking reimbursement from defendant of the sum of $9,581.25 which plaintiff had paid to Charles Edward McDonald (McDonald) in settlement of personal injuries and property damages sustained by McDonald in a collision with an automobile insured by a policy of insurance issued by plaintiff to David Earl Williams and his wife Sallie Young Williams. In summary, plaintiff alleged that on 30 January 1971 Sallie Young Williams allowed her minor son David to use her 1965 Mustang automobile which was insured by the policy above referred to. David, in turn, gave defendant, who was then 16 years old, permission to use the car. Defendant, while in lawful possession of the Williams' car, negligently operated the automobile thereby causing a collision with an automobile operated by McDonald; that defendant's negligence was the proximate cause of serious personal injuries and substantial property damage suffered by McDonald. Nationwide thereafter notified defendant that it was reserving all rights and defenses under the provisions of the Williams' policy, but nonetheless under its reservations of rights and at the request of defendant proceeded in good faith to settle the McDonald claim against defendant for the sum of $9,581.25. As a result of this settlement, Nationwide obtained a release which forever discharged defendant Chantos from any further liability to McDonald. Plaintiff further alleged that at the time of said collision, defendant was in lawful possession of the insured automobile and therefore plaintiff was re-

quired by the terms of G.S. 20-279.21(b) to extend coverage to defendant solely because of the provisions of the statute; and that plaintiff was entitled to reimbursement from defendant pursuant to the provisions of G.S. 20-279.21(h) and the policy. Plaintiff thereupon prayed for recovery of the sum of $9,581.25 with interest from 5 April 1972.

By his answer defendant admitted that while he was in lawful possession of the insured vehicle, he was involved in an accident with McDonald as a result of which McDonald suffered personal injury and property damage; that plaintiff was legally obligated to afford coverage and protection to him. He denied the other substantive allegations of the complaint and by way of further defense alleged that on the date plaintiff settled with McDonald, defendant was a minor; that he had at no time entered into any contract or agreement with plaintiff and if plaintiff contended that any contract or agreement was entered into, he (defendant) repudiated it because of his minority at the time. He further alleged that he had not ratified but had disavowed any such contract since reaching majority. Defendant also alleged that he was not a party to the insurance policy issued by plaintiff to the Williams', therefore he was not liable to plaintiff in any amount.

Plaintiff replied and alleged that during both his minority and majority, defendant accepted the benefits of the release obtained by plaintiff and thereby ratified the release so as to estop him from denying same.

In May, 1974, plaintiff filed an amendment to its complaint alleging that defendant sought coverage, protection and defense from Nationwide under the Williams' policy, and in the alternative that, if the jury should find that defendant did not seek such coverage and protection, defendant caused Nationwide to be led to understand that he was expecting such coverage and protection. It was further alleged that defendant was notified of plaintiff's attempt to negotiate settlement with McDonald while the negotiations were in progress. Defendant denied all the allegations in the amendment to plaintiff's complaint.

Plaintiff's evidence in essence tended to show that on 30 January 1971, defendant, who was then sixteen years of age, borrowed a car, insured by plaintiff, from one David Williams, also a

minor, who had been allowed to use the car by his mother, one of the named insureds in the policy. While driving the car, defendant crossed the center line on North Boulevard in Raleigh and collided with an automobile being driven by one Charles McDonald. Both defendant and McDonald suffered extensive injuries.

Thereafter, on 21 April 1971, plaintiff wrote to defendant informing him that a claim had been filed against him and, further, that it was plaintiff's understanding that defendant was expecting coverage under the policy issued to the named insureds. Plaintiff explained that its position in the case was that defendant was not in lawful possession of the car on 30 January, and he was, therefore, not entitled to coverage under the policy. Plaintiff did, however, reserve the right to defend, negotiate or settle the claim without actually obligating itself to do so. Defendant did not respond to this letter.

Plaintiff entered into negotiation with McDonald and at McDonald's urging settled the claim for property damage on 21 May 1971 in the amount of $581.25. On 15 June 1971, defendant, through his attorney, sent plaintiff medical bills incurred in the treatment of his injuries sustained in the accident. Plaintiff rejected these claims, contending that, under the circumstances, the policy did not cover them.

After reconsidering its position that defendant was not in lawful possession of the Williams' car, plaintiff notified defendant on 5 November 1971 that it was attempting to negotiate a settlement of McDonald's claim. A copy of this letter was sent to defendant's attorney. Neither defendant nor his attorney responded to this letter. On 5 April 1972, plaintiff paid McDonald an additional $9,000.00 in final settlement and received a release in favor of both plaintiff and defendant. Plaintiff did not contact defendant again until this action was filed in February of 1973.

The final pretrial order in the case before us contained, *inter alia*, the following stipulations:

> 2. It is stipulated that the defendant is now twenty-one years of age.
>
> 3. It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of the parties.

4. In addition to the other stipulations contained herein, the parties stipulate and agree to the following undisputed facts:

(a) That on the 30th day of January, 1971, the plaintiff had in force a policy of liability insurance on a certain 1965 Mustang automobile owned by David and Sally (sic) Williams, parents of David Williams, Exhibit "A" to the Complaint filed herein, being a true copy of such policy.

(b) On January 30, 1971, Mrs. Williams gave her son, David, permission to use the 1965 Mustang.

(c) Charles Edward McDonald did not file a claim nor institute a civil action against defendant, Andrew Currie Chantos for damages arising out of their accident of January 30, 1971.

(d) David Williams allowed the defendant to use the Mustang and put him in lawful possession thereof; Chantos did not have the permission to operate the Mustang from Mr. or Mrs. David Williams, owners of the Mustang and the parents of David Williams.

(e) On January 30, 1971, the defendant while traveling North on "Downtown Boulevard" in the City of Raleigh, in the northbound lane and while driving the Mustang automobile during a rainstorm, left the northbound lanes and crossed over into the southbound lanes, colliding with an automobile traveling South in the southbound lanes and being driven by Charles Edward McDonald.

(f) McDonald was injured in the collision.

(g) Nationwide proceeded to handle and settle with McDonald for the sum of $9,581.25 plus his property damages.

Issues were submitted to the jury and answered by the jury as follows:

1. Did the defendant, Andrew Currie Chantos, seek protection or coverage under Nationwide's policy of automobile insurance from Nationwide Mutual Insurance Company on or prior to Nationwide's settlement with Charles Edward McDonald on or about April 5, 1972?

ANSWER: YES

2. Did the defendant, Andrew Currie Chantos, accept the benefit of the settlement by Nationwide with McDonald and thereafter fail to repudiate or disaffirm that acceptance within a reasonable time after reaching the age of eighteen years?

ANSWER: NO

3. What amount, if any, is the plaintiff, Nationwide, entitled to recover of the defendant Andrew Currie Chantos?

ANSWER: _____

Plaintiff appealed from judgment entered in favor of defendant.

Ragsdale, Liggett & Cheshire, by George R. Ragsdale, William J. Bruckel, Jr., and Robert R. Gardner, for plaintiff-appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant-appellee.

BRANCH, Justice.

At the threshold of this case, we consider it proper to state that our denial of certiorari in the case of *Nationwide Mutual Insurance Company v. Chantos*, 25 N.C. App. 482, 214 S.E. 2d 438, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624, does not necessarily constitute approval of the reasoning or the merits of that decision. In the appeal now before us, we may consider any error which has occurred during the course of this litigation, provided the parties have taken proper steps to preserve the questions for appellate review. *Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133.

As between the insurer and the named insured, the validity of the reimbursement provision of the policy *sub judice* is not before us. However, we note, in passing, that this question has been decided in other jurisdictions. Although there is a conflict in other jurisdictions, the majority view appears to uphold such provisions as between an insurer and the named insured. See 29 A.L.R. 3d 291. We wish to make it clear that this decision is not to be construed as approving or disapproving the reimbursement

provisions of this policy as between insurer and the named insureds.

[1] The posture of appellant is that since it was required by statute to provide liability coverage for defendant, it is entitled to reimbursement from defendant in accordance with the reimbursement provisions of the Williams' policy and by reason of the provisions of G.S. 20-279.21(h).

G.S. 20-279.21(h) provides:

> Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Article.

Pursuant to this authorization, appellant included in the Williams' policy the following:

> Financial Responsibility Laws
>
> When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

While the policy provision does comply with the statutory authorization, G.S. 20-279.21(h) does not *compel* reimbursement by the insured, it merely allows the insurer and the insured to enter into such an agreement. The policy provision is, then, merely a contractual agreement between the parties to the policy and does not have the effect or force of a statute of which we could charge defendant with constructive knowledge. See, Annot., 58 Am. Jur. 2d, *Notice* Section 21. It is a fundamental principle of contract law that parties to a contract may bind only themselves and that the parties to the contract may not bind a third person who is not a party to the contract in absence of his consent to be bound. 17A

C.J.S., *Contracts* Section 520, page 999. However, appellant contends that defendant sought protection under the policy by submitting a claim for medical expenses incurred in the treatment for injuries sustained by him in the accident and that defendant led appellant to believe that he was relying on it for protection because he failed to respond to its letters of 21 April 1971 and 5 November 1971. We reject these contentions.

[2] The mandatory coverage required by the Financial Responsibility Act is solely for the protection of innocent victims who may be injured by financially irresponsible motorists. It does not require the insurer to extend medical payment coverage beyond the terms of the policy to one who receives liability coverage solely by virtue of the Act. G.S. 20-279.21(b)(2). Thus the filing of a claim by defendant under the medical payment clause of the policy did not amount to seeking protection under the mandatory liability provisions of the policy. Neither was a contractual relationship created between the parties to this action because of defendant's failure to reply to appellant's letters. Except in unusual circumstances, silence will not result in the formation of a contract between primary parties. Calamari, Contracts, Section 31. Certainly this rule would not operate to bind a third party who is without any knowledge of the provisions of the contract.

Appellant's letter of 21 April 1971 reserved certain rights but made no mention of any right to reimbursement. The letter of 5 November 1971 informed defendant that appellant was attempting to negotiate a settlement with McDonald. Plaintiff's inaction and silence, under these circumstances, could not bind him to a contract provision of which he had no knowledge.

[3] We, therefore, hold that plaintiff cannot rely upon the reimbursement clauses contained in the Williams' policy to support its action. By so holding, we do not decide that there is no theory upon which appellant could recover. We are therefore faced with the troublesome question of whether an insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer had paid as a result of liability imposed by statute. We are unable to find a case in which any court has considered this question. We must, therefore, look to the applicable statutes and relevant holdings of our courts for guidance.

G.S. 20-279.21(b), in part provides:

Such owner's policy of liability insurance:

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle, or motor vehicles. . . .

Also pertinent to our decision is G.S. 20-279.21(f) which reads as follows:

(1) Except as hereinafter provided, and with respect to policies of motor vehicle liability insurance written under the North Carolina assigned risk plan, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; . . .

In interpreting statutes, our task is to seek and apply the legislative intent. *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12. The Court will not adopt an interpretation which results in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. *Puckett v. Sellars*, 235 N.C. 264, 69 S.E. 2d 497. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765.

Under the Financial Responsibility Act, all insurance policies covering loss from liability growing out of the ownership, maintenance and use of an automobile are mandatory to the extent coverage is required by G.S. 20-279.21. The primary purpose of this compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or

not the nature or circumstances of the injury are covered by the contractual terms of the policy. The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834; *Strickland v. Hughes, supra; Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118; *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654.

In this action it is alleged and admitted in the pleadings and stipulated by the parties that, at the time of the collision between the automobile operated by defendant Chantos and the automobile operated by McDonald, defendant was in *lawful possession* of the automobile insured by the policy issued by appellant to Mr. and Mrs. Williams. Thus, while defendant was not an "insured" under the contractual terms of the policy, he was made an "insured" for the protection of the public by virtue of G.S. 20-279.21(b)(2). McDonald's right to recover against appellant became absolute upon the occurrence of the accident which caused injury and damage to him. *Insurance Co. v. Casualty Co., supra.*

Appellant's liability to McDonald did not arise out of any actionable negligence on its part but by operation of law. While the Financial Responsibility Act does impose liability upon an insurer as a matter of public policy, it is obvious that, but for the actions of defendant, McDonald would have had no claim or cause of action against appellant. Thus, liability has been imposed upon appellant in much the same manner that public policy imposes liability upon an employer for the tortious conduct of his employee under the doctrine of *respondeat superior.* See, Prosser, Torts, Section 68. See also, Lee, North Carolina Law of Agency and Partnership, Section 21. The same theory which permits an employer to be indemnified against a negligent employee should permit Nationwide to seek recovery from defendant Chantos.

It has long been established that where liability has been imposed upon an employer because of the negligence of his employee and he incurs such liability solely under the doctrine of *respondeat superior,* the employer, having discharged the liability, may recover full indemnity from the employee. *Ingram v. Insurance Co.*, 258 N.C. 632, 129 S.E. 2d 222. *See also, Gadsden v.*

Crafts & Co., 175 N.C. 358, 95 S.E. 610; *Smith v. Railroad*, 151 N.C. 479, 66 S.E. 435. This rule of indemnity has also been applied to joint tort-feasors. The general rule of common law is that there is no right of indemnity between joint tort-feasors. *Bowman v. Greensboro*, 190 N.C. 611, 130 S.E. 502. This rule is modified by the doctrine that a party secondarily liable is entitled to indemnity from the party primarily liable even when both parties are denominated joint tort-feasors. For example, when the active negligence of one tort-feasor and the passive negligence of another combine to proximately cause injury to a third party, the passively negligent tort-feasor who is compelled to pay damages to the injured party is entitled to indemnity from the actively negligent tort-feasor. *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768; *Bowman v. Greensboro, supra.* The theory underlying the right of one who is passively liable to recover against one who is primarily liable is succinctly stated in the Restatement of Restitution, Section 76:

> A person who, in whole or in part, has discharged a duty which is owed by him, but, which as between himself and another, should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his act.

The theory of indemnity applied in the cases discussed above is applicable to instant case.

Assuming that Chantos' negligence proximately caused the damages and injuries to McDonald, he became the actual wrongdoer and was primarily liable. Nationwide's statutory liability was passive and secondary. Nationwide discharged its statutory duty and is, therefore, entitled to seek reimbursement. We do not believe that the Legislature intended to enact a statutory scheme which would permit a wrongdoer to gratuitously reap the benefits of an insurance policy without being liable to indemnify the insurer who became liable solely by virtue of that statute. To so hold would be to reach a highly inequitable and foolish result. When such a void appears in the law, it should, when possible, be bridged by equity.

We hold that the pleadings and evidence in instant case are sufficient to permit the trial judge to submit the case to the jury on the theory of a contract of indemnity implied in law.

[4] We now turn to appellant's contention that the trial judge erred by instructing the jury that in order for plaintiff to invoke the reimbursement provisions of the policy, Nationwide had the burden of proving by the greater weight of the evidence that Chantos sought coverage and protection under the policy.

Unlike conventional contracts or contracts implied in fact, contracts implied in law require no expression of assent or agreement by the parties. In Volume 1, Section 19, at page 46, of Corbin on Contracts, we find the following statement:

> A quasi contractual obligation is one that is *created by the law* for reasons of justice, *without any expression of assent* and sometimes even against a clear expression of dissent. If this is true, it would be better not to use the word "contract" at all. Contracts are formed by expressions of assent; quasi contracts quite otherwise. The legal relations between contractors are dependent upon the interpretation of their expressions of assent; in quasi contract the relations of the parties are not dependent on such interpretation. (Emphasis ours.)

After the rights and liabilities of Nationwide and Chantos were fixed by statute and operation of law, Nationwide's right to reimbursement from Chantos was not dependent upon any action on the part of defendant Chantos. The challenged instruction was therefore erroneous and might well have led the jury to believe that the rights of the parties depended upon the formation of a conventional contract based upon assent of the parties.

[5] In view of the foregoing analysis, it is obvious that we must also sustain appellant's assignment of error to the effect that the trial judge erred by instructing the jury that appellant also had the burden of proving that defendant had accepted benefits and thereafter failed to repudiate them within a reasonable time after reaching his majority. Again, this instruction sounds in the theory of conventional contracts.

It is well settled that the conventional contracts of an infant, except those for necessities and those authorized by statute, are voidable at the election of the infant and may be disaffirmed by the infant during minority or within a reasonable time after reaching majority. *Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19; *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94; *Col-*

lins v. Norfleet-Baggs, 197 N.C. 659, 150 S.E. 177; *Chandler v. Jones*, 172 N.C. 569, 90 S.E. 580. However, the relationship of the parties before us does not arise out of such a contract.

Infancy does not protect a person from obligations or duties required of him by statute. Furthermore, it is immaterial that the statute imposing quasi contractual obligations or duties does not expressly mention infants so long as the statute, in its ordinary meaning, would include infants within its general terms. Annot., 42 Am. Jur. 2d, *Infants* Section 64; *McCall v. Parker*, 54 Mass. (13 Met.) 372.

In *McCall v. Parker, supra*, the court considered a statute which required one accused of being the father of an illegitimate child to post bond with sureties. In that case, the accused, a minor, signed the bond as principal, and, he and his sureties sought to avoid payment because of his minority at the time the bond was executed. The Massachusetts court, in rejecting this defense, in part, stated:

> The remaining objection to the action is that the defendants are not liable because the principal in the bond was a minor. To this objection, it has been answered that the statute requires that the party accused, under the bastardy act, should give bond, and there is no exception of minors, as there is in the Rev. Sts. c. 135, Sec. 20, as to witnesses, being married women or minors; and it has been argued, that it must, from the nature of the subject, have been intended that minors should not be excepted. And the rule laid down by Lord Wilmot, as to the construction of similar statutes, is applicable. He says, "Many cases have been put, where the law implies an exception, and takes infants out of general words, by what is called a virtual exception. I have looked through all the cases; and the only inference to be drawn from them is, that where the words of law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject matter of it." *Earl of Buckinghamshire v. Drury, Wilmot, 194*. By this rule of construction, we are of the opinion that the Rev. Sts. c. 49, Sec. 1, must be so construed as to include infants.

The language of the Financial Responsibility Act leaves no doubt that the Legislature intended to make all financially irresponsible persons, including minors, subject to its provisions. Minors have long been accorded the privilege of driving in this State, G.S. 20-9(a), and the Legislature enacted G.S. 20-279.21 knowing full well that minors would come within its operative effect. Since the provisions of the Financial Responsibility Act imposed mandatory obligations upon the parties without any expression of assent by either of them, it follows, then, that neither party could of his own volition revoke or disaffirm the obligations created by law. See, 1 Corbin on Contracts, Sec. 19.

We hold that defendant's minority had no effect whatever upon the rights and liabilities imposed upon the parties by the Financial Responsibility Act. Therefore, the trial judge erred by instructing the jury on the issue of defendant's repudiation and disaffirmance of any benefits received from appellant.

[6] By cross assignment of error, defendant takes the position that plaintiff had no right to settle with McDonald and seek reimbursement because at the time of settlement plaintiff was not under legal obligation to make settlement. He directs our attention to the fact that suit had not been instituted and no formal claim had been filed with plaintiff or defendant.

The statute imposing mandatory obligations upon an insurer also expressly authorizes the insurer to negotiate and settle any claim covered by the policy. When exercised in good faith, these statutory provisions are valid and binding on the insured. G.S. 20-279.21(f)(3); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886; *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8. This statutory authority is in accord with the policy provisions that exist between insurer and named insureds. *Liability Co. v. Aronofsky*, 308 Mass. 249, 31 N.E. 2d 837; 44 Am. Jur. 2d, *Insurance* Section 1524.

We hold that it was not incumbent upon plaintiff to wait until suit was filed or judgment entered before seeking to mitigate the absolute liabilities imposed upon it by statute.

In order for Nationwide to recover it will have to prove that defendant's negligence was the proximate cause of the injuries and damages suffered by McDonald and that the settlement made with McDonald was fair and made in good faith. In *Casualty Co.*

v. Krol, 324 Ill. App. 478, 58 N.E. 2d 473, the court reversed a judgment in favor of a defendant in a suit brought for reimbursement for a sum paid by the insurer under the Illinois Financial Responsbility Act. The court there, *inter alia*, stated:

> . . . In order to recover, plaintiff was of course obliged to prove that the settlement was fair, that defendant was liable to the claimants, and that the whole transaction was carried out in good faith. . . .

See also, *Casualty Co. v. Sauers*, 38 F. Supp. 656 (W.D. Pa.); *Liability Co. v. Aronofsky*, *supra*.

[7] The fact that defendant's negligence has not yet been determined does not bar Nationwide from proving it at the same trial in which it makes its claim for indemnity. We base this conclusion upon the same analogy to the employer who has been made a party defendant in an action based on his employee's negligence in which the employer is permitted to cross file against the employee for indemnity. See, *Steele v. Hauling Co.*, 260 N.C. 486, 133 S.E. 2d 197. We find no logical reason why under the facts of this case Nationwide should not be allowed to likewise prove both defendant's negligence and its own right to indemnification in the same trial.

For the reasons stated, there must be a new trial. At that trial the trial judge should submit the following issues:

1. Was Charles Edward McDonald injured and damaged by the negligence of defendant? _____
2. Was plaintiff's settlement with McDonald made in good faith? _____
3. Was plaintiff's settlement with McDonald fair and reasonable? _____
4. What amount is plaintiff entitled to recover? _____

The trial judge should instruct the jury that if they answer the first issue "No," the case is ended and judgment will be entered in favor of defendant. If the answer to the first issue is in the affirmative, the trial judge should instruct the jury to proceed to consider the second issue. If the jury answers the second issue "No," the case would be ended and judgment would be entered in favor of defendant. If the jury answers the second issue "Yes,"

they should proceed to consider the third issue. If the jury answers the third issue "Yes," the case is ended and the trial judge should enter judgment for plaintiff in the amount of $9,581.25 with interest from 5 April 1972. The trial judge should instruct the jury that if it answers the third issue "No," it should proceed to answer the fourth issue.

We do not deem it necessary to consider the remaining assignments and cross assignments of error since they may not arise at the next trial.

New trial.

STATE OF NORTH CAROLINA v. TONY GRAY KIRKMAN AND RONNIE LEE HAWKS

No. 13

(Filed 11 November 1977)

1. Jury § 7.14— peremptory challenge of juror after impanelment

Where, after the jury in a homicide case, including two alternates, had been selected and impaneled, a juror reported to the court that she had observed a communication between a lady with whom she worked and counsel for one of the defendants and believed it possible that this lady was a relative of such defendant, and upon inquiry by the court it developed that the lady who had so communicated with the attorney was one defendant's wife, the trial court did not abuse its discretion when it permitted the district attorney to recall the juror for further examination, allowed the district attorney's peremptory challenge of the juror, and seated one of the alternate jurors in place of the juror so excused.

2. Criminal Law § 73.2— instruction to witness to tell the truth—no hearsay

Testimony that the district attorney and investigating police officers had told the witnesses "to tell the whole truth and nothing but the truth" was not hearsay.

3. Criminal Law § 73.2— showing that statement was made—no hearsay

In this prosecution for murder committed in the perpetration of a robbery, testimony that the victim said "that he had plenty of money on him" and he tried to talk one defendant's girl friend into leaving with him was not hearsay since the purpose of the evidence was not to prove that the victim did, in fact, have money on his person but was to show that the statement was made in the presence of defendant's girl friend.

4. Criminal Law § 73.3— statements showing motive—no hearsay

In this prosecution for murder committed in the perpetration of a robbery, testimony that the witness overheard one defendant's girl friend tell such defendant about what money the victim had on him was not hearsay, whatever may have been the source of the girl friend's information, since the purpose of the testimony was not to prove the correctness of the girl friend's statement to defendant as to what money the victim had on his person but was to establish that the statement was, in fact, made to such defendant, thus providing a motive for the killing of the victim.

5. Criminal Law § 89.3— corroboration—prior joint statement by two witnesses—inability to separate statements by each witness

The trial court in a homicide case did not err in refusing to strike an officer's testimony, admitted for corroborative purposes, as to a joint statement made to him by two State's witnesses on the ground that the officer was not able to state specifically which statements made at the joint interview were made by each witness, since there was no suggestion in the officer's testimony that any statement made by either witness was contradicted by the other.

6. Criminal Law § 89.5— admission of noncorroborative testimony—harmless error

Defendants were not prejudiced by the trial court's failure to instruct the jury to disregard an officer's noncorroborative testimony that a witness told him that the first defendant "made a nodding motion" to the second defendant before the second defendant shot the victim, since the testimony concerned an immaterial detail, and the discrepancy was of no consequence in view of testimony that after the second defendant shot the victim three times, the first defendant directed him to shoot the victim again because he was still moving.

7. Criminal Law § 62— references to lie detector tests

Defendants were not prejudiced when a witness referred to the fact that she had taken a lie detector test, a second witness stated she had been asked by officers to take a lie detector test, and an officer testified that he had asked the second witness to take a lie detector test, since there was no testimony as to the result of any polygraph test or as to the particular statement of the witness to which any such test related.

8. Homicide § 21.6— murder in perpetration of robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of two defendants for first degree murder committed during the perpetration of a robbery where it tended to show that a female occupant of a trailer saw several hundred dollar bills in the victim's wallet; when one defendant came to the trailer a short time later, he and the female occupant had a private conversation, following which both left the trailer; in about 20 minutes both defendants entered the trailer and, without any conversation except normal salutations, the second defendant shot the victim three times and then, at the

direction of the first defendant, shot him again; and the second defendant then removed from the victim's pocket his wallet, pistol and keys.

9. **Robbery § 4— variance—amount of money taken**

There was no fatal variance between indictment and proof in an armed robbery case where the indictment charged that defendants did take, steal and carry away "approximately $400.00 in United States currency" from the victim's person and the evidence showed that the victim had several hundred dollars in his wallet and defendants took the victim's wallet, it not being necessary that the State prove the taking of the exact amount of money alleged in the indictment.

10. **Constitutional Law § 33; Homicide § 31.1— life imprisonment for first degree murder—ex post facto laws**

A construction of Ch. 1201, Session Laws of 1973 as making life imprisonment the proper sentence for a first degree murder committed prior to the decision of the U.S. Supreme Court invalidating the death penalty in this State for first degree murder, *Woodson v. North Carolina*, 428 U.S. 280, does not violate the *ex post facto* clause of the State and Federal Constitutions.

APPEAL by defendants from *Walker, J.*, at the 8 November 1976 Special Session of SURRY.

Upon indictments, proper in form, each defendant was found guilty of armed robbery and of first degree murder in the perpetration of a felony. Each was sentenced to imprisonment for life upon the murder charge and, as to each defendant, judgment was arrested upon the charge of armed robbery, this being the felony in the perpetration of which the murder was committed.

The evidence introduced by the State, if true, was sufficient to show:

On 26 March 1976, the body of Clayton Gravely, a resident of Carroll County, Virginia, was found in the trunk of his automobile, which was abandoned in a peach orchard in Carroll County, a short distance north of the North Carolina State line. The body was partially wrapped in a sheet and a quilt which were identified as having come from the trailer home of Betty Ramey, then located in Surry County, North Carolina. The trailer was destroyed by an intentionally set fire in the early night hours of 26 March, approximately seven hours after the body of Gravely was found in the trunk of the car. There were four bullet wounds in the body, the cause of death being either a wound in the chest or a wound in the back, either of which would have been fatal. Neither the body nor the clothing thereon showed powder

residue, indicating that the shots were fired from a distance of at least two feet.

On 24 March, Dreama Smith, half-sister to Betty Ramey, was also living in the trailer. Living there with Dreama Smith was Jackie Easter. Betty Ramey was a drug addict. She is presently serving a prison sentence for breaking and entering. On that date no one was "living with" Betty Ramey, her most recent cohabitant having moved out of the trailer when Easter moved in.

On 24 March, Clayton Gravely came to the trailer to see Betty Ramey, as he and other men frequently did. She was not at home so he left and returned in the afternoon. At that time, Betty Ramey, Dreama Smith, Easter and two other women were present in the trailer. After about an hour of conversation, the other two women left. Gravely remarked that he had "plenty of money on him" and tried to persuade Betty Ramey to go to South Carolina with him but she refused. He was then carrying an automatic pistol. Betty Ramey saw that he had "several hundred dollar bills in his billfold."

The defendant Kirkman, who had been "going with" Betty Ramey for two or three weeks, then arrived at the trailer. He and Betty Ramey went into one of the back rooms and engaged in a conversation for a few minutes, immediately following which they departed in his car. In about 20 minutes he returned with the defendant Ronnie Hawks, Betty Ramey not being with them. At that time, Gravely and Easter were alone in the living room of the trailer, Dreama Smith having gone to sleep in one of the bedrooms.

Easter testified: When the two defendants walked into the trailer, the four men simply spoke to each other. The defendants did not sit down and Gravely and Easter stood up simply by way of greeting the new arrivals. Kirkman walked across to the far end of the living room and leaned against a post, Hawks remaining in front of the door. Two or three minutes after their arrival, Hawks "pulled around with a gun in his hand" and shot Gravely, then standing two or three feet from Hawks. Three shots were fired and Gravely fell to the floor. Kirkman then said, "He is still moving, shoot again." Hawks shot Gravely again and said, "He ain't moving any more." Hawks then removed from Gravely's pocket his wallet, gun and keys.

Pursuant to instructions from the defendants, Easter obtained a sheet from a bed in the trailer, and this, together with a quilt taken from the couch in the living room, were put over Gravely's body. The defendants told Easter that if he was "planning on talking" and couldn't keep his mouth shut, he might as well lie down beside Gravely. The defendants then instructed Easter to open the trunk of Gravely's car, which he did with the keys given him by Hawks. The defendants brought Gravely's body out of the trailer and put it in the trunk of the car. They then instructed Easter to follow them in Hawks' car, in which the two defendants had come to the trailer. This he did, the two defendants riding in Gravely's car, in the trunk of which they had placed the body. They drove to the orchard where the Gravely car and Gravely's body were eventually found, left the car there and, the defendants coming back to the car driven by Easter, they all returned to the trailer of Betty Ramey.

After arriving at the trailer, the defendants told Easter and Dreama Smith to clean it up, a substantial quantity of blood having gotten upon the floor. The defendants then departed and Easter and Dreama Smith cleaned up the blood as best they could. Before departing, the defendant Kirkman told Easter and Dreama Smith that if they knew what was good for them they would forget all they had seen. An hour later, Kirkman brought Betty Ramey back to the trailer, this time traveling in his own car.

Betty Ramey testified: Kirkman had picked her up at the trailer in which Hawks and his wife were then living, to which he had taken her when he and she left her trailer prior to the shooting. After Kirkman and Betty Ramey left the Hawks trailer, they rode about and, as they crossed the Ararat River, he directed her to throw into the river a package which contained an object which "felt like it was a gun." This she did.

Easter and Dreama Smith testified: Following the burning of the Ramey trailer, Kirkman arranged lodging for Dreama Smith and Easter at a motel, where they stayed for two or three weeks, Kirkman paying the bill. They then left the county and went to live with Dreama Smith's mother in Reidsville. When interviewed by officers investigating both the burning of the trailer and the death of Gravely, they first denied knowledge of the killing of

Gravely because they were afraid, but eventually they told the officers what they had seen and heard at the Ramey trailer.

On 26 March, the day the body was found and the trailer was burned, a 1969 Oldsmobile was added as a covered vehicle to Kirkman's insurance policy.

Each defendant testified in his own behalf and denied any connection whatever with the shooting or robbery of Gravely. Kirkman testified that he did not know Gravely, did not kill him, did not witness the killing of Gravely by Hawks and did not go to the trailer of Betty Ramey on the date of Gravely's death. He acknowledged that he bought the 1969 Oldsmobile on the day the body of Gravely was discovered and the Ramey trailer was burned. Defendant Hawks denied that he had ever been at the trailer of Betty Ramey. Both defendants admitted, on cross-examination, their previous convictions for larceny.

Other evidence is set forth in the opinion in connection with the respective assignments of error to which it relates.

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

Fred Folger, Jr., and Larry Bowman for Defendant Kirkman.

Bruce C. Fraser for Defendant Hawks.

LAKE, Justice.

[1] After the jury, including two alternates, had been selected and impaneled, the court recessed for the day. Before anything else was done the following day, one of the twelve jurors brought to the attention of the court the fact that she had observed a communication between a lady with whom she worked and counsel for one of the defendants and believed it possible that this lady was a relative of such defendant, of which fact the juror had not previously been aware. Upon inquiry by the court, it developed that the lady who had so communicated with the attorney was the wife of the defendant Hawks. There was no suggestion of any impropriety in the conduct of Mrs. Hawks or of any communication between her and the juror. In response to questions by the court, the juror stated that she would feel no embarrassment in serving on the jury and returning a verdict against the defendant Hawks, if the evidence so warranted, and then continuing to work

with Mrs. Hawks. The District Attorney then asked the juror a few questions with reference to the extent and duration of her acquaintance with Mrs. Hawks.

The remaining jurors were then brought back into the courtroom and the court inquired if the State was ready to proceed. Thereupon, the District Attorney requested a conference with the court in the absence of the jury and the jury was again sent from the courtroom. The District Attorney then advised the court that had he known of the above circumstances he would have excused the juror. He requested leave to reopen the examination with reference to this particular juror. In its discretion, the court permitted this and called the juror back for further examination. Without further questioning, the District Attorney "in the interest of time" exercised one of his remaining three peremptory challenges, and the court, in its discretion, allowed the challenge over the objection of the defendants, seating one of the alternate jurors in place of the juror so excused. The jury was then reimpaneled. The defendants moved for a mistrial, which motion was denied. Neither defendant had exhausted his peremptory challenges and neither defendant requested permission to make any further examination of the alternate juror so seated as one of the twelve. The trial then proceeded.

In this we find no reversible error. The purpose of selecting alternate jurors is to permit a trial to proceed although one of the impaneled twelve becomes ill or otherwise unable to serve. Neither defendant suggests that any of the jurors who actually served was incompetent to do so or objectionable to such defendant. It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either peremptory or for cause. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, death sentence vacated, 429 U.S. 912 (1976); *State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796, *cert. den.*, 414 U.S. 850 (1973).

In the foregoing cases, we held that G.S. 9-21(b) providing that the State's challenge, whether peremptory or for cause, must be made before the juror is tendered to the defendant "does not deprive the trial judge of his power to closely regulate and super-

vise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury." *State v. McKenna, supra,* at 679. In all the foregoing cases, the challenge in question was allowed before the jury was impaneled. We perceive no reason for the termination of this discretion in the trial judge at the impanelment of the jury. This assignment of error is overruled.

[2] Assignments of Error 6, 7 and 8 are based upon alleged violations of the Hearsay Rule in the admission of the State's evidence. Over objection, witnesses for the State were permitted to testify that the District Attorney and investigating police officers had told the witnesses "to tell the whole truth and nothing but the truth." Obviously, testimony that such an instruction was given to the witness who is testifying thereto is not hearsay.

[3] Dreama Smith testified, without objection, that it was she, Easter, Betty Ramey and Clayton Gravely who were talking in the trailer prior to the first arrival of the defendant Kirkman. She saw that Gravely had a gun and he told them that he had it to protect himself. To a question by the District Attorney as to what Gravely said about money, the defendants objected. The objection was overruled and Dreama Smith answered, "He said that he had plenty of money on him and he tried to talk Betty into leaving with him." This was not hearsay. The purpose of this evidence was not to prove that Gravely did, in fact, have money on his person but was to show that the statement was made in Betty Ramey's presence.

[4] Dreama Smith then continued to testify, without objection, that upon the arrival of Kirkman at the trailer he and Betty Ramey went into another room and had a conversation, immediately following which he and Betty Ramey left the trailer. Over objection, Dreama Smith was then permitted to testify that she heard Betty Ramey tell Kirkman, in this conversation, "about what money Clayton [Gravely] had on him." Subsequently, when called as a witness, Betty Ramey denied making such a statement to Kirkman, but she further testified that she, Betty Ramey, saw "several hundred dollar bills in his [Gravely's] billfold." While Dreama Smith was still testifying, the court recessed for the day. At the start of the next day's session, the court instructed the jury that he was reversing his ruling of the previous day, was allowing the objections of the two defendants to the testimony of

Dreama Smith concerning what she had heard Betty Ramey say to the defendant Kirkman about what money Gravely had on him and was directing the jury not to consider such testimony by Dreama Smith. The defendant contends that it was impossible for the court by this instruction to remedy its alleged error in initially admitting the evidence and, therefore, a new trial should be granted.

The fallacy of this contention is that the error of the court was not in admitting the evidence but in instructing the jury to disregard it, which error was, of course, not prejudicial to the defendants. This testimony of Dreama Smith as to the statement she heard Betty Ramey make to the defendant Kirkman, whatever may have been the source of Betty Ramey's information, was not hearsay evidence. The purpose of Dreama Smith's testimony on this point was not to prove the correctness of the statement of Betty Ramey to Kirkman as to what money Gravley had on his person. The purpose of the evidence was simply to establish that the statement was, in fact, made to Kirkman, thus planting in his mind the belief that Gravely had money on his person and thus providing a motive for the killing of Gravely.

The evidence of the State is that, immediately following this conversation in the back bedroom of the trailer between Betty Ramey and Kirkman, the two of them left the trailer, Kirkman returning in approximately 20 minutes with Hawks, and the shooting of Gravely occurring in two or three minutes after the two men entered the trailer and before anything occurred other than simple salutations.

The Hearsay Rule does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement but merely to show that the statement was, in fact, made. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Crump*, 277 N.C. 573, 178 S.E. 2d 366 (1971); *State v. Griffis*, 25 N.C. 504 (1843); Stansbury, North Carolina Evidence (Brandis Rev., 1973), § 141.

These assignments of error are overruled.

David Beal, an agent of the State Bureau of Investigation, testified that he interviewed Easter and Dreama Smith, jointly, on two occasions and observed and listened to a third interview

with these witnesses conducted by other officers. Over objection, he was permitted to testify as to statements made by them. Repeatedly, throughout his testimony, the judge instructed the jury that this testimony was not substantive evidence but was admitted solely for the purpose of corroborating Easter and Dreama Smith, if the jury found that it did so corroborate them. Beal testified that in their first statement Easter and Dreama Smith told him they were both in the bedroom of the trailer at the time Gravely was killed and so did not actually witness the shooting, but on the second interview, Easter told him that he (Easter) had not told the truth in the first statement, that he was present in the trailer and actually witnessed the killing of Gravely and that Hawks had pulled out a pistol and shot Gravely, Kirkman being present in the trailer at the time. Beal testified that Dreama Smith told him she was actually in the bedroom at the time the killing occurred and did not witness it.

The defendant Kirkman objected to the testimony by Beal concerning the first statement made to him by Easter, for the reason that this did not corroborate Easter's own testimony. Easter's own testimony with reference to this matter was that he first talked to Agent Beal and Captain Scott of the Surry County Sheriff's Department and told them nothing but that eventually he told them what had happened, his failure to tell them what he knew about the matter at the first interview being due to his being scared. Thus, the testimony of Agent Beal corroborates the testimony of Easter to the effect that the latter made inconsistent statements to the officers at the different interviews. Furthermore, while the first statement of Easter to the officers did not corroborate his testimony as to his own whereabouts at the time of the shooting, we fail to see how this first statement, that he was not then present in the living room when the shooting occurred, could possibly have been prejudicial to the defendant Kirkman. In other respects, the testimony of Agent Beal concerning statements made to him by Easter and Dreama Smith does tend to corroborate their testimony at the trial.

[5] Both defendants moved to strike the testimony of Agent Beal concerning their joint statement to him, for the further reason that Agent Beal was not able to state specifically which statements, made at the interview, were made by Easter and which were made by Dreama Smith. The testimony of Agent Beal makes

it clear that Easter and Dreama Smith were interviewed by him at the same time. There is no suggestion in his testimony that any statement made by either of them was contradicted by the other. At the trial, both Easter and Dreama Smith testified that she was in the bedroom at the time of the shooting and did not see it.

[6] Captain Scott testified that he was present with Agent Beal when Easter and Dreama Smith made a statement concerning the killing of Gravely. The court twice instructed the jury, during the testimony of Captain Scott, that his testimony was admitted solely to corroborate the testimony of Dreama Smith or Jackie Easter and that it was for the jury to determine whether it did so corroborate those witnesses, his testimony not being substantive evidence. Captain Scott then testified that Easter's statement was that Easter was in the mobile home on the day that Gravely was shot, that Dreama Smith was in the bedroom asleep, that Kirkman and Hawks came into the trailer, that Kirkman walked over to the divider between the kitchen and the living room, leaned up against the post and looked over toward Hawks who was standing near the doorway and "made a nodding motion." Easter's own testimony did not mention a "nodding motion" made by Kirkman. Thus, to this extent, Captain Scott's testimony concerning Easter's statement in his presence did not corroborate Easter's own testimony. This, however, was an immaterial detail in the light of the entire statement to Captain Scott by Easter which otherwise fully corroborated Easter's testimony concerning the circumstances of the shooting and the disposition of the body. In view of Easter's testimony, so corroborated by the testimony of Captain Scott, that after Hawks shot Gravely three times, Kirkman directed Hawks to shoot Gravely again since he was still moving, the above mentioned discrepancy is of no consequence and the court's failure to instruct the jury to disregard Captain Scott's testimony concerning the making of a "nodding motion" was harmless error.

State v. Bagley, 229 N.C. 723, 51 S.E. 2d 298 (1949), relied upon by the defendants, is distinguishable in that in the *Bagley* case a prior statement of the witness to the investigating officer substantially and prejudicially expanded her testimony concerning what she had seen and heard at the time of the shooting there in question.

In *State v. Patterson*, 288 N.C. 553, 572, 220 S.E. 2d 600 (1975), death sentence vacated, 428 U.S. 904 (1976), speaking through Justice Moore, this Court said: "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." In *State v. Caddell*, *supra*, at 278, we said, "To be admissible for corroborative purposes it is not necessary that the prior statement of a witness be in the exact words of her testimony at the trial, it being sufficient that the two are consistent." *See also*: *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973); *State v. Westbrook*, 279 N.C. 18, 35, 181 S.E. 2d 572 (1971), death sentence vacated on other grounds, 408 U.S. 939 (1972).

We find no merit in this assignment of error.

[7] During the cross-examination of Dreama Smith by Kirkman's counsel, the witness was testifying concerning the first time she decided that she was "safe and far enough away to tell an officer anything about" this matter. In the course of that portion of her testimony, and apparently not in response to a question by defendant's counsel, she said: "I don't remember the dates that I went to Mr. Scott's office in Wentworth and made the statement to him. It was about a week after I took a lie detector test." Counsel at that time did not request any instruction or ruling with reference to this statement concerning such test.

Subsequently, when Betty Ramey was testifying she stated that she had been questioned by two Virginia officers with reference to the burning of her trailer and stated that these officers asked her if she would take "a lie detector test." Upon objection by counsel for both defendants, the court struck that statement and told the jury not to consider it.

Thereafter, Detective Andrews of the Virginia State Police testified that he had an interview with Betty Ramey concerning the death of Gravely, which at that time he believed to have been a homicide committed in the State of Virginia, and that, at the conclusion of the interview, he asked Betty Ramey if she would accompany him to Wytheville, Virginia, and take a polygraph test.

Counsel for Kirkman objected and the court overruled the objection, saying to counsel: "No, don't go any further. It has been brought out, don't go any further about that, however the objection is overruled." The record does not show whether Betty Ramey did, in fact, take such test.

The defendants now assign these three occurrences as error. It will be observed that, as to the first instance, there was no objection, motion to strike or request for an instruction to the jury; as to the second instance, the court promptly instructed the jury not to consider the statement; and as to the third instance, there was no testimony that Betty Ramey consented to take a polygraph test or that such a test was ever given her. In no instance was there any testimony as to the result of any polygraph test or as to the particular statement of the witness to which any such test related.

Speaking through Justice Branch in *State v. Montgomery*, 291 N.C. 235, 243-244, 229 S.E. 2d 904 (1976), this Court said:

> "It is well settled in this jurisdiction that *the results* of a polygraph test are inadmissible into evidence and that the parties may not be allowed to introduce such results directly or by indirection. (Citations omitted.) However, every reference to a polygraph test does not necessarily result in prejudicial error. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971)." (Emphasis added.)

There is no merit in this assignment of error.

[8] The defendants assign as error the denial of their motion for dismissal or nonsuit. It is elementary that upon such a motion the evidence of the State is deemed to be true and discrepancies and contradictions therein are resolved in favor of the State. Each defendant testified that he did not know Gravely. The testimony of Easter was that he (Easter) was an eyewitness to the shooting of Gravely, that almost immediately upon their entry into the room and without any conversation, except normal salutations, Hawks shot Gravely three times and then, at the direction of Kirkman, shot him again, that Hawks then removed from Gravely's pocket his wallet, pistol and keys. The testimony of Betty Ramey is that Gravely had in his wallet, a short time earlier, several hundred dollar bills. The testimony of Dreama Smith is to the effect that when Kirkman first came to the trailer he and Bet-

ty Ramey had a private conversation, immediately following which both left the trailer. The testimony of Easter is that in about 20 minutes Kirkman and Hawks returned and the shooting then occurred within two or three minutes. This evidence is ample to support a verdict that the defendants, acting in concert, shot and killed Gravely in the perpetration of the felony of robbery and did actually rob him.

[9] The defendants contend that the motion for dismissal should have been allowed because there is a fatal variance between the indictment on the charge of armed robbery and the proof. The indictment of each defendant on the charge of armed robbery is in proper form and states that such defendant, with the use of a .38 caliber pistol whereby the life of Clayton G. Gravely was endangered and threatened, did take, steal and carry away "*approximately* $400.00 in United States currency from the person of Clayton G. Gravely." (Emphasis added.) The defendants' contention is that the only evidence as to what, if anything, was taken from Gravely is the testimony of Easter to the effect that Hawks "reached in his pocket and got his wallet and gun and his keys." This overlooks the testimony of Betty Ramey to the effect that Gravely had in his wallet several hundred dollar bills. Obviously, there is no material variance between the allegation and the proof. It is not necessary that the State prove the taking of the exact amount of money alleged in the indictment. *See, State v. Waddell*, 279 N.C. 442, 183 S.E. 2d 644 (1971). Furthermore, judgment was arrested on the charge of armed robbery. The defendants do not contend that there was any variance between the indictments charging murder and the evidence offered by the State.

[10] By Chapter 1201, Session Laws of 1973, Section 1, effective 8 April 1974, nearly two years prior to the killing of Gravely, the General Assembly rewrote G.S. 14-17 to provide that the punishment for murder in the first degree (defined to include a murder committed in the perpetration of or in an attempt to perpetrate any robbery) shall be death, but, by Section 7 of that Act, provided:

> "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for

any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment."

The United States Supreme Court having so determined in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), Section 7 of this Act became operative. Thus, the sentence to imprisonment for life was properly imposed. *State v. Warren*, 292 N.C. 235, 232 S.E. 2d 419 (1977). *See also*: *State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (1977); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977); *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977); *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1977). We find no merit in the defendants' contention that to construe the 1973 Act as making life imprisonment the proper sentence for a first degree murder committed prior to the decision in *Woodson v. North Carolina, supra*, would violate the *ex post facto* clause of the State and Federal Constitutions. Constitution of the United States, Article I, § 10; Constitution of North Carolina, Article I, § 16. This assignment of error is overruled.

The defendants have made a number of other assignments of error. We have carefully examined each of these and find no merit in any of them. No useful purpose would be served by a detailed discussion of these other assignments. They are overruled.

The defendants have had a fair trial in accordance with the law of this State. The direct conflict between their own testimony to the effect that neither of them was in the trailer of Betty Ramey at the time Clayton Gravely was shot and killed and the testimony of Easter that he was an eyewitness to the shooting and that the defendants perpetrated it merely raised a question for the jury, which resolved it adversely to the contentions of the defendants.

No error.

STATE OF NORTH CAROLINA v. ROY LEE CATES

No. 14

(Filed 11 November 1977)

1. **Homicide § 21.5— first degree murder—sufficiency of evidence—no evidence of lesser included offenses**

Evidence in a first degree murder prosecution was sufficient to permit the jury to find that defendant unlawfully, with malice, premeditation and deliberation, killed the deceased mistakenly thinking at the time that he was killing someone else, and the trial court did not err in failing to instruct on lesser included offenses where the evidence tended to show that defendant, after hearing that his friend had been robbed, came from Durham to Raleigh to get the details of the robbery; defendant was armed with three pistols; defendant learned that the robbers had been to his friend's house earlier with one Christmas; defendant requested the friend's boyfriend to accompany him to Christmas' apartment; defendant gave the boyfriend one of the pistols; when they arrived at the apartment complex where Christmas lived, the boyfriend told defendant that Christmas lived in "the one on the end"; defendant, armed with an automatic pistol, went toward the front of the apartment and the boyfriend went to the back; defendant was in fact standing in front of an apartment which was occupied by one other than Christmas; deceased opened his door and defendant shot him three or four times; and immediately after firing the fatal shots, defendant went to his car and left the scene at a high rate of speed.

2. **Criminal Law § 34.4— defendant's guilt of another offense—admissibility of evidence**

The trial court in a first degree murder prosecution did not err in allowing a witness to testify as to defendant's pistol whipping him in 1971 for his failure to pay defendant for narcotics he was to sell for defendant, since the purpose of that testimony was not simply to prejudice the defendant or to prove that he was a man of bad character; rather, its purpose was to show that the witness accompanied defendant to the crime scene due to his fear, and the testimony tended to rebut the inference raised on cross-examination that the witness's motive for accompanying defendant was revenge, and the further inference that the witness himself had committed the crime.

3. **Criminal Law § 60.3— expert fingerprint evidence—admissibility**

A witness's opinion concerning the freshness of fingerprints at the crime scene was properly admitted, though the trial judge made no specific finding that the witness was an expert in fingerprint processing and identification, where the record indicated that such a finding could have been made; moreover, defendant made no objection to the questions which elicited this testimony and no motion to strike the witness's answer.

4. **Criminal Law § 113— jury instruction on evidence—no error**

The trial court's instruction which stated that only testimony and exhibits entered into evidence constituted the evidence to be considered by the jury

and that arguments by counsel or recapitulation of the evidence by the court should not be considered as evidence was proper; moreover, the court correctly instructed the jury that it was their duty to find the facts from the evidence offered after determining the credibility of the witnesses.

5. **Criminal Law § 114.3— jury instructions—no expression of opinion**

The trial court's statement, made while instructing the jury, that "There will be, you will be glad to know, no effort to restate all of the evidence" was not prejudicial to defendant but merely informed the jury that it was not necessary for the judge to go over all the evidence.

6. **Criminal Law § 99— expression of regret by court—no error**

In a first degree murder prosecution where defendant shot and killed a Nigerian student, mistakenly thinking he was someone else, defendant was not prejudiced by the trial court's remarks, made after the verdict had been returned and judgment pronounced, expressing regret for the useless and senseless killing of an innocent young man.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *McLelland, J.*, at the 15 November 1976 Session of WAKE Superior Court.

Upon an indictment, proper in form, defendant was charged with the murder of Donald C. Obi-Obasi. He was tried and convicted of murder in the first degree, and sentenced to life imprisonment.

The evidence for the State may be summarized as follows: Donald Jeffrey Crews testified that in June 1976 he was living at the home of Carolyn Conyers at 1400-F Quail Ridge Road in Raleigh. Ms. Conyers sold heroin supplied to her by the defendant, and Crews had made some sales for her. At 4:00 a.m. on the morning of 16 June 1976, one Johnny Christmas brought two unidentified black males to the home of Ms. Conyers. The men wanted heroin but said they had no money. Crews told the men that he worked for Ms. Conyers, and that she could not afford to give them heroin without payment. The men searched about the room while Crews went outside. Crews came back inside with one packet of heroin, but refused to give them the bag until they paid. The men went outside, searched around the house and yard for ten minutes, and then left.

At 7:00 a.m. that same morning, the two unidentified black males returned to the apartment of Ms. Conyers, without Johnny Christmas. At this time, Ms. Conyers was in the shower and her

twelve-year-old son was in bed. Jeffrey Crews answered the door, whereupon the two men held a pistol to his face and demanded entrance. The two men entered the apartment, tied up Crews, Conyers and her son, and took heroin, cash and other property from the premises.

After their departure, Ms. Conyers freed herself and telephoned the defendant at his home in Durham, informing him of the robbery. Within an hour or two thereafter, defendant arrived at Conyers' apartment in Raleigh. He talked with her about the robbery and asked her or Crews where Johnny Christmas lived. Defendant asked Crews if he would show him where Christmas lived, and Crews agreed to do so.

Carolyn Conyers corroborated Jeffrey Crews' testimony up to this point, and further testified regarding her heroin dealings with the defendant.

Crews further testified that he and the defendant got into defendant's 1975 red and white Oldsmobile and drove to Washington Terrace Apartments in Raleigh. En route, defendant handed Crews a .38-caliber revolver. Crews testified that there were two other guns in the car. Defendant parked to the side of the apartment complex and asked Crews in which apartment Christmas lived. Crews testified that he told defendant, without pointing, that Christmas lived in "the one on the end." Defendant took a pistol and walked toward the front of the duplex apartment while Crews walked around to cover the back door of the apartment. Johnny Christmas lived in Apartment F-15. Crews testified that he stationed himself behind the door of the adjoining apartment, number F-14. He heard a gun fire three or four times and heard bullets going over his head. Crews testified that he then ran around to the front of the apartments and saw a black male lying on the lawn in front of Apartment F-14. Crews further testified that he kicked the man on the shoulder and cursed him, thinking he was one of the men who had robbed Ms. Conyers' apartment. He then ran and jumped into the car, where defendant was waiting, and the defendant drove away.

The victim was Donald Obi-Obasi of Nigeria, a student at Shaw University. He resided with Lucky Ehigianusoe, also a Nigerian student, at F-14 Washington Terrace, next door to Johnny Christmas. Ehigianusoe testified that he came in from his

job at the Raleigh News and Observer at 6:00 a.m. that morning and went to bed. At about 10:00 a.m. he heard several shots and Obi-Obasi staggered into his room bleeding. Obi-Obasi then left the room and went outside while Ehigianusoe ran out the back door. The victim's roommate testified that Obi-Obasi did not use drugs, drink or smoke, and that he had never known him to possess any sort of drugs.

Other testimony showed that Obi-Obasi had worked the night shift at Health Care Center of Raleigh, and that he had been at work at the time of the robbery.

Five witnesses for the State, all residents of Washington Terrace Apartments, testified that on the morning of 16 June they each heard several shots. Linda Nelson, Trudy Hawkins and Melvin Plummer said they looked out their windows to see a black male run to and enter a red automobile. They testified that moments later Obi-Obasi staggered out of his apartment and fell onto the lawn. The five witnesses all testified that they saw a black male come from behind Apartment F-14. This man walked up to the victim and kicked him several times in the head. He then jumped into a red car driven by another black male, and the car sped away. Katherine Wright, who lived in F-15 with Johnny Christmas, testified that she looked out her window and saw Jeff Crews, whom she knew, kicking Obi-Obasi in the head.

Officer M. W. Brown of the Raleigh Police Department testified that he arrived on the scene at 10:15 a.m. and that the victim took his last breath a few minutes later. The autopsy report showed that his death was caused by the bullet wounds inflicted by defendant.

Other evidence offered by the State will be referred to in the opinion.

The defendant offered no evidence.

Attorney General Rufus L. Edmisten and Assistant Attorney General James E. Magner, Jr. for the State.

Norman E. Williams and Kenneth B. Oettinger for defendant appellant.

MOORE, Justice.

The trial judge instructed the jury that they could return one of three verdicts: murder in the first degree, murder in the second degree or not guilty. Defendant contends the trial judge should have submitted the lesser included offenses of voluntary manslaughter and involuntary manslaughter.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971); G.S. 14-17. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Duboise*, *supra*; *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Duboise*, *supra*. Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation which results from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. *State v. Rummage*, *supra*; *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959).

Premeditation may be defined as thought beforehand for some length of time. " 'Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose. . . .' *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769." *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970). *See State v. Davis*, *supra*. Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence. Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing, and (4) the

number of blows inflicted or shots fired. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Perry, supra.*

Malice is defined as ". . . not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. [Citation omitted.]" *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922). *See State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969).

Where it is permissible under a bill of indictment to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Keaton*, 206 N.C. 682, 175 S.E. 296 (1934). Where all the evidence, however, 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, this principle does not apply, and the court correctly should refuse to charge on the unsupported lesser degree. *State v. Sparks, supra*; *State v. Duboise, supra*; *State v. Manning*, 221 N.C. 70, 18 S.E. 2d 821 (1942); *State v. Sawyer*, 224 N.C. 61, 29 S.E. 2d 34 (1944).

In present case, if the defendant resolved in his mind a fixed purpose to kill Johnny Christmas and thereafter, because of that previously formed intent and not because of any legal provocation on the part of Christmas, deliberately and intentionally shot and killed him, the three essential elements of murder in the first degree—premeditation, deliberation and malice—would concur.

[1] Here, all the evidence tends to show an unlawful killing with malice and with premeditation and deliberation. After hearing that Carolyn Conyers had been robbed, defendant, armed with three pistols, came from Durham to Raleigh to get the details of the robbery. When he learned that Johnny Christmas had accompanied the two robbers on their first visit to Carolyn Conyers', he inquired as to where Christmas lived and requested Jeff Crews to accompany him and show him the way. Crews agreed to do so, and on the way there, defendant gave Crews a .38-caliber pistol. When they arrived at the apartment complex, Crews told defend-

ant that Christmas lived in "the one on the end." Defendant, armed with an automatic pistol, then went toward the front of the duplex apartment and Crews went to the back. According to defendant's statement to Crews, deceased opened the door, but, upon seeing defendant with a pistol, tried to close it. Defendant then "let [the victim] have it three or four times in the gut. It was a screen door and that wooden door was open." Immediately after firing the fatal shots, defendant went to his automobile and left the scene at a high rate of speed.

In our opinion, this evidence is sufficient to permit the jury to find that defendant unlawfully, with malice, premeditation and deliberation, killed the deceased mistakenly thinking at the time that he was killing Johnny Christmas. The fact that defendant killed Obi-Obasi when he intended to kill Johnny Christmas has the same legal effect as if he had killed Christmas. If he feloniously, with malice, premeditation and deliberation, intended to kill Johnny Christmas and killed Obi-Obasi instead, he would be guilty of first degree murder just as he would have been had he killed Christmas.

In *State v. Heller*, 231 N.C. 67, 55 S.E. 2d 800 (1949), defendant was charged with killing his wife. His testimony was to the effect that he did not intend to shoot his wife but intended to kill the person he thought to be her paramour, whom he believed to be in the house. This Court approved an instruction that if defendant feloniously and with premeditation and deliberation intended to kill another person and killed his wife instead, he would be guilty of murder in the first degree. *See State v. Williams*, 246 N.C. 688, 99 S.E. 2d 919 (1957); *State v. Sheffield*, 206 N.C. 374, 174 S.E. 105 (1934); *State v. West*, 152 N.C. 832, 68 S.E. 14 (1910).

As stated by Justice Branch in *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971), ". . . It has been aptly stated that 'The malice or intent follows the bullet.' 40 Am. Jur., Homicide, § 11, p. 302; *State v. Rogers*, 273 N.C. 330, 159 S.E. 2d 900; *State v. Dalton*, 178 N.C. 779, 101 S.E. 548."

Under the facts in the case at bar, there was no evidence of voluntary or involuntary manslaughter, and the trial court correctly refused to submit these lesser included offenses to the jury. This assignment is overruled.

[2] On redirect examination by the prosecutor, State's witness Crews was allowed to testify, over defendant's objection, that he had prior drug dealings with the defendant in 1971 or 1972; that at that time he had bought some bad drugs from defendant for resale and had attempted to return the drugs to defendant through a middle man; that defendant had pistol-whipped the middle man for failure to return the drugs; and that defendant demanded payment for the missing drugs from Crews, and had hit Crews in the head with a pistol and forced him at gunpoint to obtain money to pay for the drugs.

Defendant did not testify in his own behalf or otherwise put his character into issue. He argues that the admission of this testimony as to his prior misconduct is a violation of the general rule that the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, and furthermore that the testimony does not fall within one of the eight exceptions to this general rule listed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). But the listing of "well recognized exceptions" in *McClain* does not pretend to be exclusive. Rather, as was stated in *McClain*, ". . . The acid test [of admissibility of testimony of prior misconduct] is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. . . ." 240 N.C. at 177, quoting *State v. Gregory*, 191 S.C. 212, 4 S.E. 2d 1. The general rule in this State has been aptly stated as follows: ". . . Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury, N.C. Evidence § 91 (Brandis rev. 1973); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971). *See also State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973).

On cross-examination, defendant's attorney subjected State's witness Crews to a searching interrogation regarding his presence and participation in the crime, and attempted to establish the witness's motive for committing the murder himself, thereby exculpating the defendant. The witness was subjected to

extensive questioning concerning his reasons for going to Johnny Christmas's apartment with the defendant. He admitted that he went over there, in part, in order to show Ms. Conyers that he was a man. He denied that he was mad at the men who had robbed him and Ms. Conyers, and he denied bearing a grudge toward them and a desire to get even. The witness insisted that he mainly went with defendant due to his fear of defendant and his suspicion that defendant would accuse him of collaborating with the thieves if he stayed behind.

On redirect examination, Crews testified as to defendant's pistol-whipping him in 1971 for his failure to pay defendant for narcotics he was to sell for defendant. The purpose of this testimony was not simply to prejudice the defendant, or to prove that he was a man of bad character. Rather, its purpose was to show that Crews went with Cates due to his fear, and not out of motive of revenge. This fear was genuine, based upon his past experiences with defendant's manner of dealing with those whom he suspected had deprived him of the fruits of his trade. Such evidence tends to rebut the inference raised on cross-examination that the witness's motive for accompanying the defendant was revenge, and the further inference that the witness himself had committed the crime.

"On redirect examination a witness may properly be interrogated as to facts, circumstances, or any matter tending to refute, weaken, or remove inferences, impressions, implications, or suggestions which might result from testimony or inquiries on cross-examination, although the facts brought out may be prejudicial to the other party." 98 C.J.S., Witnesses § 419(c), pp. 223-24. In *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973), where defendant elicited testimony from a witness on cross-examination tending to show her bias, this Court held it proper for that witness to testify on redirect that the reason she disliked defendant was due to the fact that he had raped her. In *Patterson*, this Court quoted and reaffirmed the law as stated in *State v. Glenn*, 95 N.C. 677 (1886), where the Court said: ". . . A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and then stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such ex-

planation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so." *See State v. Sawyer*, 224 N.C. 61, 29 S.E. 2d 34 (1944); *State v. Orrell*, 75 N.C. 317 (1876).

In the present case, Crews' testimony on redirect as to prior acts of misconduct by defendant was clearly relevant in that it showed the witness's motive for accompanying defendant to the scene of the crime, after his motives had been called into question on cross-examination. The testimony tended to rebut and remove the inference that the witness himself may have perpetrated the crime. We hold therefore that this evidence of prior misconduct by defendant was admissible.

[3] Defendant's third assignment of error is based on the contention that the trial court erred in admitting the testimony of State's witness H. L. Battle, a technician with the City-County Identification Bureau, concerning the freshness of the fingerprints he lifted at the crime scene. Defendant argues that the witness did not explain the technical basis for his opinion or give a sound reason for the opinion.

The record shows no objection to the questions which elicited this testimony and no motion to strike the witness's answer. ". . . An objection to the admission of evidence must be made at the time it is offered. Objection to incompetent evidence should be interposed at the time the question intended to elicit it is asked, and a motion to strike an incompetent answer should be made when the answer is given. An objection not made in apt time is waived. [Citations omitted.] . . ." *State v. Davis* and *State v. Fish*, 284 N.C. 701, 713, 202 S.E. 2d 770, 778 (1974). *See also* North Carolina Rules of Appellate Procedure, Rule 10(b)(1); 1 Strong, N.C. Index 3d, Appeal and Error § 30, p. 258. ". . . It is too late after trial to make exceptions to the evidence. [Citations omitted.]" *State v. Lowery*, 286 N.C. 698, 707, 213 S.E. 2d 255, 261 (1975), quoting from *State v. Howell*, 239 N.C. 78, 79 S.E. 2d 235 (1953).

In any case, the testimony by this witness was competent. His testimony established that he was trained and experienced in the processing, lifting and identification of latent fingerprints. Though the trial judge made no specific finding that this witness

was an expert in fingerprint processing and identification, the record indicates that such a finding could have been made. In such cases it will be assumed that the judge found the witness to be an expert. *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). This being the case, the witness's opinion testimony as to the freshness of the fingerprints found at the scene of the crime was properly admitted.

[4] During his charge to the jury, the trial judge stated:

> "Evidence is the testimony witnesses gave from the stand during the course of the trial and such exhibits as were admitted into evidence to illustrate the testimony of the various witnesses. Nothing else is evidence. The statements by counsel in the course of their argument as to what the evidence is is not evidence. Neither is the summary the Court will later give you as to what the evidence tends to show to be regarded by you as evidence.
>
> "Your duty as jurors is to remember as best you can—and experience has shown that a 12-headed jury remembers quite well—all of the evidence and to weigh and consider all of the evidence in determining whether or not the State has borne the burden of proof mentioned; that is, proof of guilt beyond a reasonable doubt."

Defendant excepted to and assigns this portion of the charge as error. We see no merit to this assignment. The trial judge was simply telling the jury what to consider as evidence in arriving at its verdict.

Following the above quoted portion of the charge, the trial judge, without exception, said:

> "You are the sole judges of the credibility, the believability, of the witnesses that you have heard, and you must decide for yourselves whether you will believe the testimony of any witness. In making that determination, I suggest that you apply tests of truthfulness which you ordinarily use. Such tests may include the opportunity the witness had to see, hear, know or remember the matters about which he or she testified, the manner and appearance of the witness on the stand as testimony was given, the apparent understanding and fairness of the witness, whether

> the witness's testimony is consistent with other testimony that you believe, whether the witness's testimony is reasonable, and whether the witness has any interest in the outcome of the trial or has any other bias or prejudice that would have a bearing upon truthfulness."

Clearly, the jury here was instructed that it was their duty to find the facts from the evidence offered after determining the credibility of the witnesses.

Defendant insists that there is a conflict between those portions of the charge set out above. We fail to perceive a conflict. This assignment is overruled.

[5] The trial judge further instructed the jury:

> "The law requires the presiding judge, ladies and gentlemen, to declare and explain to you the law arising on the evidence and to state the evidence to the extent that may be necessary to enable you to apply the law to the evidence and to the facts that you find from that evidence to exist. My statement of the evidence will be in summary form. There will be, you will be glad to know, no effort to restate all of the evidence."

Defendant contends that by this portion of the charge the trial judge expressed an opinion in favor of the State, contrary to G.S. 1-180. "The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential feature of the case." *State v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823 (1946). There is no contention that the trial judge failed to comply with this statutory requirement in the present case. Rather, the defendant contends that the judge's remark, "you will be glad to know," was prejudicial to defendant. There is no merit to this argument. The trial judge was simply stating that it was not necessary for him to go over all the evidence. We see no expression of opinion prejudicial to defendant.

[6] Under this same assignment, defendant argues that the trial judge clearly revealed his feelings against defendant by the following statement:

"I deem it not inappropriate, though somewhat presumptuous, to express for the State of North Carolina and its people our sorrow for the pain and death inflicted in our State upon Donald Obi-Obasi and our apologies to his kin and the people of Nigeria for the loss to them of the leadership of one who had undertaken to prepare himself through education in our land for such leadership."

Suffice it to say that this statement was made after the verdict had been returned by the jury and after judgment of the court had been pronounced. It was simply an expression of regret by the trial judge for the useless and senseless killing of an innocent young man.

We have examined the entire record and find no prejudicial error. Hence, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLIAM HARBISON, JR.

No. 1

(Filed 11 November 1977)

1. **Constitutional Law § 60— reasonable opportunity to show systematic exclusion of blacks from jury**

A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded reasonable time and opportunity must be determined from the facts in each particular case.

2. **Constitutional Law § 60— denial of continuance—opportunity to show systematic exclusion from jury**

Defendant was not denied his constitutional right to a reasonable time and opportunity to investigate the possibility of systematic exclusion of blacks from the petit jury by the denial of his motion for continuance made on the day defendant's case was called for trial where the only evidence urged in support of the motion was the fact that sixty prospective jurors were drawn from the box and the thirty-two of them who reported for jury duty were all white; defendant was represented by counsel at least four months before trial; the names of the sixty prospective jurors were publicly known for fifty-five days prior to the trial; and defense counsel was thus afforded a reasonable time and opportunity prior to the trial to inquire into the race of each juror, the com-

position of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused and the practices and procedures employed by the chief district judge when passing upon excuses.

3. Criminal Law § 42.2— real evidence—identity and unchanged condition

Objects offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." In order to be admissible, such evidence must be identified as the same object involved in the incident and it must be shown that the object has undergone no material change in its condition since the incident.

4. Criminal Law § 42.2— identity and unchanged condition of evidence—discretion of court

The trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that an object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition.

5. Criminal Law §§ 42.5, 42.6— exclusion of tire—failure to show identity and unchanged condition

The trial court did not err in the exclusion of a tire, offered for the purpose of showing the location of bullet damage to the tire, on the ground that the identity and unchanged condition of the tire had not been established where officers who first examined the tire testified that such examination revealed no holes in the tire, and bullets were not discovered in the tire until reexamination of the tire three months after it had been released from police custody; furthermore, the State was not prohibited from objecting to admission of the tire because police officers—agents of the State—caused the breakdown in the chain of custody by releasing the tire to its owner where there was no evidence that officers knew the tire had been fired into at the time they released it from custody or that defendant's counsel had informed anyone the tire would be material to defendant's case.

6. Homicide § 31.7— second degree murder—imposition of life imprisonment

The trial judge did not act arbitrarily and capriciously in sentencing defendant to life imprisonment for second degree murder since the punishment is within statutory limits, G.S. 14-17, and is not inappropriate for the brutal, unprovoked murder disclosed by evidence which would have supported a verdict of first degree murder.

Justice EXUM dissenting.

DEFENDANT appeals from judgments of *Friday, J.*, 30 August 1976 Session, BURKE Superior Court.

Defendant was tried upon separate bills of indictment charging him with the first degree murder of Morris Hardy on 25 April 1976 and felonious assault upon Dannah Yvonne Franklin on the same date.

The State's evidence tends to show that defendant, a twenty-six-year-old black man, married and the father of two children, and Dannah Franklin, a twenty-year-old unmarried white woman, had known each other for three years, dated for about two years, quit dating in August 1975 but continued an occasional rendezvous on a friendly basis. Because Miss Franklin's father objected to the relationship on account of the racial difference, they would meet by prearrangement at various secluded parking places along the road.

On 24 April 1976 Miss Franklin had been visiting Mrs. Rena Shade, a colored friend of hers. She arrived at the Shade home between 9 and 10 a.m. and remained until approximately midnight. Morris Hardy, a black man, came to the Shade home about 9:30 p.m. and remained until approximately midnight. This was the second time Miss Franklin had ever seen him. After watching television and talking until approximately midnight, Miss Franklin arose to leave and Morris Hardy asked her to take him home. They left together in her 1968 blue Buick Electra 225. As they proceeded westward on I-40 near Morganton, defendant drove up behind them in his 1975 white Oldsmobile Cutlass. Miss Franklin speeded up and attempted to elude him. Defendant followed the Franklin car for five miles from I-40 over rural paved roads and finally onto the Morningstar Road which is unpaved. When the Franklin car skidded into the ditch line on a stiff curve, defendant succeeded in passing it and stopped his vehicle partially blocking the road. He jumped out of his car with gun in hand and came back to the Franklin vehicle.

Miss Franklin described the events which followed in these words: "He didn't say anything. . . . He pointed it at the window. I started to go around his car, and the angle he pulled in front of me, I didn't know whether I could get past his car or not without going on up the embankment. He, as I started around his car rolling, he shot at the left front tire. He shot once, and then he slid his steps, and he shot twice. . . . I felt the tire going down. He then raised up and shot through the window. He was midways of the back end of his car, about three feet, maybe less when he shot. . . . I seen glass bursting, and it hit me in the face. I screamed. . . . Morris touched my left arm . . . I didn't hear the fourth shot. It hit me in the back of the head. . . . I went in the floor between Morris' legs. . . . I heard the fifth shot. I was pray-

ing. . . . I got up. Morris' arm was laying inside on the same side of his seat where he was sitting. I touched his arm. I heard him breathing real loud; and then he started groaning . . . and I heard him groan three times, or like he was drowning in his blood, or something, and I looked up. I didn't realize at the time that he must have died right there."

The State's evidence further tends to show that defendant got in his car and left the scene but returned after driving about a mile. He overtook Miss Franklin who was walking along the road looking for help. He picked her up and repeatedly said, "I didn't mean to do it." She asked him why he did it and he never did say. He drove Miss Franklin to the hospital after examining Morris Hardy and expressing the opinion that he was probably dead. He threw the murder weapon under the shrubbery at the hospital and it was later recovered by the officers.

Morris Hardy died from a gunshot wound in his back inflicted by a bullet fired from defendant's gun. Miss Franklin suffered a gunshot wound in the left eye resulting in its total destruction, necessitating removal.

Defendant testified as a witness in his own behalf. On and prior to 25 April 1976 he was employed as a correctional officer at Western Correctional Center in Morganton. He had known Dannah Franklin since 1972, had dated her on weekends for two years and thereafter continued to see her on an irregular basis until the date this incident happened. According to defendant's testimony, they had a good relationship, including a sexual relationship, and were quite compatible. They would call each other by telephone, arrange a meeting time and place, and if passing each other on the highway would blink their lights on and off, or blow the horn, and then meet at the agreed rendezvous spot. Sometimes, when Miss Franklin's father was not at home, defendant would pick her up at her home.

Shortly before midnight on the night in question, defendant recognized Dannah Franklin's car on the highway and she blinked her lights. Shortly thereafter the Franklin vehicle left I-40 westbound and defendant followed. He did not recognize the driver and could not tell who was in the car. The Franklin car was half a mile ahead of him as he continued to follow it. The Franklin car proceeded onto a dirt road where the driver accelerated rapidly,

throwing gravel, and defendant proceeded to follow it to find out why the car had not stopped. It was on the Morningstar Road when defendant finally succeeded in passing the car. He pulled in front of it and stopped about thirty feet away. Although his car was sitting in the middle of the road, it did not block the road. Defendant got out of his car, walked back toward the Franklin car, still unable to see who was in it, and heard a sudden acceleration. Thinking the driver was trying to run him down, he drew his revolver and fired twice at the left front tire. Demonstrating what happened, defendant said: "As I was walking back towards the car, the car accelerated, gravel started throwing proceeding towards me. At that point, I was scared for my life. I pulled my revolver. I fired twice at the two front tires. The car proceeded. It kept on coming. At that point, I was excited. I panicked. As the car kept coming, the third shot was fired. The third shot hit the window, the glass came out and hit me in the face, and at the same time I was pulling the fourth and fifth rounds."

Defendant further testified that the Franklin car ran off the road following the shooting and he got in his car and left. After driving about a mile he returned to the scene, took Miss Franklin to the hospital and called the sheriff's office to send an ambulance for Morris Hardy.

Defendant later told Detective Pruitt where to find the murder weapon. He testified that he kept the weapon loaded and on the console in his car at all times for "self-protection." He admitted that he followed the Franklin car five or six miles but asserted he was not chasing it. He denied getting out of the car with pistol drawn. He asserted that no ill will existed between him and the deceased Morris Hardy.

The jury convicted defendant of second degree murder of Morris Hardy and of an assault with a deadly weapon inflicting serious bodily injury on Dannah Franklin. The court imposed a life sentence for the murder and ten years for the felonious assault. He appealed the life sentence directly to the Supreme Court and we allowed a motion to by-pass the Court of Appeals in the assault case to the end that both cases receive initial appellate review in the same court.

Rufus L. Edmisten, Attorney General; James E. Magner, Jr., Assistant Attorney General, for the State of North Carolina.

James C. Fuller, Jr. and John H. McMurray, attorneys for defendant appellant.

HUSKINS, Justice.

When this case was called for trial on the morning of 30 August 1976 defendant moved for a continuance "to allow him reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegation of racial discrimination as to the petit jury as set forth in this motion." The unverified motion alleges that: (1) Thirty-two persons had been summoned and appeared for jury service, all of the white race and none of the Negro race; (2) more than 10 percent of the total population of Burke County are members of the Negro race; (3) lack of a reasonable number of members of the black race on the petit jury panel indicates systematic exclusion of members of the Negro race from jury service in Burke County; and (4) the number of Negroes, if any, on the petit jury for this session of criminal court of Burke County was unknown to defendant until such jurors appeared in the courtroom for jury service.

The motion for continuance was denied. This constitutes defendant's first assignment of error.

The record shows that the names of sixty prospective jurors, corresponding to numbered decals drawn from the box, were taken from the master jury list and certified on 6 July 1976. Those names were available to the public generally and to defense counsel particularly from and after that date. On 30 August 1976, the date this case was called for trial, thirty-two of the sixty prospective jurors appeared in court ready to serve. All were members of the white race. Of the twenty-eight persons who did not report for jury duty, there is no evidence to show how many had died or moved away and were not summoned due to the sheriff's inability to locate them. There is no evidence of record to show how many rendered an excuse and were excused from jury duty by the chief district judge. There is nothing in the record to indicate how many, if any, were Negroes. The record does show that several members of the Negro race served on the jury during the previous week.

Defendant was represented by Attorney McMurray who was appointed on 27 April 1976 and also by Attorney Fuller whose firm had been privately retained on a date not shown by the record. Both are able, experienced attorneys, and Mr. McMurray has practiced law in Burke County for more than twenty years.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent abuse of discretion. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). However, if the motion is based on a right guaranteed by the federal and state constitutions, it presents a question of law and the order of the court is reviewable. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). Defendant urges as error denial of his constitutional right to a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the petit jury in his case, citing *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), as authority. For reasons which follow, we find no merit in this contention.

[1] Decisions both state and federal hold that: (1) a defendant is not entitled to a proportionate number of his race on the jury which tries him, on the venire from which petit jurors are drawn, or even to have a representative of his race on the jury; (2) a defendant does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded; and (3) a defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. The authorities supporting these principles are cited and discussed in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), and *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972).

In his argument to the trial court in support of the motion for a continuance, defense counsel stated: "As I understand the cases, they provide that if this motion is made, even though it's made and the court is of the opinion that it's made purely for the purpose of a continuance, due process—*State v. Spencer*—holds, as I understand it, that the defendant is entitled to additional

time to make that investigation." The statement is erroneous; counsel is acting under a misapprehension of the law. Upon the facts disclosed by the record in this case, defendant had "a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes" from serving on the petit jury in his case. Attorney McMurray was appointed on 27 April 1976. The sixty-member venire was drawn and made public on 6 July 1976. The case was duly calendared and thereafter called for trial on 30 August 1976. At 11:15 a.m. that morning defendant's motion for a continuance was filed. Admittedly, no investigation concerning the jury selection process had been undertaken and no evidence had been compiled, statistical or otherwise, tending to establish that blacks were under-represented in the jury box or on the jury, or that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes had served on the juries of Burke County notwithstanding a substantial Negro population therein. The only evidence urged in support of the motion for continuance is the naked fact that sixty prospective jurors were drawn from the box and thirty-two of them, all white, appeared for jury duty. This fact alone does not even suggest a *systematic exclusion* of Negroes from the petit jury. "Even when there is 'striking' statistical evidence of disparity between the ratio of the races in population and jury service, or of the progressive elimination of potential Negro jurors through the selection process, the courts have considered such evidence, *standing alone*, insufficient to constitute a prima facie case of systematic discrimination. *See Alexander v. Louisiana*, 405 U.S. 625, 31 L.Ed. 2d 536, 92 S.Ct. 1221 (1972); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965)." *State v. Brower*, 289 N.C. 644, 653, 224 S.E. 2d 551, 558-59 (1976).

[2] It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. *Compare State v. Inman*, 260 N.C. 311, 132 S.E. 2d 613 (1963); *State v. Perry*, 248 N.C. 334, 103 S.E. 2d 404 (1958). The jury list from which petit jurors are selected is prepared biennially, G.S. 9-2, is a public record, G.S. 9-4, and the

jury commissioners who possess knowledge of the sources from which the master jury list is compiled are local residents. G.S. 9-1. Persons who wish to be excused from jury duty must apply to the chief district judge, or another district judge designated by him, at a publicly announced time and place. G.S. 9-6(b). The record here shows that the names of the sixty jurors were publicly known for fifty-five days prior to the time the case was called for trial. This afforded defense counsel reasonable time and opportunity to inquire into the race of each juror, the composition of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused, and the practices and procedures employed by the chief district judge when passing upon excuses. Failure to make such inquiry creates no constitutional right, in the name of Due Process, to additional time for such investigation simply because all jurors who reported for jury duty on the day defendant's case was called for trial were white. An automatic continuance for such inquiries, upon motion lodged for the first time when the case is called for trial, would fatally disrupt every session of court.

Under the facts of this case defendant has not been deprived of a reasonable opportunity to investigate the "possibility" of systematic exclusion of blacks from the petit jury. The lateness of the motion for a continuance suggests only a natural reluctance to go to trial and affords no basis to conclude that the trial judge abused his discretion or violated defendant's constitutional rights. The motion for continuance was properly denied. Defendant's first assignment of error is overruled.

On 25 April 1976 Officers Pruitt and Suttle examined the left front tire on the 1968 Buick in which decedent's body had been found. The examination revealed nothing unusual about the exterior of the tire except road damage and the fact that it was flat. Officers Pruitt and Bruce Allen removed the tire from the wheel, broke it down, examined the interior and noticed nothing unusual. The tire was then placed in the trunk of the Buick and, later that day, Officer Pruitt advised the person having custody of the car that the officers' inspection had been concluded and the car could be released to its owner John Franklin, Miss Franklin's father. At the time this inspection and release of the tire took place, defendant had made no statement that he had shot into the tire; rather,

he had told Officers Pruitt and Stan Jenkins that he had not been involved in any shooting.

On 31 July 1976 Officer Pruitt had occasion to examine a tire similar in make and appearance to the one he had examined on 25 April. On this examination he discovered two metal objects embedded in the back side of the tire. The tire was thereupon marked for identification and placed in the police evidence room where it remained until trial. Officer Pruitt was of the opinion that the tire he examined on 31 July was the same tire he had examined on 25 April. He testified, however, that his opinion was based on Miss Franklin's statement to him that it was the same tire and that he himself was unable to identify it as such. Neither Miss Franklin nor her father, the owner of the car, were examined concerning the identity of the tire or whether there had been any material change in its condition since the shooting on 25 April.

Defendant sought to offer the tire in evidence and, upon objection, it was excluded by the trial judge. This ruling constitutes defendant's second assignment of error.

[3] Objects offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." McCormick, Evidence § 212 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 117, n. 1 (Brandis rev. 1973). Such evidence must be identified as the same object involved in the incident in order to be admissible. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). It must also be shown that since the incident in which it was involved the object has undergone no material change in its condition. *See* McCormick, supra, § 212, p. 527. *See also Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). According to Professor Stansbury, when a tangible object is offered it must be first authenticated or identified, "and this can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is." 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973).

[4] There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. "No specific rules have grown up about the authentica-

tion of chattels, chiefly because the variety of circumstances involved are so great that no specific rules would be suitable." 7 Wigmore, Evidence § 2129, at 569 (3d ed. 1940). Consequently, the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition. McCormick, *supra* § 212, p. 527, at nn. 25-27. *See, e.g., Walker v. Firestone Tire and Rubber Co.*, 412 F. 2d 60 (2d Cir. 1969).

[5] In the present case defendant argues that the location of bullet damage in the tire would tend to show that he was in front of the vehicle at the time the tire was shot and thus tend to corroborate his testimony that he first fired at the vehicle as a defensive measure when Miss Franklin attempted to run him down. Even so, the record shows the trial court had before it the testimony of the officers who examined the tire on 25 April to the effect that their examination on that date revealed no holes in the tire. After the tire had been excluded, Officer Pruitt testified that even after the tire was broken down for examination of its interior on 25 April he observed nothing unusual about it except that it was flat. The bullets were not discovered until reexamination of the tire three months after it had been released from police custody. Under these circumstances Judge Friday quite properly insisted that defendant establish the identity and unchanged condition of the tire before admitting it into evidence. There was no testimony identifying the tire offered at trial. There was no evidence of unchanged condition. Rather, testimony at trial suggested that the examinations conducted on 25 April and 31 July (of what was alleged to have been the same tire) showed conflicting results. In our view Judge Friday properly excluded the tire and the testimony concerning examinations of it conducted on 31 July and thereafter.

Defendant further argues, however, that since the police officers—agents of the State—caused the breakdown in the chain of custody, the State should not be permitted to object to the introduction of the tire. It suffices to say that there is no evidence indicating the officers knew the tire had been fired into at the time they released it from custody. Nor is there any indication that defendant's counsel had informed anyone the tire would be

material to defendant's case. Neither bad faith nor negligence can be ascribed to the officers under such circumstances. Defendant's second assignment of error is overruled.

[6] Finally, defendant contends the trial judge acted arbitrarily and capriciously in sentencing him to life imprisonment for second degree murder. This assignment is overruled without discussion. The punishment is within statutory limits, G.S. 14-17 (1975 Cum. Supp.), and not inappropriate for the brutal, unprovoked murder and felonious assault disclosed by evidence which would have supported a verdict of murder in the first degree.

Prejudicial error in the trial not having been shown, the verdicts and judgments must be upheld.

No error.

Justice EXUM dissenting.

I dissent on the ground that defendant was not afforded a reasonable opportunity to inquire into and present evidence to support his contention that there was systematic exclusion of people of the black race from the petit jury that tried him. The majority recognizes the principle that such opportunity must be given when the defendant alleges such systematic exclusion. Its position is that since the jury panel for the week of court at which defendant was tried was selected some weeks before the trial began the defendant had an opportunity to develop such evidence as was available. He could have, the majority says, examined the names of the 60 jurors summoned for duty on the panel. I think the majority relies more on theory than reality. An examination of the 60 jurors summoned for duty could not have revealed which of those jurors would ultimately find their way into the courtroom to form the panel from which defendant had to select the petit trial jury. Obviously almost half of these names were somehow culled, or for some other reason did not appear for jury duty on the day defendant's case was called for trial. It was not until defendant arrived in the courtroom that he knew, or could have known, that the panel from which his petit jury was to be selected contained not a single member of his race. Faced with that circumstance I think defendant should have been entitled to inquire into the reasons and be given an opportunity to present evidence on the point he raised.

"Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any." *State v. Perry*, 248 N.C. 334, 339, 103 S.E. 2d 404 (1958); *accord*, *State v. Inman*, 260 N.C. 311, 132 S.E. 2d 613 (1963). In both *Perry* and *Inman* new trials were granted under circumstances quite similar to those presented by defendant in this case.

STATE OF NORTH CAROLINA v. DONALD OWEN BATDORF

No. 34

(Filed 11 November 1977)

1. **Criminal Law § 14— jurisdiction challenged—burden of proof on State**

When jurisdiction is challenged, the State must carry the burden and show beyond a reasonable doubt that N.C. has jurisdiction to try the accused, and former cases of the N.C. Supreme Court holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative.

2. **Criminal Law § 14— jurisdiction challenged—crime committed in N.C.—sufficiency of evidence**

Evidence in a first degree murder prosecution made out a prima facie showing of jurisdiction sufficient to carry the question to the jury and permit the jury to infer that the killing took place in N.C. where such evidence tended to show that a valid bill of indictment, regular on its face, was returned against defendant by the Sampson County Grand Jury; the murder weapon was concealed by defendant in N.C. and was recovered in N.C.; the victim's body was found in N.C.; and materials with which the victim's body was trussed and weighted came from the N.C. home of defendant's girl friend.

3. **Criminal Law § 15— venue—proof beyond reasonable doubt not required—burden of proof on State**

Since G.S. 15A-135 is silent concerning the burden of proof with respect to venue, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment, but venue need not be shown beyond a reasonable doubt, since it does not affect the question of defendant's guilt or the power of the court to try him.

4. **Criminal Law § 15— murder—venue question—body found in county in which crime was allegedly committed**

The State's evidence in a first degree murder case was sufficient to support the conclusion that the offense occurred in Sampson County and to fix

venue in Sampson County where the bill of indictment alleged that defendant committed the offense in Sampson County, the body of deceased was discovered in Sampson County, and defendant's rebuttal evidence pointed to no particular place beyond the boundaries of Sampson County as the scene of the crime.

5. **Criminal Law § 14— *jurisdiction challenged—instructions favorable to defendant***

Where the trial court in a first degree murder case instructed the jury at length that unless the prosecution had satisfied it beyond a reasonable doubt that the killing occurred in N.C., it should return a verdict of not guilty, but a correct instruction would have required the jury, if not so satisfied, to return a special verdict indicating lack of jurisdiction because a court with no jurisdiction could neither acquit nor convict, nevertheless the trial court's instruction was favorable to defendant and adequately guaranteed him the right to have the facts determinative of jurisdiction found beyond a reasonable doubt by a jury of his peers.

6. **Criminal Law § 14— jurisdiction challenged—place where body was found—instructions proper**

In a first degree murder prosecution defendant's contention that the trial court failed to instruct the jury that the inference arising from the discovery of the body in N.C. was rebuttable and failed to require the jury to consider the evidence of both the State and defendant in its determination of where the killing occurred is without merit where the court charged the jury that "if you are satisfied from the evidence beyond a reasonable doubt that the body was found in N.C., that is some evidence from which you may conclude that the killing occurred in N.C."

DEFENDANT appeals from judgment of *Webb, J.*, February 1977 Session, SAMPSON Superior Court.

A true bill of indictment, returned by the grand jury of Sampson County, charged that defendant feloniously, willfully and of his malice aforethought, did kill and murder Leroy E. West in Sampson County, North Carolina, on 17 January 1976, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

Prior to trial defendant moved to dismiss the charge for lack of jurisdiction alleging that the crime charged, if committed at all, which was denied, was committed either in the State of Ohio or some other state "adjacent or close to Ohio" and not within the State of North Carolina. Defendant also asserted that Sampson County was not the proper venue.

Answering defendant's motion to dismiss, the State alleged: (1) that the body of Leroy West, clothed and wrapped in two

Army blankets, roped, chained and weighted with a cement block, was found floating in a water-filled clay hole near Roseboro, North Carolina, in Sampson County on 7 May 1976; (2) that an autopsy revealed the cause of death to be a bullet wound in the back of the head and that a .22 caliber bullet was removed from the victim's head; (3) that defendant, while being held on other charges in Nassau County, New York, confessed to killing Leroy West and placing the body in a pond in Sampson County, North Carolina; (4) that defendant told Nassau County officers and officers of the North Carolina State Bureau of Investigation that he first came in contact with Leroy West at a truck stop in Conneaut, Ohio, and rode with the truck driver for some distance, sleeping part of the time, and that later the truck stopped and he shot and killed Leroy West; that defendant then drove the truck to Fayetteville, North Carolina, where defendant's girl friend lived; that he wrapped the body of Leroy West in blankets, rope, chain, weighted it with a cement block, and then threw it into a pond near Roseboro in Sampson County; (5) that defendant said he did not know where or in what state he shot Leroy West; (6) that several prosecutors in the State of Ohio, including the county in which Conneaut is located, have been contacted and all have declined to assume jurisdiction of the case on the grounds that they cannot establish venue; (7) that the federal courts have no jurisdiction of the homicide charge in this case; (8) that defendant has not been placed in jeopardy for this crime in North Carolina or any other state and is likely to escape punishment altogether for a murder to which he has confessed unless he is prosecuted in this jurisdiction; and (9) that the discovery of the body of Leroy West in Sampson County and defendant's admission that he killed West and wrapped the body in blankets, ropes, chains, and weighted it with a cement block, and threw it in the Sampson County pond where it was discovered, sufficiently establishes jurisdiction and venue in Sampson County.

Following a hearing Judge Rouse found that the State of North Carolina had jurisdiction to try defendant for this offense and that Sampson County was the proper venue for the trial of the case. The motion to dismiss was thereupon denied and defendant excepted.

The State's evidence tends to show that Leroy E. West was 5 feet 7 inches tall and weighed 125 pounds. He was employed in

March 1975 by John R. Hafner who was in the trucking business in Strasburg, Ohio. West was not a regular truck driver but had certain supervisory duties such as checking drivers in, writing checks, going after disabled vehicles and making an occasional delivery of a load in the immediate area. On Friday morning, 16 January 1976, Mr. Hafner instructed West to drive a tractor-trailer from the garage in Strasburg to Conneaut, Ohio, a distance of one hundred miles, and deliver the load of scrap plastics to Allied-Resin Company in Conneaut. West was told that after making the delivery he could take time off until early Monday morning. West was a dependable, trustworthy employee.

In January 1976 defendant was twenty-three years of age, 6 feet 2 inches tall and weighed 215 pounds. He had been in the military service for about two years stationed at Fort Bragg, North Carolina. He obtained a leave of absence from the 6th to the 20th of January 1976 and went to his civilian home in Conneaut, Ohio, to visit his parents. Shortly before his leave expired he talked to different truck drivers at the truck stops around Conneaut in an effort to locate a ride back to Fort Bragg. In that fashion he met Leroy West unloading his truck at the Allied-Resin plant and West agreed to give him a ride. Defendant obtained his traveling bag and secretly took his father's .22 caliber High Standard target pistol, and the two men left in the tractor-trailer rig driven by West.

On Sunday, 18 January 1976, defendant appeared at the home of his girl friend Patricia Danak in Fayetteville, North Carolina, driving the tractor-trailer and told her he had bought it. The tractor was dirty and had a bad odor about it. Defendant took the mattress out of the tractor and washed it. His girl friend then washed the mattress with two bottles of pine oil and washed the whole inside of the cab. Defendant bought a can of silver paint and used it to paint the stacks and to paint over the numbers. He then sprayed the name "P & D Motors, Inc." on the doors.

In February 1976 defendant volunteered to drive his girl friend to New York to visit her sister. While there he was involved in a minor accident as a result of which the tractor-trailer was impounded. The New York officers ascertained that the truck had been reported stolen, obtained a warrant charging defendant with felony possession of stolen property, and during interrogation defendant gave a statement in which he confessed to killing

the truck driver and depositing the body, wrapped in blankets and weighted down, in a pond near Fayetteville, North Carolina. He confessed that the murder weapon was located under a mattress at his girl friend's house in Fayetteville and drew a map indicating the location of the body. The New York authorities then contacted the Cumberland County Sheriff's Department and a warrant was obtained to search the girl friend's residence where the weapon was located and seized. The body was found in the pond in Sampson County and identified as the body of Leroy E. West, the missing truck driver. Thereafter a warrant was issued charging defendant with the first degree murder of West, and on 22 June 1976 defendant gave a statement to SBI Agent Marshal Evans and Sampson County Deputy Sheriff Landis Lee. A subsequent statement was taken from defendant on 30 September 1976 by the same parties.

In those statements defendant said that he killed Leroy E. West after being homosexually assaulted; that the incident occurred in southeast Ohio some five or six hours after defendant and his victim left their starting point in Conneaut, Ohio; that he drove the truck to Fayetteville, North Carolina, with the body in it, arriving on Sunday afternoon; that late at night on either Monday or Tuesday, January 19 or 20, 1976, in Fayetteville, North Carolina, he tied up the body in two blankets that were in the trailer, using some green nylon riser cord that he had at his girl friend's house; that he obtained a cement block from the backyard there, put it in the trailer with the body, drove to the water hole or pond near Roseboro in Sampson County, attached the chains and cement block to the body and threw it into the pond. Defendant said he had been to the pond a couple of times before Christmas and knew its location. He told the officers how he and his girl friend cleaned out the cab of the truck and washed the mattress and stated that the only blood he saw was on the mattress in the sleeper. He said he carried the victim's boots, coat and the red cover to the mattress to a garbage dump in Fayetteville.

There were various discrepancies in defendant's statements. He told FBI Agent Caverly that he bought the tractor-trailer for $3200 from a man named James Little but never mentioned that he had been sexually attacked or had killed anyone. He told Kenny Meyer with the Nassau County Police that he bought the

tractor-trailer from James Little for $28,000, withheld $4,000 pending delivery of title, and borrowed the purchase money from lenders who did not want their identity known. He also told Officer Meyer that he went home late at night after killing Leroy West with the body in the truck. He told SBI Agent Evans that Leroy West drove defendant to his father's home in the tractor-trailer, a distance of ten miles, to get defendant's suitcase and the .22 caliber pistol. He denied to Agent Evans that he told Officer Meyer he drove the truck to his parent's home with the body in it, asserting that he drove it alone. He told Agent Evans he killed Leroy West in southeastern Ohio near the Pennsylvania state line and then asserted he did not know where he was when he started driving the truck. On direct examination of these officers the State elicited testimony concerning all of defendant's statements.

The State's evidence further tends to show that a .22 caliber bullet taken from the brain of the victim was fired from the .22 caliber High Standard target pistol found under the mattress at the home of defendant's girl friend, and defendant's father identified the weapon as belonging to him.

Defendant offered in evidence a map of the eastern United States and elicited, by cross-examination of State's witnesses, testimony to the effect that it is about seven hundred miles from Conneaut, Ohio, to Clinton, Sampson County, North Carolina, or about fourteen hours driving time in a tractor-trailer moving at 50 miles an hour; that six hours out of Conneaut, Ohio, the tractor-trailer would have covered only three hundred miles and would have reached a point close to Washington, D.C., which is at least two hundred miles from the North Carolina border.

Defendant then testified as a witness in his own behalf, repeating his previous statements to the officers that he hitchhiked a ride with Leroy West in Conneaut, Ohio, was sexually assaulted by him some six hours after they left Conneaut, and while the two struggled over the pistol it accidentally discharged killing West; that he did not know where or in what state the killing occurred; that he drove the tractor-trailer to Fayetteville with the body in it, wrapped it in blankets as heretofore described, weighted it and threw it in a pond in Sampson County. He testified about hiding the gun at his girl friend's home and about

taking her to New York in the tractor-trailer to see her sister, narrating the details concerning the accident, the impoundment of the rig and his later interrogation and confession to the New York officers. He said he planned to find a truck terminal belonging to the owner of the rig so he could leave it there and take the bus back to Fayetteville, North Carolina.

On cross-examination defendant said he was positive that Leroy West was not killed in North Carolina and added, "If I was on trial in Ohio I would be telling them it didn't happen up there and if they had a trial up there that's what I would have told them, yes, sir." He asserted on the witness stand that West wasn't killed in Ohio, North Carolina, Virginia, West Virginia, Kentucky, South Carolina, Texas, Tennessee, Maryland or Pennsylvania. Then he said: ". . . It could have happened in southeastern Ohio or it could have happened in Pennsylvania, Kentucky, Tennessee or West Virginia. . . . I do not know where it happened. One thing I am sure of, with the time factor involved, it couldn't have happened here, in North Carolina."

The court submitted first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter or not guilty as permissible verdicts. The jury returned a verdict of guilty of murder in the first degree and defendant was sentenced to life imprisonment. He appealed to the Supreme Court assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Associate Attorney, for the State of North Carolina.

David J. Turlington, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends there was insufficient evidence to show (1) that the murder with which he is charged was committed in North Carolina so as to confer jurisdiction on the courts of this State and (2) that the crime was committed in Sampson County so as to fix venue in that county. Denial of his motions challenging both jurisdiction and venue constitutes his first assignment of error.

[1] This Court has traditionally regarded a challenge to jurisdiction as an affirmative defense with the burden of persuasion on

the defendant. *State v. Golden*, 203 N.C. 440, 166 S.E. 311 (1932); *State v. Davis*, 203 N.C. 13, 164 S.E. 737, *cert. denied* 287 U.S. 649 (1932); *State v. Long*, 143 N.C. 670, 57 S.E. 349 (1907); *State v. Barrington*, 141 N.C. 820, 53 S.E. 663 (1906); *State v. Blackley*, 138 N.C. 620, 50 S.E. 310 (1905).

The majority of states, however, require the state to prove beyond a reasonable doubt that its courts have jurisdiction in a criminal case. *See* Annot., 67 A.L.R. 3d 988, 1004 (1975); *State v. Wardenburg*, 261 Iowa 1395, 1401-02, 158 N.W. 2d 147, 151 (1968), a case dealing with venue which necessarily entails a resolution of jurisdiction, and cases therein cited. For reasons which follow, we think North Carolina should adopt the majority rule.

We have recognized from earliest times that the criminal jurisdiction of our courts is territorially restricted. *State v. Brown*, 2 N.C. 100 (1794); *State v. Knight*, 1 N.C. 143 (1799); *State v. Cutshall*, 110 N.C. 538, 15 S.E. 261 (1892); *State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946). A defendant's contention that this State lacks jurisdiction may be an affirmative defense in that it presents, in the words of Justice Barnhill in *State v. Davis*, 214 N.C. 787, 793, 1 S.E. 2d 104, 108 (1939), a matter "beyond the essentials of the legal definition of the offense itself." Jurisdictional issues, however, relate to the authority of a tribunal to adjudicate the questions it is called upon to decide. When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" (*State v. Davis, supra*) and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Moreover, problems akin to double jeopardy are involved. The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, does not require one state to accept the judicial determinations of a sister state as to which possesses jurisdiction in a given case. *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 21 L.Ed. 897 (1873). *See also State v. Baldwin*, 305 A. 2d 555 (Me. 1973); *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.*, 285 N.C. 344, 204 S.E. 2d 834 (1974). If different states could successively try an ac-

cused for equivalent criminal offenses arising out of the same conduct, the spirit, if not the letter, of the provisions against double jeopardy would be violated. *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435, 12 L.Ed. 213, 224 (1847) (dissenting opinion); *State v. Brown, supra. See Green v. United States*, 355 U.S. 184, 187-88, 2 L.Ed. 2d 199, 204, 78 S.Ct. 221, 223 (1957); *State v. Knight, supra.* It seems appropriate, therefore, that when jurisdiction is challenged the State should bear the burden of showing the authority of its trial courts to proceed to judgment. By placing upon the State the burden of proving beyond a reasonable doubt that the crime with which an accused is charged was committed in North Carolina, we minimize the possibility that a defendant will be tried here for a crime actually committed elsewhere. By so doing we enhance the prospect that sister states will give full faith and credit to our decisions respecting criminal jurisdiction even though such deference is not constitutionally required. *See State v. Baldwin*, supra. This is most desirable. For these reasons we hold that when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Our former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative.

In the present case Judge Webb properly placed the burden of proof and instructed the jury that unless the State had satisfied it beyond a reasonable doubt that the killing of Leroy West occurred in North Carolina, a verdict of not guilty should be returned. While the court should have instructed the jury, if not so satisfied, to return a special verdict indicating lack of jurisdiction, the instruction given was favorable to defendant and affords him no just grounds for complaint.

Defendant argues, however, that the State's evidence on the question of jurisdiction was insufficient to carry the case to the jury. Therefore, he contends the court erred in denying his pretrial motion for dismissal and his motion for nonsuit at the close of all the evidence. For reasons which follow we hold these motions were properly denied.

[2] A valid bill of indictment, regular on its face, was returned against defendant by the Sampson County Grand Jury. The murder weapon was concealed by defendant in North Carolina and was recovered in North Carolina. The victim's body was

found in North Carolina. Materials with which the victim's body was trussed and weighted came from the North Carolina home of defendant's girl friend. These undisputed facts make out a prima facie showing of jurisdiction sufficient to carry the question to the jury and permit the jury to infer that the killing took place in North Carolina. *See, e.g., People v. Peete*, 54 Cal. App. 333, 202 P. 51 (1921); *Breeding v. State*, 220 Md. 193, 151 A. 2d 743 (1959); *Commonwealth v. Knowlton*, 265 Mass. 382, 163 N.E. 251 (1928); *Commonwealth v. Costley*, 118 Mass. 1 (1875); *State v. Fabian*, 263 So. 2d 773 (Miss. 1972).

Even if *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), include within their uncertain ambit the requirement that a state's jurisdiction to try a criminal defendant be proved beyond a reasonable doubt, permitting the jury to infer from the prima facie showing that the killing took place within North Carolina does not offend the Due Process Clause—the "rational connection" between the evidence offered and the inference which the jury was permitted to draw is sufficiently strong to meet due process standards. *See Mullaney v. Wilbur*, 421 U.S. at 702, n. 31; *Barnes v. United States*, 412 U.S. 837, 845-46, nn. 9-11, 37 L.Ed. 2d 380, 93 S.Ct. 2357 (1973), and cases there cited. *See also United States v. Jones*, 508 F. 2d 1271 (4th Cir. 1975), *cert. denied* 421 U.S. 950.

Defendant's contention that the evidence was insufficient to fix venue in Sampson County is likewise without merit. Former G.S. 15-134 (repealed effective 1 July 1975) provided that all offenses were deemed to have been committed in the county alleged in the indictment unless defendant denied same by plea in abatement and indicated by affidavit the proper county for trial of the charges against him. The statute did not state which party had the burden of proof if such plea were filed. "At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. *State v. Oliver*, 186 N.C. 329, 119 S.E. 370." *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). The purpose of former G.S. 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. *State v. Mitchell*, 83 N.C. 674 (1880); *State v. Overman, supra.*

[3] Former G.S. 15-134 has been replaced by G.S. 15A-135 which deletes the requirement that a defendant contesting venue execute an affidavit setting forth the proper venue and replaces the plea in abatement by "a motion to dismiss" for improper venue under G.S. 15A-952. The new statute, like the old, is silent concerning the burden of proof. Hence, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). Venue need not be shown beyond a reasonable doubt since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. This accords with the rule in many states. See Annot., 67 A.L.R. 3d 988 at 1000 (1975), and cases there cited from sixteen states and from seven federal circuit courts.

[4] Here, the bill of indictment alleges that defendant committed the offense in Sampson County. The body of Leroy West was discovered in Sampson County. That evidence makes a prima facie showing that Sampson County is the proper venue. *See United States v. Rees*, 193 F. Supp. 849 (D.C. Md. 1961); *People v. Peete*, supra; *Breeding v. State, supra*; *Commonwealth v. Knowlton*, supra; *Commonwealth v. Costley, supra*; *People v. Sparks*, 53 Mich. App. 452, 220 N.W. 2d 153 (1974); *Sanders v. State*, 286 So. 2d 825 (Miss. 1973); *State v. Fabian, supra*; *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900); *State v. Coolidge*, 109 N.H. 403, 260 A. 2d 547 (1969), *reversed on other grounds* 403 U.S. 443 (1971); *McGlocklin v. State*, 516 P. 2d 1357 (Okla. Crim. App. 1973). Upon such prima facie showing defendant must go forward with evidence sufficient to rebut the inferences arising therefrom. He remains silent at his own risk. Since defendant's rebuttal evidence points to no particular place beyond the boundaries of Sampson County as the scene of the crime, we hold that the State's evidence was sufficient to support the conclusion that the offense occurred in Sampson County and to fix venue in Sampson County. Defendant's motion to dismiss for improper venue was properly denied. His first assignment of error is overruled.

[5] Defendant's remaining assignments concern alleged inadequacies in the charge to the jury. He contends Judge Webb failed to instruct that in order to convict defendant the jury must be

satisfied beyond a reasonable doubt that the killing occurred in North Carolina and that the burden was on the prosecution to prove that fact. This contention is puzzling. The court instructed the jury at length that unless the prosecution had satisfied it beyond a reasonable doubt that the killing occurred in North Carolina, it should return a verdict of not guilty. This charge was reiterated near the end of the judge's instructions. As noted above, a correct instruction would have required the jury, if not so satisfied, to return a special verdict indicating lack of jurisdiction *because a court with no jurisdiction could neither acquit nor convict.* Even so, Judge Webb's instruction was favorable to defendant and adequately guaranteed him the right to have the facts determinative of jurisdiction found beyond a reasonable doubt by a jury of his peers.

[6] Finally, defendant assigns as error the court's charge with respect to permissible inferences arising from the discovery of the corpse in Sampson County. Defendant argues that Judge Webb failed to instruct the jury that the inference arising from the discovery of the body in North Carolina is rebuttable and failed to require the jury to consider the evidence of both the State and defendant in its determination of where the killing occurred.

The court charged the jury as follows, the challenged portion being in parentheses:

> "Now, (I charge you ladies and gentlemen, if you are satisfied from the evidence beyond a reasonable doubt that the body was found in North Carolina, that is some evidence from which you may conclude that the killing occurred in North Carolina).
>
> However, you are not compelled to do so. That is evidence which you will take into account along with all other evidence in determining whether you are satisfied beyond a reasonable doubt that this killing occurred in North Carolina."

We hold this instruction was entirely proper. The assignment of error based thereon is overruled.

For the reasons given, the verdict and judgment must be upheld.

No error.

WHITLEY'S ELECTRIC SERVICE, INC. v. HENRY C. SHERROD

No. 94

(Filed 11 November 1977)

1. **Accounts § 1— running account—characteristics**

An ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits and further dealings between the parties are contemplated; such an account is running or current where it continues with no time limitations fixed by express or implied agreement.

2. **Accounts § 1— running account—sufficiency of evidence**

The Court of Appeals properly determined that a current or running account existed between the parties at the time of defendant's final payment where the evidence tended to show that the purpose of notes executed to a bank was to apply the proceeds to the entire debt then owed by defendant and to permit the continued extension of credit; defendant was responsible for payments on the notes so that any payments by plaintiff were charged back to defendant pursuant to their understanding; plaintiff sent defendant regular statements; defendant made payments and plaintiff consequently adjusted the balance in its records; after 10 September 1971 defendant received monthly statements for the entire amount owing without making any objection; and the parties discussed the debt and defendant made an oral promise to pay it.

3. **Limitation of Actions § 6— running account—partial payment—tolling of statute of limitations**

A part payment on a running or current account operates to toll the statute of limitations if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance.

4. **Accounts § 1; Limitation of Actions § 6— running account—partial payment—tolling of statute of limitations**

The Court of Appeals erred in concluding that there was no evidence of circumstances surrounding a payment on an account by defendant which would permit the trial judge to find that it was an acknowledgment by defendant of the entire indebtedness represented by a current account, since the evidence tended to show that defendant made the payment while he was continuing to

make payments on a bank loan which had been executed as a means of refinancing defendant's account with plaintiff; every payment defendant made to the bank was essentially a recognition of his liability to plaintiff; when defendant missed payments on the bank loan, these were charged back to his account by plaintiff according to their original agreement; and after the payment in question, the parties discussed the account and defendant promised to pay the balance.

5. Limitation of Actions § 6— current account—part payment—statute of limitations tolled as to amount acknowledged

A part payment on a current account which constitutes an acknowledgment begins the statute of limitations running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment.

ON appeal by plaintiff from a decision of the Court of Appeals, reported in 32 N.C. App. 338, 232 S.E. 2d 223 (1977), *Vaughn, J.*, dissenting. The Court of Appeals reversed judgment for plaintiff entered by *Tillery, J.*, at the January 1976 Session of WILSON Superior Court. This case was docketed and argued as No. 117 at the Spring Term 1977.

Farris, Thomas & Farris, P.A., by Robert A. Farris, Jr., and Thomas J. Farris, Attorneys for plaintiff.

Vernon F. Daughtridge, Attorney for defendant.

EXUM, Justice.

This is an action by an electrical subcontractor against a general construction contractor for money ($18,213.80) claimed to be due for "services rendered" between 6 April 1967 and 10 September 1971. The complaint was filed on 23 October 1973, and a copy of plaintiff's ledger account relating to work performed for defendant was attached to the complaint. Defendant answered denying the debt, pleading the three-year statute of limitations[1], and contending that there had never been a running account between the parties, that plaintiff had furnished labor and material pursuant to a number of separate and distinct contracts, and that more than three years had elapsed since a claim had accrued on any contract. It was undisputed that on 14 May 1971 defendant made a payment of $525.00 to plaintiff.

1. G.S. 1-52.

The most important question presented by plaintiff's appeal concerns the effect of this payment on defendant's statute of limitations defense. Judge Tillery, hearing the case without a jury, found that by this payment defendant "ratified and acknowledged his indebtedness to Plaintiff" and entered judgment for plaintiff in the sum of $17,450.83 with interest from 10 September 1971. The Court of Appeals, being of the opinion that the payment did not revive the entire indebtedness but only so much thereof as accrued within three years prior to the payment, reversed and remanded. Judge Vaughn dissented on the ground that defendant did not properly bring forward his exception to the trial court's crucial finding so as to raise on appeal the question whether there was evidence to support the finding. Defendant did not except specifically to this finding. There appears in the record after the judgment only this language:

> "To the extension [sic] of the foregoing judgment, and to each and every finding of fact, and, conclusion of law therein, contained, defendant Henry C. Sherrod excepts.
>
> DEFENDANT'S EXCEPTION NO. 113."

While we note the defendant's "broadside" exception fails to comply strictly with the requirement of Rule 10(b)(2) of the Rules of Appellate Procedure, appropriate disposition of this appeal requires that we nevertheless proceed to the merits of the case. *See* N.C.R. App. P. 2; *City of King's Mountain v. Cline*, 281 N.C. 269, 188 S.E. 2d 284 (1972).

We hold that there is evidence in this record to support Judge Tillery's finding that the payment was an acknowledgment by defendant of that portion of his account balance which was awarded in the judgment. We consequently reverse the decision of the Court of Appeals remanding the case and order that the judgment of the trial court be reinstated.

Plaintiff offered evidence which tended to show the following: From 1958 to 1971 plaintiff furnished goods and services to defendant in the course of electrical, heating and air-conditioning work on various building and remodeling jobs, and in certain other personal transactions. In October, 1967, defendant owed approximately $14,000.00 and agreed to borrow this amount for payment of the debt. Because its credit rating was more favorable than defendant's, plaintiff executed a $14,000.00 note to Branch

Banking and Trust Company (BB&T). This note was then endorsed by defendant. The loan proceeds were deposited in plaintiff's account at BB&T and credited to defendant on the original obligation. Plaintiff's records reflect this credit. Although plaintiff remained primarily liable on the note, the understanding between the parties was that defendant would make the payments. To secure this note defendant assigned several notes secured by second mortgages to plaintiff, which in turn assigned them to BB&T. Payments on these second mortgage notes were made to defendant's savings account. Defendant was to apply these funds toward payment on the BB&T note. Defendant "paid down" the note and several renewal notes were issued. Defendant then missed a number of payments and plaintiff made these payments to BB&T. These payments were subsequently charged back to defendant's account with plaintiff. Plaintiff continued to work on projects for defendant and made further ledger entries, designated by the name or address of the property owner, that represented both work done pursuant to written contract and "extras" authorized by defendant. Plaintiff's last entry of 14 May 1971 recorded defendant's $525.00 payment, which was not credited to any specific job. Plaintiff billed defendant regularly, and on 10 September 1971 the indebtedness totaled $18,213.80. After that date defendant received monthly statements for the "balance owing" without objecting or denying his obligation. The parties discussed the matter several times, and in October, 1972, defendant orally promised to pay the entire debt.

Defendant's testimony, which frequently conflicted with that of plaintiff's witnesses, may be summarized as follows: Plaintiff performed subcontracting work for defendant beginning in the late 1950's. From 1968 to 1971 a series of separate contracts was entered for work on houses and other buildings. Defendant's customary procedure was to furnish plans and specifications for the proposed job to plaintiff, who then submitted an estimate. The contract price between defendant and a property owner was based on the estimates submitted by plaintiff and other subcontractors. While plaintiff would on occasion perform additional work at the owner's direction, defendant always insisted that these "extras" be billed directly to the customer. When plaintiff nevertheless included the extras in its statement, defendant would demand that those items be taken off the bill. Several

times plaintiff complied temporarily and then resumed its practice of billing defendant for the extras. Defendant endorsed the BB&T note and assigned the second mortgage notes to plaintiff for the purpose of raising $14,000.00 to buy a farm. At that time he owed plaintiff substantially less than the value of the BB&T note and understood the transaction as a sale of the second mortgage notes to plaintiff. After the assignment he did not receive the proceeds from BB&T or credit from plaintiff. Although he claims not to have received the $14,000.00 due him from a "sale" of the second mortgage notes, defendant never filed an action to contest his liability on the BB&T note. Defendant paid down the original and several renewal notes until a $6,550.00 note was issued in November, 1970, and the indebtedness was placed on a monthly basis from that time. Defendant continued to make the monthly payments on this debt, and a balance of approximately $300.00 still remained due at the time of trial. Plaintiff was never authorized to pay BB&T or to charge back any of the payments to defendant. After 10 September 1971 defendant neither discussed the indebtedness with plaintiff nor received any written demands for payment.

Plaintiff contends that the evidence shows a course of dealing which constituted a current or running account between the parties. Moreover, it urges that the payment of 14 May 1971 revived defendant's entire obligation and not, as held by the Court of Appeals, only that portion which plaintiff can prove was incurred within three years prior to that payment or prior to any preceding payments which would have started the statute of limitations running anew. In other words, plaintiff insists that it is not required to prove a succession of payments, each within three years of the previous one and the last within three years prior to the commencement of the action, in order to recover the entire debt.

Defendant argues that the evidence shows that the parties conducted their business under separate contracts for each job rather than on an account. Even if an account is established, defendant urges that the partial payment of 14 May 1971 would not toll the statute of limitations because no evidence would permit the clear inference that by this payment defendant intended to acknowledge and ratify his entire obligation. At the very least defendant argues that the statute was tolled only as to those

items which had accrued after 14 May 1968, that the trial court's judgment included recovery for claims which had accrued prior to that date, that plaintiff has not proved successive payments so as to toll the statute on these earlier claims, and that therefore the Court of Appeals correctly reversed and remanded for new trial on these issues.

Plaintiff contended before the Court of Appeals that the evidence showed a "mutual, open and current account" within the meaning of General Statute 1-31 so that the limitations period pursuant to this statute began to run from the time of the "latest item proved in the account on either side." The Court of Appeals correctly held that, because of the absence of reciprocal demands and other characteristics of mutuality, the account alleged by plaintiff does not fall within General Statute 1-31. Plaintiff properly abandoned this contention in its argument before us.

[1] The Court of Appeals also reviewed this area of the law of accounts and summarized the principles which control our decision here. It correctly stated that an ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. Such an account is "running" or "current" where it continues with no time limitations fixed by express or implied agreement. *McKinnie Bros. v. Wester*, 188 N.C. 514, 125 S.E. 1 (1924); 1 Am. Jur. 2d Accounts and Accounting § 4 (1962). An account may also be "mutual" if there are reciprocal dealings so that each party extends credit to the other and the account is allowed to run with a view to an ultimate adjustment of the balance. *Brock v. Franck*, 194 N.C. 346, 139 S.E. 696 (1927); *McKinnie Bros. v. Wester, supra; Hollingsworth v. Allen*, 176 N.C. 629, 97 S.E. 625 (1918); 1 Am. Jur. 2d Accounts and Accounting § 5 (1962). See G.S. 1-31.

[2] As the Court of Appeals recognized, plaintiff's evidence supports the view that a current or running account existed between the parties at the time of the 14 May 1971 payment. Plaintiff's witnesses testified to this effect: The purpose of the notes executed to BB&T was to apply the proceeds to the entire debt then owed by defendant and to permit the continued extension of credit. Defendant was responsible for payments on the notes so

that any payments by plaintiff were charged back to defendant pursuant to their understanding. Plaintiff sent defendant regular statements. Defendant made payments and plaintiff consequently adjusted the balance in its records. After 10 September 1971 defendant received monthly statements for the entire amount owing without making any objection. They discussed the debt and defendant made an oral promise to pay it. This testimony allows the inference that the parties considered the various construction jobs and the borrowing on the notes as a connected series of transactions and contemplated further dealings with no agreed time limitations.

Defendant's evidence tends to show, on the other hand, that the parties' financial transactions were keyed to distinct and separate contractual arrangements rather than to a current account maintained between them.

The resolution of this evidentiary conflict was for the trial judge. Judge Tillery found facts as follows:

> "First, that Plaintiff, Whitley's Electric Service, Inc. furnished goods and services to Defendant, Henry C. Sherrod or to his benefit through September 10, 1971, of a total value of Eighteen Thousand Two Hundred Thirteen Dollars and Eighty Cents ($18,213.80);
>
> "Second, that Defendant, Henry C. Sherrod received and accepted goods and services from Plaintiff, Whitley's Electric Service, Inc. through September 10, 1971 of the total value of Seventeen Thousand Four Hundred Fifty Dollars and Eighty-three cents ($17,450.83) and has failed and refused to pay Plaintiff said amount after demand by Plaintiff;
>
> "Third, that Defendant, Henry C. Sherrod paid Plaintiff, Whitley's Electric Service, Inc. the sum of Five Hundred Twenty Five Dollars ($525.00), ratified and acknowledged his indebtedness to Plaintiff, Whitley's Electric Service, Inc. on May 14, 1971; and that
>
> "Fourth, Plaintiff, Whitley's Electric Service, Inc. commenced this action on October 23, 1973 against Defendant, Henry C. Sherrod and this Court finds as a fact that said action is not barred by the Statute of Limitations; and that

"Fifth, Defendant, Henry C. Sherrod owes Plaintiff, Whitley's Electric Service, Inc. the sum of Seventeen Thousand Four Hundred Fifty Dollars and Eighty-Three cents ($17,450.83), plus interest at the legal rate from September 10, 1971 plus the costs of this action."

It is true that Judge Tillery did not make an express finding that a current account existed between the parties. His findings, however, speak consistently in terms of a *single* indebtedness incurred as plaintiff furnished goods and services to defendant through 10 September 1971. It is clear that Judge Tillery considered this indebtedness to be one obligation arising out of a current account. Such a finding is implicit in his judgment. *See Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968); *Bradham v. Robinson*, 236 N.C. 589, 73 S.E. 2d 555 (1952); 89 C.J.S. Trial §§ 615, 646, 649 (1955).

[3] Where suit is brought more than three years after the claim arises on an account or other contractual debt, the bar of the statute of limitations may be avoided if the debtor has acknowledged his obligation within three years prior to the date the action is filed. A mere promise or similar acknowledgment must be in writing in order to have this effect. G.S. 1-26. A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. *Bryant v. Kellum*, 209 N.C. 112, 182 S.E. 708 (1935); *Kilpatrick v. Kilpatrick*, 187 N.C. 520, 122 S.E. 377 (1924); *Cashmar-King Supply Co. v. Dowd & King*, 146 N.C. 191, 59 S.E. 685 (1907); *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895). Such a payment is given this effect on the theory that it amounts to a voluntary acknowledgment of the existence of the debt. From this acknowledgment the law implies a new promise to pay the balance. *Cashmar-King Supply Co. v. Dowd & King, supra*; 51 Am. Jur. 2d Limitation of Actions § 360 (1962).

[4] We think the Court of Appeals erred in concluding that there was no evidence of circumstances surrounding the 14 May 1971 payment which would permit the trial judge to find that it was an acknowledgment by defendant of the entire indebtedness represented by a current account. The trial court found that defendant *acknowledged his indebtedness* by the payment on 14

May 1971. There are circumstances sufficiently probative of an acknowledgment to support this finding. Defendant made the payment while he was continuing to make payments on the BB&T loan. According to plaintiff's evidence, defendant's payments to BB&T were made pursuant to the parties' understanding of the entire transaction as a means of refinancing defendant's account with plaintiff. On this view of their agreement, every payment defendant made to BB&T was essentially a recognition of his liability to plaintiff. These BB&T payments formed the context surrounding defendant's payment to plaintiff on 14 May 1971 and tend to support the trial court's finding of an acknowledgment. Moreover, plaintiff's evidence on the BB&T transaction is sufficient to show that defendant's missed payments were charged back to his account according to their original agreement. Finally, there was evidence tending to show that after the payment on 14 May 1971 the parties discussed the account and defendant promised to pay the balance. In view of the entire course of dealing between the parties, the evidence supports the trial court's finding of an acknowledgment on 14 May 1971.

It would have been preferable if the trial judge had been somewhat more precise in finding exactly what defendant acknowledged by the payment. The exhibits offered at trial help to elucidate his findings and show more clearly that his judgment ought to be upheld. *See Harrelson v. Insurance Co., supra; Bradham v. Robinson, supra.* Defendant's Exhibit 48 is an invoice dated 4 May 1971 for plaintiff's work at 710 Jordan Street. The amount of $611.32 represents a contract price of $525.00 and a charge of $86.32 for "extras." A $525.00 payment is recorded, and the last line designates a remaining balance of $86.32. A similar differentiation between the contract price and extras is reflected in Defendant's Exhibits 23, 24, 25, 26, 39, 41 and 45. When the charges for extras in these invoices are added together, the total is $760.82. If this amount is subtracted from the $18,213.80 ledger balance claimed by plaintiff, a difference of $17,452.98 represents all of the contract and miscellaneous work which plaintiff performed. As Judge Tillery awarded plaintiff $17,450.83, it is obvious that he found defendant to have acknowledged his indebtedness for the remainder of the account balance while continuing to dispute the extras. The discrepancy of $2.15 undoubtedly represents either a mistake in arithmetic or some small item we

have not been able to locate in these voluminous and sometimes illegible exhibits. The insignificant difference favors defendant and may be safely disregarded. The important point is that these exhibits clarify Judge Tillery's formal findings. They support our conclusion that he found, in part expressly and in part impliedly, that on 14 May 1971 defendant acknowledged by part payment an obligation of $17,450.83 on his then current account with plaintiff. As this finding is supported by competent evidence, it will not be disturbed. *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966); *Stewart v. Rogers*, 260 N.C. 475, 133 S.E. 2d 155 (1963).

While there is language in some of the decisions suggesting that a part payment on a current account revives only those items that accrued within three years preceding the payment, this Court has not so held in any case where (1) a current account was established, (2) the debtor made a partial payment, and (3) there were circumstances showing that in making the payment the debtor intended to acknowledge the entire account and thereby impliedly promised to pay the balance due.

In *Phillips v. Penland*, 196 N.C. 425, 147 S.E. 731 (1929), the plaintiff sued to recover the reasonable value of services rendered to his disabled sister for some ten years prior to her death in 1926. The evidence disclosed that she made payments to him of $3.00 in 1921 and $40.00 in 1925, but the circumstances under which these payments were made did not appear. The trial judge charged the jury that if it found the 1925 payment was made on a current account in such a way as to acknowledge the debt as still existing, it would return a verdict that none of the plaintiff's account was barred by the statute of limitations. On appeal from a verdict and judgment for the plaintiff, this Court held the instruction to be error and ordered a new trial under the following rule:

> "The payment of $40.00, made in 1925, *nothing else appearing*, had the legal effect of preventing the bar of the statute of limitations against the most precarious claim then existing, that is, the one for 1922, and of prolonging its enforceability for three years beyond the date of such payment. . . . The result is that the payment of $40 in 1925 prevented the bar of the statute of limitations as to all claims to a corresponding date in 1922. Moreover, as the services were continuous, such payment constituted a legal recognition of all claims

within the statutory period of three years, that is from said corresponding date in 1922." 196 N.C. at 427-28, 147 S.E. at 733. (Emphasis supplied.) (Citations omitted.)

Notwithstanding the problematic instruction in *Phillips*, which implies evidence of an account and that the 1925 payment was made in recognition of it, we read the decision to state a rule for cases where the evidence is insufficient to show a clear acknowledgment of the entire balance. Not only did the Court note that the circumstances surrounding the two payments did not appear, but the legal effect of the payment is declared with the qualification "nothing else appearing." The implicit holding in *Phillips* is that the record would not support a finding that the debtor intended to acknowledge her entire account debt. Moreover, some question exists whether there was any evidence of a current account in that case.

In *Richlands Supply Co. v. Banks*, 205 N.C. 343, 171 S.E. 358 (1933), the defendant bought merchandise on an open and current account at the plaintiff's store from 1925 through 1929. Several purchases were made shortly before the defendant's last payment on 7 December 1929, and suit was instituted 6 December 1932. The trial court directed a verdict for the defendant upon a plea of the statute of limitations. On appeal this Court awarded a new trial under the rule of *Phillips v. Penland*, *supra*, stating that "plaintiff is entitled to recover for all purchases made within three years next immediately preceding the cash payment of $70.00 on 7 December, 1929, less any payments by the defendant during said period. The effect of this payment on 7 December was to stop the running of the statute of limitations against all items not then barred, and to fix a new *terminus a quo* from which the statute would start to run anew." 205 N.C. at 345, 171 S.E. at 359. (Citations omitted.) This decision marked the first application of the *Phillips* rule where a running account was clearly present. No consideration, however, was given to the presence or absence of circumstances showing that the debtor's payment acknowledged the entire account.

This Court confronted the problem of successive payments in *Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503 (1941). There the plaintiff sold milk on an account from July, 1934, to July, 1938. The defendant made intermittent payments during this period,

the last one being on 16 May 1938. Thereafter plaintiff continued to render monthly statements to defendant for the entire amount due, or $185.63. Six further payments were made—the first on 12 November 1938, and the last in January, 1940. Plaintiff's evidence was that defendant during this latter period told him she wished she could pay all she owed and would do so if she had the money. The plaintiff instituted the action on 10 September 1940. The defendant pleaded the three-year statute of limitations, contending that all items accrued on the account prior to January, 1937, or more than three years before the last payment, were barred. The trial court instructed the jury in accordance with defendant's contention. The jury awarded plaintiff $104.50, which represented the agreed value of all milk sold after January, 1937. On plaintiff's appeal this Court awarded a new trial on the ground that the trial court should have used the 12 November 1938 payment, the first in the series of payments made after deliveries had ceased and within three years of suit, from which to measure the recoverable indebtedness. In so holding, however, the Court assumed that the effect of this payment was to remove the bar of the statute only as to those items which had accrued within the three years prior to the payment. It is not clear from the opinion whether consideration was given to any circumstance that might show whether the defendant's payment constituted her acknowledgment of the *entire* account balance.

As an alternative ground for awarding plaintiff a new trial in *Little*, the Court held that the evidence was sufficient to be submitted to the jury on the theory of an *account stated*. It said, 220 N.C. at 431-32, 17 S.E. 2d at 504-05:

> "To constitute a stated account there must be a balance struck and agreed upon as correct after examination and adjustment of the account. However, express examination or assent need not be shown—it may be implied from the circumstances. 1 C.J.S., 707.
>
> "An account becomes stated and binding on both parties if after examination the parties [sic] sought to be charged unqualifiedly approves of it and expresses his intention to pay it. *Ray v. Kings Estate*, 179 Pac., 821. The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and prom-

ises to pay the balance shown to be due, *Duerr v. Sloan*, 181 Pac., 407, 1 C.J.S., 711, or makes a part payment and promises to pay the balance. 1 C.J.S., 712.

" 'It is accepted law in this jurisdiction that when an account is rendered and accepted, or when so rendered there is no protest or objection to its correctness within a reasonable time, such acceptance or failure to so object creates a new contract to pay the amount due. *Gooch v. Vaughan*, 92 N.C., 611; *Copland v. Telegraph Co.*, 136 N.C., 11, 48 S.E., 501; *Davis v. Stephenson*, 149 N.C., 113, 62 S.E., 900; *Richardson v. Satterwhite*, 203 N.C., 113, 164 S.E., 845.' *Savage v. Currin*, 207 N.C., 222, 176 S.E., 569."

Judge Tillery's findings and award are clearly based on an acknowledgment by part payment of an indebtedness evidenced by a *current or running account.* While we are not called upon here to decide the point, it appears that the evidence also would have permitted plaintiff to recover this indebtedness on the theory of an *account stated* under the rules declared in *Little. See also Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 530-31, 126 S.E. 2d 500, 506-07 (1962).

[5] We hold here that where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. The record before us discloses sufficient evidence of the circumstances surrounding defendant's part payment to support the trial court's finding that by this payment he acknowledged a debt of $17,450.83 as the balance due on a current account. The trial court correctly concluded that this much of plaintiff's claim was not barred by the statute of limitations. *See Smith v. Davis*, 228 N.C. 172, 45 S.E. 2d 51 (1947); *Kilpatrick v. Kilpatrick, supra*, 187 N.C. 520, 122 S.E. 377 (1924); 1 Am. Jur. 2d Accounts and Accounting § 18 (1962).

The judgment of the trial court is, accordingly, reinstated. The judgment of the Court of Appeals is reversed.

Reversed.

IN RE: LAST WILL AND TESTAMENT OF J. B. TAYLOR, DECEASED

No. 22

(Filed 11 November 1977)

1. **Executors and Administrators § 5— revocation of letters of administration— appeal to superior court**

Upon appeal to the superior court from the clerk's revocation of letters of administration, the trial judge may review any of the clerk's findings of fact when the finding is properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings. However, absent exceptions to specific findings of fact, a general exception to the judgment only presents the question of whether facts found support the conclusions of law.

2. **Executors and Administrators § 8— collection of estate assets**

It was the duty of an administrator C.T.A. to collect the assets of the estate and to pay therefrom debts, taxes, and the cost of administration until all were paid or the assets of the estate exhausted. If the assets of the estate were not exhausted, it became his duty to distribute the remaining personalty coming into his hands in accordance with the provisions of the decedent's will.

3. **Executors and Administrators § 5.5— removal of administrator C.T.A.— misconduct—letter seeking to collect assets**

The clerk's determination that an administrator C.T.A. should be removed because he acted in bad faith and was guilty of default or misconduct in the execution of his office was not supported by a letter from the attorney for the administrator C.T.A. to the attorney for the decedent's widow seeking to collect assets of the estate, even though the demands and contentions set forth in the letter may have been overblown and excessive.

4. **Executors and Administrators § 5.5— removal of administrator C.T.A.—late filing of accounts**

A finding that an administrator C.T.A. had not filed his accounting on time did not support the clerk's removal of the administrator for misconduct or bad faith in carrying out his duties where there was no finding that the estate was endangered or any interested party injured by the late filing or that the administrator had failed to comply with orders of the court.

5. **Executors and Administrators § 5.4— removal of administrator C.T.A.—joint ownership of devised property**

The fact that an administrator C.T.A. and decedent's widow owned lands which had been devised to them by decedent's will as tenants in common and the land was subject to lien did not support the clerk's removal of the administrator on the ground that he had a private interest which would hinder his proper administration of the estate.

APPEAL by petitioner from judgment of *McLelland, J.*, 14 June 1976 Session of ORANGE Superior Court.

J. B. Taylor died testate in Orange County on 31 January 1973. His widow, Mary R. Taylor, renounced her right to qualify as Executrix of his estate, and on 9 July 1973 D. Wayne Taylor was appointed Administrator C.T.A. of the estate of J. B. Taylor. Thereafter, Mrs. Taylor filed a dissent from her husband's will and also filed a caveat to the will alleging mental incapacity and undue influence. The propounders of the will prevailed, and the caveator did not perfect a notice of appeal. On 3 February 1976, Mr. Thomas Cooper, attorney for the Administrator C.T.A., wrote a letter concerning the administration of the estate to Mr. Lucius M. Cheshire, attorney for Mrs. Taylor. Since this letter appears to be the principal basis for the petition for removal, we deem it necessary to quote its entire text.

February 3, 1976

Mr. Lucius M. Cheshire
Graham & Cheshire
Hillsborough, N.C. 27278

Re: Estate of J. B. Taylor

Dear Lucius:

This will acknowledge receipt of and thank you for your letter of December 31, 1975 enclosing photocopy of items purporting to represent all of the personal property at the home of J. B. Taylor.

It is obvious that this list does not represent ALL of the items at the home. For instance: we feel that there are many items at the house that have not been listed at all, such as a breakfront secretary, cast iron pots and kettles, shipaugers, planes, hammers, axes and other tools, mowing machine, spoke shaving bench, clocks, pictures, Bibles, etc. We feel that there are many antique items there at the house which would be of some value at such time as the administrator had his sale. We would also need to know, and have a list of, the items which were there at Mr. Taylor's death and, according to our information, are no longer there, such as a cider mill and the Maris book. In summary, we need additional lists of what items are physically there that she has not listed, and what items she has disposed of since the death of J. B. Taylor and the price therefor.

In addition, we will have to determine the amount of rent chargeable to your client for the use of the land and the house. We also need an accounting of such profits as she has made from the use of the land. We need to know the value of the crops there at Mr. Taylor's death, the disposition of them and the price received therefor. We feel that the administrator is also required by law to charge your client with waste for her refusal to allow some of the land to be rented.

Specifically, as concerns the list which you furnished us; we would agree with her statement of ownership with the following exceptions:

3 beds
1 kitchen range
hot water heater
refrigerator
dining room table and chairs
tractor
tractor plow
harrow
corn sheller

The administrator contests that she owns half of these items, contending that all of these items were there when she took up residence at the house and some of these items were owned half by Mr. J. B. Taylor and half by Wayne Taylor's father.

With respect to the "some mixed old dishes—no complete sets", we would contend that ALL eating utensils, including pots and pans and cutlery belong to the estate.

With respect to the tractor, it is the contention of the administrator that putting new tires on the tractor and paying for repairing the same would not be considered preservation of the estate. Assuming for the sake of argument that she purchased new tires and paid for repairing the tractor, she would still owe the estate for rent for the use of the tractor and the two items would very probably wash out.

With respect to the chickens and cows, we would agree that these items belong to her, but feel again that she should account to the estate for all estate property used in con-

nection with the animals, including feed, grain, pasture rent, etc.

It is our suggestion that you specify a date, within ten days, at which time the administrator and a disinterested person, preferably one of the deputy clerks, could go to the property and make a physical inventory of every item that is located there. If there is any question about items that might be missing, in the absence of our failure to agree on such items and the value thereof, we would propose to examine Mrs. Taylor under oath as allowed by G.S. 28-69 as to such items. If we cannot agree on the taking of a physical inventory and agreement as to such items as may be missing, we would propose to apply to the Clerk for an Order directing Mrs. Taylor to allow such inventory and then appearing before him for examination under oath.

It is my hope, and that of Wayne, that we will be able to settle this matter without too many more appearances before the Clerk and the Court. Wayne has a legal obligation as administrator to account for ALL items in the estate. He also has the heirs breathing down his neck continually about old family items which may be put up for sale and which members of the family want. It is absolutely necessary that he account to the heirs for every item that someone may remember. We would appreciate very much your discussing with your client the possibility of coming to a reasonable agreement that will satisfy the legal requirements and still be something that everyone can live with. If this cannot be done, it's beginning to look as though the entire estate may be dissipated in Court costs and lawyers' fees. We will appreciate very much your going over all the matters in this letter with your client and advising us of your decision as soon as possible.

With kind personal regards.

Very truly yours,

s/ THOMAS D. COOPER, JR.
for the firm
LATHAM, WOOD AND COOPER

On 4 March 1976, the Administrator C.T.A. filed a motion in which he alleged that he had been unable to obtain an accounting from Mary Taylor for personal property belonging to the estate and for rents and profits due the estate from the real property which she occupied. He prayed that, pursuant to G.S. 28-69, Mary Taylor be ordered to appear before the Clerk of Superior Court of Orange County for examination concerning property belonging to the estate. On 11 March 1976, Mary Taylor filed a petition requesting the Clerk to remove D. Wayne Taylor as Executor pursuant to G.S. 28-32 on the grounds that (1) he had not filed his accounting on time, (2) he had evidenced bad faith by asserting baseless claims to the effect that she had committed waste, (3) he had also exhibited bad faith in harassing petitioner by claiming for the estate property which belonged to her. Respondent answered and denied any act of bad faith and asserted that his actions were in accord with his duty to collect and preserve the assets of the estate.

A hearing on both motions was held before the Clerk of Superior Court of Orange County on 8 April 1976, and after hearing evidence and arguments of counsel, the Clerk announced that the past due account had been filed by the Administrator C.T.A. and had been audited and approved on that date. He stated that he found no prejudice to anyone as a result of the late filing. The Clerk further stated that he was denying Mrs. Taylor's petition to remove the Administrator C.T.A. and indicated that an inventory would be taken under the supervision of his office. The Administrator C.T.A. tendered orders consistent with the Clerk's oral decisions, but the Clerk refused to sign the orders. He thereupon set another hearing for 26 April 1976 and on that date heard one witness who testified concerning the existence of one piece of furniture. On 29 April 1976, the Clerk, after finding facts and entering conclusions of law, signed an order revoking the letters of administration issued to D. Wayne Taylor. Pertinent findings of fact and conclusions of law contained in that order are as follows:

> 5. That the aforesaid letter asserted that the widow, Mary R. Taylor, had supplied to the administrator a list of certain items of personal property at the J. B. Taylor home and that the list had not included many items; that among said items the letter set forth a breakfront secretary, ham-

mers, axes, and numerous other items as will be reflected by said letter.

6. That D. Wayne Taylor, Administrator C.T.A., conferred with his attorney, Mr. Thomas D. Cooper, Jr., prior to the date of said letter and that said letter was written as a result of said conference.

7. That D. Wayne Taylor, Administrator C.T.A., testified that he had been in the J. B. Taylor's homeplace on frequent occasions before the said J. B. Taylor's death and could not remember whether he had seen the breakfront secretary referred to in the February 3rd letter at the time of Mr. Taylor's death, within six months prior to J. B. Taylor's death, or within one year prior to J. B. Taylor's death.

8. That the February 3rd letter stated that the administrator would be required by law to charge Mary R. Taylor with waste for "her refusal to allow some of the land to be rented". That all of the evidence was to the effect that the only refusal on anyone's part to allow the rental of any of the J. B. Taylor farm or the allotments thereon was the refusal of D. Wayne Taylor, Administrator C.T.A., to allow the tobacco allotment to be rented for the crop year immediately after the death of J. B. Taylor and that the crop allotments have not been rented since said refusal by the Administrator, C.T.A.

9. That the letter of February 3, 1976, stated that rent would be chargeable to Mary R. Taylor for her use of the land and house.

10. That the letter further stated that "we would contend that ALL eating utensils, including pots and pans and cutlery belonged to the estate".

11. That during the course of the inquiry conducted by the Court to determine what responsibility the Administrator C.T.A. had for the assertions contained in the letter of February 3, 1976, the Administrator, C.T.A., through his counsel, pleaded the lawyer-client privilege and refused to answer questions directed toward discovering the extent, if any, the Administrator C.T.A. was responsible for the assertions contained in said letter.

12. That the petitioner, Mary R. Taylor, and the Administrator C.T.A., D. Wayne Taylor, are tenants in common of certain lands which belong to J. B. Taylor, deceased, at the time of his death which had vested in said parties as the result of the death of J. B. Taylor, which lands are subject to a lien for such debts of the estate of J. B. Taylor, as the personalty of said estate is insufficient to pay, and that there are insufficient personal assets with which to pay the debts of the estate.

Upon such findings of fact, the court concludes as a matter of law:

1. That there is evidence of bad faith on the part of the Administrator C.T.A. in carrying out his fiduciary duties.

2. That the said D. Wayne Taylor, Administrator C.T.A. has been guilty of misconduct in the execution of his office other than acts specified in G.S. 28(a)-9-2.

3. That D. Wayne Taylor, Administrator C.T.A., has a private interest that might tend to hinder or be adverse to a fair and proper administration of the estate.

The Administrator C.T.A. excepted to each of the above findings and conclusions and duly gave notice of appeal to the Superior Court.

This matter came on to be heard before Judge McLelland, and, after reviewing the file and hearing arguments of counsel, he reversed the order of the Clerk removing D. Wayne Taylor as Administrator C.T.A. of the estate of J. B. Taylor. Judge McLelland further ordered the Clerk to issue process requiring petitioner to disclose to the Administrator C.T.A. information sufficient to enable him to complete an accurate inventory of the estate. Petitioner appealed.

The Court of Appeals affirmed the judgment entered by Judge McLelland and we allowed petitioner's petition for discretionary review on 3 May 1977.

Graham, Manning, Cheshire & Jackson, by Lucius M. Cheshire, for petitioner-appellant.

Latham & Wood, by B. F. Wood, for respondent-appellee.

BRANCH, Justice.

We note that the Court of Appeals decided this case upon the assumption that the statutory provisions of Chapter 28A were applicable. Chapter 1329 of the Session Laws of 1973 repealed Chapter 28 and enacted Chapter 28A in lieu thereof. Section 5 of Chapter 1329 provides: "This act shall be effective on and after July 1, 1975." Chapter 19, Section 12 of the Session Laws of 1975 stated: "Section 5 of Chapter 1329 of the 1973 Session Laws is hereby amended following the word 'effective' by inserting the words 'as to the estates of decedents dying'." This act became effective on 27 February 1975. Chapter 1329 of the 1973 Session Laws was again amended by the 1975 Legislature by the enactment of Chapter 118 which provided:

> Section 1. Chapter 1329 of the Session Laws of 1973, codified as Chapter 28A of the General Statutes, entitled "Administration of Decedents' Estates", is amended by changing the effective date in Section 5 thereof from "July 1, 1975" to "October 1, 1975".
>
> Sec. 2. This act shall become effective upon ratification.
>
> In the General Assembly read three times and ratified, this the 9th day of April, 1975.

The language of Chapter 118 of the 1975 Session Laws could be interpreted to mean that Chapter 28A became effective, without limitation, on 1 October 1975; however, in view of the fact that the last enactment in Chapter 118 did not repeal Chapter 19, Section 12, of the 1975 Session Laws, we conclude that the Legislature intended to only insert the date October 1, 1975, in lieu of the date July 1, 1975. Thus, Section 5 of Chapter 1329 of the 1973 Session Laws as amended would now read as follows: "Sec. 5. This act shall be effective as to the estates of decedents dying on and after October 1, 1975." Since decedent J. B. Taylor died in 1973, the relevant statutes in Chapter 28 would still be applicable to decision of this appeal.

The sole question presented by this appeal is whether the trial judge erred in concluding that the findings of fact in the Clerk's order of 29 April 1976 did not support the conclusions of law entered therein.

G.S. 28-32, in pertinent part provides for the revocation of letters of administration by a Clerk of Superior Court when the administrator "has been guilty of default or misconduct in due execution of his office." The other causes for revocation of letters of administration set forth in that statute do not apply to the facts before us.

[1] When the Clerk exercises the powers of revocation vested in him by this statute, his action is reviewable on appeal. *In Re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563. Upon appeal to the Superior Court, the trial judge may review any of the Clerk's findings of fact when the finding is properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings. However, absent exceptions to specific findings of fact, a general exception to the judgment only presents the question of whether facts found support the conclusions of law. *In Re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693. In the case before us, specific exceptions were taken to each of the crucial findings of fact.

It is obvious that petitioner relies principally upon her Exhibit 1, the letter from attorney Cooper to attorney Cheshire, to support her motion to remove. She argues that the content of this letter shows respondent to be so partial, biased and lacking in integrity that he should be removed from his office as Administrator C.T.A. It is true that this Court has consistently approved the removal of administrators and executors who were guilty of default or misconduct in the execution of the duties of their office. This Court found no error in the removal of an executor who refused to pay the widow her share from the sale of personalty of the estate and arbitrarily commingled her funds with estate funds. *In Re Estate of Boyles*, 243 N.C. 279, 90 S.E. 2d 399. This Court has also upheld removal of an administrator who obtained a contract from an illiterate widow which granted to him and another person 25 percent of the assets of the estate in addition to the legal fees allowed him by law. *In Re Battle*, 158 N.C. 388, 74 S.E. 23. It is apparent that each of the cases above reviewed involves default in the execution of the duties of the office of administrator or executor or involve actual misconduct. The facts of these cases are a far cry from the actions of respondent as revealed by the contents of petitioner's Exhibit 1 and the Clerk's findings based thereon.

[2] Upon his appointment and qualification as Administrator C.T.A., it became the duty of respondent to collect the assets of the estate and to pay therefrom debts, taxes, and cost of administration until all were paid or the assets of the estate exhausted. If the assets of the estate were not exhausted, it then became his duty to distribute the remaining personalty coming into his hands in accordance with the provisions of the will of J. B. Taylor. N.C. G.S. Chapter 28 (1966) (repealed 1975); 31 Am. Jur. 2d, *Executors and Administrators*, Sec. 6, page 30. It must be borne in mind that respondent owed a duty to faithfully discharge the duties of his office not only to the widow but to all persons who took under the will of J. B. Taylor.

[3] The entire content of the letter from Mr. Cooper to Mr. Cheshire was directed toward executing respondent's duty to collect the assets of the estate. Perhaps the demands and contentions set forth in the letter were overblown and excessive, but it is not unusual for counsel when dealing with adverse counsel to "puff his wares" by making strong demands and then retreating to reasonable grounds for the purpose of making settlement. Even so, it must be remembered that this was not a letter directed to an illiterate and legally unrepresented person. It was a letter from one competent, knowledgeable attorney to another competent, knowledgeable attorney. When read in context the letter is, in fact, conciliatory and expressive of a desire to follow a course which would permit respondent to speedily perform his duties without further litigation and the accompanying needless exhaustion of the funds of the estate. We, therefore, conclude that none of the Clerk's conclusions are supported by his findings numbers 4, 5, 6, 7, 8, 9 and 10. The remaining crucial findings of fact are numbers 3 and 12.

[4] Finding of fact number 3 stated:

> That D. Wayne Taylor, Administrator C.T.A., filed an annual account on the 30th day of July, 1974, and had not filed a further accounting until after the petition herein was filed; however, the Administrator C.T.A. was never notified by the Court to file an accounting.

This finding does not support conclusions 1 and 2 relating to respondent's misconduct in office or bad faith in carrying out his duties as Administrator C.T.A.

In *Jones v. Palmer*, 215 N.C. 696, 2 S.E. 2d 850, Justice Seawell speaking for the Court said:

> The clerk is not compelled to remove an administrator for failing promptly to file an inventory when in his judgment the estate has received no damage; C.S., 48, 49; nor for failure to file account; C.S., 106; nor for delay in winding up an administration. Instead of removal, the performance of all these duties may be enforced by appropriate proceeding. *Atkinson v. Ricks*, 140 N.C., 418, 53 S.E. 230; *Barnes v. Brown*, 79 N.C., 401. But he may remove an executor or administrator for such failure, and must do so when he finds the omission of duty is sufficiently grave to materially injure or endanger the estate, or if compliance with the orders of the court in the supervision and correction of the administration are not promptly obeyed.

Finding of fact number 3 does not show that the estate of J. B. Taylor was endangered or any interested party injured by the late filing of accounts. Neither does the finding show any noncompliance with orders of the court. In fact, this record at one point discloses an oral statement by the Clerk who signed the order of removal to the effect that the late filing did not harm or prejudice the estate or any interested party.

[5] Finally, we consider finding of fact number 12. This finding simply stated that petitioner and respondent owned certain lands which had been devised to them by the last will and testament of J. B. Taylor as tenants in common, and that the land was subject to lien. If this finding supported any conclusion of law made by the Clerk, it would be conclusion number 3 which concluded that the Administrator C.T.A. had a private interest which "might tend to hinder or be adverse to a fair and proper administration of the estate."

In *Morgan v. Morgan*, 156 N.C. 169, 72 S.E. 206, an heir at law sought to remove an administrator on the ground of adverse interest because the administrator owned jointly with the estate certain personal property in which he was claiming the whole ownership. There was no evidence of bad faith or fraudulent concealment, and the administrator was holding the property intact and under bond. The clerk denied the motion to remove, and on

appeal the judge of superior court reversed. This Court in reversing the superior court judgment stated:

> . . . The administrator cannot be removed solely because he has personal property in his possession in which it is claimed his intestate had a half interest, in the absence of any findings of bad faith and fraudulent concealment.
>
> * * *
>
> In the case at bar the distributee is at no disadvantage. He may contest the title to this property in dispute in a proceeding by himself against the defendant and his bond for a final accounting and settlement of the estate.

We fail to discern how the joint ownership of this real property would furnish any basis for finding that respondent was guilty of default or misconduct in the execution of his office as Administrator C.T.A. Petitioner was in possession of the personal property belonging to the estate and could dispute any action by which the Administrator C.T.A. sought to misuse the property. She also had a remedy against his bond if he committed any act or default in the handling of this property. Finding of fact number 12 did not support any of the Clerk's conclusions of law.

We hold that the Clerk's findings of fact would not support a conclusion that D. Wayne Taylor while acting as Administrator C.T.A. of the estate of J. B. Taylor acted in bad faith, had a private interest that would hinder the proper administration of the estate or that he was guilty of any default or misconduct in the execution of his office as Administrator C.T.A.

The decision of the Court of Appeals affirming the judgment of Judge McLelland entered on 17 June 1976 in this cause is,

Affirmed.

STATE OF NORTH CAROLINA v. ALLEN CURRIE

No. 24

(Filed 11 November 1977)

1. **Criminal Law § 67— voice identification—exclusion of cross-examination**

In this prosecution for rape and armed robbery in which the victim testified that the voice of her assailant "was not the voice of an average colored man" and that she recognized defendant's voice as the voice of her assailant, the trial court did not abuse its discretion in excluding the victim's testimony on cross-examination that her assailant didn't use the average slang of a Negro, his words were clear, and he did not talk like a Negro she had ever heard before; furthermore, the exclusion of such testimony was not prejudicial since admission of the testimony could not have influenced the verdict favorably for defendant or produced a different result.

2. **Criminal Law § 86.2— impeachment—prior convictions**

For impeachment purposes a witness, including the defendant in a criminal case, may be cross-examined with respect to prior convictions of crime and may be asked disparaging questions concerning collateral matters relating to his criminal and degrading conduct.

3. **Criminal Law § 86.3— prior convictions—conclusiveness of witness's answer—sifting the witness**

While the answers of a witness with respect to prior convictions are conclusive in the sense that the record of his convictions may not be introduced to contradict him, the cross-examiner, by appropriate questions, may continue to inquire about specific convictions already denied as well as other prior unrelated criminal convictions so as to "sift the witness."

4. **Criminal Law § 86.3— prior convictions—answer of witness—further questions by prosecutor**

Where defendant, in response to the prosecutor's question on cross-examination as to whether he had agreed to make restitution to five different businesses that he had broken into, stated that he "thought it was just one place," the prosecutor was properly allowed to "sift the witness" by asking defendant whether he had agreed as part of his probation to pay restitution to four named businesses.

5. **Criminal Law § 85.2— defendant's bad character—specific acts of misconduct**

Testimony by defendant's father on cross-examination that he had stated in a prior trial of defendant for other crimes that he had tried to raise his boys right and couldn't help what happened to his son did not constitute proof of defendant's bad character by evidence of specific acts of misconduct on defendant's part.

6. **Criminal Law § 99.9— question by trial judge—no expression of opinion**

The trial judge's question to a rape victim as to how long she had been working as a telephone operator served only to clarify and promote a proper

understanding of her testimony and did not amount to an expression of opinion by the judge.

7. **Criminal Law § 99.3— judge's statements that evidence not relevant—no expression of opinion**

In this prosecution for rape and armed robbery, the trial judge's repeated statements that he could not see the relevance of a softball trophy won by defendant's team on the night of the crimes did not constitute an expression of opinion since it was the duty of the trial judge to expedite the trial and to question the irrelevancy or redundancy of evidence, and the judge's statements merely sought a clarifying response, after which counsel was permitted to continue when any relevance was suggested.

DEFENDANT appeals from judgments of *Smith, J.*, 3 January 1977 Criminal Session, ALAMANCE Superior Court.

Defendant was charged in separate bills of indictment, proper in form, with (1) first degree rape and (2) armed robbery of Elizabeth B. Alexander on 29 August 1976. The two cases were consolidated for trial.

The State's evidence tends to show that Elizabeth B. Alexander, fifty-four years of age, had been employed as a switchboard operator at Memorial Hospital of Alamance County for approximately seventeen years. On Sunday, 29 August 1976, she was working the 3 p.m. to 11 p.m. shift. She checked out about 11:05 p.m. and, with keys in hand, walked to her car which was backed into the first space in an employee's parking lot located next to the hospital. A hedge and quite a few trees were around the area. The overhead parking lights were burning, but two had been disconnected to conserve electricity. She was about to insert the key into the lock when she heard a rustling sound. As she swung around a man grabbed her around the neck and said, "I've got a knife to your throat. . . . Don't you scream and don't you holler. . . . Get in the car." She pleaded with him to let her go but he persisted and kept ordering her into the car. She couldn't see his face but could tell he was tall and could tell he was black. When he came at her she saw his clothes. He was wearing a floppy bluish-white hat, cut-off jeans, white athletic socks with a colored band at the top, tennis shoes and either a shirt or other type of cloth around his neck.

Mrs. Alexander's assailant failed to force her into the car and dragged her into a nearby pine thicket at the rear of the hospital grounds, all the while holding the knife to her throat and

threatening to kill her if she ran or screamed. Then, standing behind her, he demanded money and ordered her to empty her wallet and hand him the contents. She gave him what money she had—about four dollars—a credit card, her house keys, post office box key and a book of stamps. Thinking he would release her if she gave him all of her valuables, Mrs. Alexander then gave him her wedding band and her watch, each containing rows of diamonds. The two articles had been appraised at nearly $5,000. She then begged her assailant to release her, explaining the condition of her health and that of her diabetic husband. Ignoring her pleas, he forced her to undress and raped her. She was then ordered to cover her eyes with her hands. He said he was going to walk away slowly, but "if you take your hands off your eyes or look in any direction that I am leaving in, I'll come back and I'll cut your goddamn throat from ear to ear." She heard him move away and lay there on the ground for some time. Finally, she got up, returned to the hospital and was immediately taken to the emergency room. She had sustained numerous cuts and bruises, had neck and jaw injuries from the assault, and tests showed the presence of male sperm in her vagina.

A short while later, Mary Ann Enoch, a twenty-year-old black girl, was standing with a group of friends in a neighborhood not far from the hospital. It was about 11:30 p.m. when she saw Allen Currie, the defendant, coming from the wooded area up the street toward the hospital. He was wearing cut-off shorts, sport socks, red at the top and "white the rest of the way," and a pair of white tennis shoes. "He didn't have any shirt on." In Mary Ann Enoch's words: "He called me out and we talked and he showed me a ring and a watch. The watch was covered with diamonds. He asked me did I want to buy it for $10.00 apiece. I was going to buy it, but I didn't have the money. He put the watch that was studded with diamonds and the rings that had diamonds all over it back in his pocket." Miss Enoch testified that State's Exhibit 1 looked like the watch she saw that night in Allen Currie's possession. She further stated under oath that she had been getting threatening telephone calls all week "about coming down here to testify. I got two last night . . . and I came here of my own free will."

Officer Dupree of the Burlington Police Department testified he was on his way to work shortly after 11 p.m. on the night of 29

August 1976 and saw defendant two blocks from the hospital going in that direction. The officer noticed that defendant was tall, wore cut-off pants and athletic socks and had a floppy hat on his head.

On 9 September 1976 Officer Elgin, armed with a search warrant, went to the home of Allen Currie to search for clothing fitting the description given by Mrs. Alexander. The officer found a pair of cut-off short blue pants, several pairs of athletic socks with red bands around the top, and a floppy brimmed blue hat. These items were seized pursuant to the search warrant and offered into evidence.

Defendant, testifying in his own behalf, stated that he lived at 2509 Aaron Street in Glen Raven with his father, mother, two sisters and four brothers. He is twenty-one years of age and 6 feet 5 inches tall.

Defendant further testified that on 29 August 1976 he was a member of the armed forces and was home on leave between enlistments. On that date he was playing in a softball tournament in the southern part of Alamance County. He left his home and rode with Monroe Graves, the manager of the team, to the site of the tournament. His team was presented a trophy for winning second place, and he rode back to his home in Glen Raven with Mr. Graves. On the way they made several stops to show the trophy to various friends of the players. He arrived home at 10:25 p.m., took a bath and changed clothes, putting on long Army khaki pants, a white T-shirt and black tennis shoes with black socks, not athletic socks. He then had something to eat and left the house about 11 p.m. to join a group of people in front of the home of Annette Wade on Pennsylvania Avenue, a short distance from his own home. He saw Mary Ann Enoch there; she smoked some marijuana, drank some wine and left. He denied that he attempted to sell her a watch and ring.

The Reverend Phillip June Woods testified that he walked the route from defendant's home to Memorial Hospital and it took him thirty-four minutes.

Defendant offered other witnesses in corroboration of his alibi testimony.

Defendant was convicted on both charges and sentenced to life imprisonment for first degree rape, with credit for time spent in jail pending trial, and forty years for armed robbery, to run consecutively. He appealed the life sentence to the Supreme Court and the robbery sentence to the Court of Appeals. We allowed motion to bypass the Court of Appeals in the robbery case to the end that both matters be initially reviewed by the Supreme Court.

Rufus L. Edmisten, Attorney General; Elizabeth C. Bunting, Assistant Attorney General, for the State of North Carolina.

Harold T. Dodge, attorney for defendant appellant.

HUSKINS, Justice.

[1] Mrs. Alexander heard defendant's voice for the first time during the assault upon her. On direct examination she stated that the voice of her assailant "was not the voice of an average colored man." When defendant testified during the trial she immediately recognized his voice as that of her assailant. Then, when the defense rested, the trial judge permitted the State to reopen its case and permitted Mrs. Alexander to testify, over objection, that she recognized defendant's voice as the voice of the man who raped and robbed her. Defense counsel then undertook to cross-examine with respect to her additional testimony as compared with her previous statement that the voice of her assailant was not that of an average colored man. The following exchange occurred:

"DEFENSE COUNSEL: Well, now you said on direct examination, as I recall, that this voice you heard was not the voice of an average colored man, is that what you said?

COURT: Answer the question Mrs. Alexander.

A. Yes. Yes, sir.

Q. Are you now saying that this voice of the defendant is not the voice of an average colored man?

PROSECUTOR: Well, object. Now we're getting argumentative.

COURT: Sustained.

EXCEPTION NO. 29"

Had Mrs. Alexander been permitted to answer in the presence of the jury, she would have replied: "He didn't use the average slang of a Negro, the average talk of the average Negro off the street. His words were clear, but he did not talk like a Negro that I ever heard talk before. This boy is more educated." Exclusion of the victim's answer constitutes defendant's first assignment of error.

There is no merit in this assignment. The scope of cross-examination rests largely in the discretion of the trial judge because he is present, hears the testimony, observes the demeanor of the witnesses, knows the background of the case, and is in a favored position to determine the proper limits of cross-examination. For these reasons his rulings thereon will not be disturbed absent abuse of discretion amounting to prejudicial error. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied* 397 U.S. 1050 (1970); *State v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725 (1947). Admission of the excluded answer could not have influenced the verdict favorably for defendant or produced a different result. Hence in no view of the matter was the court's ruling prejudicial. Defendant's first assignment is overruled.

[4] Defendant next contends the trial court erred in allowing the State, over objection, to cross-examine him concerning his probationary judgment.

Defendant testified in his own behalf and, as part of his direct examination, stated that in 1972 (sic) he was convicted of breaking and entering, put on probation, ordered to pay back $800 and in fact paid it back. On cross-examination he stated that on 18 January 1973 he pled guilty to breaking and entering Oscar's Snack Bar with intent to commit larceny and stealing $120. He denied breaking and entering Alamance Beauty College, whereupon the prosecutor asked him if he did not agree to make restitution to five different businesses that he had broken into. Defendant said he thought it was just one place. The prosecutor, over objection, then asked: "Did you agree to pay back as part of your probation restitution in the amount of $608 to Oscar's Snack Bar, Bill's Lounge, the Owl Tavern, the Ernest Jackson Poolroom? You remember that, don't you, Mr. Currie?" Over objection,

defendant replied that he remembered those charges. We perceive no error in the admission of this evidence.

[2, 3] For impeachment purposes, a witness, including the defendant in a criminal case, may be cross-examined with respect to prior convictions of crime and may be asked disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968); *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967). With respect to such collateral matters, the answers of the witness are conclusive in the sense that the record of his convictions cannot be introduced to contradict him. *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297 (1965); *State v. King*, 224 N.C. 329, 30 S.E. 2d 230 (1944); 1 Stansbury's North Carolina Evidence § 112 (Brandis rev. 1973). By appropriate questions, however, the cross-examiner may continue to inquire about specific convictions already denied as well as other prior unrelated criminal convictions so as to "sift the witness." *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Robinson*, 272 N.C. 271, 158 S.E. 2d 23 (1967).

[4] When the foregoing rules are applied to the challenged cross-examination here, it is readily apparent that no error was committed. Defendant did not deny breaking and entering Oscar's Snack Bar, Bill's Lounge, the Owl Tavern or the Ernest Jackson Poolroom. He merely stated that he "thought it was just one place." The State was not bound by that answer. The cross-examiner was entitled to press or sift the witness in search of the truth. *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972). "The scope of cross-examination rests largely in the trial judge's discretion and his rulings thereon will not be disturbed unless it is shown that the verdict is improperly influenced thereby." *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Carver*, *supra*. No such showing has been made in this case. Defendant's second assignment of error is overruled.

[5] On cross-examination of defendant's father the prosecutor was permitted to inquire whether the father was in court with defendant in 1973 when defendant was placed on probation for various charges of breaking and entering. The prosecutor was further permitted, over objection, to ask the witness if he did not state to the court on that occasion that he had tried to raise his boys right and couldn't help what had happened. The witness

replied: "I said exactly. That is true." Defendant contends the State was thus permitted to show defendant's bad character by implication, *i.e.*, "by proof of specific acts of misconduct of defendant." Counsel argues that although defendant testified he did not otherwise put his character in issue and it was error to permit the challenged cross-examination of his father "as to particular acts of misconduct on the part of the defendant," citing *State v. Green*, 238 N.C. 257, 77 S.E. 2d 614 (1953).

We perceive no error prejudicial to defendant in the challenged testimony. The father's statement at the 1973 trial that he had tried to raise his boys right and couldn't help what had happened to his son does not, as defendant contends, show by implication or otherwise specific acts of misconduct *on defendant's part.* Our decision in *State v. Green*, supra, relied on by defendant, is not in point. Defendant's third assignment of error is overruled.

The following question by the court was put to the witness during the course of the trial: "Mrs. Alexander, how long have you been working as a telephone operator?" She answered: "Going into seventeen years, sir." Defendant took exception thereto and also to certain isolated comments by the judge. At one point when defendant was eliciting testimony concerning the trophy won in the softball tournament by the team on which defendant played, the court said: "I fail to see any relevance to this." Defense counsel explained that he wanted to show "what they did when they came home about this trophy." The court replied: "Well, let's get on to it." Later while examining Mr. Graves, the man in charge of the softball team, counsel requested that he go home and bring the trophy to court. The judge said: "I don't really see what much difference that trophy has to do with this case. . . . What is the purpose of this testimony." Defense counsel replied: "It's alibi, your Honor, to show where he was." The foregoing questions and comments by the court constitutes defendant's fourth and final assignment of error. Defendant contends they amount to an expression of opinion in violation of G.S. 1-180.

There is no merit in this assignment. "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . ." *State v. Horne*, 171 N.C. 787, 88 S.E. 433 (1916). Of course, such ex-

aminations should be conducted 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 the impression of judicial leaning, they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error. *State v. Lea*, 259 N.C. 398, 130 S.E. 2d 688 (1963); *State v. Peters*, 253 N.C. 331, 116 S.E. 2d 787 (1960); *Andrews v. Andrews*, 243 N.C. 779, 92 S.E. 2d 180 (1956); *State v. McRae*, 240 N.C. 334, 82 S.E. 2d 67 (1954). Even so, judges are not mere moderators. They preside over the courts as essential and active agencies in the due and orderly administration of justice. "It is entirely proper, and often necessary, that the trial judge ask questions to clarify and promote a proper understanding of the testimony of the witnesses." *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968).

[6] The question put to Mrs. Alexander served only to clarify and promote a proper understanding of her testimony and did not amount to an expression of opinion by the judge. *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959). Weight and credibility of the testimony remained a matter for the jury.

[7] With respect to the trophy, the record discloses that defendant was allowed to offer it in evidence with additional testimony concerning its display to various friends at various times. The judge's repeated statement that he could not see the relevance of the trophy merely sought a clarifying response and, when any relevance was suggested, counsel was permitted to continue. It was the duty of the judge to expedite the trial and to question the irrelevancy or redundancy of evidence. In doing so he expressed no opinion in violation of G.S. 1-180. *See State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950). This assignment is overruled.

There is substantial evidence of all material elements of first degree rape and armed robbery as charged in the bills of indictment. Defendant having failed to show prejudicial error, the verdicts and judgments must be upheld.

No error.

STATE OF NORTH CAROLINA v. GARLAND WAYNE CARTER

No. 33

(Filed 11 November 1977)

1. **Criminal Law § 89— evidence supporting witness's credibility**

Evidence tending to support a witness's credibility is admissible when he is impeached in any manner including contradictory statements, cross-examination, or contradiction by other witnesses.

2. **Criminal Law § 89.5— noncorroborative testimony—slight variance—absence of prejudice**

In a prosecution for murder committed in the perpetration of an armed robbery wherein the evidence tended to show that decedent's companion was the victim of the robbery, defendant was not prejudiced by an officer's noncorroborative testimony that the companion told him that defendant had taken the decedent's billfold before he robbed the companion since (1) defendant entered only a general objection to the officer's testimony, all other portions of which did corroborate the companion's testimony, and failed to point out the testimony which he claims was erroneously admitted, and (2) whether defendant first robbed decedent before he completed the robbery of decedent's companion was of little consequence, and the officer's tetimony constituted only a slight variance from the companion's testimony.

3. **Criminal Law § 46.1— inability to find defendant—evidence of flight**

An officer's testimony that he obtained a warrant for defendant's arrest on the date of the crime, February 1, and had been attempting service but could not locate defendant until February 6 was competent to show flight by defendant; furthermore, any possible error in the admission of such testimony was cured by a defense witness's testimony that she and defendant fled the crime scene and, after driving around for one or two days, lived in the woods until their surrender on February 6.

4. **Homicide § 25.1— murder in perpetration of robbery—robbery of person other than decedent**

In a prosecution for murder allegedly committed during the perpetration of an armed robbery, the trial court did not err in instructing the jury that the "armed robbery or attempted armed robbery need not be of a person who may have been shot."

5. **Criminal Law § 89.5; Homicide § 25.1— murder in perpetration of robbery—instruction not reference to noncorroborative testimony**

In this prosecution for murder committed in the perpetration of an armed robbery of decedant's companion, the court's instruction that one of the elements of armed robbery was that defendant took property from the companion "or took property in [the companion's] presence" did not constitute a prejudicial reference to an officer's noncorroborative testimony to the effect that decedent was robbed where the trial judge instructed the jury to

disregard evidence concerning a robbery of decedent and made it absolutely clear in his final mandate to the jury that the companion was the victim of the robbery.

APPEAL by defendant from *Long, J.*, 24 January 1977 Session of DAVIDSON Superior Court. Defendant was charged with first degree murder and armed robbery. He entered pleas of not guilty.

The State's crucial evidence was offered through the Witness Dennis Porterfield. This evidence, in substance, discloses that on 31 January 1976, defendant and his girlfriend, Kay Huffman, were at the Captain's Lounge in High Point, North Carolina. Kay Huffman became angered because defendant was dancing with another woman, and she told him that she wanted to go home. Defendant refused to leave, and she thereupon arranged for a ride home with James Price and Dennis Porterfield. On the way, they stopped at another tavern in order for Price to pick up some beer. According to Porterfield, Price had bargained with Kay Huffman to have sexual relations with her for the sum of $10.00. They arrived at the residence of Kay Huffman in Thomasville, North Carolina, about midnight. The three of them were in the living room when Kay suddenly exclaimed, "My God, it's my boyfriend." She ran to another part of the house. At that point, defendant and another man came into the room through the front door. Defendant had a pistol in his right hand. Upon observing defendant armed with a pistol, Porterfield backed toward the hall and the bedroom door. Upon defendant's orders, he lay face downward on the bed. Porterfield managed to see James Price and defendant falling to the floor of the bedroom. He heard a pistol fire as the two men went to the floor and he then heard Price say: "Don't shoot me again, you have shot me once." As defendant was getting up from the floor, he shot Price again. Defendant then pointed the pistol toward Porterfield's face and Porterfield said: "Don't shoot me, just take what you want and go." Thereupon, defendant took about $75.00 from Porterfield's wallet. Upon Porterfield's suggestion, Kay Huffman, the defendant, and Porterfield carried Price to the automobile he had been driving for the purpose of transporting him to the hospital. Before Kay Huffman was able to start the car, Porterfield announced that Price was dead. Kay Huffman, defendant, and his unidentified companion left in another car. Porterfield called the

police and waited for their arrival. Later that night at the police station, Porterfield viewed nine photographs of white males and picked out defendant's photograph as being a picture of the man who shot Price.

Detective Don Truell testified that he obtained a warrant for defendant's arrest on 1 February 1976 and tried to execute the warrant without success until 6 February 1976 when defendant "turned himself in."

It was stipulated that if Dr. E. Earl Jackson were in court, he would testify that the probable cause of Price's death was a gunshot wound in the chest.

The only other eye witness to the alleged crime was defendant's Witness Kay Huffman. Her evidence was substantially the same as Porterfield's concerning the events prior to the arrival of defendant in her home, except she denied having any agreement with Price concerning sexual relations. Her account of the pertinent events after reaching her home was in essence as follows: When she, Price, and Porterfield arrived at her home, Porterfield tried to get her to join him in the bedroom where he was sitting when defendant arrived. Defendant asked Porterfield "what in the hell he was doing in his girlfriend's house?" Porterfield made a derogatory remark about Kay Huffman and defendant pushed him back on the bed. At that time, Price ran into the bedroom with a gun in his hand and defendant grabbed his arm. During the ensuing struggle between defendant and Price, the gun went off two times wounding Price. Kay Huffman, Porterfield, and defendant then managed to get Price to the car he had been driving, but before Kay was able to start the car, Porterfield announced that Price was dead. Porterfield ran and Kay Huffman and defendant left in the other car. She and defendant rode around for one or two days and then lived in the woods until they voluntarily went to the police on 6 February 1976.

The jury returned verdicts of guilty of first degree murder and guilty of armed robbery. Defendant appealed from judgment imposing a sentence of life imprisonment on the murder charge. The judgment did not mention the armed robbery conviction.

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

J. Calvin Cunningham, for the defendant-appellant.

BRANCH, Justice.

Defendant first contends that the trial judge erred by admitting testimony of Detective Truell which was offered to corroborate the testimony of Porterfield. Initially, defendant seems to take the position that this evidence was inadmissible because Porterfield had not testified to the content of the statement as he had related it to Detective Truell. This argument is without merit.

[1, 2] In this jurisdiction, evidence tending to support a witness's credibility is admissible when he is impeached in any manner including contradictory statements, cross examination, or contradiction by other witnesses. *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773. Some of our more recent cases tend to recognize the admissibility of corroborative evidence without even considering the question of whether the witness has been impeached. *See*, 1 Stansbury's N.C. Evidence, *Witnesses* Sec. 50 (Brandis Rev.), and cases there cited. One of the most widely used and well-recognized methods of strengthening the credibility of a witness, as was done here, is by the admission of prior consistent statements. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348; *State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250; *State v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708. Defendant, however, argues that the challenged evidence was erroneously admitted because the Witness Porterfield did not testify to certain facts which the officer's testimony allegedly corroborated. In his testimony, offered for the purpose of corroboration, Detective Truell testified: "Porterfield said this man then took James' billfold out of his pocket, took his money . . . ." The record shows that Porterfield did not so testify. All other portions of Truell's testimony tend to corroborate the evidence given by Porterfield.

The rule of law which defendant relies upon is well stated in *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354, as follows:

> 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. Neither may the State impeach or discredit its own witness by introducing his prior contradictory statements under the guise of corroboration. *State v. Bagley*, 229 N.C. 723, 51 S.E.

2d 298; *State v. Melvin*, 194 N.C. 394, 139 S.E. 762; *State v. Scoggins*, 225 N.C. 71, 33 S.E. 2d 473. 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. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429; *State v. Walker*, 226 N.C. 458, 38 S.E. 2d 531; *State v. Scoggins*, supra.

* * *

Where portions of a document are competent as corroborating evidence and other parts incompetent, it is the duty of the party objecting to the evidence to point out the objectionable portions. Objections to evidence en masse will not ordinarily be sustained if any part is competent. *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84; *State v. Wilson*, 176 N.C. 751, 97 S.E. 496; *State v. English*, 164 N.C. 497, 80 S.E. 72; *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196; *Grandy v. Walker*, 234 N.C. 734, 68 S.E. 2d 807; *Wilson v. Williams*, 215 N.C. 407, 2 S.E. 2d 19. N.C. Index, Trial, Sec. 15.

Accord: *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746.

Here when the district attorney asked Detective Truell to relate the statement made by Porterfield to him on 1 February 1976, defense counsel entered a general objection. During Detective Truell's lengthy testimony, counsel failed to further object or point out the testimony which he now claims to have been erroneously admitted; neither did he move to strike that testimony. Detective Truell's testimony did not contradict Porterfield's testimony and was generally consistent with it.

The State's evidence raises reasonable inferences which would have permitted, but not have required, the jury to find that defendant came into the home of Kay Huffman with the intent to commit an armed robbery and during the course of that robbery shot and killed James Price. Whether he first robbed Price before he completed the armed robbery of Porterfield is of little consequence. Therefore, the variance between Porterfield's testimony and the Witness Truell's corroborative testimony was slight. Further the trial judge carefully and correctly instructed the jury as to the purpose for which this evidence was admitted,

and in his charge cautioned the jury that it should not consider that portion of Truell's evidence which varied from Porterfield's sworn testimony.

We hold that there was no error prejudicial to defendant in the admission of Detective Truell's corroborative testimony.

[3] Defendant's "Issue Two" is as follows: "Did testimony of Officer Truell, a law enforcement officer, to the effect that defendant fled to avoid service of warrants, constitute incompetent, irrelevant and immaterial questioning to the prejudice of the defendant?" We find nothing in this record which discloses that Detective Truell testified that defendant fled to avoid service of warrants. The detective stated that he obtained a warrant for defendant's arrest on February 1, and had been attempting service but could not locate defendant until February 6.

Defendant relies on the cases of *State v. Lee*, 287 N.C. 536, 215 S.E. 2d 146, and *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697, to support his position. His reliance is misplaced. Both *Lee* and *Lampkins* turn on the question of whether there was sufficient record evidence to support an instruction on flight. In instant case, there was no exception or assignment of error relating to the trial judge's charge on flight. Rather, defendant seems to question the *competency* of the evidence. The answer to this contention is found in the following language from *State v. Lampkins, supra*:

> . . . most jurisdictions recognize that testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime is competent. See cases collected in Annot., 25 A.L.R. 886; Wharton's Criminal Evidence Section 214 (1972). See also, *State v. Wallace*, 162 N.C. 622, 78 S.E. 1; *State v. Jones*, 93 N.C. 611.

Our conclusion that there is no merit to this contention is strengthened by the fact that defense Witness Kay Huffman later testified that she and defendant fled the scene and after driving around for one or two days lived in the woods until their surrender on 6 February 1976. This testimony was of the same import as that here challenged. Its later admission without objection cured any possible error in the admission of the evidence relating

to flight. *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4, *cert. denied*, 389 U.S. 865.

[4] Finally defendant contends that the trial judge committed prejudicial error in his charge upon armed robbery and the felony murder rule.

In his charge on the underlying felony of armed robbery, the trial judge stated, "Armed robbery or attempted armed robbery need not be of a person who may have been shot." We are of the opinion that this is a substantially correct statement of the law. G.S. 14-17 declares that a murder committed in the perpetration of *any* robbery or attempted robbery is deemed to be murder in the first degree. *See, State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563. Here the homicide was linked to and was a part of a series of incidents forming one continuous transaction which resulted in decedent's being killed during the course of an armed robbery. See, *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666.

[5] The second portion of the charge to which defendant excepts is in the trial judge's statement of the elements of the felony of armed robbery. He charged, "One, that the defendant took property from the person of Dennis Porterfield *or took property in Porterfield's presence.*" (Emphasis ours.) Defendant argues that the italicized portion of the preceding quotation constituted a prejudicial reference to the non-corroborative statement of the Witness Truell to the effect that Price was robbed. We disagree. Immediately after charging on the elements of armed robbery, the trial judge in his final mandate to the jury on the charge of armed robbery made it absolutely clear that Porterfield was the victim of the robbery. In light of this charge and the trial judge's careful and clear instructions to the jury that it should disregard the evidence concerning a robbery of the decedent, we conclude that the jury would not have been misled by the use of this rather ambiguous phrase.

We find nothing in defendant's assignments of error or in this record which would justify a new trial.

No error.

THE NORTH CAROLINA STATE BAR v. FRANK WADE HALL, ATTORNEY AT LAW, BUNCOMBE COUNTY, ASHEVILLE, NORTH CAROLINA

No. 82

(Filed 11 November 1977)

1. **Criminal Law § 25— plea of nolo contendere—no admission of guilt for other proceedings**

A plea of *nolo contendere*, so far as the court is concerned, in that court and in that particular case, authorizes judgment as upon conviction by verdict or plea of guilt, but so far as defendant is concerned, he is at liberty in all other proceedings, civil and criminal, to assert his innocence, and his plea may not be considered as an admission of guilt.

2. **Attorneys § 12; Criminal Law § 25— plea of nolo contendere—no basis for disciplinary action against attorney**

Where the State Bar relied on respondent's *nolo contendere* plea in a prosecution for receiving stolen goods as a basis for disciplinary proceedings, the Court of Appeals erred in basing its decision that the State Bar was entitled to summary judgment on the ground that respondent not only entered a plea of *nolo contendere* but the District Court Judge, prior to imposing judgment upon the plea, "adjudged that defendant is guilty as charged and convicted," since a plea of *nolo contendere* has the effect of a plea of guilty for the purpose of that case only.

3. **Attorneys § 12— nolo contendere plea—no grounds for disciplinary action**

Where respondent, a licensed attorney, pled *nolo contendere* to a charge of receiving and possessing chattels of a value less than $100, knowing the same to have been stolen or embezzled, the State Bar was not entitled to summary judgment in a disciplinary action on the basis of the *nolo contendere* plea, since the statute under which the State Bar instituted this proceeding, G.S. 84-28(2)(a), makes *commission* of a criminal offense showing professional unfitness one of the grounds for disciplinary action against an attorney, but respondent denied his guilt of the charge to which he had pled *nolo contendere*.

ON petition for discretionary review of the decision of the Court of Appeals, 31 N.C. App. 166, 229 S.E. 2d 39 (1976), reversing judgment in favor of complainant entered by *Rouse, J.*, at the 8 December 1975 Session of the Superior Court of BUNCOMBE, docketed and argued as Case No. 54 at the Spring Term 1977.

Complainant, North Carolina State Bar (State Bar), is the State agency established by N.C. Gen. Stat. § 84-15 (1975) to hear and determine charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics made against any licensed attorney of this State. G.S. 84-28 (1975). Respondent (Hall)

is a licensed attorney. On 5 February 1975 State Bar instituted this action to discipline Hall upon allegations that he (1) had committed a criminal offense showing professional unfitness, a violation of G.S. 84-28(2)(a) (1975) and (2) had engaged in illegal conduct involving moral turpitude, a violation of the North Carolina State Bar Code of Professional Responsibility. DR1-102(A)(3), 283 N.C. 783, 786-87 (1973).

As the specific basis for imposing discipline, State Bar alleged that on 5 November 1974 in the United States District Court, Western District of North Carolina, Hall entered a plea of nolo contendere to a charge of receiving and possessing chattels of a value less than $100, knowing the same to have been stolen or embezzled, in violation of 18 U.S.C. § 659 (1970). Upon the entry of his plea "respondent was adjudged guilty of said offense."

Hall's answer to State Bar's complaint admitted the foregoing allegation. However, he denied his guilt of the charge to which he had pled nolo contendere and asserted that he had not violated the laws of North Carolina or the State Bar Code of Professional Responsibility. He moved to transfer the proceeding to the Superior Court of Buncombe County for a trial by jury pursuant to G.S. 84-28(3)(d). This motion was allowed. In the Superior Court State Bar moved for summary judgment and Hall moved for judgment on the pleading.

In support of its motion for summary judgment heard before Judge Rouse, State Bar introduced the "Judgment and Commitment" of the United States District Court in which District Judge Woodrow W. Jones, after reciting that he was satisfied a factual basis existed for Hall's plea of nolo contendere to the charge of violating 18 U.S.C. § 659, adjudged defendant Hall "guilty as charged and convicted," and ordered his imprisonment for "ONE (1) year, suspended on probation without supervision for THREE (3) years and pay $1,000.00 Fine."

Judge Rouse denied each party's motion for judgment. State Bar petitioned the Court of Appeals for certiorari, which petition was allowed. Upon review, that court ruled that Judge Rouse had erred in not granting State Bar's motion for summary judgment. It remanded the cause to the superior court with directions that summary judgment be entered for State Bar and that Hall be disciplined. We allowed certiorari.

Christopher Bean and Harold D. Coley for complainant appellee.

Uzzell and Dumont for respondent appellant.

SHARP, Chief Justice.

In this disciplinary action respondent admits he entered a plea of nolo contendere in the Federal District Court to the charge of receiving and possessing chattels valued at less than $100 knowing them to have been stolen or embezzled (a violation of Title 18, U.S.C., § 659), but denies he committed the offense charged. The question presented is whether respondent's plea of nolo contendere entitles the State Bar to summary judgment authorizing disciplinary action against respondent. The answer is found in our decisions defining the legal effect of a plea of nolo contendere. Its consequences, long established in this State, are clearly articulated in the cases cited below and in many others.

[1] By the plea of nolo contendere a defendant says only that he does not wish to contend with the State in respect to the charge. *State v. Norman*, 276 N.C. 75, 170 S.E. 2d 923 (1969); *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953). Such a plea is not open to a defendant as a matter of right; its acceptance by the court is a matter of grace. "When accepted by the prosecution and approved by the court it ends the case and subjects the defendant to the judgment of the court as if guilt had been confessed. But this plea has a double implication. So far as the court is concerned, in that court and in that particular case, it authorizes judgment as upon conviction by verdict or plea of guilt. . . . But so far as the defendant is concerned, he is at liberty in all other proceedings, civil and criminal, to assert his innocence, and his plea may not be considered as an admission of guilt.

". . . Both the court and the prosecuting attorney may well decline to accept such plea in cases where the due administration of justice might be improperly affected, for when the plea is accepted it is accepted with all the implications and reservations which under the law and accurate pleading appertain to that plea." *Winesett v. Scheidt, Comr. of Motor Vehicles*, 239 N.C. 190, 194-95, 79 S.E. 2d 501, 504-505 (1954). *See State v. Sellers*, 273 N.C. 641, 161 S.E. 2d 15 (1968).

"The basic characteristic of the plea of *nolo contendere* which differentiates it from a guilty plea, as unanimously accepted by all the courts, is that while the plea of *nolo contendere* may be followed by a sentence, it does not establish the fact of guilt for any other purpose than of the case to which it applies." *Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 35, 84 S.E. 2d 259, 262 (1954). *See State v. Smith*, 265 N.C. 173, 143 S.E. 2d 293 (1965); *State v. Barbour*, 243 N.C. 265, 90 S.E. 2d 388 (1955); *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952). Its effect is a plea of guilty for the purpose of that case only.

Following acceptance of the plea nothing more remains for the court to do except pronounce judgment. "When a plea of *nolo contendere* has been accepted by the Court, and as long as it stands, it is not within the province of the Court to adjudge the defendant guilty or not guilty. . . . The judge can hear evidence only to aid him in fixing punishment." *State v. Barbour*, 243 N.C. 265, 267, 90 S.E. 2d 388, 389 (1955). "Thus the super-added clause 'and was found guilty by the court' would be a misapprehension of the effect of a plea of *nolo contendere* in a criminal action, and could not be upheld." *State v. Thomas*, 236 N.C. 196, 202, 72 S.E. 2d 525, 529 (1952). See Annot., *Plea of Nolo Contendere*, 89 A.L.R. 2d 540, § 30, 584 (1963).

The principles enunciated in the decisions noted above were applied in *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933). Stiers, a North Carolina attorney, entered a plea of nolo contendere in the United States District Court for the Middle District of North Carolina to ten charges of embezzlement of trust funds. He was fined and placed on probation. In a North Carolina disbarment proceeding, civil in nature and brought in the Superior Court, the solicitor for the State presented to the trial judge a certified copy of the indictment, plea, judgment and docket entries of the United States District Court. The trial judge dismissed the proceeding on the ground that the plea of nolo contendere did not amount to a confession of the crime charged. The State appealed and this Court affirmed on dual grounds: (1) the disciplinary statute (C.S. § 205 (1929)) gave the State no right to appeal an adverse decision and (2) "the mere introduction of a certified copy of an indictment, and a judgment thereon, based upon a plea of *nolo contendere*, is not sufficient to deprive an attorney of his

license; certainly when he is present in court, denying his guilt . . . ." *Id.* at 50, 167 S.E. at 383.

[2] In its opinion the Court of Appeals attempted to take this case out of "the general rule" enunciated in *In re Stiers* and the other cases cited above on the ground that respondent Hall not only entered a plea of nolo contendere but the District Court judge, prior to imposing judgment upon the plea, "adjudged that the defendant is guilty as charged and convicted." The Court of Appeals based its decision that the State Bar is entitled to summary judgment on the premise that the general rule "simply should have no application where a judgment of conviction is entered on the plea." *State Bar v. Hall*, 31 N.C. App. 166, 174, 229 S.E. 2d 39, 44 (1976).

In our view the Court of Appeals misconstrued the effect of the District Court's judgment. Our research discloses no difference in the consequences of a plea of nolo contendere in this jurisdiction and the federal courts. On the contrary, it leads us to the conclusion that Justice Parker (later Chief Justice) was correct when he said, "It seems to be the law in all the State Courts and in the Federal Courts that a plea of *nolo contendere* to an indictment good in form and substance, has all the effect of a plea of guilty for the purposes of that case only." *Fox v. Scheidt, Comr. of Motor Vehicles*, supra at 35, 84 S.E. 2d at 262. *See* Fed. Rules Cr. Pro. Rule 11, notes 247-256; Annot., *Plea of Nolo Contendere*, 89 A.L.R. 2d 540, §§ 27, 28, 30 (1963); 22 C.J.S., *Criminal Law* § 425(4) (1961).

In *United States v. Reisfeld*, 188 F. Supp. 631 (Md. 1960), after the defendant entered a plea of nolo contendere, the District Court judge entered judgment on a printed form which would permit its use when a defendant pled guilty or nolo contendere, or was found guilty by a jury or by the court. The form contained the provision which also appears in respondent Hall's judgment, *i.e.*, "It is adjudged that the defendant is guilty as charged and convicted." Thereafter Reisfeld moved the court to amend his judgment by striking out the quoted adjudication of guilt.

In allowing the motion Chief Judge Thomsen held that a judgment based on a plea of nolo contendere "need not and should not state: 'It is adjudged that the defendant is guilty as charged and convicted.'" Judges Chestnut and Watkins concurred in

Judge Thomsen's opinion, wherein he said: "It is not necessary that the court adjudge the party guilty; indeed, it has been held that such a provision in a judgment is not even proper. *See* 152 A.L.R. at 276; Rossman, *Arraignment and Preparation for Trial*, 5 F.R.D. 63, 67. However the judgment may be worded, the effect of the acceptance of a plea of nolo contendere and the imposition of sentence thereon is the same." 188 F. Supp. at 633. Citing numerous authorities, Judge Thomsen noted that while a plea of nolo contendere has all the effects of a plea of guilty for the purpose of the criminal case in which it is entered, "it does not have the effect of an estoppel and cannot be used in any other proceeding as an admission of guilt." 188 F. Supp. at 633.

In footnote 8 to its opinion in *North Carolina v. Alford*, 400 U.S. 25, 36, 91 S.Ct. 160, 166-67, 27 L.Ed. 2d 162, 170, the Supreme Court noted:

"Throughout its history . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea 'unless it is satisfied that there is a factual basis for the plea'; there is no similar requirement for pleas of nolo contendere, since it was thought desirable to permit defendants to plead nolo without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11." See *United States v. Prince*, 533 F. 2d 205 (CCA 5th Cir., 1976); *United States v. Safeway Stores*, 20 F.R.D. 451 (N.D. Texas (1957)); Annot., *Plea of Nolo Contendere*, 89 A.L.R. 2d 540, § 30 (1963).

In *United States v. Safeway Stores*, *supra*, after noting that Counsel for the Government had described the plea of nolo contendere as "a plea of guilty in Latin," Judge Estes quoted with approval the following comment of the Committee which drafted the Federal Criminal Rules: "While at times criticized as theoretically lacking in logical basis, experience has been that [the plea of nolo contendere] performs a useful function from a practical standpoint." 20 F.R.D. at 454.

[3] Although not a basis for decision, in its opinion, the Court of Appeals—citing authorities from several other jurisdictions—recorded its view that "an exception to the general rule in this

and other jurisdictions that a plea of nolo contendere cannot be used against a defendant in any proceeding other than the case in which it was entered should be made in the case of disciplinary proceedings against licensed attorneys." 31 N.C. App. at 174, 229 S.E. 2d at 44.

With reference to the foregoing comment of the Court of Appeals we reiterate the statement of Chief Justice Devin in *Winesett v. Scheidt, Comr. of Motor Vehicles*, supra at 194-195, 79 S.E. 2d at 505: "Both the court and the prosecuting attorney may well decline to accept such plea [nolo contendere] when the administration of justice might be improperly affected, for when the plea is accepted it is accepted with all the implications and reservations which under the law and accurate pleading appertain to that plea."

The statute under which State Bar instituted this proceeding, G.S. 84-28(2)(a) (1975), makes "*Commission* of a criminal offense showing professional unfitness" one of the grounds for disciplinary action against an attorney. As rewritten by 1975 N.C. Sess. Laws, ch. 582, § 5 (effective 1 July 1975 and codified as G.S. 84-28(b)(1) (Cum. Supp. 1975)), the corresponding ground is "*Conviction* of a criminal offense showing professional unfitness." (Italics ours.) Presumably the General Assembly understood the legal effect of a plea of nolo contendere to a criminal offense involving moral turpitude and constituting conduct showing professional unfitness. We note the omission from the statute of such a plea as a ground for disciplinary action against an attorney.

We have no doubt that respondent's plea of nolo contendere was entered and accepted in reliance upon "all the implications and reservations which under the law . . . appertain to that plea." Fundamental fairness would preclude making an ex post facto exception to the long established rule that the plea of nolo contendere has no effect beyond the particular case in which it was entered and cannot be used against the accused as an admission of guilt in any subsequent civil or criminal action.

We hold that State Bar is not entitled to a judgment as a matter of law on the uncontroverted facts in this case. Respondent's denial of the charge to which he pled nolo contendere raises a genuine issue of material fact. Thus, State Bar is not entitled to summary judgment. The decision of the Court of

Appeals is reversed, and this case will be remanded to the Superior Court for the trial by jury as provided by G.S. 84-28(d)(1) (1975).

Reversed and Remanded.

STATE OF NORTH CAROLINA v. HAROLD BRYANT WILLS, JR.

No. 45

(Filed 11 November 1977)

Criminal Law § 169.3— evidence of defendant's prior offense—objection—subsequent similar testimony by defendant—no prejudice

By presenting the same evidence on his direct examination as was earlier presented by the State, defendant waived the benefit of his earlier objection to that evidence; additionally, by taking the stand defendant opened himself up to impeachment, and on cross-examination the State had every right to inquire into a prior offense for purposes of questioning his credibility.

ON petition by the State under G.S. 7A-31 for discretionary review of the decision of the Court of Appeals, reported without published opinion, 32 N.C. App. 787, 236 S.E. 2d 734, finding error in the trial before *Lee, J.*, at the 5 April 1976 Session of DURHAM Superior Court.

Defendant was charged with the felonious larceny of currency and checks of the value of $3800, felonious breaking and entering and feloniously forcing open a safe. The jury found defendant guilty as charged and he was sentenced to a term of fifteen to twenty years' imprisonment. On appeal, the Court of Appeals found error and awarded defendant a new trial. We allowed State's petition for discretionary review.

The State presented evidence summarized as follows:

Charles Wellons testified that he owned a building at 821 N. Miami Boulevard, Durham, in which Wellons, Inc., maintained a safe for the purpose of holding money and other valuables. When he left and locked the building at 6:30 p.m. on 5 November 1975, there was $3600 in cash in the safe. Upon his return to the business at 8:00 a.m. the following morning, he found that the building and safe had been broken into, and the $3600 was miss-

ing. He had not given the defendant nor anyone else permission to enter his building, nor permission to open the safe or to remove any property therefrom.

Ralph D. Seagroves, a Durham police officer, testified that on 22 November 1975 defendant came to Durham Fire Station No. 3 and complained to Seagroves that he wanted something done about a reckless driving ticket. The defendant then said that he could give Seagroves some information about several break-ins. Seagroves stopped defendant and read him his Miranda rights. The defendant said he knew his rights and did not want a lawyer. Defendant then admitted to Officers Seagroves and Rigsbee that he was guilty of breaking into Mr. Wellons' building on 5 November 1975, forcing the safe open, and taking $3600 in currency therefrom.

Over defendant's objections Wellons and Seagroves both testified on direct examination that some six weeks prior to 5 November 1975 the defendant had been apprehended while attempting to break into the same business establishment at 821 N. Miami Boulevard.

Tony Rigsbee of the Durham Public Safety Department testified that on 22 November 1975 he was present when defendant confessed to committing the crimes for which he is being tried. Rigsbee further testified that defendant said he had broken into the business with two other people.

Other testimony for the State indicates that no fingerprints or other physical evidence of defendant's presence was discovered at the scene of the crime.

The defendant testified in his own behalf. He denied that he had committed the offenses charged against him and he denied that he had confessed committing these offenses. On direct examination, he admitted that he had earlier attempted to break and enter the business at 821 N. Miami Boulevard, and said that he was on probation for that offense.

John Caulder testified that on the evening of 5 November 1975 he and defendant were at his mother's home in Durham. At midnight, he, defendant and another individual left his mother's house and drove to Roxboro. They returned to Durham at 7:00 a.m. on the morning of 6 November.

Defendant presented other evidence tending to establish an alibi.

The State presented rebuttal evidence which showed that on 22 November 1975 defendant had confessed to the breaking and entering of three additional business establishments. Officer Seagroves testified that after his confession on 22 November defendant took him and Officer G. H. Milan to a place on the other side of Chapel Hill and showed them where he and others had stored merchandise stolen from the various stores broken into.

Attorney General Rufus L. Edmisten and Assistant Attorney General Archie W. Anders for the State, appellant.

James V. Rowan for defendant appellee.

MOORE, Justice.

Defendant assigns error to the admission in evidence, over his objection, of testimony concerning a prior offense committed by him. On direct examination, and before defendant took the stand in his own defense, State's witnesses Charles R. Wellons, the owner of the premises robbed in the present case, and Officer Ralph Seagroves testified that they had apprehended the defendant on 24 September 1975 while he was attempting to break into the same premises involved in the present case. Defendant argues that admission of such evidence violates the principle that the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Defendant further argues, and the Court of Appeals so held, that evidence of this prior attempt to break and enter is not admissible under any of the well-recognized exceptions listed in *State v. McClain, supra.* The State, on the other hand, argues that this evidence of an earlier attempt to break and enter into the same premises was relevant to show the identity of the perpetrator of the offense for which defendant is being tried in present case.

Assuming that the court erred in admitting this evidence of a prior crime, its admission was nonprejudicial to the defendant. The defendant testified in his own behalf. On his direct examination, in relating the substance of his statement to police, he admitted that he had attempted to break into Wellons' store once

before. The defendant said: "He questioned me about safecracking, did I know anything about a man and I told him no, which Charles Wellons is the man that I got my probation from for attempt to break and enter, and I was paying for it, and I swear I did not go back to that man's premises."

In *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972), where defendant's witness admitted on cross-examination that defendant had been in prison, this Court said:

> ". . . Assuming *arguendo* that the evidence was inadmissible, there was no prejudicial error. In the instant case the defendant subsequently testified in his own behalf as to his criminal record and his imprisonment on other charges. An objection to inadmissible testimony is waived when evidence of the same or like import is introduced without objection. *State v. Wright*, 270 N.C. 158, 153 S.E. 2d 883 (1967); *Mallet v. Huske*, 262 N.C. 177, 136 S.E. 2d 553 (1964) . . . ."

And in *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1956), where the State put on direct evidence of prior offenses by defendant and defendant later took the stand and testified to essentially the same facts, the Court said:

> "Exceptions by the defendant to evidence of a State's witness will not be sustained where the defendant or his witness testifies, without objection, to substantially the same facts. *S. v. Matheson*, 225 N.C. 109, 33 S.E. 2d 590.
>
> "Likewise, the admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial. *S. v. Merritt*, 231 N.C. 59, 55 S.E. 2d 804. . . ."

See also State v. Minton, 234 N.C. 716, 68 S.E. 2d 844 (1951).

Under Amendments V and XIV of the United States Constitution, and Article I, Section 23, of the North Carolina Constitution, a defendant has a right not to be compelled to be a witness against himself in any criminal case. *See State v. McDaniel*, 274 N.C. 574, 164 S.E. 2d 469 (1968). But defendant in present case does not contend that the admission of this allegedly inadmissible evidence compelled him to take the witness stand in his own behalf. At no time during the trial, nor in his argument to this Court, did the defendant intimate that he did not intend to take the witness stand in order to deny that he had committed

the crime and to deny that he had confessed committing the crime to police.

Defendant argues, however, that *Harrison v. United States*, 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1967), holds that the burden is on the State to show that defendant's testimony was not induced by the erroneous admission of evidence. That case is not on point. *Harrison* involved a question of constitutionally impermissible evidence, *i.e.*, an illegally obtained confession, and the effect of the admission of this constitutionally impermissible evidence on the defendant's Fifth Amendment rights.

In *Harrison*, the defendant did not take the stand. The Court held that the prosecution could not introduce evidence of his admissions at an earlier trial of the same case when his taking the stand was clearly compelled by the State's introduction of illegally obtained confessions by him. The Court held that since he was compelled to take the stand in the earlier case to respond to the illegally obtained confession, his forced testimony in that case was a violation of his Fifth Amendment right against self-incrimination. Therefore, his testimony could not be admitted as an admission in his later trial.

In the case at bar, no such constitutional question is involved. In *United States ex rel Harris v. State of Illinois*, 457 F. 2d 191, 198 (7th Cir. 1972), *cert. denied*, 409 U.S. 860, 34 L.Ed. 2d 106, 93 S.Ct. 147, the Court held that the question of the admissibility of evidence of prior crimes "is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved. . . ." *See also Grundler v. State of North Carolina*, 283 F. 2d 798 (4th Cir. 1960). No such denial appears in present case. Here, there is no question but that defendant's confession to the crime was properly obtained. It is also clear that he took the stand, not to answer the State's evidence regarding his prior crime, but in order to rebut State's evidence that he both committed and confessed to the crimes in the present case. There is no allegation that his taking the stand in his own behalf was induced by the allegedly erroneous admission of evidence of his prior crime. Rather, it is clear that defendant was "compelled" to testify by the strength of the State's case, and that case included ample evidence, which was clearly competent, of his guilt. ". . . A defendant who chooses to testify waives his privilege against com-

pulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." *Harrison v. United States*, *supra*, 392 U.S. at 222, 20 L.Ed. 2d at 1051, 88 S.Ct. at 2010.

As stated in *State v. McDaniel*, *supra*, at 584, 164 S.E. 2d at 475:

> ". . . To hold that a defendant in a criminal action, once evidence has been erroneously admitted over his objection, may then take the stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State to compel him to testify against himself. . . ."

Defendant also argues, under *State v. Godwin*, 224 N.C. 846, 32 S.E. 2d 609 (1945), that he was entitled to explain the evidence of his prior misconduct, or to destroy its probative value, or to contradict it with other evidence, without running the risk of abandoning his objection to the original introduction of the evidence. 224 N.C. at 847-48. Ordinarily this is true. In *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353, 358-59 (1968), this Court said, "[O]ne does not waive an objection or motion to strike, otherwise sound and seasonably made, by offering evidence for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question. *State v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766; Stansbury, North Carolina Evidence [Brandis Ed. 1973], § 30."

However, defendant's testimony in present case regarding the September break-in was not an attempt to explain or contradict the evidence of his prior misconduct; nor was it an attempt to impeach the credibility or to establish the incompetency of the testimony. Instead, the witness was simply producing the same and additional evidence of the facts that had already been testified to over his objection. *See* 1 Stansbury, North Carolina Evidence § 30, p. 80 (Brandis rev. 1973). In denying the officers'

testimony that he had confessed committing the breaking and entering of 5 November, defendant added that he had in fact attempted to break into the same store on 22 September, and was on probation for that offense at the present time. Such testimony does not come within the requirements set out in *Godwin* and *Williams*, *supra*, for the preservation of the exception to the allegedly improper testimony. Hence, we hold that, by presenting the same evidence on his direct examination as was earlier presented by the State, the defendant waived the benefit of his earlier objection to that evidence. Additionally, by taking the stand the defendant opened himself up to impeachment, and on cross-examination the State had every right to inquire into this prior offense for purposes of questioning his credibility. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967). Thus, we fail to see how this testimony could have prejudiced defendant's case.

Since the admission of the evidence of defendant's prior attempt to break into Mr. Wellons' building was not prejudicial to defendant, we need not consider whether it was admissible to show the identity of defendant under Exception No. 4, as set out in *State v. McClain*, *supra*.

For the reasons stated, we hold that the Court of Appeals erred in awarding defendant a new trial.

Further assignments of error presented by defendant in the Court of Appeals were not passed upon by that court and have not been brought forward to this Court. The decision of the Court of Appeals is reversed and the judgment of the superior court is affirmed. The case is remanded to the Court of Appeals with direction that it remand to Durham Superior Court for issuance of commitment to put the prison sentence into effect.

Reversed.

STATE OF NORTH CAROLINA v. HARRY ALSTON, JR.

No. 52

(Filed 11 November 1977)

1. **Burglary and Unlawful Breakings § 7— first degree burglary—failure to submit lesser offenses**

The trial court did not err in failing to instruct the jury with respect to possible verdicts of guilt of lesser offenses included within the charge of first degree burglary where the evidence for the State tended to show the commission of the offense of first degree burglary and the evidence of defendant tended to show alibi.

2. **Criminal Law § 88.2— exclusion of argumentative question**

In a prosecution for first degree burglary and rape wherein a deputy sheriff testified that he took no physical evidence from the victim's house, the trial court properly sustained the State's objection to defense counsel's question to the deputy sheriff as to whether "your entire case is just on [the victim's] words," since (1) the question was mere argument with the witness and not designed to elicit any information not already before the jury, and (2) the case for the State also included the testimony of a medical expert and evidence with reference to the condition of clothing worn by the defendant.

3. **Criminal Law § 66.18— identification of defendant—evidence of witness's impaired vision—failure to reopen voir dire hearing**

In this prosecution for burglary and rape, the trial court did not err in failing to reopen the voir dire examination of the victim concerning the admissibility of her testimony identifying defendant as her assailant when defendant thereafter ascertained during cross-examination of the victim before the jury that her vision was impaired by cataracts where uncontroverted evidence showed that the victim knew defendant well, the victim was confronted with and struggled with her assailant over a substantial period of time in a lighted room of her home, and no police procedure contributed to her identification of defendant, since the impairment of the victim's vision under such circumstances would relate only to the credibility of her identification and not to the admissibility of her testimony.

APPEAL by defendant from *Ervin, J.*, at the 7 February 1977 Session of MOORE.

Upon indictments, proper in form, the defendant was tried and convicted of first degree burglary and second degree rape. He was sentenced to life imprisonment for the burglary and to 16 to 20 years for the rape, the sentences to run concurrently, the court finding in each judgment that the defendant will not benefit from Article 3A of Chapter 148 of the General Statutes and,

therefore, declining to sentence him as a committed youthful offender.

Mary Lee Clark testified that she was 61 years of age, had been separated for about 20 years from her husband and lived alone in a small six room frame house in Moore County. She knew the defendant and had known him since he was a small boy. On the night of 10 December 1976, she went to bed about 7:00 p.m. Her house was locked with bars across the front and back doors and with sticks over the windows to keep them from being raised, all of the windows having glass in them. She was awakened by someone knocking on the front door but she did not get up. Later she got up, ascertained that it was 3:30 a.m., started a fire in the stove in the room where she slept and then went into another room to get her snuff box. When she returned to the first room, she bent over to see if the fire was burning and when she raised up she saw the defendant standing in the living room with his hand on the door.

The defendant objected to the identification and requested a voir dire, which was conducted in the absence of the jury. On the voir dire, Mary Lee Clark testified that she had known the defendant since he was a boy, had seen him occasionally during the preceding four or five years and that he would bring firewood to her, chop it and bring it into the house. On the night in question, when she first saw the defendant, the electric light in her bedroom was turned on and the light was shining in his face. She talked to him for 15 or 20 minutes and called him by name. She pointed to the defendant in the courtroom. She testified she had had no opportunity to see the defendant since the alleged offense, except at the preliminary hearing, and that she had never viewed a lineup or been shown photographs. When awakened by the knocking on her front door, she first thought that the person outside her house was a man named Dave McLeod, but she never said that the person who assaulted her was anyone other than the defendant.

Deputy Sheriff Thornton, the investigating officer, testified on the voir dire that he went to the residence of Mary Lee Clark on the morning of 11 December 1976, that she told him that, as she was building a fire, she saw the defendant standing in the doorway and she did not state she had seen any other man in her house that night. Deputy Thornton further testified that there

was a working electric light suspended from the ceiling of the room in which the alleged assault occurred, that he did not show Mary Lee Clark any photographs, conduct a lineup for her investigation, take her to the jail to observe the defendant or use any other identification procedures.

At the conclusion of the voir dire, the defendant having offered no evidence thereon, the court made findings of fact in accordance with the above stated evidence and concluded that the identification of the defendant by Mary Lee Clark resulted solely from her previous knowledge of him and her having observed him in a lighted room for a substantial period at the time the offenses are alleged to have occurred and, consequently, the State is entitled to offer into evidence her identification of the defendant.

The jury then returning to the courtroom, Mary Lee Clark continued to testify as follows: After she got up and before she saw the defendant, she heard the sound of something breaking but thought it was a cat outside the house among some flower pots. The light in her bedroom was on when she looked up and saw the defendant standing in the doorway with his hand up on the door. The light was shining on his face. She tried to get out the front door of the house but he put his hand around her neck. She screamed twice and the defendant said, "If you holler again, I'll kill you." The defendant then pushed her back to the davenport on which she slept. When she asked him what he wanted, he said that he wanted money and, in vulgar terms, to have intercourse. She gave him her pocketbook which contained $10.70, which he took. He then dragged her down onto the floor and, as she lay there, had intercourse with her, although she asked him not to do so and told him she was sick and too old for him. He told her to shut up. After the defendant left the house, she screamed and neighbors called the police. She was then taken to the hospital and examined by Dr. Smith. Glass had been broken out of a window in one of the other rooms of the house, the glass being found inside the house. The stick which had been placed so as to prevent the raising of the window was lying on the floor. She did not give the defendant permission to come into her house.

On cross-examination, Mary Lee Clark testified that, because of cataracts, she was blind in one eye and saw only poorly with the other eye, except when she was wearing her glasses, which she was not wearing at the time of the alleged assault. There-

upon, in the absence of the jury, counsel for the defendant requested a reopening of the voir dire with reference to the admissibility of her identification of the defendant. The court, in its discretion, declined to reopen the voir dire.

Deputy Sheriff Thornton testified, in the presence of the jury, that he answered the call to the residence of Mary Lee Clark at 5:18 a.m. on 11 December 1976. He observed broken glass inside the house and that a plastic covering on the outside of the window had been cut.

Lieutenant Ritter of the Sheriff's Department testified that he arrested the defendant at the latter's residence and identified as the State's Exhibit No. 3 trousers worn by the defendant that morning after his arrest, these being taken from the defendant following his being advised of his rights. These trousers were examined by a serologist employed by the State Bureau of Investigation who found blood on the fly of the pants.

Dr. Smith, an expert gynecologist, testified that, on the morning of 11 December 1976, he examined Mary Lee Clark and found bruises, a deep abrasion and slight bleeding of the vagina.

The defendant testified in his own behalf, his defense being alibi. According to his testimony, he was at the home of his aunt from 7:00 p.m. until 1:45 a.m. on the night of December 10-11 and, from his aunt's house, went straight home, arriving there at about 2:05 a.m. and then went to bed, where he remained until awakened when the officers arrived at approximately 9:00 a.m. This alibi was supported by the testimony of his father and sister.

The defendant and his sister further testified that the trousers which he put on when he was so awakened, and which were taken from him following his arrest and introduced in evidence as the State's Exhibit No. 3, belonged to his sister, he frequently wearing her trousers, and that these were not the trousers worn by him the evening before. The defendant denied going to the home of Mary Lee Clark, breaking into it, taking money from her, threatening her or raping her. The defendant's sister testified that she did not know how the blood got upon the fly of the trousers, it not being thereon the last time she had seen the trousers.

In rebuttal, the State offered in evidence a pair of undershorts worn by the defendant at the time of his arrest and taken

from him along with the above mentioned trousers. A small bloodstain was on the front of this garment near the opening. The defendant had previously testified that he was wearing this garment the evening before and slept in it the night before his arrest.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery III, Associate Attorney, for the State.

John B. Evans for the defendant appellant.

LAKE, Justice.

[1] The defendant does not except to any portion of the court's charge to the jury. We have, however, carefully examined the court's instructions and find no error therein. In his statement of the case on appeal, the defendant did assign as error the failure of the court to instruct the jury with respect to possible verdicts of guilt of lesser offenses included within the charge of first degree burglary, but no argument is made or authority cited with reference to this assignment of error in the defendant's brief. It is, therefore, deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 671, 741. In any event, this assignment of error is without merit. There was no evidence of a lesser offense included within the offense of first degree burglary, the evidence for the State showing the commission of the offense charged in the bill of indictment and the evidence of the defendant tending to establish an alibi. Where there is no evidence which would support a verdict of guilty of a lesser included offense, it is not error to fail to instruct the jury upon such offenses or to fail to submit these as possible verdicts. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706 (1972); *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); Strong, N.C. Index 3d, Criminal Law, § 115.

[2] On cross-examination, Deputy Sheriff Thornton stated that he took no physical evidence from the residence of Mary Lee Clark, such as fingerprints, clothing or blood samples. Thereupon, defendant's counsel asked the witness, "Then eventually, Deputy Thornton, your entire case is just on Mrs. Clark's words * * *." The State objected and the objection was sustained. In this there was no error. While the record indicates the defendant's question was not completed, his assignment of error is not based on that

circumstance so we conclude that the question was, in fact, complete. The objection was properly sustained for the reason that this question was, in reality, mere argument with the witness and not designed to elicit any information not already before the jury. Moreover, the record does not disclose what the answer of the witness would have been. See, Stansbury, North Carolina Evidence (Brandis Rev.), § 26. Furthermore, while the deputy may have relied entirely upon Mary Lee Clark's statements, the case for the State also includes the testimony of Dr. Smith and the evidence with reference to the condition of clothing worn by the defendant.

[3] The principal contention of the defendant on appeal is that the court erred in failing to reopen the voir dire examination of Mary Lee Clark concerning the admissibility of her testimony identifying the defendant as her assailant. The basis for this contention is that, after the voir dire was concluded, upon cross-examination of this witness the defendant ascertained that her vision was impaired by cataracts. This would relate only to the credibility of her identification, not to the admissibility of her testimony, there being no indication whatsoever of any police procedures, proper or improper, contributing to her identification of the defendant. Her testimony, not controverted by the defendant, was that she knew the defendant well and had known him practically all of his life. On the occasion in question, she was confronted by and struggled with her assailant over a substantial period of time in a lighted room in her own home. Under these circumstances, there was no occasion for the court to conduct any further voir dire examination with reference to the admissibility of the in-court identification of the defendant by this witness. *State v. Cox, Ward and Gary*, 281 N.C. 275, 282, 188 S.E. 2d 356 (1972); *State v. Richardson*, 279 N.C. 621, 626, 185 S.E. 2d 102 (1971). *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), relied upon by the defendant, has no application to the circumstances of the present case.

The conflict between the testimony of Mary Lee Clark positively identifying the defendant as the burglar and her assailant, and the testimony of the defendant, designed to establish an alibi, simply presented a question of credibility for the jury, which resolved it contrary to the defendant's contention.

No error.

STATE OF NORTH CAROLINA v. ROSCO WILLIAM HALL

No. 19

(Filed 11 November 1977)

1. **Rape § 5— second degree rape—physical force—victim's resistance—sufficiency of evidence**

Evidence in a second degree rape prosecution was sufficient to support the State's contention that defendant had carnal knowledge of the victim by force and against her will, though defendant made no verbal threats to the victim and though the victim offered no physical resistance, where the victim testified that she had intercourse with defendant against her will; she said that she repeatedly told him that she did not want to have intercourse; when defendant advanced toward her she screamed and began crying; and she testified that defendant grabbed her around the neck and choked her, and that this caused her to lose consciousness.

2. **Rape § 6— second degree rape—submission of lesser included offenses—error favorable to defendant**

Where all of the State's evidence in a second degree rape case showed a completed act of intercourse, error of the trial court in submitting to the jury the lesser included offenses of rape was favorable to defendant.

APPEAL by defendant from *Kirby, J.*, at the 29 November 1976 Session of GASTON Superior Court.

On an indictment, proper in form, defendant was convicted of second degree rape and was sentenced to life imprisonment.

The State offered evidence which tends to show the following: Goldie Virginia Leach (Goldie) lived in Kings Mountain, North Carolina, was thirty-six years old, and had never married. She had seen defendant several times prior to 22 August 1976, but did not actually know him. She only knew him as "Tracy." On the morning of 22 August 1976, Goldie went to visit her boyfriend, one Charles Collins, at his home in Gastonia. When she arrived she saw Collins in his car with another woman, Geraldine. She followed the car to defendant's home on Morris Street. Goldie and Collins began arguing and Goldie swung a wrench at Collins. Collins grabbed the wrench from her and pushed her. Goldie then got into her car to drive uptown in order to take out a warrant for Collins, but on her way changed her mind and drove back to Morris Street. Upon her arrival there, she took a second wrench from her car and again started swinging it at Collins. Collins grabbed the wrench, threw it in the yard and knocked her down. At this

point, Goldie hit her head on the pavement, causing her to become unconscious. After she had regained consciousness, Collins left. The defendant then walked up to her and told her he was concerned about her physical condition. He offered his aid. Goldie agreed to go to his house in order to clean the blood off her face before returning to Kings Mountain. Upon arrival at his apartment, defendant gave her Q-tips and alcohol. She cleaned her face and told him that she had to go. He insisted that before she left she sign his autograph book. She did so. Defendant then offered to give Goldie some dresses. She refused his offer, and told him that she had to go to the hospital to be checked before returning home. She then attempted to leave, but defendant put his hand on the door to keep her from going.

Goldie testified that the defendant told her they "were going to do something before [she] left." She replied, "Tracy, please don't make me do something like that. I didn't come here for that." He said, "No, we're going to do something." Goldie then became scared and began crying and screaming. He told her that it would do no good to scream. She then asked for a towel to wipe off her face. Defendant walked into the bathroom to get a towel. At this time, Goldie attempted to get the door unlatched so that she could escape. There were two locks on the door and she was not able to get both unlocked before defendant returned from the bathroom. When he returned, defendant grabbed her arm and pushed her away from the door. He then grabbed her around the neck and started choking her. She started backing up and backed into the living room, through the kitchen and into the bedroom. Defendant still had his hand on her throat. He backed her to the foot of the bed. She fell onto the bed and then "passed out." When Goldie regained consciousness, defendant was having intercourse with her. She asked him to please let her go to the hospital. Defendant stopped and she pushed him away. He then told her that she could go to the hospital but that he would go with her so that he could bring her back to his apartment.

Goldie and defendant then went across the street to the home of Goldie's cousin, Ella Mae Leach. She told her cousin what defendant had done. Goldie and her cousin drove to the magistrate's office and then to the Gaston Memorial Hospital. The doctor who examined her found no sperm in her vagina. She said this was due to the defendant's failure to reach a climax.

Ella Mae Leach testified that on the morning of 22 August 1976 her cousin, Goldie Leach, came to her house with defendant. Goldie was upset and had been crying. She told Ella that the defendant had just choked and raped her.

Defendant did not testify in his own behalf nor did he offer any evidence.

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

Attorney General Rufus L. Edmisten, Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

Jim R. Funderburk for defendant appellant.

MOORE, Justice.

Defendant alleges that the trial court erred in failing to grant defendant's motion for nonsuit at the close of the State's evidence and at the close of all the evidence.

When there is a motion for nonsuit in a criminal case, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact deducible from the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). "[T]he court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. . . ." *State v. McNeil, supra*, at 162, 185 S.E. 2d at 157. *See State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). The question for the court is whether there is substantial evidence of each essential element of the crime charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

Defendant in present case was charged with second degree rape. "Rape is the carnal knowledge of a female person by force and against her will. The force necessary to constitute rape need not be physical force. Fear, fright, or coercion may take the place of force." *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201

(1975). *See State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Primes*, *supra*.

The crime of rape was divided into two degrees by the 1973 amendment to G.S. 14-21, which provides that second degree rape shall be a lesser included offense of first degree rape. The statute says:

> "*Rape; punishment in the first and second degree.* — Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape—
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

See State v. Goss, 293 N.C. 147, 235 S.E. 2d 844 (1977).

[1] Defendant argues that, according to the victim's testimony, no physical force was ever directly used against her, and, secondly, that the victim offered no resistance to defendant's advances.

The victim testified that defendant grabbed her around the neck and choked her. He held her neck while he backed her through the living room, kitchen, and into the bedroom. On cross-examination, the victim said: "When I fell down on the bed, his hand stayed on my neck. I passed out; I couldn't get my breath;

and he was choking me; and it was cutting my wind off. I was scared to death." This testimony was sufficient evidence of the force used against the victim.

Defendant further contends that, other than asserting, "I don't want you to do this" several times, the victim offered no additional resistance to defendant's advances. However, not only did the victim say several times, "I don't want you to do this," but she also cried and screamed when defendant's desires became clear to her. In addition, defendant exerted physical force against her from the moment she attempted to escape via the front door. The victim said on direct examination: "I didn't ever try to fight Tracy; I just lay there and looked at the ceiling. I didn't fight him because I was afraid of him"; and, "I passed out because I guess I was just scared to death and I was hurting too. . . . I was just scared and I don't remember."

It is true that the victim offered no physical resistance to defendant's attack. However, evidence of physical resistance is not necessary to prove lack of consent in a rape case. In *State v. Primes*, 275 N.C. 61, 67, 165 S.E. 2d 225, 229 (1969), where a defendant made similar contentions, this Court said: "While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent. [Citation omitted.]" And in *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965), the Court, quoting 1 Wharton's Criminal Law and Procedure (Anderson Ed. 1957), § 311, p. 649, said: "A consent obtained by use of force or fear due to threats of force is void, and the offense then rape." In both *Primes* and *Carter* the Court quoted with approval the following language from 44 Am. Jur., Rape, § 13, p. 910:

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

See also State v. Williams, 275 N.C. 77, 165 S.E. 2d 481 (1969).

In present case, the victim testified that she had intercourse with defendant against her will. She said that she repeatedly told him that she did not want to have intercourse. When he advanced toward her she screamed and began crying. She testified that

defendant grabbed her around the neck and choked her, and that this caused her to lose consciousness. Though defendant made no verbal threats to her, and though she offered no physical resistance, this is ample evidence to support the State's contention that the defendant had carnal knowledge of her by force and against her will. Hence, there was sufficient evidence to support the trial court's denial of the motion for nonsuit.

[2] In his charge to the jury, the trial judge submitted the possible verdicts of second degree rape, assault with intent to commit rape, assault on a female and not guilty. Defendant's second assignment of error is based on the contention that the trial court erred in submitting to the jury the lesser offenses included within the charge of rape. He argues that all the State's evidence showed a completed act of intercourse, and thus that the only issues which should have been submitted to the jury were whether defendant was guilty of second degree rape or not guilty.

In *State v. Armstrong*, 287 N.C. 60, 65, 212 S.E. 2d 894, 897-98 (1975), a factually similar case, Justice Huskins, speaking for the Court, said:

> "It should be noted that all of the evidence in this case reveals a completed act of sexual intercourse. The only dispute between the State and the defendant is whether the act was accomplished by consent or by force. Under those circumstances there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. Lesser included offenses must be submitted only when there is evidence to support them. *State v. Watson*, 283 N.C. 383, 196 S.E. 2d 212 (1973); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972). *Submission of the lesser included offenses, however, was error favorable to the defendant and affords him no grounds for relief.*" (Emphasis added.)

Accord, State v. Jones, 287 N.C. 84, 214 S.E. 2d 24 (1975); *State v. Accor* and *State v. Moore*, 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968). This assignment of error is overruled.

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

No error.

THE COCA-COLA COMPANY v. J. HOWARD COBLE, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 57

(Filed 11 November 1977)

1. **Taxation § 38— unlawful tax—authority to refund**

G.S. 150-266.1 conferred no authority on the Secretary of Revenue to refund taxes which, at the time they were collected, were unlawful but not erroneous or incorrect.

2. **Taxation § 38— soft drink tax—nonresident distributor—amount in excess of alternate method—voluntary payment**

A nonresident distributor voluntarily paid the soft drink tax by means of taxpaid crowns or stamps rather than by the less expensive alternate method provided by G.S. 105-113.56A, and is not entitled to recover the amount paid in excess of the alternate method, where the distributor failed to demand a refund from the Secretary of Revenue within 30 days of payment pursuant to G.S. 105-267, notwithstanding the distributor was informed by the Department of Revenue that the alternate method was unavailable to it and the Court of Appeals thereafter held that the exclusion of nonresident distributors from the operation of the statute allowing the alternate method was unconstitutional.

3. **Taxation § 38— payment of tax—voluntariness—apprehension of civil suit**

Mere apprehension on the part of a taxpayer that it might be put to some trouble and expense by having to commence judicial proceedings to challenge the legality of a tax is insufficient to constitute duress or to render payment of the tax involuntary.

Justice HUSKINS dissents.

WE allowed discretionary review of the decision of the Court of Appeals, 33 N.C. App. 124, 234 S.E. 2d 477 (1977) (Morris, J., concurred in by Vaughn and Martin, J.J.), reversing judgment of *Herring, J.*, 22 July 1976 Session, WAKE Superior Court.

Plaintiff, a Delaware corporation, instituted this civil action to recover a portion of certain excise taxes paid on the distribution of its soft drink known as "Hi-C." The taxes were collected

pursuant to G.S. 105-113.45, which levied an excise tax of one cent per bottle on the ". . . sale, use, handling and distribution of all soft drinks . . ." in North Carolina. Under G.S. 105-113.51, the tax could be paid by affixing North Carolina taxpaid stamps or crowns to the soft drink containers. G.S. 105-113.56A afforded resident dealers and distributors an alternative means of payment whereby sales reports could be made to the Secretary of Revenue each month and a tax paid as follows: "For the first fifteen thousand gross of bottled soft drinks sold annually, seventy-two cents (72¢) per gross; for all in excess of fifteen thousand gross, one cent (1¢) per bottle. In addition, there shall be allowed a discount of eight percent (8%) of the said tax to be remitted."

The restriction of this lower tax rate and less burdensome method of payment to resident dealers and distributors was held by the Court of Appeals to be violative of the Commerce Clause of the United States Constitution. *Richmond Food Stores v. Jones*, 22 N.C. App. 272, 206 S.E. 2d 346 (1974). The Secretary of Revenue did not seek discretionary review of that decision in our Court.

During the tax years ending 30 September 1971, 1972, 1973 and 1974, plaintiff manufactured and distributed "Hi-C" in North Carolina and paid the soft drink excise tax by purchasing and affixing taxpaid crowns or stamps to its containers pursuant to G.S. 105-113.51, since it was not a North Carolina distributor and had not established a commercial domicile here. On several occasions during this period, plaintiff inquired of an official in the Department of Revenue whether it might utilize the alternate method of payment under G.S. 105-113.56A. The Department responded that the law did not permit plaintiff to use the alternate method. Relying on this, plaintiff continued to pay the tax without protest by means of taxpaid lids.

After the decision in *Richmond Food Stores v. Jones*, *supra*, plaintiff applied to the Secretary of Revenue under G.S. 105-266.1 seeking a refund of that portion of its taxes paid which exceeded the amount it would have paid under the alternate method. This claim for refund was denied and plaintiff filed suit. At trial, the court granted summary judgment for defendant as to plaintiff's claim for refund for the tax year ending 30 September 1971, since this claim was barred by the three year time limitation in G.S. 105-266.1(a). After the presentation of evidence was concluded, the

court found for plaintiff and entered judgment granting a refund of $32,400, representing an overpayment of $10,800 for each of the three tax years in question. Defendant appealed from that judgment and, as indicated above, the Court of Appeals reversed. No appeal was taken from the partial summary judgment for defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Myron C. Banks, for defendant-appellee.

Blanchard, Tucker, Twiggs & Denson by Charles F. Blanchard and R. Paxton Badham for plaintiff-appellant.

COPELAND, Justice.

Plaintiff argues on this appeal that it is entitled to refund of a portion of its soft drink excise tax payments for the years in question. For reasons indicated below, this contention is overruled and the judgment of the Court of Appeals is affirmed.

While the tax in fact paid under G.S. 105-113.51 is not alleged to be unlawful, plaintiff maintains that, but for an unlawful restriction, it would have paid under the more favorable method in G.S. 105-113.56A. This situation is closely analogous to one in which a party pays a tax that later proves to be unconstitutional and then seeks a refund of those payments. "Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully." *Middleton v. Wilmington, Brunswick & Southern Railroad Company*, 224 N.C. 309, 311, 30 S.E. 2d 42, 43 (1944). Where there is express statutory authority, however, even voluntary payments may be recovered when mistakenly paid. *B-C Remedy Company v. Unemployment Compensation Commission*, 226 N.C. 52, 36 S.E. 2d 733 (1946).

Plaintiff first asserts that there is express statutory authority for refund of these taxes under G.S. 105-266.1, which reads, in part, as follows:

> "(a) Any taxpayer may apply to the Secretary of Revenue for refund of tax or additional tax paid by him at any time within *three years* after the date set by the statute for filing of the return or . . . within six months from the date of payment of such tax or additional tax, whichever is later. The Secretary shall grant a hearing thereon, and if upon such

> hearing he shall determine that the tax is *excessive or incorrect*, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly." (Emphasis added.)

It is argued that the Secretary should have refunded that portion of the taxes plaintiff paid by purchase of taxpaid stamps and crowns which exceeded the amount payable under the alternate method. The Secretary's authority under G.S. 105-266.1, however, extends only to the resettlement of taxes which he finds *excessive or incorrect*. In the instant case, the tax is challenged as having been collected *unlawfully*.

In *Richmond Food Stores v. Jones*, *supra*, which held the restriction in G.S. 105-51 unconstitutional, refund was sought under G.S. 105-267. This statute permits a person with a valid defense to the collection of any tax to pay the tax and demand a refund within thirty days after payment. If no refund is forthcoming within 90 days, the party may then sue before the proper court for the amount claimed. As grounds for refund, G.S. 105-267 provides as follows: "If upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an *illegal* or *unauthorized purpose*, or was for any reason *invalid* or *excessive*, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases." (Emphasis added.)

[1] As we have said earlier, our statutes and case law ". . . recognize a distinction between an erroneous tax and an invalid or illegal tax. An invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation." *Redevelopment Commission of High Point v. Guilford County*, 274 N.C. 585, 589, 164 S.E. 2d 476, 479 (1968) (citations omitted). The Secretary of Revenue has no authority under G.S. 105-266.1 to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts. *Gulf Oil Corporation v. Clayton*, 267 N.C. 15, 147 S.E. 2d 522 (1966); *Great American Insurance Company v. Gold*, 254 N.C. 168, 118 S.E. 2d 792 (1961). While the tax here had already been held unconstitutional at the time plaintiff filed for refund, G.S. 105-266.1, by its express terms, confers no authority on the Secretary to refund taxes which, at the time they were collected, were unlawful but *not* erroneous or incorrect.

The appropriate remedy here was under G.S. 105-267, since it permits suits for refund of invalid *or* excessive taxes. Plaintiff, however, failed to demand a refund within the requisite time specified in the statute and thus is without recourse under this provision. The taxpayer here could have followed the same course used in *Richmond Food Stores*; nevertheless, having elected the route it would pursue, plaintiff is bound by its limitations. *Kirkpatrick v. Currie*, 250 N.C. 213, 108 S.E. 2d 209 (1959). Unfortunately for plaintiff, "The Moving Finger writes; and, having writ, moves on." E. Fitzgerald, *The Rubaiyat of Omar Khayyam*, st. 71. We therefore conclude that G.S. 105-266.1 fails to provide an exception to the general rule that voluntary payments of unconstitutional taxes are not refundable.

Plaintiff next contends that its payments were involuntary because it would have been subject to civil and criminal sanctions had it refused to pay the tax and, in the alternative, would have been compelled to become involved in a lawsuit to determine the constitutionality of the tax, which it did not wish to do. The threat of civil or criminal sanctions does not render the payments involuntary because, as noted earlier, plaintiff could have protected its rights by paying the tax and subsequently demanding a refund under G.S. 105-267 within thirty days of payment. Upon failure to receive the refund within ninety days, plaintiff would have been entitled to sue the Secretary of Revenue for the amount demanded. This procedure would have protected plaintiff against any possible civil or criminal sanctions, since the tax would have been paid, yet plaintiff's right to contest the legality of the restriction in the alternate payment method would have been preserved.

[2] We conclude from plaintiff's failure to make demand on the Secretary within the thirty day time limit that the payments were voluntary at the time they were made. While plaintiff did inquire of the Department of Revenue as to whether it could proceed under the alternate payment method, as we have already noted, the Executive Branch has no authority to declare legislative acts unconstitutional. *Great American Insurance Company v. Gold, supra.* If plaintiff paid the tax under duress, as alleged, it was free to follow the procedure under G.S. 105-267 for recovering unlawful payments. Having failed to demand refund within thirty days of payment, plaintiff now seeks the benefit of

the longer time period available under G.S. 105-266.1; however, as previously indicated, this provision may not be used to obtain a refund of taxes unlawfully collected. As pointed out by Justice Huskins, speaking for our Court in a different context, "The law does not permit [a party] to board the train after it has left the station." *Brock v. North Carolina Property Tax Commission*, 290 N.C. 731, 739, 228 S.E. 2d 254, 260 (1976).

[3] Plaintiff's contention that the payments were made under compulsion because of the necessity of commencing a civil lawsuit to recover them is likewise without merit. Mere apprehension on the part of a plaintiff that it might be put to some trouble and expense by having to commence judicial proceedings to challenge the legality of a tax is insufficient to constitute duress or render payments involuntary. 84 C.J.S. Taxation, § 636 (c), p. 1284 (1954); *Spring Valley Coal Company v. State*, 198 Ind. 620, 154 N.E. 380 (1926). Indeed, if we were to uphold this argument, challenged tax payments would never be voluntary because of the necessity of pursuing administrative or judicial action to secure a refund.

It is our conclusion that the payments here were voluntarily made, and, since plaintiff has established no exception to the general rule, no refund is due. For these reasons, the decision of the Court of Appeals is

Affirmed.

Justice HUSKINS dissents.

STATE OF NORTH CAROLINA v. ELMER LEE

No. 60

(Filed 11 November 1977)

1. **Criminal Law § 91.1— continuance—when motion is reviewable**

Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge; however, when such a motion is based on a constitutionally guaranteed right, the question presented is one of law and not discretion and is reviewable on appeal.

2. **Criminal Law § 91.7— continuance to obtain witness—denial proper**

The trial court did not err in denying defendant's motion for continuance to obtain the presence of an alibi witness who was ill in Washington, D.C. and

could not attend trial, since no affidavits were filed in support of the motion, nor was there a written certificate from a physician attesting to the nature and existence of the proposed witness's illness; defendant failed to avail himself of the procedures under G.S. 15A-813 for obtaining out-of-state witnesses; and a defendant shows no prejudice where, as in this case, the State admits that a prospective witness, if present, would have testified as contended by the accused.

3. Criminal Law § 66.9— pretrial photographic identification of defendant—no suggestiveness

Evidence was sufficient to support the trial court's conclusion that in-court identifications of defendant by a service station employee and a convenience store employee were untainted by pretrial photographic identification procedures where the evidence showed that the service station employee viewed his assailant nine times for a total of thirty seconds in the light from the station and the dome light of a car, concentrated on this person's face at the time and looked at him for the purpose of identifying him, was positive in his belief in the accuracy of his identification, earlier described the irregularity in his assailant's teeth later seen at trial, and identified his assailant's photograph six days after the crime took place; the convenience store employee viewed his attacker for four or five minutes in a well lighted store, was alert and watched the person closely, chose defendant's picture after study of those shown him one day after the attack, and had seen defendant on prior occasions.

4. Criminal Law § 34— evidence of prior offense—admissibility to disprove alibi evidence

In a prosecution for armed robbery and aggravated kidnapping of a service station employee, even if the trial court erred in allowing testimony of a convenience store operator concerning defendant's earlier robbery of that store, such error was cured when defendant offered alibi evidence, since the fact that defendant had committed another robbery in the same town less than twenty-four hours earlier became highly relevant and competent to disprove his alibi evidence.

5. Criminal Law § 43— blackboard sketch—use to illustrate testimony

In an armed robbery and aggravated kidnapping case where the victim was crippled for life after being shot by his assailant, the trial court did not err in allowing the victim to draw a diagram on a blackboard to illustrate his testimony while sitting in a wheelchair, even if the demonstration did illustrate the victim's paralysis to the jury, since it is permissible for a witness to use a blackboard sketch to illustrate his testimony.

6. Criminal Law § 102.3— improper jury argument—cure by judge's instructions

Defendant was not entitled to a mistrial when the State, in closing argument, exhibited photographs to the jury used to identify defendant which had been introduced on voir dire but not placed in evidence at trial, since the trial judge promptly instructed the jury to disregard any reference to the pictures.

State v. Lee

APPEAL from *Tillery, J.*, 12 April 1977 Session, WAYNE Superior Court.

Upon indictments proper in form, defendant was charged with and convicted of armed robbery and aggravated kidnapping. He was sentenced to life imprisonment on each charge.

The State's evidence tended to show the following:

On 28 December 1976 at about 11:00 p.m., the victim, Ralph Holmes Burlingame, was employed at a Kayo Service Station at the corner of George and Grantham Streets in Goldsboro, North Carolina. He had been on duty since 4:00 p.m. that day and was in the process of closing the station for the evening. He had turned off all the outside lighting, except those near the ladies rest room and inside the station. At this time, the victim was approached by two black males who sought to buy some beer. After the victim told them that the station was closed, they walked away.

The victim then closed the station and turned to walk toward his automobile, which was parked near the ladies rest room. At this point, the victim saw two black men standing on the opposite side of his car, some ten feet away. He could not recognize either of them at that time. As the victim stood near the door of the filling station, the two black men approached him with drawn pistols. The man standing closest asked the victim if he wanted to live. He replied that he did. The victim was then asked if he had any money, to which he responded that he had three dollars, but could go inside and get thirty dollars more. The two men then ordered the victim into his car. When they tried to enter on the passenger side, the victim told them that the door was jammed, whereupon they came around to the driver's side and got in. The victim was ordered to drive down Grantham Street and make a left turn onto Carolina Street.

Upon being told that he was going to be killed because he was a "white boy," the victim became afraid and jumped from the car after turning onto Carolina Street. He was shot from behind while in the air and landed in the road. The two men approached the victim while he was lying in the road, shot him two more times, searched his pockets and took his wallet, containing the three dollars.

Burlingame was left lying in the road until the police arrived. He was then taken to Wayne Memorial Hospital and later trans--

ferred to Duke University Medical Center, where he remained for one month. Some days after the shooting, the victim was interviewed at Duke Medical Center by officers from the Goldsboro Police Department. At this time, he identified defendant from photographs shown him.

Some twenty-two and one-half hours prior to the robbery and shooting in question, defendant had attempted to rob a Fast Fare store at the corner of George and Ashe Streets in Goldsboro. In the process, the operator, William Edmond Gurley, who had seen defendant before, was shot.

Other evidence disclosed that defendant was seen at the corner of James and Elm Streets in Goldsboro on 28 December 1976 at about 11:00 p.m.

Defendant's evidence tended to show that:

Defendant had been living in Washington, D.C. since October 1976, and had not owned an automobile after November 1976. His wife came to Goldsboro on 27 December 1976 and remained there until 15 January 1977, when she returned to Washington and picked up defendant. Defendant maintained that he remained in Washington at all times between 27 December 1976 and 15 January 1977.

Other facts pertinent to the decision are related in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Robert P. Gruber for the State.

Strickland & Fuller, by Robert E. Fuller, Jr., for the defendant.

COPELAND, Justice.

Defendant, seeking a new trial, assigns a number of errors. For reasons hereinafter indicated, we conclude that he has had a fair trial, free of prejudicial error.

[1] Defendant first argues that it was error to deny his motion for continuance made the first day of trial. Ordinarily a motion for continuance is addressed to the sound discretion of the trial judge; however, when such a motion is based on a constitutionally guaranteed right, the question presented is one of law and not

discretion and is reviewable on appeal. *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975).

[2] It is defendant's contention that the court's denial of his motion for continuance prevented him from presenting an alibi witness, who was ill in Washington, D.C. and could not attend the trial. Since the right to confront one's accusers and witnesses with other testimony is guaranteed by our Federal and State Constitutions, the question here is one of law, rather than discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

Denial of a motion for continuance is grounds for a new trial only upon a showing that the denial was erroneous and that defendant was prejudiced thereby. *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). In the instant case, no affidavits were filed to support the motion, nor was there a written certificate from a physician attesting to the nature and existence of the proposed witness' illness. Further, defendant failed to avail himself of the procedures under G.S. 15A-813 for obtaining out-of-state witnesses. Ordinarily the absence of a witness who could have been served with a subpoena does not constitute grounds for continuance. *State v. Smathers, supra.* In addition, a defendant shows no prejudice where, as here, the State admits that a prospective witness, if present, would have testified as contended by the accused. *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943); *State v. Wellmon*, 222 N.C. 215, 22 S.E. 2d 437 (1942). This assignment of error is overruled.

[3] Next defendant challenges the admissibility of the victim's in-court identification of defendant, as well as that of the convenience store operator. He asserts that the pre-trial photographic identification procedures carried out by the police were so suggestive in nature that the subsequent in-court identifications were irreparably tainted.

In-court identification of a defendant by a witness is barred when photographic identification procedures are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968). "[T]he 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 atten-

tion, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199, 34 L.Ed. 2d 401, 411, 93 S.Ct. 375, 382 (1972).

The trial judge found as fact that the victim: (1) viewed his assailant nine times for a total of about thirty seconds in the light from the station and the dome light of the car; (2) concentrated on this person's face at the time and looked at him for the purpose of identifying him; (3) was positive in his belief in the accuracy of his identification; and (4) earlier described the irregularity in his assailant's teeth later seen at trial. We further note that the photographic identification took place only six days after the crime. As to the identification by the convenience store operator, the court found that the witness: (1) viewed his attacker for about four to five minutes in the well-lighted store; (2) was alert and watched the person closely; (3) chose defendant's picture after study of those shown him; and (4) had seen defendant on prior occasions. The record also discloses that this identification occurred the day after the witness was shot. These findings of fact by the trial judge are supported by competent evidence in the record and therefore are conclusive. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). In turn, the findings of fact support the court's conclusion of law that these in-court identifications were untainted by impermissible pretrial identification procedures; therefore, this assignment is without merit.

[4] Defendant's third contention involves the admission of testimony of the convenience store operator concerning the earlier robbery of the Fast Fare store, with which defendant was not charged here. It is defendant's argument that the general rule excluding evidence of the commission of other offenses by the accused applies here.

"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 N.C. Evidence, (Brandis Rev. 1973), § 91, p. 289-90 (emphasis added). Assuming *arguendo* that the admission of this testimony was error, it was

clearly cured when defendant offered alibi evidence. At this point, the fact that defendant had committed another robbery in Goldsboro, less than twenty-four hours earlier, became highly relevant and competent to disprove his alibi testimony that he had been in Washington, D.C. from 27 December to 15 January. This assignment likewise is without merit.

[5] Defendant next argues that the trial court erred in permitting the victim to draw a diagram on a blackboard to illustrate his testimony while sitting in a wheelchair. Evidence disclosed that the victim apparently had been crippled for life after being shot in the back. Defendant asserts that the only real purpose of the demonstration was to illustrate the victim's paralysis to the jury.

This assignment clearly is without merit. It is certainly permissible for a witness to use a blackboard sketch to illustrate his testimony. *State v. Cox*, 271 N.C. 579, 157 S.E. 2d 142 (1967). Since the evidence sought was relevant, it will not be excluded merely because it might tend to excite the jury. *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968).

[6] Finally, defendant maintains that the trial court should have declared a mistrial when the State, in closing argument, exhibited photographs to the jury used to identify defendant which had been introduced on *voir dire* but not placed in evidence at trial. Upon having it called to his attention, the trial judge promptly instructed the jury to disregard any reference to the pictures, since none were in evidence. Ordinarily, improper argument of counsel is cured when the trial court promptly sustains the objection and cautions the jury not to consider it. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). Thus, this assignment is overruled.

Having examined all the assignments of error, we conclude that defendant has had a fair trial, free of error; therefore, in the verdicts and judgments we find

No error.

STATE OF NORTH CAROLINA v. LEE THOMAS CARELOCK

No. 54

(Filed 11 November 1977)

1. **Burglary and Unlawful Breakings § 5.8— breaking—doors of house closed—sufficiency of evidence**

The trial court did not err in denying defendant's motion to dismiss the charge of first degree burglary on the ground that no "breaking" had been shown since the victim testified that all outside doors to her home were closed, and opening a closed but unlocked door is a sufficient breaking.

2. **Criminal Law § 114.2— jury instruction on defendant's statement—no expression of opinion**

The language of the trial court characterizing defendant's statement to an SBI agent as a "confession" was not an expression of opinion in violation of G.S. 1-180.

3. **Burglary and Unlawful Breakings § 6.4— breaking or entering—jury instructions not prejudicial**

In a prosecution for first degree burglary, the trial court's slip of the tongue when it said "breaking or entering" instead of "breaking and entering" was harmless, and the jury was not misled.

4. **Criminal Law §§ 116, 168.8— defendant's failure to testify—correct and incorrect instructions—new trial**

Where the trial court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part; therefore, defendant who did not take the stand is entitled to a new trial where the court gave both incorrect and correct instructions with respect to defendant's failure to testify.

5. **Criminal Law § 116— defendant's failure to testify—no instruction absent request**

Absent a special request the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him.

DEFENDANT appeals from judgments of *Collier, J.*, 14 February 1977 Criminal Session, ANSON Superior Court.

In separate bills of indictment defendant was charged with first degree burglary and first degree rape. The cases were consolidated for trial.

Myrtle Lovelace, fifty-nine-year-old widow, testified that she lived alone one mile south of Wadesboro. On the night of 11 September 1976 she went to bed around 9 p.m. Both outside doors to her home were closed. She awakened about 3 a.m. and noticed

a black boy standing at the foot of her bed going through her pocketbook. She sat up in bed, screamed, and asked, "What are you doing here?" The intruder immediately ran to her, put a butcher knife to her throat, and threatened to kill her if she screamed. He then forced her to unbutton her gown and lie on the bed while he raped her, all the while keeping the knife near her neck. He told her he intended to kill her before he left.

Mrs. Lovelace further testified that defendant remained in her home about one hour. He became very nervous when cars were passing. Finally, the man who delivered the morning newspapers entered the street below the Lovelace house and his car lights shone on the window. When defendant went to the window to look out, Mrs. Lovelace jerked the back door open and escaped. She told the paper man what had happened and then went into her neighbor's house to call the police. Defendant ran from the house following her and was later apprehended nearby.

Officer Feagin arrived at the Lovelace home about 5:15 a.m. On the way there he saw defendant "trotting across the road," apprehended him and carried him back to the Lovelace home. Mrs. Lovelace then and there positively identified defendant as the man who raped her. Officer Feagin found a butcher knife (State's Exhibit 11) on the lawn a short distance from the kitchen door and Mrs. Lovelace identified it as the knife defendant had used when he raped her.

SBI Agent Richardson testified that he gave defendant the full *Miranda* warnings in the presence of Officer Marvin Clark, following which defendant said he understood his rights and signed a written waiver. Defendant then made a statement to the officers that he went to Mrs. Lovelace's place intending to "get something off her car." When he arrived he saw the back door standing open so he entered the house looking for a pocketbook to get money. When Mrs. Lovelace discovered him, he showed her the knife and told her to be quiet or he would kill her. He then told her to unsnap her gown, which she did, and he had sexual relations with her by force and against her will. Sometime later he heard the paper man arrive, went to the window to peep out, and Mrs. Lovelace ran out the back door. He ran behind her, threw the knife at her and thought he had struck her in the back. Defendant stated he was seventeen years of age.

Defendant offered no evidence.

The jury convicted defendant of first degree burglary and first degree rape. A life sentence was imposed in each case and defendant appealed assigning errors.

Rufus L. Edmisten, Attorney General; David S. Crump, Assistant Attorney General, for the State of North Carolina.

Henry T. Drake, attorney for defendant appellant.

HUSKINS, Justice.

[1] We overrule defendant's first assignment of error based on denial of his motion to dismiss the charge of first degree burglary because no "breaking" had been shown. Opening a closed but unlocked door is a sufficient breaking. *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). Mrs. Lovelace testified that all outside doors were closed. In his incriminating statement offered in evidence by the State, defendant said the back door was open. The conflict in the State's evidence presented a question for the jury.

[2] Likewise, defendant's second assignment is overruled. The language of the trial court, characterizing defendant's statement to SBI Agent Richardson as a "confession," was not an expression of opinion in violation of G.S. 1-180. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683 (1972).

[3] The court's charge delineating the elements of first degree burglary, while not technically correct in every isolated portion, when construed contextually as a whole and in the same connected way in which it was given, is free from prejudicial error. The isolated slip of the tongue when the court said "breaking *or* entering" instead of "breaking *and* entering" was harmless. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969). The jury was not misled. Defendant's third assignment is overruled.

[4] Defendant's fourth assignment is based on the following excerpt from the charge:

> "The defendant by his silence denies each and every allegation of these charged [sic] against him and every element of the crimes charged against him. That is what some by his silence tends to show and what it does show, if anything, is also for you to say and determine."

Defendant argues that the quoted portion of the charge permits the jury to roam at large in its consideration of defendant's failure to testify and interpret such failure either favorably or unfavorably, for or against him, as the jury may determine. This argument is sound.

Examination of the entire charge reveals that the court had previously instructed the jury as follows:

> "The defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way."

Our decisions uniformly establish that where, as here, the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976); *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971). "A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation." *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969). The jury cannot be expected to know which of two conflicting instructions is correct. *State v. Holloway*, 262 N.C. 753, 138 S.E. 2d 629 (1964).

[5] For the error noted in the charge there must be a new trial and it is so ordered. It is appropriate to note, in passing, that absent a special request the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him. *State v. Rankin*, 282 N.C. 572, 193 S.E. 2d 740 (1973). "Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant." *State v. Barbour*, *supra*. Absent a request such an instruction is said by some jurisdictions to accentuate the significance of a defendant's silence and thus impinge upon his unfettered right to testify or not at his option. *See* Annot., 18 A.L.R. 3d 1335, and cases cited. *Accord State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973).

The remaining assignments are not discussed since the matters giving rise to them are unlikely to recur at the next trial.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM FRED CONSTANCE

No. 50

(Filed 11 November 1977)

1. **Homicide § 18— proof of premeditation and deliberation**

Ordinarily, premeditation and deliberation are not susceptible to proof by direct evidence and therefore must usually be proved by circumstantial evidence. Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted or shots fired.

2. **Homicide § 4— malice defined**

Malice is not only hatred, ill will or spite but also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification.

3. **Homicide § 21.5— first degree murder—malice, premeditation and deliberation —sufficiency of evidence**

There was sufficient evidence of malice and premeditation and deliberation for submission to the jury of a charge of first degree murder of a police officer where the State's evidence tended to show that defendant was observed firing a shotgun from within his house and again from his porch; deceased, who was in uniform and driving a marked police car, drove to defendant's residence; when he arrived, defendant pointed his shotgun at the police car; deceased continued sitting in the police car while he conversed with defendant, who was sitting on his porch; defendant went into his house and deceased approached the house carrying a shotgun straight down by the side of his leg; when deceased was within two or three steps of the porch, defendant shot him with a 12-guage shotgun; the hammer on the murder weapon had to be cocked and the trigger required a pull of between 5½ to 7½ pounds before firing; defendant made himself comfortable in a chair on the porch while deceased lay in the yard dying and offered deceased no assistance; and when defendant was taken into custody by other officers, he said, "I did it, I did it, I took care of the g- d- son-of-a-bitch."

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Martin (Harry C.), J.*, at the 21 February 1977 Regular Session of POLK Superior Court.

Upon an indictment, proper in form, defendant was charged with the murder of Andrew Williams. He was tried and convicted of first degree murder and sentenced to life imprisonment.

The State's evidence tended to show that about 3:30 p.m. on the afternoon of 3 September 1976, at the direction of the mayor of Saluda, Police Chief Andrew Williams went to the home of defendant to investigate a complaint that defendant was drunk and was discharging a shotgun. On his arrival he found defendant sitting in a chair on his front porch with his shotgun in his lap. After some discussion between defendant and Williams, during which the officer remained in his car, defendant got up and went into his house. Officer Williams got out of his car and started walking toward the front of the house. Defendant, from within the house, fired a shotgun through the screen door, killing Williams almost instantly.

Other evidence offered by the State will be referred to in the opinion.

Defendant offered no evidence.

Attorney General Rufus L. Edmisten and Assistant Attorney General Isham B. Hudson, Jr. for the State.

Robert L. Harris for defendant appellant.

MOORE, Justice.

Defendant's sole assignment of error is to the overruling of his motion to dismiss on the charge of murder in the first degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971); G.S. 14-17.

[1] Premeditation may be defined as thought beforehand for some length of time. " 'Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose. . . .' *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769." *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970). *See State v. Davis*, *supra*. Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence. Among the circumstances to

be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted or shots fired. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Perry*, *supra*.

[2] Malice is defined as ". . . not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. [Citation omitted.]" *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922). *See State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969).

When there is a motion for nonsuit in a criminal case, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact deducible from the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). If there is substantial evidence, whether direct, circumstantial or both, to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made out and nonsuit should be denied. *State v. McKinney*, *supra*; *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968).

Defendant contends that, under *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961), there was insufficient evidence of premeditation and deliberation for the submission of the charge of murder in the first degree to the jury. In *Faust* Justice Moore (Clifton L.), speaking for the Court, stated that among the circumstances to be considered in determining whether a killing was with premeditation and deliberation were the following: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; and (4) the dealing of lethal blows after deceased has been felled and rendered helpless. Considering the facts of this case in light of the factors set forth in *Faust*, we think there was ample evidence to justify submitting a charge of first degree murder to the jury.

[3] On the afternoon in question defendant was observed firing a shotgun from within his house and again from his porch. A neighbor called the mayor and the mayor directed Officer Williams to investigate. Williams, who was in uniform and driving a marked police car, drove to the defendant's residence. When he arrived, defendant was sitting on his porch. Defendant raised his shotgun and pointed it at the police car. Deceased continued sitting in the police car while he carried on a conversation with defendant, who remained on the porch. While they were talking, defendant picked up his gun, raised it across his knee, shook it and pointed it at the side of the police car. Defendant then went into the house and Williams got out of the car. The officer had a loaded 12-gauge Ithica pump gun. The safety was on, and he carried it straight down by the side of his leg. As he approached the house and was within two or three steps of the porch, defendant shot him in the chest with a 12-gauge Massachusetts single shot break-open type shotgun loaded with a cartridge containing No. 7½ shot. To fire the murder weapon required that the hammer first be cocked and the trigger pulled. The trigger pull varied between 5½ to 7½ pounds. Defendant shot from inside the house through the screen door.

Upon being hit, Williams took a few steps and then dropped to the ground. He died shortly thereafter.

Defendant removed the spent 12-gauge cartridge from his shotgun, came out on the porch with a tall Schlitz beer, sat down in a chair, and propped his feet up. He offered no assistance to the police officer who lay dying near defendant's feet. When other officers arrived on the scene to arrest him, defendant held the Schlitz high, and calmly continued drinking. As he was taken into custody by officers, he said: "I did it, I did it, I took care of the g-d- son-of-a-bitch."

We believe the above facts fully meet the test, as set forth in *State v. Faust, supra,* for determining whether the killing was done with malice and with premeditation and deliberation. Chief Williams was acting pursuant to his duties and did nothing to provoke the shooting. This indicates a lack of provocation. Defendant went inside the house after first pointing his gun at Williams. This tends to show that defendant had decided to shoot Williams from inside in order to prevent him from acting to defend himself. The hammer on the murder weapon had to be cocked and the

trigger required a pull of between 5½ to 7½ pounds before firing. This indicates that the shooting was intentional. Defendant made himself comfortable while deceased was lying in the yard dying, without offering him any assistance. This, coupled with the vindictive statements to the officers, taken with all the other circumstances, tends to show that defendant acted with malice, premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303 (1976); *State v. Faust, supra.*

In our opinion, when taken in the light most favorable to the State, the evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant, with malice, after deliberation and premeditation, formed a fixed purpose to kill Police Chief Williams, and thereafter accomplished that purpose. We hold, therefore, that the evidence was sufficient to be submitted to the jury on the charge of first degree murder.

No error.

STATE OF NORTH CAROLINA v. JAMES CHAPMAN

No. 58

(Filed 11 November)

Assault and Battery § 14.7— secret assault—insufficient evidence

In a prosecution for secret assault, evidence was insufficient to be submitted to the jury, though there was some evidence of motive, evidence that defendant possessed a shotgun bearing the fresh odor of powder, and evidence that a spent shell fired from defendant's gun was found in the alley between the buildings in which defendant and the victim lived, since such evidence was not sufficient to support inferences that the victim was shot with defendant's gun and defendant fired the shot.

ON indictments proper in form, defendant was charged with and convicted of secret assault and sentenced to twenty years imprisonment. The Court of Appeals, 32 N.C. App. 599, 232 S.E. 2d 884 (1977), (Morris, J., concurred in by Brock, C.J., and Britt, J., reported under Rule 30(e)) found no error in defendant's trial before *Kivett, J.*, ALEXANDER Superior Court. We subsequently granted defendant's *pro se* petition for discretionary review.

The State's evidence at trial tended to show the following:

On 25 June 1975 at about 11:00 p.m. the victim, Solon Chapman, was struck in the back by a shotgun blast as he prepared to unlock the door to the Alexander County Hotel, where he lived. The victim did not see who shot him or where the blast came from. Defendant, James Chapman, lived in the Campbell Building, which was separated from the Alexander County Hotel by a barber shop and an alleyway. Three weeks prior to the shooting, the victim had been acquitted of a robbery charge brought against him by defendant. Although defendant had refused to talk to the victim after the acquittal, there had been no harsh words between them concerning the charge.

A police officer talked with defendant shortly after the shooting and advised him of his constitutional rights. At this time it was determined that defendant owned a twelve gauge shotgun, which he voluntarily turned over to the police, stating that he had not fired it in two months. At the time it was surrendered, however, the gun contained a shell of the same make as a spent shell discovered in the alleyway between the two buildings. The breech of the gun carried a strong odor of gun powder. The spent shell was later found to have been fired from defendant's gun and was introduced into evidence at trial. Defendant gave an exculpatory statement to the effect that he had been watching television in his room until someone came in and told him there had been a shooting.

Defendant's evidence tended to show the following:

Defendant was seen by a passing motorist, standing near the two buildings in question dressed in a tee shirt and shorts. At that time he had nothing in his hands, nor did the motorist see a gun nearby. Shortly after he passed defendant, the motorist heard a shot ring out and reported it to the Sheriff's Department. The motorist returned to the scene a few minutes later and observed defendant still wearing the tee shirt and shorts.

Attorney General Rufus L. Edmisten by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Robert E. McCarter for the defendant.

COPELAND, Justice.

Defendant's principal assignment of error is the trial court's denial of his motion for nonsuit. In passing upon a motion for judgment of nonsuit, the court must consider the evidence in the light most favorable to the State. *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977). Thus, all conflicts in the evidence must be resolved in favor of the State and it must be given the benefit of every inference reasonably to be drawn in its favor. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973).

The State's case here is based entirely on circumstantial evidence. Nonetheless, the test of sufficiency of the evidence to withstand nonsuit is the same whether the evidence is direct, circumstantial, or both. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). The question for the court in ruling on such a motion is whether a reasonable inference of defendant's guilt may be drawn from the circumstances; if so, the case must go to the jury for determination of whether these facts prove the defendant guilty beyond a reasonable doubt. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965).

The State must establish two propositions in the prosecution of a criminal charge: (1) that a crime has been committed; and (2) that it was committed by the person charged. *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968). The State's case here is defective primarily because it fails to show that the crime in question was committed by this defendant. While there was arguably evidence of motive in this case, motive alone is insufficient to carry a case to the jury. *State v. Jarrell*, 233 N.C. 741, 65 S.E. 2d 304 (1951). Further, while defendant's possession of the shotgun bearing the fresh odor of powder, combined with the finding of the spent shell fired from defendant's gun in the alleyway, is certainly strong evidence, it is not adequate to support the double inference that: (1) the victim was shot with defendant's gun; and (2) defendant fired the shot. There was no proof as to: (1) the size of the shot which struck the victim; (2) the size of the shot fired from the spent shell; or (3) how recently the spent shell appeared to have been fired.

The most the State has shown is that the victim could have been shot by a shell fired from defendant's gun. There is nothing,

other than an inference which could arise from mere ownership of the gun, that would tend to prove that defendant actually fired the shot. "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor*, 290 N.C. 68, 75, 224 S.E. 2d 180, 185 (1976). Even when the State's evidence is enough to raise a strong suspicion, if it is insufficient to remove the case from the realm of conjecture, nonsuit must be allowed. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967). For these reasons, we find that the trial court erred in denying defendant's motion for judgment of nonsuit; therefore, the decision appealed from is

Reversed.

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

CREECH v. ALEXANDER, COMR. OF MOTOR VEHICLES

No. 46 PC.

Case below: 32 N.C. App. 139.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 1 November 1977.

HUDSON v. HUDSON

No. 65 PC.

Case below: 34 N.C. App. 144.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 11 November 1977.

INSURANCE CO. v. KNIGHT

No. 54 PC.

Case below: 34 N.C. App. 96.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 November 1977.

LEVITCH v. LEVITCH

No. 47 PC.

Case below: 34 N.C. App. 56.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 November 1977.

LITTLE v. FOOD SERVICE

No. 42 PC.

Case below: 33 N.C. App. 742.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 1 November 1977.

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

STATE v. ALLEN

No. 69 PC.

Case below: 34 N.C. App. 165.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 November 1977.

STATE v. BARBEE

No. 62 PC.

Case below: 34 N.C. App. 66.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 November 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 November 1977.

STATE v. BROWN

No. 67 PC.

Case below: 34 N.C. App. 165.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 November 1977.

STATE v. CHURCH

No. 43 PC.

Case below: 34 N.C. App. 58.

Petition for defendant for discretionary review under G.S. 7A-31 denied 1 November 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 November 1977.

STATE v. FREEMAN

No. 44 PC.

Case below: 33 N.C. App. 756.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 18 October 1977.

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

STATE v. HUGENBERG

No. 52 PC.

Case below: 34 N.C. App. 91.

Petition by defendant for discretionary review under G.S. 7A-31 denied 20 October 1977.

STATE v. KING

No. 115.

Case below: 34 N.C. App. 165.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 November 1977.

STATE v. LATTAKER

No. 72 PC.

Case below: 34 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 November 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 18 November 1977.

STATE v. LOCKLEAR

No. 111.

Case below: 34 N.C. App. 37.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 18 October 1977.

STATE v. PLESS

No. 125.

Case below: 34 N.C. App. 166.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 November 1977.

STATE v. ROBINSON

No. 49 PC.

Case below: 33 N.C. App. 394.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 1 November 1977.

STATE v. SHUFFORD

No. 53 PC.

Case below: 34 N.C. App. 115.

Petition by defendants for discretionary review under G.S. 7A-31 denied 11 November 1977.

STATE v. SIMMONS

No. 50 PC.

Case below: 33 N.C. App. 705.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 18 October 1977.

STATE v. TOWNSEND

No. 66 PC.

Case below: 34 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 November 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 1 November 1977.

STATE v. WIGGINS

No. 63 PC.

Case below: 33 N.C. App. 291.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 11 November 1977.

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

THOMPSON v. LOCKERT

No. 59 PC.

Case below: 34 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 November 1977.

WATER AND SEWER AUTHORITY v. ESTATE OF ARMSTRONG

No. 58 PC.

Case below: 34 N.C. App. 162.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 November 1977.

STUDENT BAR ASSOCIATION BOARD OF GOVERNORS, OF THE SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; CAROLYN McALLASTER; CATHERINE REID; LAURA BANKS; JOHN MEUSER; ANN WALL; AND PAUL MONES v. ROBERT BYRD, DEAN OF THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; FEREBEE TAYLOR, CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; WILLIAM L. FRIDAY, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; WALTER R. DAVIS, CHAIRMAN, BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; WILLIAM A. DEES, JR., CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; AND THE UNIVERSITY OF NORTH CAROLINA

No. 16

(Filed 15 December 1977)

1. **State § 1.5— Open Meetings Law—notice of meetings**

Even if the Open Meetings Law, G.S. 143-318.1 *et seq.*, applies to meetings of the faculty of the University of North Carolina School of Law, the trial court erred in ordering the Dean of the School of Law to cause a notice to be given to the public of meetings of the faculty, or of its various committees, since the Open Meetings Law contains no provision requiring any body to give to the public notice of any meeting.

2. **State § 1.5— Open Meetings Law—faculty of U.N.C. Law School**

For its meetings to fall within the scope of the Open Meetings Law, the faculty of the University of North Carolina School of Law must (1) be a component part of a "governing and governmental" body of the State, and (2) must "have or claim authority to conduct hearings, deliberate or act" as a "body politic."

3. **State § 1.5— Open Meetings Law—meaning of "body politic"**

As used in G.S. 143-318.2, the term "body politic" connotes a body acting as a government; *i.e.*, exercising powers which pertain exclusively to a government, as distinguished from those possessed also by a private individual or a private association.

4. **State § 1.5— Open Meetings Law—strict construction of "governing and governmental bodies"**

The language of G.S. 143-318.2 extending its reach to meetings of commissions, subdivisions and component parts of "governing and governmental bodies of this State" which "act as bodies politic" is designed to be restrictive, rather than broadening, and shows an intent of the Legislature to limit the Open Meetings Law to meetings of "governing *and* governmental bodies" strictly construed.

5. **State § 1.5— Open Meetings Law—meaning of "governing body"**

The "governing body" of an institution, organization or territory ordinarily means the body which has the ultimate power to determine its policies and

control its activities, and such body's delegation of authority to an employee or group of employees to make, initially, such decisions does not render such employee or group of employees the "governing body" so long as his or its determinations are subject to review and reversal by the higher authority.

6. State § 1.5— Open Meetings Law—inapplicability to faculty of U.N.C. Law School

The Open Meetings Law, G.S. 143-318.2, does not apply to meetings of the faculty of the University of North Carolina School of Law because (1) the Board of Governors of the University of North Carolina, not the faculty of the School of Law, is the "governing body" of the School of Law since the Board has the power to modify or reverse decisions of the faculty; (2) the faculty is not a "subsidiary or component" part of the Board of Governors but is simply a group of employees of the Board; (3) the faculty does not act as a "body politic"; and (4) the Board of Governors is not, itself, a "governmental body" of this State since the operation of an educational institution is not a governmental activity and the Board has no powers peculiar to the sovereign.

Chief Justice SHARP concurs in the result.

Justice EXUM dissenting.

APPEAL by defendants from the decision of the Court of Appeals, reported in 32 N.C. App. 530, 232 S.E. 2d 855, *Hedrick, J.*, dissenting, in which the Court of Appeals affirmed *Preston, J.*, who, at the 18 June Session of ORANGE, granted a permanent injunction.

The facts are not is dispute. The individual plaintiffs are students enrolled in the School of Law of the University of North Carolina at Chapel Hill. The Board of Governors of the Student Bar Association is composed of duly elected representatives of the student body of the School of Law. On 27 February 1976, the faculty of the School of Law met in a general faculty meeting. The individual plaintiffs and others attempted to attend the meeting and were refused admission by the Dean although no vote had been taken by the faculty for the holding of an executive session. The record does not disclose the matters upon which the faculty deliberated or as to which it reached decisions at the meeting. The plaintiffs, contending that Chapter 143, Article 33B, of the General Statutes, generally known as the Open Meetings Law, applies to meetings of the faculty of the School of Law, instituted this action on behalf of themselves and all members of the class whom they represent (alleged by them to be "all members of the public") to enjoin the defendants, and all persons acting in concert with them, "from closing, or allowing to be

closed, the official meetings of the faculty of the School of Law of the University of North Carolina at Chapel Hill, and official committee meetings of said faculty, to members of the public."

Judge Preston entered an order directing the defendants to show cause why a preliminary injunction, as requested by the plaintiffs, should not be entered. Pursuant to this order, a hearing was had at which Judge Preston received evidence, heard arguments of counsel, made findings of fact and conclusions of law. Upon these, a preliminary injunction was entered, which was made permanent when the court was advised by counsel for both parties that neither desired to introduce further evidence. By this judgment, the defendants have been permanently enjoined from holding, or permitting to be held, "any meeting, assembling, or gathering together at any time or place of the faculty of the School of Law of the University of North Carolina at Chapel Hill, or any of said faculty's committees or subcommittees, for the purpose of conducting hearings, deliberating, voting, or otherwise transacting any business of the said faculty, or any of its committees or subcommittees, except in conformity with the provisions of Chapter 143, Article 33B, of the General Statutes of North Carolina." The judgment further directs Dean Byrd to "cause a notice to be given to the public of every official meeting of the general faculty of the School of Law * * * and of its committees and subcommittees, at least six hours in advance of each such meeting" by posting a written notice of the time and place thereof upon official bulletin boards located within the School of Law.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, for Defendant Appellants.

Loflin & Loflin by Thomas F. Loflin III and Carolyn McAllaster for Plaintiff Appellees.

LAKE, Justice.

[1] Preliminarily, it was error for the trial court to order the Dean of the School of Law to cause a notice to be given to the public of meetings of the faculty, or of its various committees and subcommittees. The Open Meetings Law, G.S. 143-318.1 to G.S. 143-318.6, contains no provision requiring any body to give to the

public notice of any meeting. All that law requires of bodies, to which it is applicable, is that the meetings of any such body be open to the public. The body is not required to send invitations to anyone, or to notify individual members of the public, or the public at large, of the time and place of any meeting held by it for any purpose. The order, as entered in the Superior Court, would prevent a called meeting of the faculty for at least six hours after the need therefor was determined, regardless of the urgency or simplicity of the problem requiring faculty action. Apparently, this portion of the order of the trial court derives from a similar requirement in an order entered by the Chancery Court of Tennessee on March 31, 1976 in the case of *Fain v. Faculty of the College of Law of the University of Tennessee*. The Nebraska Open Meetings Law expressly requires such notice. *See: State ex rel Medlin v. Choat*, 187 Neb. 689, 193 N.W. 2d 739 (1972). Since there is no comparable provision in the Open Meetings Law of this State, if it were otherwise free from error, the judgment of the Superior Court would have to be modified to delete this provision requiring the giving of notice.

We turn now to the question of whether the Open Meetings Law applies to meetings of the faculty of the School of Law of the University of North Carolina at Chapel Hill. The controlling provision is in G.S. 143-318.2, which reads:

> "All official meetings of the governing and governmental bodies of this State * * * including all State * * * commissions, committees, boards, authorities, and councils, and any subdivision, subcommittee, or other subsidiary or component part thereof which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest shall be open to the public."

The constitutional validity of this Act is not before us. We are here concerned only with its meaning and, more specifically, with its applicability to a meeting of the faculty of a state-owned educational institution and meetings of committees and subdivisions of such faculty. The wisdom or lack of wisdom, practicability or impracticability of its provisions are matters for the Legislature, not the courts once the meaning of its provisions is judicially determined. *Fain v. Faculty of the College of Law of the University of Tennessee, supra.* However, a court may legitimately consider consequences to be anticipated from the respective

possible constructions of a statute in determining which of these the Legislature most probably had in mind when it enacted the statute.

So far as the right of nonmembers of the faculty to attend faculty meetings is concerned, the statute affords no basis for distinguishing between enrolled students in the School of Law, rejected applicants for admission, prospective applicants for admission, employees of or students in rival law schools in the State, or other members of the public seeking only a warm shelter on a cold winter's day.

While matters likely to be presented to their meetings will differ in nature, the statute affords no basis for distinction between the faculty of the School of Law, the faculty of the English Department, the Athletic Department or the football coaching staff, the faculty of a public elementary school or of a public kindergarten. It would, in all probability, create substantial consternation in the headquarters of the Athletic Department of the University at Chapel Hill if a rival school's coach appeared and demanded admission to a conference of the University's football coaching staff called to consider strategy to be pursued in a forthcoming contest with the team of such other institution, or a meeting of a subcommittee called to discuss the qualifications of prospects for recruitment for next year's team. We fail to find in G.S. 143-318.3 any ground for the denial of such demand if G.S. 143-318.2 is applicable.

The brief for the defendants directs our attention to the Family Educational Rights and Privacy Act, enacted by the Congress of the United States in 1974, commonly called the Buckley Amendment, 20 USCA, § 1232(g)(b)(d) which provides, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information)" concerning a student without his consent. The brief for the defendants suggests that such information may well be the subject of discussion in a meeting of the faculty or any of its committees, and since the Buckley Amendment is part of the Supreme Law of the Land, pursuant to Article VI, section 2, of the Constitution of the United States, it controls the Open Meetings Law. This argument is not, however, determinative of

the present appeal. The Buckley Amendment does not forbid such disclosure of information concerning a student and, therefore, does not forbid opening to the public a faculty meeting at which such matters are discussed. The Buckley Amendment simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information. Thus, if the Open Meetings Law applies to a meeting of the faculty of the School of Law at which such matters are discussed, the right of the public to attend such meeting would continue. Only the availability of Federal funds in aid of the institution would be affected. Of course, a violation of the Buckley Amendment could well result, not only in termination of any otherwise available Federal financial aid to the School of Law but also in the termination of any such aid to the entire University.

Since the Buckley Amendment was enacted by Congress after the Open Meetings Law was enacted by the North Carolina Legislature, it sheds no light upon what the North Carolina Legislature had in mind when it enacted the Open Meetings Law. However, the possibility that all further Federal financial aid to the entire University of North Carolina, including all its component institutions, may be jeopardized by an interpretation of the Open Meetings Law making it applicable to meetings of the faculty of the School of Law is an additional reason for care in so construing the Open Meetings Law.

The only meetings required by G.S. 143-318.2 to be open to the public are official meetings of the "governing *and* governmental bodies of this State and its political subdivisions," including specified types of "subsidiary or component" parts of such bodies. (Emphasis added.)

[2] Obviously, the faculty of the School of Law is a "component part" of the University of North Carolina at Chapel Hill. This alone does not bring its meetings within the scope of G.S. 143-318.2. For its meetings to fall within the scope of the Open Meetings Law, the faculty of the School of Law must (1) be a component part of a "governing *and* governmental" body of the State (emphasis added), and (2) the faculty must "have or claim authority to conduct hearings, deliberate or act" as a "body politic." Nothing in the record before us, including the uncontroverted facts found by the trial court, suggests that the faculty of the

School of Law of the University of North Carolina at Chapel Hill acts upon different types of matters, or through different procedures, or in any different manner, than does the faculty of any other school of law, including the three schools of law presently operated in this State by privately endowed and operated educational institutions.

Webster's New International Dictionary, 2nd Edition, defines "body politic" as "a group organized for government; now usually specif.: a. a state * * * * b. an organized society, as in a church." In Ballentine's Law Dictionary, the term "body politic" is thus defined: "The term is aptly defined in the preamble of the state constitution of Massachusetts as a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This definition was quoted with approval by the Supreme Court of the United States in *Munn v. Illinois*, 94 U.S. 113, 124, 24 L.Ed. 77, 84 (1876), and by this Court in *Durham v. Cotton Mills*, 141 N.C. 615, 642, 54 S.E. 453 (1906). Ballentine's Law Dictionary defines the related term "body politic and corporate" as "A term often applied to a municipal corporation" and says, "A county is such a body." In 11 C.J.S., p. 380, the term "body politic" is interpreted as follows:

> "A term of ancient origin, the collective body of a nation or state as politically organized, or as exercising political functions; the state or nation as an organized political body of people collectively; a corporation, a body to take in succession, framed as to its capacity by policy. It has been said that the phrase connotes simply a group or body or citizens organized for the purpose of exercising governmental functions; that such a group may be large or small, and that it may be a group within a group, including counties even though they are but agencies of the state. It may be formed by a voluntary association of individuals, and is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. Where the term is used as referring to the state, it signifies the state in its sovereign, corporate capacity, and applies to a body incorporated by the state and charged with the performance of a public duty, such as an institution of learning for the benefit

of the people of a particular parish, or a corporate body created for the sole purpose of performing one or more municipal functions, or an incorporated board of trustees of a levee district, or a township declared by statute to be a body politic and incorporate. Also, it applies to the United States as a body capable of attaining the objects for which it was created, by the means which are necessary for their attainment."

Corpus Juris Secundum cites as authorities for these various applications of the term "body politic" numerous cases. The only one of these indicating that the term "body politic" extends to "an institution of learning" is *School Board of Caldwell Parish v. Meredith*, 139 La. 35, 71 So. 209 (1916).

Speaking of the term "body politic and corporate," the Supreme Court of Nebraska, in *Lindburg v. Bennett*, 117 Neb. 66, 219 N.W. 851 (1928), said that the term, as applied to a county, is conjunctive rather than disjunctive, and, therefore, it cannot be said that when the members of the county board deal with governmental matters they are acting as agents of the county in exercising its functions as a body politic, but when they deal with other matters they are exercising its functions as a body corporate.

[3, 4] We think it evident that, as used in G.S. 143-318.2, the term "body politic" connotes a body acting as a government; *i.e.*, exercising powers which pertain exclusively to a government, as distinguished from those possessed also by a private individual or a private association. Thus, the language of this statute, extending its reach to meetings of commissions, subdivisions and component parts of "governing and governmental bodies of this State" which "act as bodies politic," is designed to be restrictive, rather than broadening, and shows an intent of the Legislature to limit the Open Meetings Law to meetings of "governing *and* governmental bodies" strictly construed. (Emphasis added.)

The statute uses the term "governing" and the term "governmental" in the conjunctive, not the disjunctive relation. Thus, the body to which this statute applies must be both a "governing" body and a "governmental" body. Is the faculty of the School of Law of the University of North Carolina at Chapel Hill such a body? If not, is it a component part of such a body which, itself, acts as a "body politic"?

[5] In ordinary speech, the "governing body" of an institution, organization or territory means the body which has the ultimate power to determine its policies and control its activities. Such body may delegate to an employee or group of employees authority to make, initially, such decisions, but such employee or group of employees is not the "governing body" so long as his or its determinations are subject to review and reversal by the higher authority, by whose permission such determination is made.

[6] G.S. 116-11(2) vests in the Board of Governors of the University of North Carolina "the general determination, control, supervision, management and governance" of all the affairs of all of the sixteen constituent institutions of the University, including the University of North Carolina at Chapel Hill, of which the School of Law is a part. The faculty of the School of Law are employees of the Board of Governors, authorized by that Board to make certain determinations with reference to the day-to-day operation of the School of Law, but all such determinations by the faculty are subject to the power of the Board of Governors to modify or reverse them. The fact that such superior power is rarely used by the holder of it does not abrogate it. Thus, the faculty of the School of Law is not the "governing body" of the School of Law. The "governing body" is the Board of Governors.

The plaintiffs rely upon the decision of the Chancery Court of Tennessee in *Fain v. Faculty of the College of Law of the University of Tennessee, supra,* holding the Open Meetings Act of Tennessee applicable to meetings of the faculty of the College of Law of the University of Tennessee. As shown, however, in that decision and also in the decision of the Supreme Court of Tennessee in *Dorrier v. Dark,* 537 S.W. 2d 888 (Tenn. 1976), the Tennessee law, unlike our statute, defines "governing body" to mean "the members of any *public* body * * * with the authority to make decisions for *or recommendations* to a public body on policy or administration." Such statutory definition would, of course, prevail over the ordinary meaning of the word "governing." Moreover, the *Fain* Case was reversed on appeal, the Tennessee Court of Appeals holding the faculty of the School of Law is not a governing body. 552 S.W. 2d 752 (1957).

The faculty of the School of Law is not a "subsidiary or component part" of the Board of Governors, but is simply a group of

employees of the Board. Furthermore, the faculty does not act as a "body politic."

If the faculty of the School of Law were a component part of the Board of Governors, the "governing" body of the School, and if it did deliberate and act as a "body politic," that would not make its meetings subject to the North Carolina Open Meetings Law (G.S. 143-318.2) unless the Board of Governors is, in addition to being the "governing" body of the School of Law, also a "governmental" body within the meaning of this Act.

A "governmental body" is one which has at least some of the powers of government. These are powers which are the attributes of sovereignty. They are not possessed by individuals and private associations, as a matter of natural right, and may not be exercised by them unless granted to them by the sovereign. Such powers include, for example, the power to tax, to appropriate public money, to adjudicate controversies, to maintain a police force, to fix and determine rights in property and procedure for its conveyance, to regulate commerce and industry, to condemn private property for public use, to declare specified conduct unlawful and to impose criminal sanctions for engaging therein, and to legislate generally for the public welfare.

A "governmental body" may also exercise nongovernmental powers. These are powers which individuals and private associations may also exercise, as a matter of natural right in the silence of the sovereign. The establishment, maintenance and operation of an educational institution is such a nongovernmental activity. It may be, habitually has been and now is being engaged in by individuals and private associations in this State, including the operation of schools of law. Thus, while a "governmental body" may establish and operate an educational institution, that is not a governmental power and a body which has no other power is not a "governmental body."

[6] The Board of Governors of the University of North Carolina operates the educational institutions comprising the University and has the power to do all acts incidental thereto, but so does the "governing body" of a privately endowed and operated university. The Board of Governors of the University of North Carolina has no governmental powers; *i.e.*, no powers peculiar to the sovereign. G.S. 116-11. Therefore, the Board of Governors is not, itself, a "governmental body of this State," and G.S. 143-318.2

does not extend to the meetings of its employees, even though such employees be deemed a "component part" of the Board of Governors. Consequently, G.S. 143-318.2 does not require that meetings of the faculty of the School of Law of the University of North Carolina be open to the public and the granting of the injunction by the Superior Court in this action was error.

Our decision does not, in any way, affect or diminish the right of students enrolled in the School of Law, or any other person interested in its operation, to attend a meeting of the faculty of the School of Law, with the permission of the faculty, in order to present to the faculty requests and recommendations for faculty action.

We are not unmindful of the fact that G.S. 143-318.3(b) contains this statement:

> "Nor shall this Article be construed to prevent any board of education or governing body of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding disciplinary cases involving students in closed session."

The purpose of this provision was simply to remove any possibility that a board of education, a governing body of a public educational institution or a court could believe the Open Meetings Law requires a public hearing of such disciplinary matters. The provision does not extend the scope of G.S. 143-318.2 beyond meetings of "governing and governmental bodies of this State and its political subdivisions."

Again, G.S. 143-318.3(c) expressly authorizes a "board of education" when faced with a riot, or conditions indicating that a riot or public disorders are imminent, to meet in private session with law enforcement officers and others invited to such meeting for the purpose of considering and taking appropriate action. This provision was inserted out of an abundance of caution so as to prevent members of such board from being afraid to act promptly in such emergency. It, too, does not indicate legislative intent to broaden the scope of G.S. 143-318.2.

All of the Open Meetings Laws of the several states, which have come to our attention, vary widely in their terms and so decisions from the courts of those states establishing their scope are of meagre assistance in construing the North Carolina Act.

In *Scott McLarty v. Board of Regents of the University of Georgia*, 231 Ga. 22, 200 S.E. 2d 117 (1973), the Georgia "Sunshine Law" was held not to apply to meetings of a faculty-student committee appointed to make recommendations to the Dean of Student Affairs concerning allocation of revenues received from mandatory student fees for student activities. The statute provided meetings of any State agency "at which official actions are taken" must be open to the public. The Supreme Court of Georgia said:

> "Official action is action which is taken by virtue of power granted by law, or by virtue of the office held, to act for and in behalf of the State. The 'Sunshine Law' does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations and rendering advice but which have no authority to make governmental decisions and act for the State."

The plaintiffs rely upon *Cathcart v. Andersen*, 85 Wash. 2d 102, 530 P. 2d 313 (1975), which held the Open Meetings Law of the State of Washington applicable to meetings of the faculty of the School of Law of the University of Washington. That case is readily distinguishable by reason of substantial differences between Washington's Open Meetings Law and ours. The Washington statute requires, "All meetings of the governing body of a *public agency* shall be open and public." (Emphasis added.) It defines "public agency" to mean "any state board * * * *educational institution* or other state agency which is created by or pursuant to statute, other than courts and the legislature." (Emphasis added.) It defines "governing body" as "[T]he multimember board, commission, committee, council or other policy or rule-making body of a public agency." A further statute of the State of Washington provided, "The faculty of the University of Washington * * * shall have charge of the immediate government of the institution under such rules as may be prescribed by the board of regents." The Supreme Court of Washington held that the faculty of the School of Law of the University of Washington must be considered a " 'governing body', which is to say that it is a 'policy' or 'rule-making body.' " We do not consider this decision persuasive upon the question of the proper construction of the North Carolina statute.

The Nebraska Open Meetings Law involved in *State ex rel Medlin v. Choat*, 187 Neb. 689, 193 N.W. 2d 739 (1972), since

replaced, was also much broader in scope than ours, requiring the opening to the public of all meetings of "governing bodies of all agencies, now or hereafter created * * * pursuant to law, of the Executive Department of the State of Nebraska * * * or any other administrative agencies, whether advisory or executive, of the State of Nebraska * * * exercising legislative, executive or administrative powers, *or supported in whole or in part by public funds*, or entrusted with powers of recommending the expenditure of, *or actually expending, public funds*." (Emphasis added.) Nevertheless, the Supreme Court of Nebraska in *State ex rel Medlin v. Choat*, supra, held the Nebraska law did not apply to a meeting of a school district reorganization committee because it was not a "governing body."

The case of *Raton Public Service Co. v. Hobbes*, 76 N.M. 535, 417 P. 2d 32 (1966), is also distinguishable from the present case. The New Mexico Supreme Court said that the New Mexico Open Meetings Law, then in effect, was captioned "An Act relating to public meetings of all governing bodies of the state *which are supported by public funds*." (Emphasis added.) The Supreme Court of New Mexico there held a public service company, all of the stock of which was held by trustees for the benefit of the City of Raton and all the revenues of which, after the payment of operating and maintenance expenses, were payable to the City Treasury for general city purposes, was "supported by public funds" and, therefore, its meetings were required by the statute to be open to the public. The New Mexico statute was obviously broader in scope than in the North Carolina Open Meetings Law.

The decision of the Court of Appeals is, therefore, reversed and the injunction issued by the Superior Court of Orange County is vacated.

Reversed.

Chief Justice SHARP concurs in the result.

Justice EXUM dissenting.

I respectfully dissent from that portion of the majority opinion which holds that the Open Meetings Law, G.S. 143-318.1, *et seq.*, has no application to official meetings of the law school faculty of the University of North Carolina. The majority opinion through lengthy, esoteric, and dictionary definitions of such con-

cepts as "sovereignty," "governmental," and "body politic," has made unnecessarily confusing what is, in fact and in law, a relatively simple case.

We are called on here to construe the Open Meetings Law enacted by the 1971 General Assembly. The primary function of a court in construing any legislative act is to insure that effect is given to the legislative intent. The best indicia of that intent are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972) and cases cited.

The purpose of the Open Meetings Law is a simple and salutary one. It is to insure that the business of the public be conducted in the view of the public so that the people may have the wherewithal to be better informed. The legislature expressly stated the Law's public policy in the first section thereof—G.S. 143-318.1—a section which the majority strangely fails to mention. The section provides:

> "Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions *exist solely to conduct the peoples' business*, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly." (Emphasis supplied.)

The spirit of this law is that a democracy works best when the electorate knows how it is working. This kind of law should be liberally, not stintingly, construed. *Laman v. McCord*, 245 Ark. 401, 432 S.W. 2d 753 (1968); *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). Exceptions to this law, on the other hand, should be narrowly construed. *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E. 2d 580, 586 (1976), and cases therein cited.

So construed the Open Meetings Law applies to official meetings of the faculty of this state's largest publicly supported law school.[1] The law school is an important component part of the University. According to the record in this case the law school faculty determines how tax money will be spent in the education

1. In 1977 the General Assembly appropriated for the biennium beginning in 1977 $162,692,324 of the public's money to the University of North Carolina at Chapel Hill of which $84,631,403 were designated for "academic affairs." 1977 Session Laws, Ch. 802, Part I, Sec. 2.

of prospective attorneys, many of whom will practice in North Carolina. In doing so it exercises an important governing and governmental function however the majority of this Court tries to tie the meaning of these words to some esoteric notion of "sovereignty." In doing so the law school faculty acts as a "body politic and in the public interest" however, again, the majority tries to explain these words in terms of classroom, dictionary definitions. This is because these terms refer in this Law to nothing more or less than the business of the public. As the governing body of a tax-supported law school, the law school faculty, whatever else it does, helps to conduct the business of the public. Its official meetings should be, to accord with the spirit and purpose of this Law and unless the Law otherwise permits, open to that public. This is the simple and most direct answer to the issue posed in this case.

The majority's fundamental error is its failure to give effect to the fact that the University of North Carolina at Chapel Hill, of which the law school is admittedly a component part, is not simply an institution of higher learning. It is a state owned institution of higher learning, the first of its kind to admit students in the United States. Lefler and Newsome, *North Carolina*, p. 262 (1973). This institution *belongs* to the people of North Carolina. Its business is their business. Those who know well its traditions know that perhaps its greatest source of strength and pride is its ownership by and accountability to the people of North Carolina and its own ready recognition of this fact. Quite recently the Chairman of the Board of Trustees of the University at Chapel Hill said publicly[2]:

> "I know that faculty members are certain that there would be no University without them. I know that students are certain that it could not exist without them. I know that both groups can prove that it would exist very well without either administration or board of trustees.
>
> "Yet, the University belongs to all of us and its growth and enrichment depend upon our efforts together.
>
> "The University belongs to others as well. It belongs to all of the people of North Carolina—those who love it and those who do not.

2. Speech by Tom Lambeth, University Day Exercises, University of North Carolina at Chapel Hill, 12 October 1977.

"I believe that it is a better place because it is the public's institution—better if we acknowledge that ownership not as a handicap but as an asset.

"This University belongs to people who will never come here as a student or as a parent, who may never sit in Kenan Stadium [or] Carmichael Auditorium—or convalesce in Memorial Hospital.

"Those of us who are trustees sense an obligation because of this that is unique to public institutions and, I believe, to a degree that is unique to this particular public institution.

"This does not mean that we pander to the public whim or shy from encounter with the public's opposition when academic freedom or academic excellence require that we take a stand that is unpopular.

"It does mean that we owe it to that public *not only to acknowledge their ownership but to include them in our governance*, to inform them, to genuinely seek their support, to be respectful of their views, to explain our own and to be as solicitous of their understanding as we are of their tax dollars." (Emphasis supplied.)

To hold that the governing bodies of neither the Greater University of North Carolina, nor the law school on its campus at Chapel Hill are subject to the Open Meetings Law ignores not only the Law's obvious purpose that the public's business be conducted in the public view. It ignores also the University's long tradition of proudly recognizing its ownership by and accountability to the public. One can only wonder whether this tradition lies at the bottom of defendants' failure in this case to file any defensive pleading or motions or to challenge any finding of fact made by the trial judge.

But let us examine the majority opinion in more detail and on its own terms. The main operative provision of the Open Meetings Law, G.S. 143-318.2, provides, in pertinent part:

"All official meetings of the governing and governmental bodies of this State . . . including all State . . . commissions, committees, boards, authorities, and councils and *any subdivision, subcommittee, or other subsidiary or component part thereof* which have or claim authority to conduct hearings,

deliberate or act *as bodies politic and in the public interest* shall be open to the public." (Emphasis supplied.)

The position of the majority is this: In order for law school faculty meetings to be subject to the provisions of the Open Meetings Law the faculty must be a component part of a "governing and governmental body" and it must also act as a "body politic." The majority concedes that the law school faculty is a component part of the University of North Carolina and apparently concedes that the *governing* body of the University is the Board of Governors. It concludes, however, that the Board of Governors is not a governmental body inasmuch as operating an educational institution is not a governmental activity and that even if it were, the law school faculty is not a "body politic." I accept one of the majority's definitions of a governmental body as "one which has at least some of the powers of government" and one of its definitions of a body politic, as "a body . . . exercising powers which pertain exclusively to a government, as distinguished from those possessed also by a private individual or a private association."

That the Board of Governors of the University of North Carolina is a governmental as well as a governing body seems to me to be almost beyond argument. The majority correctly defines a "body politic" as a body which exercises governmental powers. In other words a body politic is a governmental body and vice versa. General Statute 116-3 expressly designates the Board of Governors of the Univesity of North Carolina to be and continue "as a body politic and corporate." The General Assembly, itself, has thus designated the Board of Governors as a governmental body. Other provisions of Part II, Article 1, of Chapter 116 reinforce this designation. The General Assembly sets the terms, appoints the members, and delegates the powers of the Board of Governors. G.S. 116-5, 116-6, 116-11. Essentially the General Assembly has in G.S. 116-11 delegated to the Board of Governors the power to "govern the 16 constituent institutions" of the University of North Carolina. It has more specifically in this section empowered the Board of Governors to be "responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions"; to "determine the functions, educational activities and academic programs of the constituent institutions [and] the types of degrees to be awarded"; to elect and fix the compensation of the chancellors of the constituent institutions; to "set tuition and required fees at

the institutions"; to "set enrollment levels of the constituent institutions"; and to "develop, prepare and present to the Governor, the Advisory Budget Commission and the General Assembly a single, unified recommended budget for all of public senior higher education."

The Board of Governors is in law and in fact the agent of the General Assembly charged by the legislature with responsibility for operating this state's publicly supported institutions of higher learning.[3] It may be that operating privately supported educational institutions is not a governmental activity; but I am satisfied that operating such institutions, as an agent of the General Assembly, with tax dollars appropriated by the General Assembly is, without question, a governmental activity and that the Board of Governors is a governmental body.

It is abundantly clear that the legislature *intended* the Board of Governors to be considered a governing and governmental body within the meaning of the Open Meetings Law. General Statute 143-318.3(b) provides: "Nor shall this Article be construed to prevent any board of education or governing body of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding disciplinary cases involving students in closed sessions." Why insert this limitation unless such bodies were otherwise covered by the Law's general operative provisions?

Indeed when this case was argued in this Court, defendants conceded that official meetings of the Board of Governors were subject to the Open Meetings Law. The complaint alleges and the defendants did not deny that the Board of Governors "is the governing body of the University of North Carolina, and the said Board has authority to act as a body politic and in the public interest."

There seems to be absolutely no support in law or in fact for the majority's conclusion that the Board of Governors of the University of North Carolina is not a governing and governmental body subject to the provisions of the Open Meetings Law.

Whether the majority considers the law school faculty a subsidiary or component part of the Board of Governors is not entirely clear. At one point it concedes that the faculty is a component

3. The 1977 General Assembly appropriated $686,156,224 of tax monies to the Board of Governors to operate these institutions. 1977 Session Laws, Ch. 802, Part I, Sec. 2.

part of the University of North Carolina but at another place in the opinion it concludes that it is not a component part of the Board of Governors but that its members are mere "employees" of that Board. The majority also concludes that the faculty is not "a body politic." Whether the law school faculty is a subsidiary or component part of the Board of Governors and whether it is "a body politic" are essentially questions of fact. The majority mistakenly treats them as questions of law answered by reference only to its own notions of what the faculty is and its relationship to the Board of Governors. In my view the answers to these questions must lie not in the majority's notions of what the faculty is but in what the fact the faculty does and how in fact it is related to the Board of Governors.

The proper place to look for these facts is in the record on appeal. It consists essentially of the allegations of the complaint and the findings of fact of the trial judge. Defendants have filed no answer and have excepted to no finding of fact. Neither, for that matter, have defendants filed a motion to dismiss for failure of the complaint to state a claim pursuant to Rule 12(b)(6), a motion for judgment on the pleadings, Rule 12(c), or a motion for summary judgment, Rule 56. All defendants have done to date is appeal from rulings with which they are, because of their appeals, presumably dissatisfied. Since "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading," Rule 8(d), the defendants have judicially admitted that the following facts alleged in the complaint are true:

> "11. The University of North Carolina at Chapel Hill School of Law is a component part of the University of North Carolina and of the University of North Carolina at Chapel Hill.
>
> "12. The Law School Faculty of the University of North Carolina at Chapel Hill School of Law . . . is the governing body of the said school of law and has lawful authority to act as a body politic and in the public interest."

Thus plaintiffs allege and defendants admit that the law school is a component part of the University of North Carolina and that its faculty is the governing body of the school and has lawful authority to act as a body politic and in the public interest. It must follow that if the Board of Governors is the governing

body of the University, then the law school faculty as the governing body of a component part of that University is a component part or subsidiary of the Board of Governors. On oral argument in this Court defendants conceded that the law school faculty was a component part or subsidiary of the Board of Governors. There is nothing, therefore, in this record or in the briefs or argument to support the majority's conclusion that "the faculty of the School of Law is not a 'subsidiary or component part' of the Board of Governors, but is simply a group of employees of the Board." The admitted facts are to the contrary.

The defense in the case is based on the theory that the law school faculty, admittedly a subdivision or component part of a board to which the Open Meetings Law applies, must itself act as a body politic and in the public interest, *i.e.*, be a governmental body, in order to be subject to the law. This is what defendants argue in their brief notwithstanding that they have judicially admitted that the law school faculty in fact acts as a body politic and in the public interest.

If we assume that defendants, for some reason, are not bound by their admissions on this appeal, the facts found by the trial judge on evidence heard by him and not controverted by defendants clearly support his conclusions that the law school faculty acts "as a body politic and in the public interest, within the meaning of G.S. 143-318.2." It is admitted on this record that the law school faculty determines the annual enrollment level of the law school, sets the school's admissions standards, approves the school's curriculum, establishes the rules relating to readmissions of students who, at some point, were academically ineligible to continue in the school, approves the editorial board of the North Carolina Law Review (a publicly distributed legal periodical) and eligibility criteria for the Law Review staff, hires the law school faculty, and determines those who will graduate annually from the school. Many of these decisions are made finally by the law school faculty and are not reviewed by any higher authority. Other decisions such as the hiring of faculty are formally manifested in the nature of recommendations, but since at least 1963 no recommendation made by the faculty has ever been rejected. In fact, therefore, the faculty is making these important decisions itself.

Even if we assume that the faculty makes only recommendations, these recommendations are an integral part of the decision making process.

The Open Meetings Law was designed to reach this *entire* process wherever it may take place in governing and governmental bodies, their component parts and subsidiaries. To except the law school faculty because some of its decisions are submitted to higher authority in the form of "recommendations" subverts the clear intent of the legislature. Such a holding permits any governmental body, otherwise subject to the Law, to evade it by delegating to a subgroup authority to make initial decisions which when "recommended" are rubberstamped by the delegating body. The Florida Supreme Court, considering that state's comparable "sunshine law," spoke to this very point when it said, in *Town of Palm Beach v. Gradison*, *supra* at 477:

> "One purpose of the government in the sunshine law was to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken."

It is admitted by all parties that the law school faculty makes the same kinds of decisions with reference to the law school that the Board of Governors makes with reference to the University as a whole. If the Board of Governors, as I think I have shown, is a governing and governmental body vis-a-vis the University as a whole, clearly the law school faculty is such a body vis-a-vis the law school.

These decisions by the faculty, we must remember, are made regarding a school supported by tax dollars. Clearly in making them the law school faculty is conducting the public's business,

making decisions which affect the public interest, and, in short, acting as a body politic.

I do not share the majority's fear that the academic and athletic worlds would crumble if we hold that the Open Meetings Law applies to the law school faculty of our state University. Whether the statute would apply to the English faculty, the Athletic Department, the football coaching staff, or the faculty of a public elementary school or a public kindergarten would depend on what these bodies do in fact, the kinds of decisions they make, and the powers they exercise. To hold that the Law applies to the law school faculty does not necessarily presage a holding that it also applies to these other kinds of faculties.

Neither do I fear that the law school faculty by complying with the Open Meetings Law will somehow run afoul of the Family Educational Rights and Privacy Act, enacted by the Congress of the United States in 1974, 20 U.S.C. § 1232g(b),(d), the pertinent provisions of which are set out in the majority opinion. Compliance with the Open Meetings Law is in nowise equivalent to establishing "a policy or practice of permitting the release of education records" of a student without his consent. There are, moreover, a number of provisions in the Law itself providing for the holding of executive sessions and exclusion of the public if certain sensitive matters are being considered. G.S. 143-318.3. Subsection (b) of this section permits the holding of closed session by bodies otherwise covered by the Law, for example, "to consider information regarding the appointment, employment, discipline, termination or dismissal of an employee or officer under the jurisdiction of such body . . . . " This subsection further provides: "Nor shall this Article be construed to prevent any board of education or governing body of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding disciplinary cases involving students in closed session." It may well be that these provisions could be construed to permit the faculty to hold an executive session whenever it was considering confidential information concerning a student or students.

In one state which has heretofore considered the applicability of a similar open meetings law to a law school faculty, the decision was in favor of applicability. *Cathcart v. Andersen*, 85 Wash.

2d 102, 530 P. 2d 313 (1975). While there are minor differences between the statutory scheme in Washington and ours here, the case in principle is indistinguishable.

In *Fain v. Faculty of the College of Law of the University of Tennessee*, 552 S.W. 2d 752 (Tenn. Ct. App. 1977) the court reached a contrary result. The Tennessee Open Meetings Law as described in the cited opinion is similar to ours in that it requires meetings "of any governing body" to be public. It defines "governing body" as "the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." The facts in *Fain*, however, are vastly different from those here. In Tennessee, as a matter of fact, the law school faculty only makes recommendations to the dean of the law school who, in turn, passes some of them on to higher authorities. The only authority exercised by the Tennessee law school faculty is to make recommendations to the dean. The dean was determined not to be, within the meaning of the statute, a public body but rather an administrative officer. Had the law school faculty in Tennessee made recommendations to a public body, such as the governing board of the University of Tennessee, it seems clear the Court then would have reached a contrary result.

I agree that it was error for the trial court to require the law school faculty to give public notice of its official meetings and I would modify the decision of the Court of Appeals by ordering that this provision of the trial judge's injunction be stricken. As so modified I would vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. JOSEPH H. SHAW

No. 37

(Filed 15 December 1977)

1. Criminal Law § 104— motion for nonsuit—competent and incompetent evidence considered

In a prosecution for rape and taking indecent liberties with a child, even if the trial court had erred in permitting the child to testify, defendant would not have been entitled to judgment as of nonsuit, since, upon a motion for judg-

ment of nonsuit in a criminal action, all of the evidence admitted which is favorable to the State, whether competent or incompetent, is considered.

2. **Rape § 5— nine year old victim—testimony not explicit—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for rape of a nine year old girl where the child testified that defendant penetrated her sex organ with his sex organ, and the fact that the child could not identify the place of penetration or the organ of penetration specifically by name did not render the State's evidence deficient since the child did, during her interrogation, stand before the jury and point to the portion of her anatomy penetrated and did draw on the blackboard, in the presence of the jury, the figure of a man, showing his sex organ.

3. **Criminal Law § 42.1; Rape § 4— evidence of pubic hair—evidence not supplied pursuant to pre-trial discovery order—no error**

In a prosecution for rape and taking indecent liberties with a child, defendant was not entitled to a mistrial because of the admission over objection of testimony concerning a foreign pubic hair found upon the private parts of the victim which a State's witness concluded could have originated upon the body of defendant, even though that evidence was not provided defendant pursuant to a pre-trial motion for discovery, since the district attorney did not learn of the evidence until trial was already in progress, and as soon as these matters came to the attention of the district attorney, he advised the defendant's counsel of them.

4. **Criminal Law § 51.1— qualification of experts—failure to make specific findings—no error**

Defendant's contention that the trial court erred in failing to make rulings on the qualifications of two witnesses to testify as experts is without merit, since the overruling of defendant's objections based upon the alleged lack of qualifications necessarily implied a finding by the court that the witnesses were qualified.

5. **Criminal Law §§ 72, 169.3; Rape § 4— defendant's age—evidence not prejudicial**

In a prosecution for rape and taking indecent liberties with a child, any error of the trial court in admitting testimony by a detective concerning defendant's age without a prior showing that defendant was given *Miranda* warnings before making an in-custody admission as to age was waived where defendant himself, testifying as a witness in his own behalf, revealed his age; furthermore, it is proper for a jury, upon looking at the defendant in court, to draw reasonable inferences as to his age.

6. **Criminal Law § 162— evidence objected to—failure to include evidence in record—no prejudice shown**

Where the record does not show what defendant's answers would have been to questions concerning prior convictions asked him by his own counsel, the court on appeal cannot determine whether defendant was prejudiced by the court's ruling sustaining the State's objections to the questions.

7. Criminal Law § 114.3— presumption of innocence—jury instructions—no expression of opinion

Statement by the trial judge in his charge to the jury that, "At this moment the defendant is legally innocent of the charges against him simply because the law says so," did not amount to an expression of opinion or suggest to the jury that the presumption of innocence was simply a legal technicality, since, throughout the charge, the court clearly and correctly instructed the jury that the State must prove beyond a reasonable doubt, which term he correctly defined, each element of the offense charged before the jury could return a verdict of guilty.

8. Criminal Law § 112.2— reasonable doubt—jury instructions proper

The trial judge did not err when he told the jury, in instructing on reasonable doubt, that it must find defendant not guilty if, upon a full, fair consideration of the evidence, the jury had "any doubt based upon common sense and reason and arising out of the evidence or lack of it, not with regard to anything that any witness told you during testimony," since that instruction must have been understood by the jury to mean that it might have some reasonable doubt as to something that a particular witness testified and still, upon consideration of all the evidence, have no reasonable doubt as to defendant's guilt.

9. Rape § 6— jury instructions—consideration of lesser offenses

In a prosecution for rape and taking indecent liberties with a child, the trial court did not err in instructing the jury that it should first determine whether the defendant was or was not guilty of rape in the first degree and consider his guilt of rape in the second degree only if it found him not guilty of rape in the first degree, and should consider his guilt of the lesser offense of assault with intent to commit rape only if it found he was not guilty of rape in the second degree.

10. Indictment and Warrant § 7.1; Criminal Law § 127.2— motion in arrest of judgment—date indictment returned not essential—motion properly denied

The trial court properly denied defendant's motion in arrest of judgment made on the ground that the indictment was deficient in that the date on which the grand jury returned the indictment did not appear upon the face of the bill, since the indictment did show that it was returned on the "9th day of August 19--" and the fact that trial was had in January of 1977 necessarily showed that the indictment was returned on 9 August 1976, but, in any event, such date was not an essential part of the bill of indictment, and the stated reason for the motion in arrest of judgment was not sound.

11. Constitutional Law § 34; Criminal Law § 26.5— rape—taking indecent liberties with child—same child—same occasion—imprisonment for both offenses—double jeopardy

In a prosecution for rape and taking indecent liberties with a child, judgment upon the charge of taking indecent liberties with a child should be arrested for the reason that defendant was convicted and sentenced for the offense of rape upon the same child in the same course of action, and to imprison defendant for consecutive terms upon both offenses would be to punish him twice for the same offense.

State v. Shaw

APPEAL by defendant from *Godwin, J.*, at the 17 January 1977 Criminal Session of CUMBERLAND.

By separate indictments, each proper in form, the defendant was charged with first degree rape of Sabrina Elliott, a virtuous female child under the age of 12 years, the defendant at the time being more than 16 years of age, and with taking indecent liberties with the said child, the two offenses being alleged to have been committed on the same day, 10 July 1976.

It is undisputed that at the time of the alleged offenses Sabrina Elliott was nine years of age and the defendant 31.

The witnesses for the State included Sabrina, five of her young playmates, ranging in age from 11 to 13, her mother, the grandmother of one of the playmates, the doctor who examined the child after the alleged offenses, his nurse assistant, the investigating police detective, two other police technicians, who testified as to the physical transmission of certain exhibits, and Mr. Glen Glesne, laboratory analyst with the State Bureau of Investigation.

The defendant testified in his own behalf, calling no other witnesses. The substantial difference between his testimony and that of Sabrina is that the defendant denied penetration of Sabrina with his male sex organ, asserting that he penetrated her female sex organ with his finger only. Sabrina, on the other hand, testified that he penetrated her with both his finger and his male sex organ, the defendant contending that her testimony was vague and indefinite as to the instrument of penetration.

The following facts are not in controversy:

About dark on 10 July 1976, Sabrina was at the home of her playmate, Phyllis Berry, aged 11. The defendant and a male companion, apparently somewhat over 16 years of age, were also at the Berry house. Some 500 yards from the house, boys of the neighborhood had built and, to some extent, furnished a tin shack which the children referred to as a camp or clubhouse. The defendant, his companion and the two little girls went to the shack, apparently at the suggestion of Phyllis, who appears to have been substantially more sophisticated than Sabrina with reference to sexual matters. At the camp they found three small boy playmates of the girls. As they all sat in the shack, the conversa-

tion went to sexual matters and to the development of the bodies of the little girls. The defendant felt of Sabrina's body about her private parts and requested Sabrina to permit him to engage in certain intimacies with her, which request she refused but, finally, at the urging of Phyllis, Sabrina agreed to permit the proposed activity outside the shack if Phyllis would go with her. The three then went outside the shack and, at the insistence of the defendant and Phyllis, Sabrina pulled down her shorts and lay down. The defendant lay down upon her, unzipped his trousers and rubbed his male sex organ upon her. He penetrated the child's female sex organ with his finger. Sabrina began screaming and the two men and Phyllis ran away.

In addition to the above uncontroverted facts, to which both the defendant and Sabrina testified, Sabrina testified that the defendant did penetrate her with his male sex organ and thereafter penetrated her with his finger. On cross-examination, she reversed the order of these penetrations. After the departure of the defendant, Sabrina ran home and her mother took her to the hospital where she was examined in the emergency room. There she told the doctor and the nurse what had happened.

The testimony of the examining doctor and his nurse was to the following effect:

When Sabrina arrived at the hospital she told the doctor that the man had actually penetrated her with his male sex organ. Her underclothing was bloody and she was still bleeding from her female sex organ. She had sustained an internal laceration which, in the opinion of the doctor, could have been caused either by penetration by a male sex organ or penetration by a finger with a long fingernail. From the exterior of the child's female sex organ, the doctor removed a hair. The child, herself, did not have any pubic hair.

Mr. Glen Glesne, laboratory analyst for the State Bureau of Investigation, testified that he compared the hair so removed by the doctor from Sabrina with pubic hairs taken from the defendant by investigation police officers and, in his opinion, the hair so removed from Sabrina "could have come from the same origin, the same source" as the hair so taken from the defendant.

Rufus L. Edmisten, Attorney General, by Nonnie F. Midgette, Associate Attorney, for the State.

Mary Ann Tally, Public Defender, for Defendant.

LAKE, Justice.

G.S. 14-202.1 provides:

"*Taking indecent liberties with children.* — (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is a felony, punishable by a fine, imprisonment for not more than 10 years, or both."

The defendant assigns as error the denial of his motions for judgment of nonsuit as to both cases. In his brief he confines his argument upon this assignment of error to the charge of rape. He has thus abandoned this assignment of error with reference to the charge of taking indecent liberties with a child. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 671, 741. His decision in this respect was well founded for his own testimony is ample to sustain the verdict of guilty as to this charge. As to the charge of rape, this assignment of error is also without merit.

[1] In his brief the defendant says that this assignment is "inextricably intertwined with the question of the determination of the competency of the child witness to testify, "which is the subject of his first assignment of error. While, as we shall subsequently show, there was no error in permitting the child to testify as a witness, if there had been such error, it would not entitle the defendant to a judgment of nonsuit. It is well settled that, upon a

motion for judgment of nonsuit in a criminal action, all of the evidence admitted, which is favorable to the State, whether competent or incompetent, is considered. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Virgil*, 263 N.C. 73, 138 S.E. 2d 777 (1964); Strong, N.C. Index 3d, Criminal Law, § 104.

It is elementary that, for the purpose of ruling upon such a motion, only the evidence introduced by the State is considered, except insofar as the evidence for the defendant clarifies and strengthens it, and any discrepancies in the State's evidence are disregarded, its evidence, favorable to it, being deemed true and being interpreted in the light most favorable to the State. Strong, N.C. Index 3d, Criminal Law, § 104. If, upon such consideration, there is substantial evidence, whether direct, circumstantial, or both, to support a finding that the offense charged has been committed and that the defendant committed it, the motion for judgment of nonsuit is properly denied. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578 (1975); Strong, N.C. Index 3d, Criminal Law, § 106.2. The evidence in the present case as to the charge of rape fully met this test.

[2] In his brief the defendant contends that the State's evidence was deficient in that Sabrina did not know the meaning of certain terms and, consequently, her testimony was vague as to the element of penetration. However, the law does not disqualify a little girl, alleged to have been the victim of a sexual assault, to testify as a witness concerning the acts of the defendant, or belittle the significance of her testimony, merely because she does not identify with scientific accuracy the portions of her anatomy and that of the defendant involved in the assault, or because she has not been sufficiently liberated to use with fluency the vernacular of the prostitute and her customers in an attempt to do so. This nine year old child, during her interrogation, stood before the jury and pointed to the portion of her anatomy penetrated and drew upon the blackboard, in the presence of the jury, the figure of a man, showing his sex organ. Unquestionably, the jury could understand her testimony as to where she was penetrated and as to the instrument of penetration.

It is well settled in this State that the competency of a child to testify rests "mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Wetmore*, 287 N.C. 344, 215 S.E.

2d 51 (1975), *reversed as to death sentence only*, 428 U.S. 905, 96 S.Ct. 3213, 49 L.Ed. 2d 1212; *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); *Artesani v. Gritton*, 252 N.C. 463, 113 S.E. 2d 895 (1960). Here, as we said in *State v. Turner, supra*:

> "There was no error in holding that the little girl who was the alleged victim of these offenses was a competent witness. [Citations omitted.] There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. In the present case, the child was examined with reference to her intelligence, understanding and religious beliefs concerning the telling of a falsehood, all of which took place out of the presence of the jury. The record indicates she was alert, intelligent and fully aware of the necessity for telling the truth."

There is nothing in the present record to indicate an abuse of discretion by the trial judge in permitting Sabrina and her playmates to testify. Her childish terminology simply raised a question for the jury as to her meaning and credibility.

[3] The defendant's Assignments of Error 5, 6 and 7 relate to the admission, over objection, of testimony concerning the finding of a foreign pubic hair upon the private parts of Sabrina, its similarity to hair taken from the defendant by the investigating police detective, and the court's denial of the defendant's motion for mistrial because of the admission of this testimony. In these assignments we find no merit. The defendant's argument with reference to these assignments is that he was taken by surprise and that G.S. 15A-910, dealing with discovery in criminal proceedings, should be construed to bar the admission of this evidence.

The record shows that the defendant made a pre-trial written request for discovery and a pre-trial motion for discovery as to any physical evidence that the State intended to introduce at the

trial. It further shows that, prior to trial, the District Attorney, in good faith, advised defendant's counsel of all exhibits then known to the District Attorney, together with the original report made by Mr. Glesne, the laboratory expert of the State Bureau of Investigation. The record further shows that the District Attorney had no opportunity to interview Dr. Johnson, the examining physician, who testified as a witness for the State, prior to a recess during trial, at which time the District Attorney first learned of the finding of the hair. The record likewise shows that Mr. Glesne, at the time of his original report to the District Attorney, did not know where this hair was found or its significance in relation to the hairs taken from the body of the defendant and so that report did not deal with a comparison of these hairs. While the trial was in progress, and after Dr. Johnson had disclosed to the District Attorney his finding of the hair upon Sabrina, Mr. Glesne made a further study of the hairs and reached his conclusion that the one found upon the body of Sabrina could have originated upon the body of the defendant. As soon as these matters came to the attention of the District Attorney, he advised the defendant's counsel of them. The trial judge ruled that there had been no bad faith on the part of the District Attorney in failing earlier to so advise defendant's counsel of these facts, overruled the objection of the defendant to the introduction of this evidence and denied his motion for mistrial. In these rulings we find no error.

G.S. 15A-910, which is part of the Article relating to discovery in criminal procedures, provides:

> "*Regulation of discovery—failure to comply.* — (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers *may*
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (4) Enter other appropriate orders." (Emphasis added.)

By its express terms, this statute authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the trial court and, under the circumstances disclosed by this record, we perceive no indication of abuse of such discretion. The defendant did not, as he might have done, request a continuance in order to permit him to prepare for cross-examination of these witnesses with reference to this matter.

[4] Defendant's Assignment of Error 4 is to the effect that the trial court erred in failing to make rulings on the qualifications of Dr. Johnson and Mr. Glesne to testify as experts. The record, however, does not support the defendant's contention. When the defendant objected to Dr. Johnson's testimony as to his findings upon his medical examination of Sabrina, the court stated: "The court will rule upon the objections going to the qualifications of the witness to state a medical opinion. The objection is overruled." As to Mr. Glesne, the defendant objected to his testimony concerning the result of his examination of the several hairs above mentioned for the reason that "the witness has not been properly qualified." The court replied, "That objection is also overruled." Thus, the court did rule upon the qualifications of each of these witnesses to testify as an expert in the field in which he was being interrogated by the District Attorney.

The overruling of the defendant's objection based upon the alleged lack of qualifications necessarily implied a finding by the court that the witness was qualified. The evidence fully sustains such findings as to each of these witnesses. As we said in *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969), "Though it would have been better practice for the [District Attorney] to have tendered him formally as an expert, and for the court so to rule expressly, under the circumstances disclosed in this record there was no error in permitting the witness to state his opinion in response to a question otherwise competent." In *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973), the action was one for damages for alleged medical malpractice. The plaintiff called as his witness a physician who testified as to his medical training and practice. The plaintiff did not formally tender this witness as an expert. The defendant objected to certain hypothetical questions, proper in form, which objections were sustained by the trial judge. The Court of Appeals held it was unnecessary to pass upon the validi-

ty of the reason given by the trial judge for this ruling since the defendant did not admit the witness was a medical expert and the plaintiff had not requested the court to find him to be one. This Court reversed, saying:

> "Nothing else appearing, when a question calling for the opinion of a witness, not previously offered as an expert, is propounded and an objection is made, if there is no finding by the court, or admission by the adverse party, that the witness is qualified to testify as an expert, the sustaining of the objection will not be held error by the appellate court. [Citations omitted.] It is always a better practice for the party offering an expert witness to tender him as such formally and to request the court to find him to be such. [Citation omitted.] However, to apply the above stated general rule under the facts of this case is to look solely to form and to disregard substance. The intent to offer the witness as an expert being clear, his qualifications being shown and the adverse ruling of the court thereon being expressly stated, together with the reason therefor, the record presents for appellate review the validity of the court's ruling."

The record in the present case shows clearly that the trial court overruled the objection of the defendant to the testimony, which objection was based upon failure to qualify the witness as an expert. To grant a new trial on the basis of this assignment of error would paramount form over substance. The assignment is overruled.

[5] Detective Watson of the Fayetteville Police Department, a witness for the State, testified that after interviewing Sabrina at the hospital, he placed the defendant under arrest and took him to the Law Enforcement Center. He then testified that he asked the defendant for his date of birth and, over objection, was permitted to testify that the defendant stated he was born in the year 1945. The defendant now contends that this evidence was incompetent for the reason that the defendant's age is an essential element of the crime of rape in the first degree, which it is, G.S. 14-21(a), and there was no showing that, prior to this in-custody admission, he was given the warnings of his constitutional rights required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

It is a sufficient answer to this assignment of error that the defendant, himself, testifying as a witness in his own behalf, began his direct testimony with this statement: "My name is Joseph Howard Shaw, and I live at 138 Grove View Terrace. I have lived in Cumberland County approximately thirty-two years." This testimony, voluntarily given by the defendant, himself, waived any error of the trial court in the admission of the testimony of Detective Watson concerning the defendant's age. Stansbury, North Carolina Evidence, Brandis Rev., § 30.

Furthermore, it has long been the rule in this Court that it is proper for a jury, upon looking at the defendant in court, to draw reasonable inferences as to his age. *State v. McNair*, 93 N.C. 628 (1885); *State v. Arnold*, 35 N.C. 184 (1851); Stansbury, North Carolina Evidence, Brandis Rev., § 119.

In *State v. Arnold, supra*, a "small boy," whose age was not stated in the record, was convicted of murder. His counsel contended that he was apparently under the age of 14 years and, therefore, it was incumbent upon the State to prove that he was over that age or had such knowledge of right and wrong as would render him responsible for the homicide. The trial court held the burden of proof was upon the prisoner to show his age. This Court, speaking through Chief Justice Ruffin, said, "As there was no proof on the point, it could only be judged of by inspection, and so far as that goes it must be taken to have been decided against the prisoner both by the court and the jury."

In *State v. McNair, supra*, the defendant was found guilty of rape of a child under 10 years of age. The defendant contended he was under 14 years of age at the time of the alleged offense and testimony was offered upon that question, which evidence was conflicting. The trial court instructed the jury, "It is for you to say whether he is under 14 years of age or not, being, as you see him before you, grown to the stature of manhood." In finding no error, this Court, speaking through Chief Justice Smith, said: "But if the patent fact of the prisoner's full growth was before the jury and beyond dispute, how could there be error in telling the jury what they saw themselves. * * * Again, it was competent for the jury to look at the prisoner and draw such reasonable inferences as to his youth as his appearance warranted."

In the present case, the defendant's exact age is not the question. The question is whether he was, at the time of the of-

fense, which was less than a year before his trial, more than 16 years of age. If, as he, himself, testified, he had lived in Cumberland County approximately 32 years, we may reasonably assume that his appearance in the courtroom would make it clear to the jury that he was more than 16 years of age at the time of the offense. Upon the defendant's objection to testimony by Detective Watson concerning statements made by the defendant to him as to the defendant's age, it would have been better practice for the court to have excused the jury and conducted a voir dire to determine whether the *Miranda* warnings were given. However, any error committed in this respect was clearly harmless.

[6] On his own direct examination, the defendant was asked by his counsel whether he had been previously convicted of any criminal offenses, and, if so, what. The State's objections to these questions were sustained. On cross-examination the defendant testified that he had been convicted of crimes on 13 previous occasions, including assault on a 40 year old female, breaking and entering, larceny, public drunkenness, affray, carrying a concealed weapon and improper registration. On redirect examination, his counsel asked him to explain the circumstances of his previous conviction of assault on a female. The State's objection to this question was sustained. These rulings of the court are the subjects of the defendant's Assignments of Error 10 and 11.

It is a sufficient answer to these assignments that the record does not show what the defendant's answers to any of these questions put by his own counsel to him on direct and redirect examination would have been. We, therefore, cannot determine from the record wherein, if at all, the defendant was prejudiced by the rulings of which he here complains. "When evidence is excluded, the record must sufficiently show what purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal. * * * When an objection to a specific question is sustained, this ordinarily means that the answer the witness would have given should have been made a part of the record." Stansbury, North Carolina Evidence, Brandis Rev., § 26. *Accord*: *State v. Little*, 286 N.C. 185, 209 S.E. 2d 749 (1974), *rehear. den.*, 286 N.C. 548 (1975); *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972); *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943).

As to the questions asked the defendant on direct examination, it would appear that his prior criminal convictions were fully brought forth by the State on cross-examination. If so, the information sought to be elicited by the rejected question on direct examination was fully obtained and no prejudice to the defendant resulted from the sustaining of the State's objections. The defendant says that he was prejudiced in that the ruling of the court precluded him from "drawing the sting" of expected cross-examination by the District Attorney with reference to defendant's prior criminal record. It would seem, however, that the hoped for psychological advantage, if any, was fully obtained by the mere fact that his counsel asked the questions in the presence of the jury. We find no merit in these assignments of error.

[7] In the introductory portion of his charge to the jury, the trial judge said:

> "When any person charged with crime upon arraignment enters a plea of not guilty the law immediately steps forward and creates for him, for his benefit, in his behalf a legal presumption that the party charged is legally innocent of the charges against him, and the defendant stands in that situation at this moment. At this moment the defendant is legally innocent of the charges against him *simply because the law says so.*" (Emphasis added.)

The defendant now contends that the portion of this instruction which we have emphasized is an intimation of opinion by the trial judge in violation of G.S. 1-180 and conveyed to the jury "the idea that the presumption of innocence is simply a legal technicality at this point in the trial." There is no merit in this contention. Throughout the charge the court clearly and correctly instructed the jury that the State must prove beyond a reasonable doubt, which term he correctly defined, each element of the offense charged before the jury could return a verdict of guilty. The defendant's Assignment of Error 12 is, therefore, overruled.

[8] The defendant's Assignment of Error 13 is that the judge erred in instructing the jury as to the meaning of the term "reasonable doubt." The portion of the judge's charge to which this assignment related was:

"So, when you come to consider the evidence in this case I instruct you that if upon a full, fair consideration of the evidence you find that you are fully satisfied of the Defendant's guilt in that case that you are then considering you have no reasonable doubt. If you find that you are fully convinced of his guilt you have no reasonable doubt. If you find you are satisfied of his guilt to a moral certainty you have no reasonable doubt, but if upon such consideration you find that you have any doubt based upon common sense and reason and arising out of the evidence presented or lack of it, *not with regard to anything that any witness told you during testimony* but if you find that you have any doubt based upon common sense and reason and arising out of the evidence or lack of it with regard to any fact which is essential to constitute guilt then you do have a reasonable doubt and if you do find that you have a reasonable doubt I instruct you that under those circumstances the law commands of you that you return a verdict of not guilty because by making such finding you will have found that the State has failed to carry the burden of proof imposed upon it by law." (Emphasis added.)

The defendant contends that the portion of the above instruction which we have emphasized "clearly conveyed to the jury the opinion of the court that they could not have any reasonable doubt as to the testimony of any witness in the case." This contention obviously lacks merit. The charge must be read contextually. The jury was clearly instructed that it must find the defendant not guilty as to each of the offenses with which he was charged, if, upon a full, fair consideration of the evidence, as to such offense, it had "any doubt based upon common sense and reason and arising out of the evidence or lack of it" with regard to any fact essential to constitute guilt. We think it evident that the phrase in this instruction which we have emphasized, and to which the defendant's objection is addressed, must have been understood by the jury to mean that it might have some reasonable doubt as to something that a particular witness testified and still, upon consideration of all the evidence, have no reasonable doubt as to the defendant's guilt. In this there was no error.

[9] The court instructed the jury as to the lesser offenses of rape in the second degree and assault with intent to commit rape. The defendant does not assign any error with reference to the instructions pertaining to the elements of these offenses. He contends, however, that the trial court erred in instructing the jury that it should first determine whether the defendant is or is not guilty of rape in the first degree and consider his guilt of rape in the second degree only if it found him not guilty of rape in the first degree, and should consider his guilt of the lesser offense of assault with intent to commit rape only if it found he was not guilty of rape in the second degree. The defendant contends that proper instruction was to tell the jury that they might consider, in order, each of the lesser offenses if they had some reasonable doubt as to the guilt of the greater offense.

As to this assignment we find no merit. The court had clearly instructed the jury that it was to find the defendant not guilty of each such offense if the jury had reasonable doubt as to the proof of any essential element of such offense. Construing the charge in its entirety, we find no reasonable basis for belief that the jury was confused by this portion of the court's instructions. We find no conflict between the several portions of the judge's charge to the jury in this respect. This assignment of error is, therefore, overruled.

We also find no merit in Assignments of Error 2 and 3. No useful purpose would be served by a detailed discussion of them.

[10] Finally, in Assignment of Error 15, the defendant contends that the court erred in denying his motion in arrest of judgment. This motion was directed to both charges against the defendant. In his brief the appellant limits his argument on this assignment to the charge of taking indecent liberties with a child, thus abandoning this assignment insofar as it relates to the charge of rape. Rule 28 of the Rules of Appellate Procedure, supra. We find in the record no basis whatever for such a motion with reference to the charge of rape. As to the charge of taking indecent liberties with a child, the defendant asserts in his brief that the indictment for this offense is deficient in that the date on which the grand jury returned the indictment does not appear upon the face of the bill.

The bill of indictment in this case charges the offense was committed on 10 July 1976 and the return by the grand jury is

dated "9th day of August, 19--." Since the trial was had in January 1977, of necessity, the indictment then showed on its face that it was returned for the grand jury on 9 August 1976. In any event such date is not an essential part of the bill of indictment. Consequently, the stated reason for the motion in arrest of judgment is not sound. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976). In Strong, North Carolina Index 3d, Indictment and Warrant, § 7.1, it is said: "Quashal of indictments and warrants is not favored, and an indictment or warrant will not be quashed for technical objections that do not affect the merits, nor for mere informality or refinement." The indictment for taking indecent liberties with a child charges all of the essential elements of the offense with sufficient certainty to apprise the defendant of the specific accusation against him, to protect him from a subsequent prosecution for the same offense and to enable the court to proceed to judgment. It was, therefore, sufficient and the motion in arrest of judgment could not be sustained because of any defect in the indictment. *State v. Pallet*, 283 N.C. 705, 198 S.E. 2d 433 (1973); Strong, North Carolina Index 3d, Indictment and Warrant, §§ 9 and 9.1.

[11] Nevertheless, we conclude that judgment upon the charge of taking indecent liberties with a child should be arrested for the reason that the defendant has been convicted and sentenced for the offense of rape upon the same child in the same course of action. The crime of rape of "a virtuous female child under the age of 12 years," the offense of which the defendant has here been convicted, cannot be committed except by taking "immoral, improper, and indecent liberties with a female child under the age of 16," the offense for which the defendant has also been here convicted. Thus, the lesser offense with which the defendant has been charged and convicted is necessarily included in the offense of rape. To imprison him for consecutive terms upon both offenses would, therefore, be to punish him twice for the same offense. The judgment of the court sentencing the defendant to imprisonment for 10 years upon the charge of taking indecent liberties with a child must, therefore, be arrested. The judgment sentencing him to imprisonment for life for rape in the first degree is free from error. The direct conflict between the testimony of Sabrina and that of the defendant as to this charge simply raised a question of fact for the jury which believed her, not him.

Judgment for rape: No error.

Judgment for taking indecent liberties with a child: Arrested.

STATE OF NORTH CAROLINA v. JAMES PALMER, ALIAS JAMES BURRELL

No. 6

(Filed 15 December 1977)

1. **Indictment and Warrant § 9.4— indictment in statutory language**

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense.

2. **Indictment and Warrant § 9— allegation of ultimate facts**

Indictments and warrants generally need only allege the ultimate facts constituting each element of the criminal offense and need not allege evidentiary facts.

3. **Assault and Battery § 11.1; Indictment and Warrant § 9.2— deadly weapon—sufficiency of allegation**

It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon.

4. **Assault and Battery § 11.1— assault with "stick, a deadly weapon"—sufficiency of indictment**

An indictment charging an assault with "a stick, a deadly weapon" without further description of the size, weight or other properties showing the deadly character of the stick is sufficient to support a verdict of guilty of assault with a deadly weapon. The decision of *State v. Porter*, 101 N.C. 713 (1888) is overruled.

5. **Assault and Battery § 16— aggravated assault—stick not deadly weapon per se—failure to submit simple assault**

In this prosecution for assault with a deadly weapon—a stick—with intent to kill inflicting serious injury, the trial court committed prejudicial error in failing to submit to the jury the issue of simple assault as a possible verdict where the stick used by defendant was not, under the evidence in the case, a deadly weapon as a matter of law, and where the jury determined other elements of aggravation in defendant's favor and defendant could only have been convicted of simple assault if the jury had not determined that the stick was a deadly weapon.

Chief Justice SHARP dissenting.

ON the state's petition for discretionary review of the decision of the Court of Appeals, 32 N.C. App. 166, 231 S.E. 2d 29 (1977), arresting the judgment entered by *McLelland, J.*, at the 10 May 1976 Criminal Session of PERSON County Superior Court.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, for the state.

James W. Tolin, Jr., attorney for defendant.

EXUM, Justice.

Defendant was tried on an indictment charging assault with a deadly weapon with intent to kill inflicting serious injury.[1] The jury returned a verdict of guilty of assault with a deadly weapon.[2] Defendant was sentenced to two years imprisonment.

This case presents two questions for decision. The first is whether the Court of Appeals erred in holding the indictment insufficient to support the verdict and judgment because it charged an assault with "a stick, a deadly weapon" without further description of the size, weight or other properties showing the deadly character of the stick. The second is whether the trial judge committed prejudicial error in failing to submit simple assault as a possible verdict. We answer both questions in the affirmative. The decision of the Court of Appeals is consequently reversed and the case remanded for a new trial.

I

Defendant was tried on an indictment worded as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 13th day of June, 1975, in Person County James Palmer, alias James Burrell unlawfully and wilfully did feloniously assault Grover A. Whitfield, Sr., with a stick, a deadly weapon, by beating him about the body and head. The assault was intended to kill and resulted in serious bodily injury, in that some teeth were knocked out and face was beat very badly."

1. A felony punishable by a fine, imprisonment for not more than twenty years, or both. G.S. 14-32(a).

2. A misdemeanor punishable by a fine, imprisonment for not more than two years, or both. G.S. 14-33(b)(1).

The "stick" mentioned in the bill of indictment was examined by the Court of Appeals and by this Court. It is a hard wooden club weighing two pounds and eleven ounces, approximately 43¼ inches long, two inches in diameter at the club end, and one and one-half inches in diameter at the handle. Conceding that the "stick" "could have been described in the bill of indictment sufficiently to show its character as a deadly weapon," the Court of Appeals nevertheless held that since it was not so described, the bill failed to charge an assault with a deadly weapon. Therefore the Court of Appeals arrested the judgment entered against defendant in the superior court.

The Court of Appeals relied principally on *State v. Porter*, 101 N.C. 713, 7 S.E. 902 (1888). In that case the indictment charged that the defendant "did unlawfully and wilfully assault, beat and wound one Candace Porter with a deadly weapon, to wit, a certain stick . . . ." The Court held the indictment insufficient to charge an aggravated assault. It said, 101 N.C. at 716, 7 S.E. at 903-04:

> "The present indictment manifestly falls short of this requirement, for while called a deadly weapon it is designated simply as a stick, with no description of its size, weight or other qualities or properties from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed."

We now think the decision in *Porter* should no longer be considered authoritative, and the decision is consequently overruled.

It is apparent that the Court in *Porter* was primarily concerned with whether the indictment on its face was sufficient to vest original jurisdiction in the superior court.[3] The rule in *Porter* seems to have been one of convenience in that by requiring a detailed statement in the bill regarding the nature of the weapon the trial court could, *in limine*, determine whether it had jurisdiction to proceed. The same concern appears in the analogous case

3. Apparently at the time *Porter* was decided justices of the peace had exclusive jurisdiction of assaults for a period of six months after their commission unless the assault was aggravated, *i.e.*, done with intent to kill, to commit rape, with deadly weapon, or inflicting serious injury. *See* the opinion in Porter; *State v. Battle*, cited in text; and *State v. Phillips*, 104 N.C. 786, 10 S.E. 463 (1889). The Court in *Porter* said, "[T]he court must be able, from an inspection of the charge, in the terms in which it is made in the indictment, to see that its jurisdiction attaches, that the weapon with which the assault was made was a deadly instrument, not merely by calling it 'deadly,' unless by so describing it by name, or with such attending circumstances as show its character as such, and when so described the jurisdiction becomes apparent and will be exercised." 101 N.C. at 716, 7 S.E. at 903.

of *State v. Battle*, 130 N.C. 655, 41 S.E. 66 (1902), where the Court held that a bill of indictment which alleged that the defendant had committed an assault inflicting "serious injury" was insufficient to charge an aggravated assault because it did not describe in detail precisely what injury was inflicted.

The soundness of the holding in *Battle* was questioned in *State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943). In *Gregory* defendant was indicted for the statutory crime of assault with a deadly weapon with intent to kill inflicting serious injury.[4] Recognizing that the rule in *Battle* might have "afforded a convenient method by which the Court might *in limine* determine its jurisdiction without entering upon a fruitless investigation," the Court in *Gregory* nevertheless concluded, 223 N.C. at 419-20, 27 S.E. 2d at 143:

> "We think, however, the requirement that the nature and extent of the injury should be more specifically described was as much due to the more meticulous standards of the common law, under which the concepts and definitions of offenses took form largely through the experience of administration and without the aid of definitive statutes; and, as a means of 'playing safe,' indictments were viewed with great, and often unnecessary, strictness. Now, under a motion for arrest of judgment for a defect in the indictment, it must be liberally construed. 15 Am. Jur., Criminal Law, s. 435, and cited cases.
>
> "The purpose of an indictment is at least twofold: First, to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; second, to put the defendant on reasonable notice so as to enable him to make his defense. When these purposes are served, the functions of the indictment are not so impaired by the omission of subordinate details—in this case a more particular description of the injury—as to necessitate an abruption of the judicial investigation in which, if it is allowed to proceed, the questioned condition may be made clear and the rights of the accused protected by the application of legal standards."

4. The statute enacted as Chapter 101, Public Laws of 1919, first codified as C.S. 4214 (the precursor of what is now G.S. 14-32(a)), provided: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment . . . for a period not less than four months nor more than 10 years."

Although the Court in *Gregory* took pains to avoid expressly overruling *Battle* and attempted to distinguish it on the ground that it dealt with a common law offense while *Gregory* involved a statutory crime,[5] it cast serious doubt on the soundness of the rule in *Battle* even as applied to common law offenses.

The *Porter* rule was seriously eroded by *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947), a prosecution under General Statute 14-32 in which the indictment described the weapon as "a deadly weapon, to wit, a certain knife." Without mentioning *Porter*, this Court held the allegation concerning the deadly weapon to be sufficient without further description of the weapon.

The Court, however, relied in part on *Porter* in *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967). One of the charges against the defendant Wiggs was an "assault . . . with a deadly weapon, to wit, a gallon glass jar, by threatening to hit [the victim] with the said jar." The Court, distinguishing *Randolph* on the ground that it was a prosecution for a statutory crime and citing *Porter*, held the warrant insufficient to charge an assault with a deadly weapon. The Court, however, placed some reliance on the allegation in the warrant that defendant merely threatened the victim with the jar. It also recognized, 269 N.C. at 514, 153 S.E. 2d at 89, that there are difficult "borderline cases, such as *State v. Phillips*, 104 N.C. 786, 10 S.E. 463, in which an indictment charging an assault 'upon one W. R. Butler, with a *certain deadly weapon*, to wit, *with a club*,' etc., was held sufficient." (Emphasis original.)

Adhering to the rule that an indictment which uses the language of the statute ordinarily is sufficient, *State v. Randolph*, *supra*; *State v. Gregory*, *supra*,[6] and following the reasoning in *Gregory*, we could limit the holding in *Porter* to warrants charg-

5. "As we have stated, the effect of the 1919 Act—section 4214, Michie's Code, *supra*—is to create a separate and distinct statutory offense in which are incorporated as essentials to the crime a number of circumstances theretofore considered merely as an aggravation of the assault—amongst them the fact of serious injury. In our opinion, the statement in the indictment that the assault inflicted serious injury is sufficient without further elaboration, and the fact becomes a matter of proof upon the trial. Except as a convenience in determining the jurisdiction of the court in the first instance, it is questionable whether the insistence that so significant an expression as 'serious injury' be further explained served any useful purpose, even at common law. In the present instance, we feel that the more reasonable rules pertaining to indictments for statutory crimes should be pursued.

"As a general rule, an indictment is sufficient when it charges the offense in the language of the statute." 223 N.C. at 420, 27 S.E. 2d at 143.

6. For a discussion of the general rule and several exceptions thereto see Note, 35 N.C. L. Rev. 118 (1956).

ing common law assaults and apply the *Gregory* rationale only to indictments under General Statute 14-32. This approach would reconcile *Porter*, *Randolph*, and *Wiggs*. The result would be different pleading requirements with respect to the deadly weapon element in warrants charging common law misdemeanor assaults on the one hand and indictments charging statutory felony assaults on the other. We could, alternatively, continue to follow *Porter* and apply its rule to common law and statutory offenses alike. We would then, of course, ignore the holdings and rationales of *Gregory* and *Randolph*.

Whether *Porter* was the result of an undue concern for the trial court's ability to determine, *in limine*, its jurisdiction in assault cases, or of the meticulous pleading requirements of the common law, we think the better course is simply to declare that whatever validity *Porter* had at the time the case arose, it is out of step with modern notions of criminal pleading and should be overruled.

[1, 2] We have already alluded to the rule that an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. It is also generally true that indictments and warrants need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged. *State v. Beach*, 283 N.C. 261, 271, 196 S.E. 2d 214, 221 (1973); *State v. Greer*, 238 N.C. 325, 328-29, 77 S.E. 2d 917, 920 (1953); 42 C.J.S. Indictments and Information, § 115 (1944). General Statute 15A-924(a)(5), in effect at the time this indictment was returned and applicable thereto,[7] provides in part: "A criminal pleading must contain . . . a plain and concise factual statement in each count which, *without allegations of an evidentiary nature*, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." (Emphasis supplied.) Warrants and bills of indictment are generally sufficient if they charge the offense "in a plain, intelligible, and explicit manner with averments sufficient to enable the court to proceed to judg-

7. While the warrant in this case was executed on 26 June 1975, the indictment was returned at the 8 September 1975 Session of Person Superior Court. G.S. 15A-924 is a codification of Chapter 1286 of the 1973 Session Laws. Section 31 of Chapter 1286 provides: "This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except Section 12 of this act which becomes effective on July 1, 1974."

ment and bar a subsequent prosecution for the same offense. G.S. 15-153."[8] *State v. Arnold*, 285 N.C. 751, 755, 208 S.E. 2d 646, 648 (1974).

We said in *State v. Greer, supra*, 238 N.C. at 327, 77 S.E. 2d at 919 (1953), that an indictment (and the same holds true for warrants) "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged" in order that the defendant may be duly informed of the charges against him,[9] protected from double jeopardy, and able to prepare for trial, and that the court may be able to pronounce an appropriate sentence upon a conviction or plea. *See also State v. Gregory, supra*, 223 N.C. 415, 27 S.E. 2d 149 (1943).

Specifically, with regard to an indictment or warrant charging the offense of assault with a deadly weapon, we said in *State v. Wiggs, supra*, 269 N.C. at 513, 153 S.E. 2d at 89:

> "The requisites of an indictment or warrant charging the criminal offense of assault with a deadly weapon are set forth in 6 C.J.S., Assault and Battery § 110g(2), as follows: 'In an indictment for an assault with a deadly or dangerous weapon, the dangerous or deadly character of the weapon must be averred, either in the language of the statute, or by a statement of facts from which the court can see that it necessarily was such. It is only necessary, however, to describe and charge the weapon to be deadly or dangerous where it is a weapon the ordinary name of which does not, *ex vi termini*, import its deadly or dangerous character; if it is a weapon the ordinary name of which imports its deadly or dangerous character, *ex vi termini*, it is sufficient to describe it by its name, without alleging that it was a deadly or dangerous weapon.' "

[3] Guided by the foregoing principles, we hold that it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the

8. G.S. 15-153 provides: "*Bill or warrant not quashed for informality.* — Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."

9. *See* N.C. Constitution, Article I, § 23.

weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon. Whether the state can prove the allegation is, of course, a question of evidence which cannot be determined until trial.

[4] The indictment in this case was, therefore, sufficient to support a verdict of guilty of assault with a deadly weapon and a judgment based thereon.

II

[5] While the Court of Appeals did not reach this question, defendant also assigns as error the failure of the trial judge to submit to the jury a possible verdict of guilty of simple assault. We find merit in this assignment.

The state's evidence tends to show the following: On 13 June 1975 defendant's car was parked in the middle of Lamar Street in Roxboro while defendant talked with someone on a water truck parked at the side of the street. Grover A. Whitfield was driving home on Lamar Street and found his way blocked by the two vehicles. He asked defendant to move his car, and after about five minutes defendant complied. Whitfield then proceeded to the Imperial Service Station. As Whitfield was stopped at the station, defendant appeared and attempted to force him out of his car. Whitfield got out of the car and the two men began fighting. Defendant pursued Whitfield into the service station building, picked up a large, heavy stick, and began swinging it at him. Whitfield described this attack as follows:

> "I was inside the service station when Mr. Palmer came in and I pushed the chair back towards him, thinking he would go back out. I went out the other door of the service station and he came out behind me. I was inside the service station for just a few seconds.
>
> "Mr. Palmer hit me on the arm four or five different times with the stick. I received several knots and things on my arms but did not receive any medical treatment for the injuries to my arms. My arm was not seriously injured."

One of the service station attendants, Lacy Compton, started to call the police but abandoned the idea when defendant threatened him with the stick. Another attendant, Gary Compton, pointed a

gun in the air and pulled the trigger, but it failed to fire. Then defendant left the station.

Ten or twelve minutes later defendant returned to the service station with his brother. They both attacked Whitfield as he got out of his car, knocking him to the ground and stomping him repeatedly in the face. The stick was *not* used during this second fight. As a result of the second fight Whitfield lost ten of his teeth and his face was severely bruised. Defendant and his brother left briefly and then returned just as the police arrived.

Defendant's evidence presented a somewhat different picture of the incident: As Whitfield drove by he cursed the defendant, who then followed him to the service station to demand an explanation. They began to fight and Whitfield ran into the station building. Defendant picked up the stick, but he neither hit Whitfield nor threatened the attendant with it. As defendant started to leave Whitfield cursed him again, and when he came back into the building Whitfield hit him in the side of his head with the stick so that he later required seven stitches. About this time Gary Compton misfired the gun while he was pointing it *at defendant.* Bleeding badly, defendant left in his car. He started to go to the hospital but changed his mind and returned to the service station. While he and Whitfield were fighting the second time, defendant's brother arrived and managed to extricate defendant from the fray. At no time did defendant ever hit Whitfield with the heavy stick.

The trial judge submitted six alternative verdicts: guilty of assault with a deadly weapon with intent to kill inflicting serious injury; guilty of assault with a deadly weapon with intent to kill;[10] guilty of assault with a deadly weapon inflicting serious injury,[11] guilty of assault with a deadly weapon; guilty of assault inflicting serious injury;[12] or not guilty. On each of these possible verdicts the trial judge limited the jury's consideration on the assault element itself to the assault *with the stick.* He did not permit the jury to consider the second beating.[13]

10. A felony punishable by a fine, imprisonment for not more than ten years, or both. G.S. 14-32(c).

11. A felony punishable by a fine, imprisonment for not more than ten years, or both. G.S. 14-32(b).

12. A misdemeanor punishable by a fine, imprisonment for not more than 2 years, or both. G.S. 14-33(b)(1).

13. The trial judge also submitted written issues to the jury which appear in the record, together with the answers thereto, as follows: "1st Issue: Did defendant intentionally assault Grover Whitfield by striking him with a stick? Answer: Yes. 2d Issue: Was that stick, as used, a deadly weapon? Answer: Yes. 3rd Issue:

It is clear that this limitation on the jury's consideration of the case was due to the trial judge's understanding of the charge as laid in the bill of indictment.[14] The bill as drawn seems to refer to only one assault—one made with a stick.[15] According to the state's evidence, however, there were two distinct assaults. The first one was committed with the stick. Some ten or twelve minutes later there was another assault without the stick. The indictment should have alleged these assaults separately with a separate count addressed to each. General Statute 15A-924, applicable to this indictment,[16] provides: "A criminal pleading must contain . . . a separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count."

Under the theory upon which this case was tried, whether simple assault should have been submitted as an alternative verdict depends upon whether the stick was a deadly weapon per se, or as a matter of law. If it was, simple assault need not have been submitted. If it was not, the jury should have been given this additional alternative.

We hold that the stick was not, under this evidence, a deadly weapon as a matter of law. A deadly weapon is "any instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . . . The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of

Did defendant have at the time a specific intent to kill Grover Whitfield? Answer: No. 4th Issue: Did defendant thereby inflict on Whitfield serious injury? Answer: No."

While the jury was deliberating it returned to ask a question of the trial judge and the following colloquy occurred: "COURT: All right, sir, will you state your question? FOREMAN: As outlined in your four issues, we have arrived at the fourth issue and the question was as stated . . . did the defendant thereby inflict on Whitfield serious injury? Our question is: Are we to consider the entire fight, the second fight or are we to consider only the fight which occurred with the stick? COURT: Thank you, sir. You may be seated. Mr. Tolin and Mr. Waters, may I see you up here? (DISCUSSION AT THE BENCH.) COURT: Mr. Foreman and members of the jury, the issue was drawn in that fashion intentionally. The bill of indictment in this case alleges assault with a deadly weapon, to wit: a stick. You may, therefore, consider only on the question of whether serious injury was inflicted, whether the defendant inflicted serious injury with the use of a stick. An injury inflicted by any other means under the evidence you are not to consider. The burden, of course, is upon the State to prove by evidence beyond a reasonable doubt that the defendant inflicted serious injury by the use of a stick on Whitfield. You may retire and resume your deliberation."

14. *See* n. 13, *supra.*

15. The indictment does describe the injury inflicted by the second assault as it is revealed by the state's evidence. Whether the indictment as drawn could be construed as charging two separate assaults is a question not now before us. Obviously the trial judge did not so construe it. If he erred, the error was in defendant's favor.

16. *See* n. 7, *supra.*

the weapon itself." *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737 (1924). Where there is no conflict in the evidence regarding both the nature of the weapon and the manner of its use, the applicable principles in determining its deadly character are well stated in *Smith, id.*:

> "Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. . . . But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury." (Citation omitted.)[17]

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

In this case there is no evidentiary conflict regarding the nature of the weapon used nor in the manner of its use against Whitfield. Defendant's evidence was that he picked up the stick but did not use it at all. Nevertheless if the state's version of its use was accepted by the jury we believe reasonable persons could draw different conclusions regarding its deadly character. The question of its deadly character must therefore be, as in fact it was in this case, left to the jury's determination.

Had the jury not determined that the stick was a deadly weapon, defendant, because of the jury's determination of the other elements of aggravation in defendant's favor, could have been convicted only of simple assault. This option was not given to the jury. It was raised by the evidence. The case, therefore, falls within the principle that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to

17. Illustrative cases declaring the weapon to be deadly as a matter of law are *State v. Hobbs*, 216 N.C. 14, 3 S.E. 2d 431 (1939) (brick or rock hurled through windshield of truck) and *State v. Craton*, 28 N.C. 164 (1845) (heavy pine "stub" which defendant swung so as to fracture deceased's skull). Illustrative cases holding the deadly character of the weapon to be a jury question are *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956) (leather belt with metal buckle used to inflict severe bruises over body of a three-year-old child), and *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905) (heavy leather strap used to beat defendant's sick, frail wife).

the jury as possible alternate verdicts. *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). Failure to submit this option was not cured by the verdict finding that the stick was a deadly weapon. *See State v. Bell, supra*; *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). The reason is that it cannot be known whether the jury would have convicted defendant of the lesser offense if it had been permitted to do so.[18] *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Wrenn, supra*. Failure to submit simple assault as a possible verdict was therefore error prejudicial to defendant. It entitles him to a new trial.

The judgment of the Court of Appeals is reversed. For error committed the case is remanded with direction that it be further remanded to the Superior Court Division in order that defendant may receive a new trial.

Reversed and remanded.

Chief Justice SHARP dissenting.

I am in accord with the decision of the majority that the indictment in this case is sufficient to support the verdict of guilty of assault with a deadly weapon and the judgment based thereon. I dissent from the majority's decision that defendant is entitled to a new trial because the court failed to submit the issue of simple assault as a possible verdict.

It is correctly stated in the majority opinion that "there is no evidentiary conflict regarding the nature of the weapon used [stick] nor in the manner of its use." The stick, which accompanied the case on appeal to this Court as an exhibit, is described in the opinion and correctly denominated there as "a hard wooden club." As defined in Webster's Third New International Dictionary (1961) a club is "a heavy staff, esp. of wood usu. tapering . . . wielded with the hand as a striking weapon . . . ." The stick in this case fits this definition precisely.

In my view this stick, when used as a club by an able bodied man, is a deadly weapon per se, and all the evidence tends to

18. If the jury had answered the second issue submitted to it, "No," *see* n. 13, *supra*, it could not have returned a verdict which comported with the trial judge's instructions. This fact alone, rather than the evidence, might have unduly impelled it to answer the issue "Yes."

show that defendant used it as such. *See State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946). Defendant, according to his testimony, is 35 years old and employed by the State Highway Department. "The nature of his duties" are "the cutting of new highways, straightening up and different things."

At the beginning of the fight, after defendant and Whitfield had engaged in fisticuffs, Whitfield went into the filling station. Defendant followed and, inside, he picked up the stick. Whitfield described subsequent events as follows:

"When I went out he started swinging at me and tried to hit me over the head with it. He tried to hit me on the head but I threw up my arms and blocked it off. I had big knots on my arms. He hit me on the arm with the stick. I hit him in an effort to stop him from hitting me with the stick. I caught hold of the stick, trying to keep him from hitting me on the head, but I could not get it away from him. After he saw that he could not do much to me with a stick, the defendant left in an automobile."

A short time thereafter defendant returned to the filling station. This time Whitfield had the stick, and when defendant stuck his head in the service station door Whitfield hit him "in the side of the head with the stick." As a result of the wound thus inflicted defendant said that "seven stitches were performed at the Person County Memorial Hospital the same afternoon and [he] was in a lot of pain from the cut."

This stick, used offensively by either defendant or Whitfield was clearly a deadly weapon. That Whitfield was able to protect his head from the blows which defendant attempted to inflict upon him with the stick and that the blows upon his arms raised knots instead of breaking flesh and bones does not change the character of the weapon or the assault which defendant made upon him. Had defendant been attempting to shoot Whitfield with a gun and Whitfield had deflected the shot upward by grabbing his arm or the gun, defendant would have been nonetheless guilty of an assault with a deadly weapon. In *State v. Hobbs*, 216 N.C. 14, 3 S.E. 2d 431 (1939) this Court held that the trial court correctly charged the jury that "if the defendant intentionally threw a brick at the prosecuting witness and struck and broke the windshield of the truck he was driving, although he may not have stricken the witness, the defendant was guilty of an assault with

a deadly weapon. The Court further held that the trial judge's failure to submit to the jury the charge of a simple assault was not error "for the reason that there is no evidence of simple assault."

The serious injury which defendant inflicted upon Whitfield occurred, of course, when defendant stomped his face. The trial judge, however, being of the opinion that the indictment did not encompass that assault, instructed the jury to consider only the assault in which defendant used the stick.

I vote to affirm the judgment of the Superior Court.

STATE OF NORTH CAROLINA v. RONALD EARL SMALL

No. 36

(Filed 15 December 1977)

1. Criminal Law § 75.2— confession—no threats or promises by officers—admissibility

Evidence was sufficient to support the trial court's conclusion that an in-custody statement of defendant was made freely and voluntarily where defendant contended that officers told him he was lying and one officer offered to intercede with the judge in his behalf; the officers specifically denied any such conduct; the officers read defendant his rights and he waived them before any interrogation took place; one of the officers told defendant that he could not "buy" one of his statements and defendant was then told that he should tell the truth; and when defendant's family arrived at the police station shortly after interrogation began, interrogation ceased and defendant's family was permitted to visit privately with him for about thirty minutes.

2. Arrest and Bail § 3.1— warrantless arrest—probable cause—bloody defendant at scene of crime

Defendant's arrest was not illegal where a police officer observed a person on the morning of the murder wearing bloody clothing within 200 feet of the place where the beaten, bloody victim was later discovered; the officer made a tentative identification of defendant from a high school annual; he and other officers proceeded to defendant's home where he observed the same person he had seen earlier that morning; at approximately the same time he saw blood spotted clothing similar to that worn by this person when he saw him in the early hours of the day; officers asked defendant to accompany them to the police station and he agreed; and officers then handcuffed defendant.

3. Criminal Law § 75.8— Miranda warnings given—break in interrogation—repetition of warnings unnecessary

Failure of police officers to repeat *Miranda* warnings after a thirty minute break in the interrogation of defendant did not render defendant's confession inadmissible, since the subsequent interrogation took place thirty minutes later in the same room, was conducted by the same officers, and concerned the same subject matter as the original interrogation; and there was no evidence that defendant was emotionally or mentally unstable or that he was unaware of his constitutional rights during the latter interrogation.

4. Homicide § 20; Searches and Seizures § 1— clothing in plain view—clothing given to officers voluntarily—evidence properly admitted

The trial court did not err in denying defendant's motion to suppress evidence relating to clothing taken from his residence where the evidence tended to show that the clothing of defendant was voluntarily given to officers by members of defendant's family and that some of the clothes were in plain view of the officers and were properly taken without any search.

5. Jury § 6— voir dire examination of prospective jurors—failure to record—no prejudice shown

The trial judge should have permitted the recording of the voir dire examination of prospective jurors so that defendant would have been in a position to make pertinent portions of that examination a part of the record for possible appellate review; however, the record does not contain an exception to the trial judge's ruling on the motion to record the voir dire examination, nor has defendant shown any prejudice resulting from a prospective juror's unamplified statement that he knew defendant because of his involvement in another incident.

6. Criminal Law § 111.1— credibility and weight to be given confession—general instructions sufficient

Though the trial court, upon defendant's request, should have charged the jury that if it found that defendant did make a confession, then the jury should consider all of the circumstances under which it was made in determining whether the confession was truthful and the weight the jury would give to it, defendant was not prejudiced by such failure, since the court did instruct the jurors that they were the sole judges of the weight to be given any evidence; they were the sole judges of the credibility of all the witnesses; and they should depend on their own recollection of the evidence and the argument of counsel in reaching their verdict.

7. Criminal Law § 113.3— failure to give instruction—no request—no error

Failure of the trial judge to include testimony concerning the victim's blood type in his summary of the evidence did not constitute prejudicial error, since such testimony did not concern a substantive feature of the case, and defendant's counsel did not call the omission to the attention of the trial judge even when he inquired of defense counsel if there were other requested instructions.

8. **Homicide § 31.1— felony murder—separate punishment for felony improper**

In a prosecution for first degree murder and assault with intent to commit rape, sentence imposed in the assault with intent to commit rape case is arrested, since the State proceeded on the theory that the victim was killed by defendant during an assault upon her with intent to commit rape, and a defendant who is convicted upon the theory of the felony murder rule cannot be punished separately for the commission of the underlying felony.

APPEAL by defendant from *Walker, S.J.*, 10 January 1977 Criminal Session of LENOIR County Superior Court.

Defendant was charged in separate bills of indictment with the first degree murder of Alexandria Elizabeth Hill and assault with intent to commit rape upon Alexandria Elizabeth Hill. He entered pleas of not guilty to each charge and the cases were consolidated for trial.

Upon call of the case for trial, the trial judge conducted a single *voir dire* hearing upon defendant's pretrial motion to suppress defendant's in-custody statements and evidence concerning items of clothing taken from his residence. We summarize the evidence offered on the *voir dire* hearing.

Officer Johnny Sharpless testified that he saw defendant between the hours of 4:00 and 4:30 a.m. on 12 September 1976 at the driveway of Sampson School in Kinston, North Carolina. He observed blood on defendant's jacket, trousers, socks and tennis shoes, and in response to the officer's inquiries, defendant told him that he had been in a fight with Leroy King. The officer then told defendant to get off the streets.

The witness was recalled to the school area about 6:55 a.m. and upon arrival he found a person, later identified as Alexandria Hill, lying beside the basketball courts which were located about 200 feet from the place where he had earlier talked with defendant. Alexandria Hill was badly beaten and was bleeding from her head. He observed tennis shoe tracks around the area. After calling for an ambulance and assistance, Officers Joyner and Smith joined in the investigation. By looking through some high school annuals, the witness was able to tentatively identify defendant as the man he had talked with earlier in the morning. The officers then proceeded to defendant's home.

To the best of the witness's recollection, it was defendant's mother who led them to the room in which defendant was sleep-

ing. When he entered the room, the witness recognized defendant as the person he had seen earlier in the morning. He also observed a pair of socks with blood on them, and trousers spotted with blood and sand lying at the foot of defendant's bed. Defendant was awakened, and Lieutenant Joyner told defendant they wanted to talk with him at the police station. Defendant agreed to go, and, after the defendant had dressed, the witness handcuffed defendant.

Upon their arrival at the police station, defendant was taken to the detective's room where Lieutenant MacIntosh warned him of his rights and defendant signed a waiver of rights. The witness stated that he had not heard anyone threaten defendant, promise him anything, or in any way coerce defendant into making a statement.

Lieutenant R. E. Joyner testified that he went to defendant's home with Officers Sharpless and Smith. Defendant's mother admitted them into the house, and they asked if they could see her son. She said they could and led them to his bedroom. They did not have a search warrant or a warrant for defendant's arrest since they did not, at that time, intend to arrest defendant. He observed blood stained socks and trousers lying at the foot of defendant's bed. The officer asked defendant if he would go to the police station with them, and defendant agreed to go. Defendant's mother picked up the pants, a shirt and the socks and gave them to the officer. As he was leaving, Lieutenant Joyner observed that Sergeant Smith had a pair of tennis shoes and a jacket in his possession.

Defendant was taken to the detective's office in the police station where they waited for Lieutenant MacIntosh. There was no interrogation until Lieutenant MacIntosh arrived. Upon his arrival, Lieutenant MacIntosh obtained a "rights" form and read it to defendant. The witness stated that he heard defendant say that he did not want a lawyer and that he was willing to answer questions. Defendant then signed a written waiver of rights. At this point, defendant stated that he had been in a fight with a "dude" on Washington Street. Before any further statements were made, defendant's family arrived and they were permitted to privately talk with defendant for a period of about thirty minutes. The interrogation was then resumed, and defendant made an oral and written statement which was, in substance, the

same as his subsequent account of the assault when he testified on *voir dire*.

Lieutenant Joyner further testified that during the time that defendant was being questioned, he appeared to be in possession of his mental faculties; that neither he, nor anyone else in his presence, threatened defendant or held out any hope to induce him to make a statement. He specifically denied that he told defendant that he would intercede with the judge in his behalf if defendant would confess.

Sergeant Kenneth C. Smith and Lieutenant William MacIntosh gave testimony which was, in substance, the same as that of Officers Sharpless and Joyner. Sergeant Smith also specifically testified that Mrs. Small invited them into the house and, at his request, a member of the family gave him defendant's jacket and tennis shoes.

Dr. Page Hudson, an expert pathologist, testified that the proximate cause of Alexandria Hill's death was a brain injury inflicted by a blunt instrument.

Defendant's mother, Mildred Small, testified that her son was 19 years old and that on the morning of 12 September 1976, she was summoned to her front door by a ringing of the doorbell. She let the officers in, and two of them preceded her up the stairs and into defendant's room. After awakening defendant, they obtained some of his clothes, handcuffed him, and took him to the police station. Officer Sharpless, without permission, reached into the closet and obtained clothes belonging to defendant. She later talked to her son at the police station, and he told her that as he was crossing the schoolyard on the morning of 12 September, he saw Alexanderia Hill lying on the ground. He thought she was drunk and lifted her up thereby getting blood stains on his clothing. He left and then encountered Officer Sharpless and falsely told him that he had been in a fight.

Deborah Moore, defendant's sister, testified that she saw one of the officers pull clothes from a closet and from boxes located behind a curtain. She and defendant's father both testified that when they went to the police station, they heard "yelling" and accusations that defendant was lying coming from the room where defendant was being questioned.

Defendant testified that on the morning of 12 September 1976, he encountered Alexandria Hill and they walked to Sampson School. After smoking marijuana, they began to caress each other and, when he attempted to have sexual relations with her, she bit his finger and slapped him. He hit her in the face three or four times with his open hand and left. He returned in about 25 minutes and found her lying in a different place. She was bloody about the face. He left again and upon encountering Officer Sharpless, he falsely told the officer that he was bloody because he had been in a fight.

The next day police officers came to his home and took him to the police station. He was read his "rights" and he understood them. He thereupon understandingly signed a waiver of rights and made a statement to the officers. The statement that he then made was to the same effect as the one that he had related to his mother. Thereafter, when only the two of them were in the interrogation room, Lieutenant Joyner told defendant, " 'Now, we've got everything we need on you; you are just making things hard and if you go on and tell us what happened, I'll see what we can do for you.' Just like that and he said, 'I'll tell the judge that you cooperated with them,' and see what I can do for you." It was then that he made the oral and written statement hereinabove referred to. He stated that, except for the statements made by Lieutenant Joyner and several accusations that he was lying, no one made him any promise or threatened him.

At the conclusion of the *voir dire* hearing, the trial judge overruled defendant's motion to suppress. We will set out the pertinent findings of fact and conclusions of law in our consideration of defendant's assignments of error.

The jury returned to the courtroom, and the State and defendant offered evidence consistent with that heard on *voir dire*.

The jury returned verdicts of guilty of first degree murder and guilty of assault with intent to commit rape. Defendant appealed from judgments imposing sentence of life imprisonment on the murder charge and a concurrent sentence of five years on the charge of assault with intent to commit rape.

Rufus L. Edmisten, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Robert E. Whitley, for the defendant.

BRANCH, Justice.

Defendant's first assignment of error is that the trial judge erred in denying his motion to suppress defendant's in-custody statements because they were not understandingly and voluntarily made.

The unquestioned rule in this jurisdiction is that the ultimate test of the admissibility of a confession is whether the confession was, in fact, understandingly and voluntarily made. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511; *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1, *Cert. denied*, 386 U.S. 911. Thus, a confession is involuntary and not admissible into evidence when it is induced by threat, coercion, hope, or promise of reward. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492; *State v. Biggs*, 224 N.C. 23, 29 S.E. 2d 121; *State v. Roberts*, 12 N.C. 259. Whether the conduct of an officer amounts to such coercion or promise of reward as would render a subsequent confession involuntary is a question of law reviewable on appeal. *State v. Biggs*, supra.

[1] Defendant contends that his confession was induced by the coercive conduct of the police officers. He relies heavily on *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92, to support his contention. His reliance upon *Pruitt* is misplaced. In *Pruitt*, the *uncontradicted* evidence on the *voir dire* hearing showed that the police officers repeatedly told defendant they knew he committed the crime and that his story had too many holes in it; that he was lying and they did not want to "fool around;" that he was the kind of person who would be relieved to get it off his chest; and that it would be harder on him if he did not go ahead and cooperate.

In the present case, defendant offered evidence to the effect that the officers told him he was lying and that Officer Joyner offered to intercede with the judge in his behalf. The officers specifically denied any such conduct. Furthermore, the contention that defendant was questioned in an oppressively police-dominated atmosphere is tempered by the evidence showing that when defendant's family arrived at the police station interrogation ceased and his family was permitted to visit privately with him for about thirty minutes.

At the conclusion of the *voir dire* in this case, the trial judge, *inter alia*, found the following facts:

7. The defendant on September 12, 1976 was 18 years of age, had completed the 11th grade and was in control of his mental and physical faculties and did not appear to be under the influence of any drugs or intoxicants and that he did appear to be nervous; that during said interrogation and questioning no reward or inducement by any of the said law enforcement officers or hope of reward or inducement was made to the defendant to make any statement or confession;

8. That no threats or show of violence by any of said law enforcement officers were made to persuade or induce the defendant to make any statement of confession;

Based upon the above findings the trial judge concluded:

6. That the statement made by the defendant to said officers on September 12, 1976, and introduced on voir dire as State's Exhibits 2 and 3 were made voluntarily, knowingly and independently;

When the trial judge's findings are supported by competent evidence, they will not be disturbed on appeal even though the evidence is conflicting. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123; *State v. Bullock*, 268 N.C. 560, 151 S.E. 2d 9. Here there was ample evidence to support the trial judge's findings as to the voluntariness of defendant's confession and the findings in turn support his conclusion that the inculpatory statements were made voluntarily and knowingly. The uncontradicted facts that one of the officers told defendant that he could not "buy" one of his statements and that defendant was then told that he should tell the truth do not constitute a persuasive showing that defendant's will was overborne by these acts of the police officers. *See, State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300.

[2] Defendant further contends by this assignment of error that the confession evidence was inadmissible because defendant was illegally arrested.

An arrest without a warrant, except as authorized by statute, is illegal. *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753. Assuming *arguendo* that defendant was placed under arrest when he was handcuffed in his home, we are of the opinion that such an arrest would have been legal.

G.S. 15A-401(b)(2) in part provides:

> Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:
>
> a. Has committed a felony . . . .

In *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364, a police officer observed the defendant go to a place in the woods where stolen goods were concealed, look around and then leave. This Court held that the police officer had probable cause to believe that the defendant had committed a felony and consequently that both his arrest without a warrant and the ensuing search of his person were lawful. In so holding, Justice Sharp (now Chief Justice) speaking for the Court stated:

> Probable cause and "reasonable ground to believe" are substantially equivalent terms. "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant." 5 Am. Jur. 2d Arrests Section 44 (1962). "The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." (Citations omitted.) 279 N.C., at 311.

In the case *sub judice*, a police officer observed a person in the early morning hours of 12 September 1976 wearing bloody clothes within 200 feet of the place where the beaten, bloody victim was later discovered. The officer made a tentative identification of defendant from a high school annual. He and other officers proceeded to defendant's home where he observed the same person he had earlier seen that morning. At approximately the same time, he saw blood spotted clothing similar to those worn by this

person when he saw him in the early hours of the day. These circumstances were sufficient to warrant a reasonable belief that defendant was guilty of the felonious assault on Alexandria Hill. Therefore, defendant's arrest was not illegal.

We hold that defendant's in-custody statements were understandingly and voluntarily made subsequent to a lawful arrest.

By his second assignment of error, defendant avers that the trial judge erred in denying his motion to suppress all statements made by defendant to police officers because he was not properly advised of his constitutional rights.

[3] Defendant admits that, prior to his initial interrogation, he was fully warned as required by *Miranda v. Arizona*, 384 U.S. 436. It is also uncontroverted that he understandingly waived these rights both orally and in writing. His position is that the 25 to 30 minute break in his interrogation when he was permitted to talk with his family was such a time lapse as to require that he be readvised of his *Miranda* rights.

The factors to be considered in determining whether the initial warning became so stale and remote that a substantial possibility exists that a defendant was unaware of his constitutional rights in a subsequent interrogation when proper warnings had previously been given are stated in *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201, *modified as to death sentence*, 428 U.S. 904, as follows:

> . . . (1) the length of time between the giving of the first warnings and the subsequent interrogation . . . (2) whether the warnings and the subsequent interrogation were given in the same or different places . . . (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers . . . (4) the extent to which the subsequent statement differed from any previous statements . . . (5) the apparent intellectual and emotional state of the suspect. . . . (Citations Omitted.)

In the case before us, the subsequent interrogation took place within thirty minutes after the initial questioning was recessed. It was conducted in the same room by the same officers and concerned the same subject matter. There was no evidence that

defendant was emotionally or mentally unstable or that he was unaware of his constitutional rights during the latter interrogation. Therefore, the failure of the officers to repeat the *Miranda* warnings did not render defendant's confession inadmissible.

[4] Defendant next assigns as error the denial of his motion to suppress evidence relating to clothing taken from his residence. He argues that the clothing was taken from his home as a result of an illegal search and seizure.

Evidence obtained by an *unreasonable* search and seizure is inadmissible. See, U.S. Const. Amend. IV; N.C. Const. Art. 1, Section 20; *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376, *Cert. denied*, 393 U.S. 1087. However, it is now well settled that when evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated. *U.S. v. Pate*, 324 F. 2d 934, *Cert. denied*, 377 U.S. 937; *State v. Coolidge*, 106 N.H. 186, 208 A. 2d 322; *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65, *Cert. denied*, 404 U.S. 840; *Duffield v. Peyton*, 209 Va. 178, 162 S.E. 2d 915. Neither do the constitutional guarantees against unreasonable search and seizure prohibit a seizure of evidence without a warrant when no search is required and the seized article is in plain view. See, *U.S. v. Pate*, *supra*; *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28; *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495; *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25.

The court's findings relevant to this assignment of error are:

> 2. That Officer Joyner, Smith and Sharpless were let in the home by Mrs. Small and showed to the defendant's bedroom. There Officer Sharpless immediately recognized items of clothing that the defendant had been wearing when observed earlier that morning with blood on certain of these items;
>
> * * *
>
> 11. That the defendant's clothes observed by Officer Sharpless and the other officers in the defendant's bedroom were handed to the said officers by the defendant's mother; that the defendant's jacket and shoes in the pantry in the kitchen were given to the officers by the defendant's sister, Joanne Small . . . .

These findings of fact are supported by competent evidence and support Judge Walker's conclusion that "the clothes of the defendant were voluntarily given to the officers by the defendant's mother, Mildred Small, and by the defendant's sister, Joanne Small." We also note that according to all the evidence, a portion of the seized clothes were in plain view and were taken without any search. The trial judge correctly denied defendant's motion to suppress evidence relating to the clothing taken from his home.

[5] Defendant assigns as error the denial of his motion for a mistrial on the ground of prejudicial statements made by a prospective juror. The record discloses the following:

> . . . The court then stated for the record that upon the voir dire examination of the jury and after two jurors had been challenged for cause by the State and said challenge is granted by the court, the defendant moved that the voir dire examination of the jury be made a part of the record based on motions that could be made with regard to the change of venue of this trial of excessive publicity appeared. The court found that no motion had previously been filed by the defendant for change of venue and that showing of such adverse publicity in the trial as to show the prejudice to the defendant and therefore denied defendant's motion. [sic]
>
> The court stated further that during the course of the jury examination and selection by the State that a juror reported that he knew the defendant based on an incident that the defendant had been involved in. The court stated that there was no showing by this prospective juror of what the incident was or the outcome of such incident and thereafter the defendant moved for mistrial based on the statement of this juror, and the court finds that no prejudice had resulted to the defendant by virtue of the statement made by the prospective juror and that the prospective juror was excused and was not chosen as a juror and therefore the court denied the defendant's motion for mistrial.

Regulation of the manner and the extent of inquiry on the *voir dire* examination of prospective jurors is a matter largely in the discretion of the trial judge. In order for an appellant to show reversible error on appeal, he must show an abuse of discretion

on the part of the trial judge *and* resulting harmful prejudice. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763, *modified as to death sentence*, 428 U.S. 903. The allowance or refusal of a motion for mistrial is a matter resting in the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing of abuse of that discretion. *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838.

In our opinion, the trial judge should have permitted the recording of the *voir dire* examination of prospective jurors so that defendant would have been in position to make pertinent portions of that examination a part of the record for possible appellate review. However, the record does not contain an exception to the trial judge's ruling on this motion and, therefore, is not properly before us for review. Even so, we might have, in our discretion, considered this ruling had defendant made a showing of prejudice which was so substantial as to require a new trial. However, we are unable to perceive how the failure to record the *voir dire* examination of prospective jurors could have precluded a motion for change of venue. The record discloses only one statement by one juror indicating any previous knowledge of defendant or of the case. We are therefore unable to find any substantial prejudice to defendant in that juror's isolated and unamplified statement that he knew defendant because of his involvement in another incident. We hold that the trial judge did not abuse his discretion in denying defendant's motion for a mistrial.

[6] Defendant's assignment of error number 5 is as follows:

> The court erred in failing to find and to instruct the jury that the defendant's evidence raised the issue of coercion or duress as a defense to the confession.

Defendant concedes that the trial judge determines the *admissibility* of a confession. However, he argues that, upon request, the trial judge should have instructed the jurors to consider all circumstances surrounding the interrogation and arrest of defendant in determining what weight they would give to his confession.

It is true that, when a confession is admitted into evidence, it is for the jury to determine whether the statement was, in fact, made and to determine the weight, if any, to be given to the con-

fession. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648. However, in assisting the jury in its search for the truth, the trial judge has wide latitude in presenting issues. He must charge the applicable principles of law and apply the law to the facts of the case without expressing an opinion concerning the sufficiency of the evidence to prove any fact. 3 Strong's N.C. Index 2d, *Criminal Law*, Section 111.

When defendant requested this instruction, the trial judge should have charged the jury that if it found that defendant made the confession then the jury should consider all of the circumstances under which it was made in determining whether the confession was truthful and the weight the jury would give to it. The trial judge instructed the jurors that they were the sole judges of the weight to be given any evidence; that they were the sole judges of the credibility of all the witnesses; that the jurors should depend on their recollection of the evidence, and not his; and that they should consider all the evidence and the argument of counsel in reaching their verdict. In light of these instructions, it is apparent that the jury was clearly informed that it should consider any evidence before it including the arrest and interrogation of defendant in determining the weight and credibility, if any, it would attach to defendant's confession.

Under the circumstances of this case, we find no prejudicial error in the failure of the trial judge to pinpoint the above instruction to the confession evidence.

This assignment of error is overruled.

[7] Defendant contends that the trial judge erred by not stating in his summary of the evidence that Dr. Phillips testified that the victim's blood was type ABO group O+.

The trial judge must charge on all substantive features of the case and recapitulate, with reasonable accuracy, the evidence and the respective contentions of the parties. However, the general rule is that unless objections to recapitulation of the evidence or statements of contentions are brought to the court's attention in apt time to afford opportunity for correction, the objections are waived. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839. The omission to which defendant points by this assignment of error does not concern a substantive feature of the case, and defense counsel did not call this omission to the attention of the trial judge even

when he inquired of defense counsel if there were other requested instructions. Thus the failure of the trial judge to include this testimony in his summary of the evidence does not constitute prejudicial error.

We find no merit in defendant's contention that the trial judge expressed an opinion in violation of G.S. 1-180 when he charged the jury that the State relied on both circumstantial and direct evidence.

[8] Finally, we agree with defendant's position that sentence imposed in the assault with intent to commit rape case should be arrested. The State proceeded on the theory that Alexandria Hill was killed by defendant during an assault upon her with intent to commit rape. It is well established that a defendant who is convicted upon the theory of the felony murder rule cannot be separately punished for the commission of the underlying felony. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152; *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238, *modified as to death sentence*, 428 U.S. 903; *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214, *modified as to death sentence*, 428 U.S. 903; *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666.

We have carefully considered this entire record and find no error warranting a new trial.

In the murder case: No error.

In the assault with intent to commit rape case: Judgment arrested.

STATE OF NORTH CAROLINA v. KENNETH MATHIS

No. 35

(Filed 15 December 1977)

1. Criminal Law § 134.4— Youthful Offender statutes—mandatory death or life imprisonment crimes

The Youthful Offender statutes, former Article 3A of G.S. Ch. 148 and its successor, Article 3B, do not apply to persons convicted of crimes for which death or a life sentence is the mandatory punishment.

2. Rape § 7— life sentence substituted for death penalty

A sentence of death imposed upon a defendant convicted of first degree rape is vacated and a sentence of life imprisonment is substituted therefor pursuant to the provisions of Ch. 1201, § 7, of the Session Laws of 1973.

3. Constitutional Law § 48— failure of original counsel to perfect appeal—absence of prejudice

Defendant was not prejudiced by failure of his original court-appointed counsel to perfect his appeal to the Supreme Court within the time allowed therefor where the Court allowed defendant's petition for certiorari filed by his present court-appointed counsel and fully reviewed the case in the same manner and to the same extent as if there had been no failure by the original counsel to perfect the appeal.

4. Criminal Law § 91.6— motion for continuance to obtain additional psychiatric examination

The trial court in a rape case did not abuse its discretion in the denial of defendant's motion for a continuance, made when the case was called for trial, so that a second psychiatric examination of defendant could be arranged where there was no indication of any basis for a belief that further psychiatric examination would produce results favorable to defendant.

5. Constitutional Law § 48— effective assistance of counsel—failure to demand voir dire on in-court identification

Failure of defense counsel in a rape case to demand a voir dire examination of the victim prior to her in-court identification of defendant did not constitute ineffective assistance of counsel so as to warrant the granting of a new trial to defendant where the record indicates no basis for the belief that a voir dire examination would have tainted the in-court identification; all the evidence shows that the victim was seized on a brightly lighted street and was dragged a short distance into a wooded area which was rather well lighted, there was a full moon, she was in a face to face encounter with her assailant for some 45 minutes, and defendant was found alone at the crime scene some 15 minutes later sitting or lying on the victim's clothing; and nothing in the record suggests that defendant ever told his trial counsel or anyone else that he was not the assailant.

6. Constitutional Law § 48— effective assistance of counsel—reasonable possibility of different result

A new trial will not be granted because of the alleged ineffectiveness of court-appointed trial counsel where nothing in the record, brief or oral argument indicated a reasonable possibility that any different, and legitimate, tactic or procedure by such trial counsel would have produced in the trial of this case a verdict more favorable to the defendant.

7. Criminal Law § 5— plea of not guilty—evidence of insanity

Evidence of defendant's insanity, if otherwise competent, would have been admissible under defendant's plea of not guilty entered after the court rejected defendant's plea of "not guilty by reason of mental irresponsibility and insanity."

State v. Mathis

APPEAL by defendant from *Kirby, J.*, at the 31 May 1976 Regular Criminal Session of BURKE.

Upon an indictment, proper in form, the defendant was tried for and found guilty of rape in the first degree. He was sentenced to death in conformity with G.S. 14-21, sentence being imposed prior to 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 evidence for the State consisted of the testimony of the victim, her personal physician, who examined her in the emergency room of the hospital in Morganton shortly after the alleged offense, and a detective of the Morganton Police Department. The defendant did not testify and offered no evidence except certain photographs of the scene of the alleged offense, which were placed in evidence by his counsel during cross-examination of the prosecuting witness. The evidence for the State was to the following effect:

The prosecuting witness was 21 years of age, married and the mother of one child. She and her husband resided in Morganton and were both students in school. They did not own an automobile and, in their joint effort to save money, they walked, when possible, to their various destinations.

She was employed at McDonald's Restaurant in Morganton, two or three miles from her home, and got off work at about 9:30 p.m. on 14 February 1976. She began to walk home, there being a full moon and ample street lights along her route. After she had been walking 15 or 20 minutes, she was passing a small wooded area. The defendant, not previously known to her but positively identified by her in court, jumped out from behind some bushes, seized her from behind, placed his hand over her mouth and dragged her down a slight incline into the woods, telling her, "If you scream or try to get away I will kill you." He struck her three times in the face, damaging her eye so that it was swollen shut upon her arrival at the hospital, loosening the cartilage in her nose, and knocking a number of her teeth loose. Although she is only five feet, two inches, tall and weighs only 110 pounds, she tried to fight the defendant off by striking him with her pocketbook which he wrenched away from her and threw down.

She continued to resist but he forced her to the ground, ripped off most of her clothing and, after physically forcing her to commit an unnatural sex act, had intercourse with her twice, interspersing these offenses with another unnatural sexual act, which he compelled her to commit by physical force, and then forced into her private parts a beer bottle which he had found at the scene. The defendant had a slight odor of alcohol about him but did not appear to the prosecuting witness to be drunk.

These acts were spread over a period of approximately 45 minutes. The defendant then appeared to fall asleep and his victim slipped away from him very meagerly clad, the defendant sitting or lying upon the remainder of her clothing which he had removed from her. She ran to a nearby house, the residents of which called the police who arrived promptly. She told the detective in charge what had happened and described the location of the offense. He, being familiar with the area, dispatched other officers thereto and he and the prosecuting witness soon followed them. Upon their arrival at the scene of the offense, the officers found the defendant still there, sitting or lying upon articles of the clothing he had stripped from the prosecuting witness.

Almost immediately, the prosecuting witness and her police officer escort arrived at the scene and she, without any prompting by the officers, told them the defendant was the man who had attacked her, she exhibiting substantial fright and distress at the sight of him. The prosecuting witness was then taken to the hospital and examined by her personal physician who testified as to her injuries and as to the results of his examination, these corroborating her testimony. Not more than 15 minutes elapsed between her flight from the scene of the attack and her return thereto in company of her police escort.

Other than the attack upon the imposition of the sentence to death, the defendant's principal contention on appeal is that his court-appointed counsel did not give him adequate representation. With reference to this contention, the record shows:

The offense was committed 14 February 1976. Counsel was duly appointed 17 February. Immediately upon his appointment, counsel conferred with the defendant and again conferred with him in the jail, in the presence of the defendant's aunt on 23 February. A preliminary hearing was held on 25 February and

probable cause was found. Counsel attended this hearing and cross-examined the prosecuting witness, no other witness being called.

On 8 March, counsel filed with the Superior Court a detailed motion that the defendant be transferred to Dorothea Dix Hospital in Raleigh for psychiatric observation and examination to determine his mental capacity to plead to the then anticipated bill of indictment and to assist his counsel in preparing his defense. This motion was granted and the defendant was so examined at Dorothea Dix Hospital. The record does not set forth the full report of the examining psychiatrist, Dr. Groce, but shows that the report was filed with the court with copies to the District Attorney and to counsel for the defendant. The record further shows that this report, which was not introduced in evidence before the jury, stated that, in the opinion of the examining psychiatrist, the defendant was competent to stand trial, that he understood the nature of the charge against him and the possible penalties in the event of conviction, that he could work with his attorney to prepare his defense and that while he had advised the examining psychiatrist that he was drinking at the time in question, which may have decreased his inhibitions and judgment, "It is doubtful that this was severe enough to render him unable to know the difference in right and wrong or the nature and consequences of his behavior." It further stated: "Psychiatric diagnosis: without psychosis, not insane; habitual excessive drinking." The record further shows that Dr. Groce, the examining psychiatrist, was present in court during the trial but was not called as a witness.

During the approximately nine weeks between the return of the defendant from the hospital and the trial, defendant's counsel conferred on several occasions with the District Attorney in an unsuccessful effort to persuade the State to accept a plea of guilty to rape in the second degree and also endeavored unsuccessfully to obtain from the Military Personnel Record Center in St. Louis, Missouri, specific information concerning the circumstances under which the defendant was discharged from the Army in July, 1974, that discharge being a "general discharge under honorable conditions." As counsel's negotiations with the District Attorney for such plea bargaining proceeded, counsel ascertained that the defendant had become "more set on his pleading not

guilty." Counsel advised the defendant of counsel's opinion as to the evidence which would be presented against him at the trial but did not endeavor to persuade him to agree to a plea of guilty of the lesser offense.

On the day that the case was called for trial, counsel appeared and moved for a continuance in order that he might endeavor to arrange a further psychiatric examination of the defendant by a privately employed psychiatrist. This motion was denied for lack of timeliness.

The defendant thereupon entered a plea of "not guilty by reason of mental irresponsibility and insanity." To this, in the absence of the jury, the State objected for the reason that the defendant had given no prior notice of his intent so to plead and the State was taken by surprise. After examining the above mentioned report of Dr. Groce, the court inquired of defendant's counsel as to whether he had any evidence with reference to insanity of the defendant other than the statement and report of Dr. Groce. Upon being advised by counsel that he had no other evidence of insanity, the trial court made findings of fact with reference to the examination of the defendant by Dr. Groce at Dorothea Dix Hospital and the resulting report to the court by Dr. Groce, as above set forth. The court refused to accept the plea of the defendant as tendered and, thereupon, the defendant entered a plea of "Not guilty" and the trial proceeded.

Counsel for the defendant cross-examined each witness for the State, his cross-examination of the prosecuting witness being in substantial detail, the narration thereof in the record being actually longer than the narration of her direct testimony. He examined the investigating detective, the State's only police officer witness, in detail as to the lighting in the area wherein the State contends the offense was committed for the obvious purpose of discrediting the identification of the defendant by the prosecuting witness. The testimony of this officer indicated, among other things, that defendant's counsel had, prior to trial, examined the exhibits offered in evidence by the State, consisting of the clothing and other articles found at the scene where the offense is alleged to have been committed.

At the conclusion of the State's evidence, counsel for the defendant moved for a dismissal of the charge of rape in the first degree, which motion was denied.

Counsel for the defendant requested the court to instruct the jury with reference to intoxication at the time of the alleged offense. This request was denied. As above noted, there was no evidence of intoxication except the testimony of the prosecuting witness that she detected a slight odor of alcohol but the defendant did not appear to her to be drunk.

Upon the return of the verdict of guilty of first degree rape, counsel requested that the jury be polled, which was done. Counsel then moved in arrest of judgment, which motion was denied.

Judgment sentencing the defendant to death was then entered and counsel gave notice of appeal therefrom to the Supreme Court. The defendant was allowed 60 days in which to prepare and serve his case on appeal. The trial court thereupon appointed trial counsel to represent the defendant on his appeal. Subsequently, counsel moved for and obtained an extension of time for the service of the case on appeal due to the delay of the court reporter in supplying him with a transcript of the trial. Counsel also applied for and obtained a stay of execution pending his then contemplated appeal.

Counsel then failed to perfect the defendant's appeal to the Supreme Court and the State moved to dismiss the appeal on 29 March 1977. Thereupon, the Superior Court, instead of dismissing the appeal, removed counsel and appointed Mr. Redmond Dill, defendant's present counsel, to "perfect the appeal if that is possible, or if not to seek a writ of certiorari from the North Carolina Court of Appeals or the Supreme Court, as the case may be." The time for perfecting the appeal having expired, Mr. Dill properly petitioned the Supreme Court for the issuance of a writ of certiorari to bring the case before it for review. This petition was granted and the appeal was duly heard at the Fall Term 1977 upon briefs and oral argument. In such brief and oral argument, the defendant's present court-appointed counsel did not suggest the existence of any evidence of insanity of the defendant, any other evidence favorable to the defendant or any procedure or tactic in his behalf not taken at the trial which could be taken if a new trial were granted or any other reason to believe that such new trial might lead to a different verdict.

The statement of the case on appeal, prepared by the defendant's present court-appointed counsel, sets forth nine assignments of error, but in the brief filed by the defendant's present court-appointed counsel, the first six of these assignments are expressly abandoned. The three remaining assignments are: (1) Failure of the trial judge to sentence the defendant according to the terms of G.S. 148-49.1 and G.S. 148-49.4; (2) the imposition of the death penalty; and (3) denial of the defendant's constitutional right to effective counsel for the reason that his court-appointed trial counsel did not effectively represent him.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffit, Associate Attorney, for the State.

G. Redmond Dill, Jr., for Defendant.

LAKE, Justice.

[1] Neither Article 3A of Chapter 148 of the General Statutes, which is relied upon by the defendant upon this appeal, now repealed but in effect at the time the defendant was sentenced, nor its successor, Article 3B, in effect since 1 October 1977, has any application to the present case, and there is no merit in the defendant's contention that the trial judge should have followed the procedure set forth therein when he sentenced this defendant. *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977). Speaking through the Chief Justice, we there said, "We hold that neither Article 3A (repealed) nor 3B of N.C. Gen. Stats. Ch. 148 was intended to apply to convictions or pleas of guilty of crimes for which death or a life sentence is the mandatory punishment."

Furthermore, the record does not show that at the time of his conviction, this defendant was less than 21 years of age. His exact age does not appear in the record but the record does show that in July, 1974, nearly two years prior to his conviction, he was discharged from the Army after an undisclosed period of service therein. At the time of the offense of which he has been convicted, this defendant was no inexperienced, adventurous adolescent. Upon overwhelming, uncontradicted evidence, he has been found guilty of an exceptionally vicious, bestial rape with no extenuating or mitigating circumstance.

[2] At the time of the offense of which the defendant has been convicted, Chapter 1201 of the Session Laws of 1973 was in effect.

This statute rewrote G.S. 14-21 to divide the crime of rape into two degrees. It provided that for first degree rape "the punishment shall be death," but further provided, "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment." After the defendant was sentenced to death in accordance with this statute, and pending his appeal to this Court, the Supreme Court of the United States, in *Woodson v. North Carolina*, supra, held the corresponding provisions of G.S. 14-17, imposing the death penalty for murder in the first degree, violate the Constitution of the United States and, so, may not be given effect by the courts of North Carolina.

In *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976), we said, "[S]ince the provisions of G.S. 14-21, imposing the death penalty for the offense of first degree rape, cannot be distinguished, in this respect, from the provisions of G.S. 14-17, we must hold that there is merit in the defendant's attack upon the death sentence imposed upon him." Thus, under the compulsion of the decision of the Supreme Court of the United States in *Woodson v. North Carolina*, supra, we must now vacate the death sentence imposed upon this defendant and, pursuant to Chapter 1201, § 7, of the Session Laws of 1973, substitute therefor a sentence to life imprisonment.

[3] The defendant's third contention that he should be granted a new trial because of the ineffectiveness of his representation by his court-appointed trial counsel is completely lacking in merit. It is true that his trial counsel, though appointed by the trial court to represent him upon his appeal to this Court, failed to perfect his appeal within the time allowed therefor. However, when this failure of counsel was brought to the attention of this Court by the defendant's petition for certiorari, filed on his behalf by his present court-appointed counsel, we allowed the petition and brought the case before us for full review, which has now been had in the same manner and to the same extent as if there had been no failure by the original counsel to perfect the appeal. Thus, this failure of counsel has in no way prejudiced the defendant and is not basis for the granting of a new trial. We turn, therefore, to consideration of the adequacy of the defendant's representation in the trial court.

Article I, § 23, of the Constitution of North Carolina expressly provides, "In all criminal prosecutions, every person charged with crime has the right * * * to have counsel for defense * * *." Article I, § 19, of the Constitution of North Carolina provides, "No person shall be taken, imprisoned * * * or in any manner deprived of his life, liberty, or property, but by the law of the land." Amendment VI to the Constitution of the United States, now made applicable to the States by construction placed upon Amendment XIV by the Supreme Court of the United States in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), and *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), provides, "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense." As stated by Justice Branch, speaking for this Court in *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867 (1974). "This right is not intended to be an empty formality but is intended to guarantee effective assistance of counsel."

What constitutes effective counsel? Obviously, the mere fact that the defendant was convicted does not show that his counsel was either incompetent, neglectful or ineffective. As we said in *State v. Sneed, supra*, neither the State nor the Federal Constitution guarantees the defendant in a criminal case "the best available counsel, errorless counsel or satisfactory results for the accused." Again, as we there said, "Incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." Even the most skilled counsel for the defense cannot "make bricks without straw" and his duty to his client does not require him to use dishonorable means, subterfuge or false testimony in order to confuse and mislead the court or the jury and thus procure a verdict favorable to the defendant.

Nothing in the record indicates in the slightest degree any divided loyalty on the part of defendant's court-appointed trial counsel, or any lack of diligence or skill in investigating, analyzing or evaluating the strength or weakness of the State's case, in searching for possible rebuttal evidence or in planning and presenting the defendant's case to the jury. According to the evidence, 15 minutes after the completion of the crime, the de-

fendant was found by police officers at the scene, sitting or lying, in a disheveled condition, upon the clothing of the victim abandoned by her when she fled from the scene. The defense of alibi was obviously unavailable. The victim's obvious physical condition negated the defense of consent. Her testimony, corroborated by the results of a virtually immediate medical examination, establishes beyond any reasonable doubt that the offense of rape was committed. In this situation, trial counsel sought and obtained expert psychiatric examination of the defendant, which failed to produce any evidence of insanity. Counsel then turned his efforts in the direction of obtaining a more favorable sentence by plea bargaining, which was unsuccessful, to which lack of success the defendant's insistence upon a plea of not guilty appears to have contributed.

[4] When the case was called for trial, counsel moved for a continuance in the obviously vain hope that another psychiatric examination might be more favorable in result. This motion was directed to the discretion of the trial court. Strong, N.C. Index 3d, Criminal Law, §§ 91.1, 91.6. In the court's denial of this motion, we find no indication of abuse of discretion. *See: State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970), in which the facts with reference to the motion for continuance are quite similar to those in the present case except that in that case there was some indication that a further psychiatric examination might be productive of evidence favorable to the defendant. Be that as it may, counsel made an effort to obtain a continuance. The record indicates that the denial of his motion was based in part upon counsel's failure to make it more promptly, but the record shows the real reason for the court's ruling was the absence of any indication of a basis for the belief that further psychiatric examination would be productive of results favorable to the defendant. Obviously, counsel was under no duty to make a misrepresentation to the court concerning that prospect.

[5] Counsel's examination of witnesses for the State, as shown in the record, appears to have been amply extensive and there is nothing in the record to indicate that it was not skillfully conducted. The record does not disclose any objection by counsel to evidence offered by the State, but neither does it disclose any question by the District Attorney which was objectionable. The record indicates no impermissible pre-trial identification pro-

cedures. While the defendant's counsel did not request a voir dire examination of the prosecuting witness before she was permitted to identify the defendant in court as her assailant, the record indicates no basis for the belief that such an examination would have tainted her in-court identification. All of the evidence is that she was seized on a brightly lighted street, was dragged a short distance into a wooded area which was rather well lighted, there was a full moon, which would have been almost directly overhead at the time of the attack, and she was in a face to face encounter with her assailant for approximately 45 minutes. Fifteen minutes later, he was found alone at the scene of the crime, sitting or lying upon her clothing. Nothing in the record, or in the brief or oral argument of defendant's present counsel, suggests that the defendant ever told his trial counsel, or anyone else, that he was not the assailant. Under these circumstances, the failure of counsel to demand a voir dire examination of the prosecuting witness, prior to her in-court identification, cannot be deemed such evidence of ineffective assistance of counsel as to warrant the granting of a new trial.

The defendant's trial counsel made an oral argument to the jury. Nothing in the record, or in the brief or oral argument of the defendant's present counsel, indicates the slightest inadequacy of this argument. At the conclusion of the trial, the learned trial judge, who had full opportunity to observe and determine the quality of the representation received by the defendant at the trial, appointed the trial counsel to represent the defendant on the appeal.

On 11 May 1977, the defendant's present, able counsel was appointed for purposes of the appeal. More than two months later, he served upon the District Attorney the statement of the case on appeal. Six months later he argued the appeal in this Court. It is worthy of note that his intervening study of the transcript of the trial did not disclose to him any question directed to any witness by the District Attorney which should have been made the subject of an objection. In his oral argument in this Court, he frankly stated that, notwithstanding his own opportunity to review the report of Dr. Groce concerning the defendant's mental condition some three weeks after the offense, and notwithstanding his own opportunities in the meantime to confer with the defendant, he was unable to state in what respect

his tactics at a new trial would differ from those pursued at the original trial by the defendant's then court-appointed counsel.

We conclude that the defendant has failed to show that at his trial in the Superior Court he was prejudiced in any way by the representation given him by his then court-appointed counsel.

Pursuant to the custom of this Court in cases wherein the defendant has received a sentence to death or life imprisonment, we have carefully examined the entire record on appeal and have not limited our review to those assignments of error brought forward in the appellant's brief. We find in the record no error which would justify the granting of a new trial to this defendant. To warrant a new trial, there should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and that a different result could well have ensued had the error not been committed. Strong, N.C. Index 3d, Criminal Law, § 167; *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Bryant*, 236 N.C. 745, 73 S.E. 2d 791 (1953); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951). As this Court, speaking through Justice Barnhill, later Chief Justice, said in *State v. Bryant*, supra, "*On this record* he could have no reasonable hope of acquittal in a future trial, for such a verdict would manifest a clear miscarriage of justice." In *State v. Turner*, supra, we said: "The seriousness of the offense charged and the severity of the potential penalty therefor do not constitute or affect the test to be applied in determining whether an error is prejudicial or nonprejudicial. The test is not the possibility of a different result upon another trial. The test is whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

[6] We think a like test is appropriate in determining whether a new trial should be granted because of alleged ineffectiveness of court-appointed trial counsel. We find nothing in this record, or in the brief or oral argument of the defendant's present counsel, to indicate that any different, and legitimate, tactic or procedure by the defendant's trial counsel would have produced in this case a verdict more favorable to the defendant.

[7] When the defendant was called upon to plead to the indictment, he responded, "Not guilty by reason of mental irrespon-

sibility and insanity." Upon objection by the District Attorney, upon the ground that he was taken by surprise, he having had no prior notice of the defendant's intent to rely upon insanity as a defense, the court rejected the proposed plea and the defendant thereupon entered a simple plea of "Not guilty." In *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888), speaking through Chief Justice Smith, this Court said:

> "When called on to plead to the indictment, the prisoner answered, and proposed it should be so entered: 'I admit the killing, but was insane at the time of the commission thereof; therefore, not guilty.' The preliminary portion of the answer was rejected, and the plea entered in the usual form, divested of the irrelevant and impertinent surplusage; and this was entirely proper. The inquiry put to him required a direct and positive response, and this is contained in the plea, not guilty, under which every defense to the charge, in repelling, or mitigating and reducing the offense to a lower degree, was admissible."

Thus, under the plea as entered, evidence of the defendant's insanity, if otherwise competent, would have been admissible. We do not reach the point upon the present appeal as to whether, by virtue of lack of notice to the State of intent to rely upon insanity as a defense, the defendant could be properly precluded from offering evidence of insanity. In the present case, no evidence of insanity was offered by the defendant. Nothing whatsoever in the record indicates that the defendant was insane at the time the offense was committed and nothing in the record indicates that such failure to offer such evidence was due to any inability or ineffectiveness of his court-appointed counsel.

Notwithstanding the defendant's express abandonment of his Assignments of Error No. 1 through No. 6 in the brief prepared by his present counsel, we have carefully considered each of those assignments. We concur in the judgment of his present counsel that there is no merit in any of them.

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

ment, the Clerk of the Superior Court issue a commitment in substitution for the commitment heretofore issued. It is further ordered that the Clerk furnish to the defendant and to his attorney a copy of the judgment and commitment as revised pursuant to this opinion.

No error in the verdict.

Death sentence vacated.

Remanded for proper sentence.

STATE OF NORTH CAROLINA v. DAVID BERNARD FOSTER

No. 38

(Filed 15 December 1977)

1. **Criminal Law § 124.5— two defendants—verdicts of guilty and not guilty—no requirement of consistency**

The trial court did not err in refusing to direct a verdict of not guilty as to defendant Foster after the jury had acquitted another defendant, even though the State's case against both defendants depended upon the testimony of an accomplice who implicated them both in the attempted robbery, since the jury could believe the accomplice's testimony with respect to one defendant's participation in the crime, and disbelieve the accomplice's testimony with respect to the other defendant's complicity.

2. **Criminal Law § 73.2— statement made in defendant's presence—no hearsay**

In a prosecution for first degree murder committed during an attempted armed robbery at which defendant was present, the judge did not err in allowing one participant to testify that another, in his presence and defendant's, suggested the robbery, such testimony being competent to show defendant's knowledge that his companions planned to rob a supermarket when the group entered it; moreover, the witness thereafter gave substantially identical testimony without objection.

3. **Homicide § 20— murderer's scars—showing to jury proper**

In a prosecution for first degree murder committed during an attempted armed robbery, the trial court did not err in permitting the jury to view the scars from the wounds which, an accomplice testified, the victim had inflicted upon him with a butcher knife at the time he shot the victim, since the scars were illustrative of relevant and material testimony.

4. **Criminal Law § 89.10— prior criminal conduct—cross-examination—reference to arrest record**

The trial court did not err in allowing the district attorney to question two witnesses concerning their criminal convictions and specific acts of misconduct while the district attorney was referring to arrest records.

5. **Criminal Law § 134.4— death or life imprisonment mandatory—youthful offender statutes inapplicable**

Since neither N.C. Gen. Stats. Ch. 148, Art. 3A, §§ 148-49.1 through 148-49.9 (repealed) nor N.C. Gen. Stats., Ch. 148, Art. 3B, §§ 148-49.10 through 148-49.16 providing for Programs for Youthful Offenders was intended to apply to a youthful offender who commits a crime for which death or a life sentence is the mandatory punishment, the trial court in a felony murder prosecution properly imposed upon defendant the mandatory sentence of life imprisonment.

6. **Homicide § 25.1— felony murder—term improper in issue**

Use of the term "felony murder" in an issue submitted to the jury is ill-advised, and the Supreme Court expressly disapproves its usage.

7. **Homicide § 31— guilty of felony murder—verdict interpreted as guilty of first degree murder**

Where the evidence, which the jury found to be true, established defendant's guilt of murder in the first degree, and the trial court properly instructed the jury that "any killing of a human being by a person committing or attempting to commit armed robbery is first degree murder without anything further being shown," ambiguity in the verdict of "guilty of felony murder" is interpreted as a verdict of guilty of murder in the first degree.

APPEAL by defendant under G.S. 7A-27(a) from *Friday, J.*, at the January 1977 Session of the Superior Court of MECKLENBURG.

Upon a bill of indictment drawn under G.S. 15-144, defendant was tried and convicted of the first-degree murder of James A. Small. Defendant Foster's trial was consolidated with that of Annette Lindsay Boulware, who had been indicted for the same offense. The State's evidence tended to establish the following facts:

James A. Small, aged 43, owned and operated Jimmy's Market, a grocery located on Old Statesville Road (Highway No. 21) in Mecklenburg County. Between 8:30 and 9:00 p.m. on 17 August 1976 James Luckey, a customer, was approaching the entrance of Jimmy's Market. There he was stopped by a young black man with a gun who said, "It's a robbery." When Luckey "froze" the man with the gun entered the store. About five minutes later Luckey heard three or four shots. Then three black

men ran from the store. They entered a dark, four-door Chevrolet parked beside the building. A fourth black person, at the wheel of this car, immediately drove it away. Luckey was unable to identify any of the men who fled the store.

Inside the store, Rommie Ross, an employee tending the cash register at the front of the store, had seen the three black males enter and go down different aisles to the rear. Ross continued checking out customers until he heard two shots fired at the rear of the store. One of the men then appeared at his cash register with a .38 caliber pistol and ordered Ross to put up his hands. Almost immediately Ross heard two more shots at the back and saw a black male run out the front door. Another, bleeding badly, followed as the one covering Ross backed out of the store. Mr. Small called from the rear of the store that he had been shot. Ross found him standing by the butcher block; his shirt was bloody and he looked as if he had "a couple of puncture wounds." Of the three men who entered the store, Ross was able to identify only the State's witness, Kenneth Martin, the man who had left the store bleeding.

Loretta Mitchell, a customer in the store at the time Small was shot, identified Kenneth Martin as the black male she saw behind the meat counter holding a gun on Small. Upon observing Martin she moved to the front of the store where she saw another black male with a gun. He was not defendant Foster. At that time she heard about five shots come from the meat counter at the rear of the store. The man at the front then pointed the gun at her and she backed into another aisle.

A commotion at the entrance to Jimmy's Market had attracted the attention of Mr. Eddie Burleson, who was sitting in his parked automobile. He saw a black man holding a gun leave the store and walk briskly to a dark, four-door Chevrolet in which two people were sitting. The man with the gun was joined by another person who emerged from the shadows and both jumped into the car, which sped away. Burleson followed the fleeing vehicle until it pulled off the road into an abandoned filling station. Before passing he saw two people leave the vehicle. He "avoided pulling into where they were," and he was unable to ascertain the license number of the automobile or to identify any of its occupants.

Kenneth Martin, heretofore identified as the black male who left the store bleeding profusely, was the primary witness for the State. His testimony, summarized below, tended to show:

On the evening of 17 August 1976 Martin, aged 16, defendant Foster, 17, and Boulware, 23, were attending "a little get-together" at the home of Joyce Pettus. About 8:30 the three left the Pettus house to go to a store two blocks away to buy some beer. Outside they were joined by Ernest Williams, aged 22, also known as "New York." The four got into the automobile which Boulware had driven to the party but which belonged to her mother. In the car Williams and Boulware began reminiscing about an armed robbery effected together. Williams suggested to the group that Jimmy's Supermarket was a store they could "rob for some money." Martin testified that Williams was carrying a .32 or .38 pistol; that defendant had a blue steel .22 pistol; and that he was armed with the .32 pistol which he "usually carried" with him albeit he was on parole for breaking and entering. They "decided to go to Jimmy's" and Boulware drove them to Small's Supermarket.

At the store Boulware parked the car at the side facing the street, and the three men went inside where they met in the restroom. There they agreed that Martin was to remain at the back and watch the butcher; Williams was to be at the door; and Foster, at the cash register. Pursuant to plan, Martin approached Small and, with gun in hand, directed him to enter the restroom. Small, after starting in that direction, suddenly attacked Martin with a butcher knife. In the ensuing scuffle Martin shot Small three times, once in his midsection and twice in the chest area. Martin, however, received stab wounds in his back and severe cuts on his arms and legs. While they were wrestling on the floor Martin felt Small go limp and he "took off running toward the front of the store." In front of him Martin saw Williams at the door with a gun in his hand. At the door Martin looked around and Foster was behind him also holding a gun. The three jumped into the back seat of Boulware's car and she drove off down the highway. Martin announced that he was bleeding badly and Boulware said, "We've got to get out of the car." Williams requested her to pull over and let him out. Martin said that he was not going to get out and instead requested that he be carried to the hospital. When the car stopped, however, defendant Foster

pushed Martin out into a trench. Foster and Williams then jumped from the car and ran in opposite directions. Boulware then drove away.

With some aid from a passing bicyclist Martin managed to reach his home where his sister summoned aid. The ambulance and police cars arrived simultaneously.

On 21 August 1976, after he had been fully advised of all his rights and had signed a written waiver of counsel, Martin made an oral statement to the police which he himself thereafter put in writing. Introduced into evidence as State's Exhibit No. 12 the written statement corroborated Martin's testimony at the trial in all material aspects. Additional adminicular evidence, not necessary to detail here, substantiated Martin's testimony.

On cross-examination Martin testified that in exchange for his testimony in this case the district attorney had agreed that Martin would be charged with second-degree murder instead of first-degree murder. Martin admitted that before he left the hospital he had written Foster that he himself would "take the rap" and "cut Foster loose." By that he meant Foster did not kill the man and that he wanted Foster to get out of jail and shoot "New York," whom he has not seen since that night. Martin also stated that he was still angry with Foster for pushing him out of the car and running into the woods; that he could never forget the treatment he received from his confederates and that their conduct was "partially" the reason he was testifying for the State against defendant and Boulware. He further admitted that in jail he also had told Boulware he was going "to cut her loose" but he had said it only to end their conversation.

Martin further testified, "Boulware was driving the car. She knew we were going to go into Jimmy's. She knew we were going to rob them. We all knew it. We sat out in the car and discussed it before we took off and while we were driving to the store. Ernest Williams suggested robbing the place." Martin "never saw Ernest Williams put a gun at Boulware's head" to force her to drive the car away from Jimmy's Supermarket. "The car was already running."

Expert medical testimony tended to show that Small was brought to the Charlotte Memorial Hospital on the evening of 17 August 1976. He had been shot three times. One bullet had

penetrated the colon, the pancreas, and the posterior wall of the stomach. Another bullet had entered his arm and the third, the left hip area. After undergoing two operations, Small died on 4 September 1976 from peritonitis and other complications resulting from these gunshot wounds.

Defendant Foster's testimony as a witness for himself tended to show:

About dark on 17 August 1976 Martin went to the basketball court where defendant Foster had been playing most of the day. Martin asked Foster if he would go with him "to get high some more." Earlier the two had spent thirty minutes together smoking marijuana. Foster followed Martin to a blue 1972 Chevrolet in which Boulware and Ernest Williams ("New York") were sitting. Defendant had never before seen Williams; he had seen Boulware but was not acquainted with her. Defendant was told that they were going to a store, Evans & Sons on Statesville Avenue, to get some kerosene for Boulware's mother. When they found Evans & Sons closed Williams requested Boulware to take him to Jimmy's Supermarket to get some canned goods and, upon his promise to buy her some gas, she agreed to do so. Once at Jimmy's Boulware did not get out of the car because Jimmy's did not sell kerosene. Defendant got out with Martin and Williams because he wanted to buy a can of Beenie Weenies. In the car defendant never heard any discussion about an armed robbery.

Inside the store, defendant was searching for the Beenie Weenies when he heard shots. He walked toward the door and saw Williams holding a gun on the cashier. Defendant left the store, returned to the car and said to Boulware, "Annette, they pulled a gun on these people, shooting and going on. Let's go." She turned the car around but traffic prevented her from entering the highway. This delay enabled Martin and Williams, who had run out of the store, to jump into the car, Martin in back with defendant and Williams in front with Boulware. Williams put a gun to her head and said, "Bitch, drive this car." He cocked the gun back and she drove off. Before going into Jimmy's defendant had seen no guns.

About ten blocks down the street Boulware stopped the car and ordered them to get out. Martin said he was cut badly and wasn't going to get out. Williams jumped out and fled across the

street, defendant pushed Martin out of the car and then walked up the street.

In jail defendant had an opportunity to talk with Martin and he asked him why he put him "in all this mess." Martin replied that he was going to get even with him for pushing him out of the car.

Codefendant Boulware also testified in her own behalf. In brief summary her testimony tended to show:

At 7:00 p.m. on 17 August 1976 she was at the home of her mother playing cards with her mother, sister, and two friends. (These persons later testified in corroboration of this testimony.) About 7:40 p.m. her mother gave her some money and the keys to her car for the purpose of going to the store to buy kerosene. En route to the G & M store to get the kerosene she saw Martin and Williams thumbing a ride. She had not previously seen them or Foster that day. She picked them up and, at Martin's request, she detoured by the basketball court so that he could speak to his friend Foster. In a few minutes Martin returned to the car with Foster, who said "he wanted to pick up some things at the store." Since she was going to Evans & Sons she agreed to take him.

From this point on Boulware's testimony dovetails with that of defendant Foster; there is no material variation. She testified that there was never any conversation about an armed robbery or "who had what pistol"; that she had never committed an armed robbery with Williams; and that she never saw a pistol until Williams came out of the store with one. Boulware also testified that on the first day of the term, while she was in a holding cell convenient to the courtroom, she had "called through the cells" to Martin and asked him why he had lied about her and got her into "this trouble when he knew she was not involved in any robbery." His reply was, "When I go to court, I'm going to tell them you didn't have anything to do with it."

Another prisoner not involved in this case, Arlene Franckewitz, was also in a holding cell in the Mecklenburg County jail during this trial. She testified that she had overheard the conversation between Martin and Boulware in which he had told her he would testify that she was not a party to what he had done. Deputy Sheriff Marcellus Brown, who "worked the court rooms," testified that on two occasions while he was escorting Martin be-

tween the jail and the courtroom Martin had told him he was going "to take down the fat bitch who carried them to this place" although she thought they were only going to the Supermarket to buy beer.

Notwithstanding Martin's testimony the jury found defendant Boulware not guilty of murder in the first degree and acquitted her of any complicity in the attempted robbery of Jimmy's Supermarket. Defendant Foster, however, was found guilty of first-degree murder, and Judge Friday adjudged that he be imprisoned for "the remainder of his natural life."

Additional facts pertinent to the decision will be stated in the opinion.

Rufus L. Edmisten, Attorney General and Jane Rankin Thompson, Associate Attorney for the State.

Shelley Blum for defendant appellant.

SHARP, Chief Justice.

[1] Defendant brings forward seven assignments of error. We consider first his assignment No. 4, which is the basis for his assertion that "the major question presented by this appeal" is whether the trial judge erred in refusing to direct a verdict of not guilty as to defendant Foster after the jury had acquitted defendant Boulware. Defendant Foster stresses the fact that although the State's case against both defendants Foster and Boulware depended upon the testimony of Martin, who implicated them both in the attempted robbery, the jury acquitted Boulware and "convicted Foster on the same testimony." He argues that if the jury disbelieved Martin with reference to Boulware's participation in the crime, then logic also required them to reject his testimony as to Foster's complicity. This contention has no merit, and it is overruled.

While it is true that the State's case against both defendants rested upon Martin's testimony, it is not true that the jury was required to accept his testimony either in its entirety or not at all. Further, Boulware offered evidence tending to show that she was not a knowing accomplice to the attempted robbery.

In this State the maxim *falsus in uno, falsus in omnibus* is not to be used as a rule of law by which evidence is withdrawn

from the jury as if the witness were incompetent. It is merely a permissive aid in weighing and sifting evidence. *State v. Williams*, 47 N.C. 257 (1855). *See Ferrall v. Broadway*, 95 N.C. 551, 557-58 (1886); Black's Law Dictionary 727 (4th Ed. 1951). More than a century ago, speaking through Justice Rodman, this Court approved the trial judge's charge that "the rule *'falsus in uno, falsus in omnibus'* does not prevail in this State; that the jury could believe a part, all, or none of the testimony, and that it was a question of credit, of which they were the sole Judges." *State v. Brantley and Watkins*, 63 N.C. 518 (1869). The substance of that portion of the charge quoted above has been a standard part, a *sine qua non*, of the trial judge's charge during the memory of any lawyer now alive. As Chief Justice Smith said in *State v. Hardee*, 83 N.C. 619, 622 (1880): "Even the clear perjury of a witness committed on the trial does not authorize the court to direct the jury to disregard the testimony, but it goes to his credit only."

Upon the evidence in this case the jury would have been fully justified in finding both Boulware and Foster guilty as charged. It is equally clear that the two differing verdicts rendered can be explained on a rational basis. We note, however, the following statement from Annot., 22 A.L.R. 3d 717, 721 (1968): "[M]ost modern courts are agreed that the verdicts as between two or more defendants tried together in a criminal case need not demonstrate rational consistency. . . .

"Of course, if the court determines that the verdicts are actually consistent notwithstanding defendant's attack upon them, affirmance will result regardless of the court's views respecting the necessity for consistency. Such a determination may be made where, considering the facts and circumstances disclosed, the verdicts can be explained on some rational basis or where the evidence adduced against the one defendant was different from or weaker than that adduced against the other." *See also State v. Meshaw*, 246 N.C. 205, 207, 98 S.E. 2d 13, 15 (1957).

Assignments of error 1, 2, and 3 challenge the court's rulings admitting certain evidence over defendant's objection.

[2] On direct examination Martin was permitted to testify that while he, Foster, Williams, and Boulware sat in her mother's car at the home of Joyce Pettus, Williams said "that down there is a

store 'we can rob for some money' . . . that he had cased it out earlier." Defense counsel objected on the ground that Williams' statement was hearsay. The objection was overruled and assignment No. 1 is based on this ruling. It is without merit.

Defendant, who admitted being in the store when the attempted robbery and murder took place, based his defense to the charge of murder on his lack of knowledge that Williams and Martin planned to rob the store and his lack of participation in the plot or its attempted execution. Thus, Williams' challenged statements were competent to prove defendant's knowledge that Boulware, Martin, and Williams planned to rob Jimmy's Supermarket. 1 Stansbury's N.C. Evidence § 83 (Brandis rev. 1973). Notwithstanding, had the admission of this testimony constituted error it would have been rendered harmless when Martin, without objection, thereafter gave substantially identical testimony both on direct and cross-examination. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976).

[3] Defendant's assignment No. 2 charges that the trial judge erred in permitting the jury to view the scars from the wounds which, Martin testified, Small had inflicted upon him with a butcher knife at the time he shot Small. These scars were illustrative of relevant and material testimony. Their exhibition to the jury, therefore, was not error. 1 Stansbury's N.C. Evidence § 119 (Brandis rev. 1973). *See also State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970).

Assignment No. 3 is directed to an allegedly leading question. The record discloses that this question was both timesaving and harmless. *See State v. Cox* et al, 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Johnson*, 272 N.C. 239, 158 S.E. 2d 95 (1967). In his brief defendant concedes that the rulings challenged by assignments 2 and 3 were on matters "committed to the discretion of the trial court." He suggests no abuse of discretion and there obviously was none. Both assignments are overruled.

[4] The substance of defendant's assignment No. 5 is that the trial judge erred by allowing the district attorney to question defendant and his witness Franckewitz about their respective criminal convictions and specific acts of misconduct. This assign-

ment is based upon an objection which the record reports as follows:

"Mr. Blum: I object to continuing along this line of questioning. (The district attorney was reading from arrest records.)

"Court: He can cross examine him."

In his brief defendant argues that to permit the district attorney to cross-examine a witness about convictions while referring to an arrest record is to permit him to insinuate that he "has a long arrest record and is not telling the truth about it." This argument, if carried to its logical conclusion, would prevent the prosecuting attorney from using any unidentified notes while cross-examining a witness. At the time the district attorney was cross-examining defendant the record contains no suggestion that the jury knew the nature of the paper the district attorney was using. Later, when examining Franckewitz, defense counsel himself identified the paper in making the following objection: "Your Honor, I object to the use of unconfirmed arrest records not reduced to conviction, as we have objected before, in use in impeachment. I believe that an arrest record has no meaning." The court's response was, "Objection overruled. He can ask if she committed the acts. Go ahead."

When the examinations were completed defendant had admitted that he had been convicted of the possession of marijuana in January 1976, of receiving stolen goods in 1975, and of resisting arrest in 1974. He had denied that he had robbed Robert Owens in 1976 and that he had ever committed larceny from the Charlottetown Mall. Franckewitz had admitted that in 1971 she had written four worthless checks in Florida and fifteen in Charlotte in 1974. She denied that she had ever been convicted of embezzlement.

A defendant who elects to testify in his own behalf knows that he is subject to impeachment by questions relating not only to his conviction of crime but also to any criminal or degrading act which tends to discredit his character and challenge his credibility. Such questions, however, must be asked in good faith. It would be highly improper for the prosecuting attorney to ask a witness an impeaching question without reasonable grounds for belief that the witness had committed the crime or degrading act about which he was inquiring. *State v. Williams*, 292 N.C. 391, 233

S.E. 2d 507 (1977); *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912, 97 S.Ct. 301, 50 L.Ed. 2d 278 (1976); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). *See* 1 Stansbury's N.C. Evidence § 112 (Brandis rev. 1973).

Whether the cross-examination transcends propriety or is unfair is a matter resting largely in the sole discretion of the trial judge, who sees and hears the witnesses and knows the background of the case. His ruling thereon will not be disturbed without a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). This record evinces neither bad faith on the part of the district attorney nor any attempt to badger or humiliate the witness. Assignment No. 5 is overruled.

Assignment No. 6, that the court erred in overruling defendant's objection to an "argumentative question," is frivolous. The question combined two related queries and was, therefore, bad form. Nevertheless defendant understood the question perfectly. He answered it favorably to himself and the district attorney dropped the matter without further ado.

[5] Defendant's final assignment, No. 7, relates to his sentence of life imprisonment. Upon the coming in of the verdict defense counsel requested the court to sentence defendant "as a youthful offender." Whereupon Judge Friday entered judgment which, *inter alia*, provided:

"The jury having found the defendant guilty of the offense of felony murder which is a violation of G.S. 14-17 and of the grade of felony;

It is ADJUDGED that the defendant be imprisoned for the term of the remainder of your natural life in the North Carolina Department of Correction. It is ordered that the defendant be given credit on this sentence for 113 days spent in custody pending trial."

After announcing the foregoing judgment, Judge Friday stated, "Now, as the court understands it, this life sentence will be served as a committed youthful offender; at least that is, to my knowledge."

This judgment did not specify that defendant was committed to the custody of the Secretary of Correction for treatment and

supervision under N.C. Gen. Stats., Ch. 148, Art. 3A (1975 Cum. Supp.), "Facilities and Programs for Youthful Offenders." Notwithstanding, in view of the court's statement that he understood defendant's life sentence would be served as a "committed youthful offender," defendant contends the case should be remanded to the Superior Court "for correction" in accordance with the trial judge's intention that defendant be confined only "for up to four years and must then be paroled." From this record we are unable to divine the trial judge's intention. However, his intention is rendered immaterial by our decision in *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141, filed 11 October 1977. In *Niccum* we held that neither N.C. Gen. Stats., Ch. 148, Art. 3A, §§ 148-49.1 through 148-49.9 (repealed 1 October 1977) nor its substitute, N.C. Gen. Stats., Ch. 148, Art. 3B, §§ 148-49.10 through 148-49.16 (effective 1 October 1977) was intended to apply to a youthful offender who commits a crime for which death or a life sentence is the mandatory punishment.

Judge Friday properly imposed upon defendant the mandatory sentence of life imprisonment, and in his trial we find no error.

However, there is one matter which we must consider *ex mero motu*. Defendant was indicted in a bill drawn under G.S. 15-144 for first-degree murder as defined by G.S. 14-17 (Cum. Supp. 1975). This statute declares, *inter alia*, that any murder "which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed murder in the first degree." Evidence for the State tended to show that defendant intentionally and voluntarily participated with three other persons in an unsuccessful attempt to rob Jimmy's Supermarket; that in the attempt one of his co-conspirators shot Mr. Small, who died approximately two weeks later from the wounds then inflicted. This evidence, which the jury found to be true, established defendant's *guilt of murder in the first degree*. *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301 (1976); *State v. Woodson*, 287 N.C. 578, 215 S.E. 2d 607 (1975), *rev'd on other grounds*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976). However, in response to the written issue submitted by the trial judge the jury returned a verdict of "guilty of felony murder."

[6] The term "felony murder" is an abbreviation for a homicide committed in the commission of or attempt to commit a felony such as specified in G.S. 14-17. Any felony "which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. 14-17." *State v. Williams*, 284 N.C. 67, 72, 199 S.E. 2d 409, 412 (1973). "Felony murder" is a term well understood, and frequently used, by both bench and bar. By statute in this State, however, murder is either murder in the first degree or murder in the second degree, and the punishment specified for murder is for each degree respectively. Notwithstanding, since "felony murder" is not a statutory term, its use in an issue submitted to the jury is ill-advised and we expressly disapprove its usage. It is a misnomer which will, of course, be reflected in the verdict whenever it is so used.

In *State v. Lee*, 292 N.C. 617, 626, 234 S.E. 2d 574, 579 (1977), the trial judge, in his charge, submitted to the jury the issue of defendant's guilt of "first-degree murder when a deadly weapon is used." In disapproving this instruction, which we held to be prejudicial error, Justice Branch, writing for the Court, said: "This instruction creates a new offense without benefit of statute or court decision."

[7] In this case, however, the ambiguity in the issue and verdict is cured by the charge, to which no exception is taken. "A verdict, apparently ambiguous, 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court' . . . . 'The verdict should be taken in connection with the charge of his Honor and the evidence in the case.' " (Citations omitted.) *State v. Tilley*, 272 N.C. 408, 416, 158 S.E. 2d 573, 578 (1967).

After telling the jury that defendants were indicted under G.S. 14-17 and reading the statute to them, Judge Friday explained that "under this statute, any killing of a human being by a person committing or attempting to commit armed robbery is first-degree murder without anything further being shown." Thereafter he several times charged the jury in words substantially as follows: If you find from the evidence beyond a reasonable doubt that on 17 August 1976 defendants Boulware and Foster accompanied Martin and Williams to Jimmy's Supermarket for the avowed purpose of robbing that store; that while

they were there, aiding and abetting each other in attempting to perpetrate the robbery, one of them shot the attendant Small; and that subsequently Small died in consequence of the shooting, those facts "would make them all equally guilty and make them guilty of murder in the first degree." In his final mandate the judge again instructed the jury that if they found the facts postulated in the preceding sentence "from the evidence and beyond a reasonable doubt" they "would return a verdict of murder, that is, guilty as to the first issue submitted to you, guilty of felony murder."

Construing the verdict, "guilty of felony murder," with reference to the charge we have no doubt that it can only be interpreted as a verdict of guilty of murder in the first degree. For that reason, albeit we condemn the use of the term "felony murder" in an issue and verdict, we find no prejudicial error in the trial and affirm this verdict. In doing so, however, we strongly recommend to the trial judges that in instructing the jury as to permissible verdicts they abstain from innovations.

No error.

RIDGE COMMUNITY INVESTORS, INC.; F. L. WRENN, TRUSTEE; W. CLYDE BURKE AND WIFE, NORMA B. BURKE; HAROLD H. GRISWOLD AND WIFE, DOROTHY B. GRISWOLD; AND MILL RIDGE PROPERTY OWNERS ASSOCIATION, INC. v. BILLY EUGENE BERRY AND WARD CARROLL, SHERIFF OF WATAUGA COUNTY, NORTH CAROLINA

No. 41

(Filed 15 December 1977)

1. **Laborers' and Materialmen's Liens § 8— enforcement of lien—jurisdiction**

An action to enforce a laborer's or materialman's lien is not required by G.S. 44A-12 and G.S. 44A-13(a) to be brought in the county in which the realty subject to the lien is located since the language in G.S. 44A-13(a) stating that an action to enforce the lien "may be brought in any county in which the lien is filed" is not a jurisdictional requirement. Therefore, the Superior Court of Mecklenburg County had jurisdiction to enforce a claim of lien filed in Watauga County.

2. **Clerks of Court § 11— authority of assistant clerks**

Assistant clerks of superior court have been granted the same authority as that given to clerks of the superior court. G.S. 7A-102(b).

3. **Clerks of Court § 8; Laborers' and Materialmen's Liens § 8; Rules of Civil Procedure § 55— foreclosure in default judgment—authority of clerk of court**

The authority of a clerk of superior court to enter orders consummating foreclosure in default judgments is limited by G.S. 1A-1, Rule 55(b)(1) to judgments entered on a debt which is secured by "any pledge, mortgage, deed of trust, or other contractual security . . . or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414."

4. **Clerks of Court § 8; Laborers' and Materialmen's Liens § 8; Rules of Civil Procedure § 55— lien for labor and materials—default judgment—foreclosure order**

A laborer's or materialman's lien established pursuant to G.S. Ch. 44A is not a "contractual security" within the meaning of G.S. 1A-1, Rule 55(b)(1), and a clerk or assistant clerk of court is thus without jurisdiction to make orders consummating foreclosure of such liens in default judgments.

5. **Laborers' and Materialmen's Liens § 8; Judgments § 31— enforcement of laborer's and materialman's lien—default judgment—standing of present owners to attack**

The present owners of property subject to a claim of lien for labor and materials have standing to attack as void the default judgment establishing and enforcing the claim of lien, although they were not parties to such action, where the grounds which support their allegation that the judgment is void appear on the face of the judgment, and the owners obviously would be adversely affected by a sale of their property pursuant to the void judgment.

6. **Laborers' and Materialmen's Liens § 7— standing to attack claim of lien—present owner**

Plaintiffs have standing to attack the sufficiency of a claim of lien for materials and labor upon which a foreclosure action was based where plaintiffs hold title to lands subject to the claim of lien through the sale of the lands under a deed of trust securing a note to a bank; the deed of trust was executed and recorded prior to the institution of the action to enforce the claim of lien; and neither plaintiffs nor the holder of the note secured by the deed of trust nor the trustee in the deed of trust was made a party to the action to foreclose the laborer's and materialman's lien.

7. **Injunctions § 13.1— attack on judgment establishing laborer's and materialman's lien—preliminary injunction**

In this action to have declared null and void a default judgment which established a laborer's and materialman's lien on property now owned by plaintiffs, the trial court erred in refusing to grant to plaintiffs a preliminary injunction prohibiting the sheriff from selling the lands under the execution issued on that judgment where plaintiffs sufficiently showed the likelihood of success upon the trial of their case upon the merits and that injunctive relief was necessary for the protection of their property rights during the course of the litigation.

ON *certiorari* to the Court of Appeals to review its decision reported in 32 N.C. App. 642, 234 S.E. 2d 6, which affirmed the

order of *Snepp, J.*, entered at the 21 May 1976 Session of MECKLENBURG Superior Court.

Plaintiffs instituted this action on 7 May 1976 seeking to have declared null and void that portion of the judgment rendered in Mecklenburg Superior Court which purported to establish a lien on certain lands owned by plaintiffs in Watauga County, and to enjoin the Sheriff of Watauga County from selling said lands under the execution issued on that judgment. A temporary restraining order was issued, and the matter came on to be heard before Judge Snepp on plaintiffs' application and motion for a preliminary injunction.

At that hearing, Judge Snepp heard oral evidence and considered affidavits and the pleadings which tended to show that on 9 May 1974 defendant Berry filed a notice and claim of lien for materials furnished and labor performed upon certain resort properties owned by Mill Ridge Developers, Inc., (Developers). On 7 June 1974, Berry sought to enforce this claim of lien by action instituted in Mecklenburg County. Defendants Caledonia Corporation and Developers filed no responsive pleadings, and on 17 June 1974 an Assistant Clerk of Mecklenburg Superior Court signed and entered a default judgment against Caledonia and Developers in the amount of $16,894.27. The judgment also contained the following language: "AND IT IS FURTHER ORDERED . . . that this judgment be transcribed and that execution issued against that property of said Defendants described as follows, retroactive to the 27th day of November, 1972 . . . ." The judgment contained a description of the land on which Berry claimed a lien including certain numbered lots and unnumbered areas (common area) shown on a subdivision plat recorded in Watauga Public Registry.

On 12 March 1974, Developers executed a note secured by a deed of trust to Wachovia Bank and Trust Company on the property in litigation. The deed of trust was duly foreclosed, and at the foreclosure sale plaintiffs Burke and Wrenn each purchased an individual lot. Plaintiffs Ridge Community Investors, Inc., and Mill Ridge Property Owners Association purchased the common area. There was evidence to the effect that defendant did not furnish labor or materials to the common area described in the claim of lien within 120 days preceding the filing of the claim of lien.

Plaintiffs' position is that the default judgment purporting to establish a lien is null and void because (1) the Mecklenburg Superior Court was without jurisdiction to enforce a claim of lien filed on property in Watauga County; (2) the portion of the judgment which purported to establish and enforce a lien on the subject property was void because the Assistant Clerk of court was without power to render such judgment; (3) the claim of lien had not been filed within the 120 day statutory period; (4) the judgment does not impose a lien on the property because there is no specific declaration in the judgment imposing a lien; (5) the judgment included property not subject to lien in that property was described in the claim of lien and the action to enforce it which had not been improved by materials furnished and labor performed by defendant; and (6) the statement of Berry's account attached to the complaint in the former action is not properly itemized and fails to comply with the provisions of G.S. 44A-12(c)(6).

Further in support of their motion for a preliminary injunction, plaintiffs allege and contend that the sale of any property described in the judgment will substantially decrease their equities in that property, and that defendant Berry will be unable to pay monetary damages.

Defendant alleged that plaintiffs' remedy at law was adequate and that, since plaintiffs were not parties to the action in which the default judgment was rendered, they are without standing to attack that judgment; that the default judgment was properly docketed at the time plaintiffs purchased the property at the foreclosure sale, and therefore plaintiffs purchased subject to all encumbrances of record. Defendant Berry did, however, indicate through counsel that he would consent to any formal order striking the numbered lots from the claim.

By his order filed 28 May 1976, Judge Snepp found that defendant Berry was seeking execution only upon the common area of the subject property; that plaintiffs had failed to show that irreparable injury would result from a sale of the property; and that plaintiffs had no standing to attack the default judgment. He, thereupon, dissolved the temporary restraining order, denied plaintiffs' motion for a preliminary injunction, and ordered that defendant Berry be only restrained from executing on the numbered lots. Plaintiffs appealed.

In affirming Judge Snepp's order, the Court of Appeals held (1) that although the default judgment did not specifically declare a lien on the subject property, the language used was sufficient to constitute such a declaration; (2) that liens established under Chapter 44A of the General Statutes are "contractual security" and therefore a clerk of superior court may enter default judgments pursuant to Rule 55(b)(1) of the Rules of Civil Procedure; (3) that the provisions of G.S. 44A-13 relating to the place where an action to enforce a lien pursuant to Chapter 44A is to be instituted pertain to venue and not to jurisdiction; (4) that plaintiffs had no standing to challenge the itemized account in the former action; and (5) that since plaintiffs failed to assert any legitimate grounds for setting aside the default judgment the issue of plaintiffs' standing to attack the judgment was rendered moot.

We allowed plaintiffs' petition for discretionary review on 13 June 1977.

Dark & Edwards, by L. T. Dark, Jr., and Henderson, Henderson & Shuford, by David H. Henderson and William A. Shuford, for plaintiff-appellants.

Harkey, Faggart, Coira & Fletcher, by Francis M. Fletcher, Jr., and Henry A. Harkey, for defendant-appellee, Billy Eugene Berry.

BRANCH, Justice.

This appeal presents the question of whether the trial judge erred by denying plaintiffs' application and motion for a preliminary injunction prohibiting defendants from enforcing the claim of lien filed in Watauga County. It is plaintiffs' position that he did.

[1] Plaintiffs first contend that the Mecklenburg Superior Court is without jurisdiction to enforce a claim of lien filed in Watauga County. In support of this contention, they point to the following language in G.S. 44A-12:

> (a) Place of Filing. — All claims of lien against any real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. The clerk of superior court shall note

the claim of lien on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien is filed. An additional copy of the claim of lien may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

G.S. 44A-13(a) further provides:

> Where and When Action Instituted. — An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. If the title to the real property against which the lien is asserted is by law vested in a receiver or trustee in bankruptcy, the lien shall be enforced in accordance with the orders of the court having jurisdiction over said real property.

Plaintiffs argue that since a notice and claim of lien *must* be filed in every county in which the land to be encumbered lies and since an action to enforce the claim *may* be instituted "in any county in which the lien is filed," the necessary implication is that such actions may be brought only in the county in which the land lies.

This Court considered a similar question in *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153, 155. There an action to foreclose a labor and materialman's lien was instituted in Lee County to enforce a claim of lien filed in Pitt County, the county in which the land was situated. Defendant claimed that plaintiffs had thereby lost their lien and were only entitled to a money judgment. Treating the question as one of venue, this Court stated:

> The lien sued upon in this action was duly filed in the county of Pitt, where the land lay. It is not provided in any of these sections where the action to foreclose such lien should be brought, but if it had been brought in any of those cases where the venue is specifically prescribed, still the error in the venue would not have been fatal, and a judgment obtained in any county where the action was brought would not have been invalid for error in the venue, "unless the defendant, before the time of answering expired, demanded in writing that the trial be conducted in the proper county,

and the place of trial is thereupon changed by consent of parties, or by order of the court."

See also, Penland v. Church, 226 N.C. 171, 37 S.E. 2d 177.

At the time *Sugg* and *Penland* were decided, the statutes concerning foreclosure of labor and materialmen's liens contained no language relating to where an action to enforce such lien should be instituted. Amendments to Chapter 44A enacted by the 1969 Legislature by Session Laws 1969, Chapter 1112, effective 1 January 1970, resulted in the language which appears in the above-quoted statutes. We are, therefore, confronted with the question of whether the language contained in G.S. 44A-13(a) stating that the action to enforce a lien "may be instituted in any county in which the lien is filed" is a jurisdictional requirement.

G.S. 7A-240 confers jurisdiction in *all* civil matters upon the General Court of Justice, and which court within the General Court of Justice is to hear a civil matter is controlled by the venue provisions of Article 7, Chapter 1 of the General Statutes. We are of the opinion that the ambiguous language contained in G.S. 44A-13(a) does not indicate a legislative intent to depart from the established law governing the enforcement of labor and material liens.

This conclusion is buttressed by the recent enactment of an amendment to Chapter 44A. G.S. 44A-13(c), effective 1 July 1977, provides:

> Notice of action. Unless the action enforcing the lien created by this Article is instituted in the county in which the lien is filed, in order for the sale under the provisions of G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the lien, a notice of lis pendens shall be filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. It shall not be necessary to file a notice of lis pendens in the county in which the action enforcing the lien is commenced in order for the judgment entered therein and the sale declared thereby to carry with it the priorities set forth in G.S. 44A-14(a). If neither an action nor a notice of lis pendens is

filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the action was neither commenced nor a notice of lis pendens filed, the judgment entered in the action enforcing the lien shall not direct a sale of the real property subject to the lien enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments.

In interpreting statutes, the primary duty of this Court is to ascertain and effectuate the intent of the Legislature. *Newlin v. Gill*, 293 N.C. 348, 237 S.E. 2d 819; *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22; *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67. In ascertaining this intent, it is always presumed that the Legislature acted with full knowledge of prior and existing law. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793. Further, light may be shed upon the intent of the General Assembly by reference to subsequent amendments which, although normally presumed to change existing law, may be interpreted as clarifying it. *See, Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481.

The enactment of G.S. 44A-13(c) is a strong indication that it was not the intent of the Legislature to enact a jurisdictional requisite when it used language in G.S. 44A-13(a) to the effect that such action "may be instituted in any county in which the lien is filed." The effect of this amendment is to give protection to purchasers and examiners of titles no matter where the action to enforce the lien is instituted. Had the Legislature intended to create a jurisdictional requirement as to the enforcement of liens, it could easily have done so by the use of explicit language. In our opinion, it is the better practice to file the action to enforce a lien in the county in which the claim of lien is filed. Even so, the General Assembly has the power to regulate proceedings in all courts below the Supreme Court, *Highway Commission v. Hemphill, supra*, and the procedure for enforcing labor and material liens is for that body.

The Court of Appeals correctly held that the Superior Court of Mecklenburg County had jurisdiction to enforce the claim of lien filed in Watauga County.

Plaintiffs next contend that the Assistant Clerk was without jurisdiction to enter that portion of the default judgment which purports to enforce the claim of lien and, therefore, that part of the judgment is void.

In *Pruden v. Keemer*, 262 N.C. 212, 136 S.E. 2d 604, Justice Bobbitt (later Chief Justice) stated:

> The basic question is whether the clerk had jurisdiction to enter the purported default judgment of August 1, 1961. If not, said purported judgment is absolutely void and must be treated as a nullity. *Deans v. Deans*, 241 N.C. 1, 9-10, 84 S.E. 2d 321, and cases cited.
>
> The clerk of the superior court has no common law or equitable jurisdiction. *McCauley v. McCauley*, 122 N.C. 288, 30 S.E. 344. The clerk is a court "of very limited jurisdiction —having only such jurisdiction as is given by statute." *Moore v. Moore*, 224 N.C. 552, 555, 31 S.E. 2d 690, and cases cited; *In re Dunn*, 239 N.C. 378, 383, 79 S.E. 2d 921; *Deans v. Deans*, supra. As stated by Seawell, J., in *Johnston County v. Ellis*, 226 N.C. 268, 279, 38 S.E. 2d 31: "The jurisdiction of the clerk of Superior Court is statutory and limited, and can be exercised only with strict observance of the statute."

[2] Considering a former statute which provided that the clerk could enter judgment only on Mondays, this Court held that a sale based upon a judgment rendered by the clerk on a day other than Monday was void. *Ange v. Owens*, 224 N.C. 514, 31 S.E. 2d 521. Likewise, where the clerk's authority was limited to the entry of voluntary nonsuits and the judgment signed by the clerk showed on its face that the nonsuit was entered upon his findings of fact, the Court held that "the clerk having undertaken to enter a kind of judgment which she had no jurisdiction to enter the judgment so entered is void and is a nullity, and may be so treated at all times." *Moore v. Moore*, 224 N.C. 552, 31 S.E. 2d 690. The Legislature has granted assistant clerks of superior court the same authority as that given to clerks of the superior court. G.S. 7A-102(b). Accordingly, the actions of an assistant clerk of court are also guided by the principles set forth in the cases above discussed.

The authority of a clerk or an assistant clerk of court to enter default judgments and make further orders to consummate

foreclosure is found in Rule 55 of the Rules of Civil Procedure. Rule 55, in pertinent part, provides:

> (b) Judgment. — Judgment by default may be entered as follows:
>
> (1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.
>
> In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes entitled "Judicial Sales."

[3] Thus, the clerk's authority to enter orders consummating foreclosure in default judgments is limited to judgments entered on a debt which is secured by "any pledge, mortgage, deed of trust, or other contractual security . . . or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414." Obviously, the entry of that portion of the judgment here under attack was not based on the clerk's statutory authority to enter judgments where the debt was secured by pledge, mortgage, deed of trust or to enforce a lien for unpaid taxes or assessments. We, therefore, must decide whether the enforcement of a claim of lien pursuant to Chapter 44A of the General Statutes is a claim for debt secured by "contractual security."

At common law, liens upon the property of a debtor were created only by contract, by statute, or by usages of trade and commerce. *See, Gunton v. Nock*, 76 U.S. (9 Wall.) 373. These

methods remain the only means by which a lien upon a debtor's property may be created. 51 Am. Jur. 2d, *Liens*, Section 6. Thus, there has always been a distinction between liens created by contract and liens created by statute. There is nothing in the language of Rule 55(b)(1) which blurs this ancient distinction.

Defendant Berry concedes that his statutory lien is not truly "contractual," but he contends that since the lien is founded upon a contract to furnish materials and to perform labor it is, nevertheless, "contractual security." This position is contrary to the long standing distinction between contractual and statutory liens. Our examination of Chapter 44A of the General Statutes and Rule 55 of G.S. 1A-1 discloses nothing which indicates that the Legislature intended that the provisions of 44A be included in every contract which might ultimately result in the establishment of a lien for materials furnished or labor performed.

Furthermore, acceptance of defendant's argument would require us to violate established principles of statutory construction. Pledges, mortgages, and deeds of trust all result from expressions of consent or agreement between the affected parties. They are, in the truest sense, examples of liens upon property created by contract. For us to hold that the terms "other contractual security" includes statutory liens would require us to give a meaning to that term which is wholly distinct and contrary to the connotation of the terms which precede it. Such construction would be contrary to the doctrine of *ejusdem generis*. *See*, *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712; *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584; *Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211.

[4] We hold that liens established pursuant to Chapter 44A of the General Statutes are not "contractual security" within the meaning of Rule 55(b)(1) of the Rules of Civil Procedure and that a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A of the General Statutes. Therefore, that portion of the judgment entered by the Assistant Clerk of Superior Court of Mecklenburg County which ordered the enforcement of defendants' claim of lien is void.

We turn to defendants' contention that plaintiffs do not have standing to attack the default judgment.

[5] The general rule is that a judgment may not be attacked by one who is a stranger to the action in which it was entered. *In re Bank*, 208 N.C. 509, 181 S.E. 621. However, this rule is not without exception. A judgment which is void, as opposed to being merely voidable or irregular, may be attacked at any time by anyone whose interests are adversely affected by it. *See, Simmons v. Simmons*, 228 N.C. 233, 45 S.E. 2d 124; *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315. For example, when a judgment operates as a lien upon real property, one who later acquires the property, even after entry of judgment, may move to vacate the judgment on the ground that it is void. Freeman, 1 Judgments, Section 261; 49 C.J.S. *Judgments*, Section 293 at page 542. One qualification to the above-stated exception is that the grounds which support an allegation that a judgment is void must appear upon the face of such judgment, *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617, or the plaintiff must allege facts which, if supported by competent evidence, would vitiate or nullify an otherwise apparently valid judgment. *See, Hinton v. Whitehurst*, 214 N.C. 99, 198 S.E. 579.

The grounds upon which plaintiffs here attack the judgment appear upon its face. Obviously, the record owners of the property would be adversely affected by a sale of their property pursuant to the void judgment. We, therefore, hold that plaintiffs have standing to attack the default judgment entered by the Assistant Clerk of Mecklenburg County.

[6] Plaintiffs question the sufficiency of the claim of lien upon which the original action was based. The Court of Appeals did not directly address this question but disposed of this contention by deciding that only the defendants in the prior action had standing to raise that point.

In *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256, defendant lumber company furnished materials on the property in litigation prior to the time that owners executed a note to plaintiff secured by a deed of trust, which was recorded prior to the time that defendant instituted its action to foreclose its material lien. The owner defendant filed no answer in the action to foreclose and default judgment was entered. Neither plaintiff nor the trustee in the deed of trust securing plaintiffs' note was made a party to the action to foreclose defendants' lien. The property was sold under the lumber company's purported lien and plaintiff

bought at the execution sale. Thereafter plaintiff instituted action to determine the priority of liens as between him and defendant lumber company.

By that action, the plaintiff attacked the purported claim of lien upon which the action was based on the grounds that it contained items fraudulently furnished in order to keep the claim alive and that the claim of lien was not filed within the time required by statute. The defendant, on the other hand, contended that plaintiff was estopped from denying the validity of the sale. The trial judge heard the matter without a jury and concluded as a matter of law that defendant's judgment had priority over plaintiff's deed of trust, held the execution sale to be valid and dissolved an existing temporary order restraining the sheriff from completing the sale.

In ordering a new trial, Justice Sharp (now Chief Justice) speaking for the Court, in pertinent part, stated:

> If a third person had become the last and highest bidder at the sale, clearly plaintiff would not have been estopped to maintain the priority of his deed of trust. While the defendant's judgment is in all respects binding as between Davis and defendant, the plaintiff is not bound by it since he was not a party to it. *Thomas v. Reavis*, 196 N.C. 254, 145 S.E. 226.

See also, *Childers v. Powell*, 243 N.C. 711, 92 S.E. 2d 65; *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390, for the proposition that when a subsequent encumbrancer is not joined in the action to enforce a mechanics or materialman's lien, he is not bound by the judgment between the contractor and the owner and may assert his rights, whatever they may be, in a separate action.

In *Lumber Co. v. Builders*, 270 N.C. 337, 154 S.E. 2d 665, we held that where a claim of lien required itemization there must be "a statement in sufficient detail to put interested parties, *or parties who may become interested*, on notice as to labor performed or materials furnished, the time when the labor was performed and the materials furnished, the amount due therefor, and the property on which it was employed." (Emphasis ours.) *Accord*, *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E. 2d 204; *Cameron v. Lumber Co.*, 118 N.C. 266, 24 S.E. 7.

In instant case, plaintiffs hold title through the foreclosure and sale of the lands in litigation under a deed of trust securing a note to Wachovia Bank and Trust Company. The deed of trust securing Wachovia's note was executed and recorded prior to the institution of the action in Mecklenburg Superior Court. Neither plaintiffs nor the holder of the note secured by the deed of trust nor the trustee in that deed of trust was made a party to the action to foreclose the lien instituted in Mecklenburg County. Under these circumstances, we conclude that plaintiffs do have standing to attack the sufficiency of the claim of lien.

[7] A preliminary injunction, the relief here sought, is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348; *Conference v. Creech*, 256 N.C. 128, 123 S.E. 2d 619.

The creation of a cloud on title has been held to result in such injury as to warrant a permanent injunction, 42 Am. Jur. 2d, *Injunctions*, Section 71, and to warrant the continuance of a preliminary injunction. *Holden v. Totten*, 224 N.C. 547, 31 S.E. 2d 635. Here enforcement of the lien and sale thereunder would create a cloud on plaintiffs' title which would require litigation to clear the title.

We are of the opinion that plaintiffs have sufficiently shown the likelihood of success upon the trial of their case upon its merits and that injunctive relief is necessary for the protection of plaintiffs' property rights during the course of this litigation. We, therefore, hold that Judge Snepp erred by denying plaintiffs' application and motion for a preliminary injunction.

The decision of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Mecklenburg County for proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. VERNON BOONE

No. 51

(Filed 15 December 1977)

1. **Searches and Seizures § 1— Fourth Amendment protection—when available**

Capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion; thus, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

2. **Searches and Seizures § 1— open field—no Fourth Amendment protection**

Generally, an open field is not an area entitled to Fourth Amendment protection.

3. **Searches and Seizures § 1— tractor under lean-to in open field—taking serial number reasonable**

A lean-to shed located in an open field belonging to defendant's wife and located 100 feet from public school grounds but near no residence and therefore not a part of any curtilage was not an area in which there was a reasonable expectation of freedom from governmental intrusion, and an officer's checking without a warrant of the serial number of a tractor located under the lean-to was reasonable.

4. **Criminal Law § 116.1— failure of defendant to testify—instructions**

While it is the better practice, in instructing on defendant's failure to testify, to use the words of the statute, *i.e.*, "shall not create any presumption against him," G.S. 8-54, the use of the words "should not" is not such error as to require a new trial.

5. **Criminal Law § 24— not guilty plea—imposition of greater sentence**

Statement of the trial judge, expressed by him in open court, that "he would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty and the jury had returned a verdict of guilty as charged" indicated that the sentence imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury; therefore, the case must be remanded for entry of a proper judgment without consideration of defendant's refusal to plead guilty to a lesser offense.

APPEAL by defendant pursuant to G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 33 N.C. App. 378, 235 S.E. 2d 74, finding no error in the trial before *McConnell, J.*, at the 19 July 1976 Criminal Session of GUILFORD Superior Court,

High Point Division, but vacating judgment and remanding for proper sentencing.

Defendant was tried and convicted of feloniously receiving stolen property, a 1974 Ford diesel 3000 tractor having a value of $6,000. From judgment imposed, defendant appealed to the Court of Appeals. That court found no error in the trial but remanded for proper sentencing.

The State offered evidence tending to show that on or about 30 June 1975, a blue 1974 Ford diesel 3000 tractor, serial number C471023, valued at $6,000, was stolen from the lot of Neuse Tractor Company in Dudley, North Carolina. Later, this tractor was discovered under a lean-to shed on a 19.9 acre field belonging to defendant's wife. On 30 June 1975, the day the tractor was reported missing, defendant obtained notarization of a bill of sale for this tractor. The bill of sale said "sold to Vernon Boone by Mr. W. G. Dawkins." Using this bill of sale, defendant borrowed $2,400 from a lending institution and gave a purchase money security interest in the tractor in return.

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

Defendant did not testify in his own behalf nor did he offer evidence.

Attorney General Rufus L. Edmisten by Associate Attorney Nonnie F. Midgette for the State.

Boyan and Slate by Clarence C. Boyan for defendant appellant.

MOORE, Justice.

Prior to the introduction of evidence, defendant moved to suppress all evidence obtained by Officer W. F. Clay's entry onto defendant's property without a valid search warrant, and all evidence obtained thereafter as the result of the allegedly illegal search.

Judge McConnell conducted a *voir dire* hearing. Both the State and defendant offered evidence. At the conclusion of the hearing, based on the evidence presented, Judge McConnell made the following findings of fact and conclusions of law:

"1. That on October 22, 1975, Detective J. E. Tobin of the High Point Police Department received a phone call from an informer saying that a stolen blue Ford farm tractor was at defendant's farm on Elder Road in Guilford County;

2. That as a result of this information Detectives Tobin and B. W. Rich, also of the High Point Police Department, drove that afternoon to defendant's farm, parking in the drive of a neighbor to the farm; walking on Allen Jay Elementary School grounds adjacent to defendant's wife's farm and along the barbed wire fence 48 inches high strung around defendant's wife's farm, Detective Tobin saw a blue Ford farm tractor parked under a shed annexed to a barn in open view;

3. That the farm consists of nineteen and nine-tenths acres with only the barn located on it; that the field was enclosed by a fence; there was no dwelling upon the property; Defendant's residence is on a city street and approximately one and two-tenths miles from the property and approximately one and one-half miles from the barn; that the only evidence as to ownership of the land is that the deed to the farm property is solely in the name of Dorothy T. Boone, the wife of the defendant;

4. That Detectives Tobin and Rich entered the property from another side of the field because of easier access to the barn and the annexed shed under which the tractor was located;

5. That Detective Tobin copied from the tractor the serial number C471023 and the model number C1013C; that the serial number was cast onto the body and both the serial number and model number were located on a metal plate attached to the inside of the hood of the tractor;

6. That on October 22, 1975, Detective Tobin contacted Inspector William F. Clay of the Enforcement and Theft Division of the North Carolina Department of Motor Vehicles for assistance in gathering information on the tractor through the Police Information Network, a system of information collection;

7. That Inspector Clay went with Detective Tobin and Rich back to the defendant's farm to recheck the serial number and the model number. All three officers entered the property by crossing at the same point of the fence that had been crossed the preceding day;

8. That after rechecking the serial number and the model number Inspector Clay entered the serial number on the Police Information Network by car radio; that he was informed that the tractor was listed as stolen from Neuse Tractor Company in Dudley, North Carolina, between 8:30 PM, June 29, 1975, and 7:00 AM, June 30, 1975, along with a 1971 Ford truck, serial number C76EUF51519, 1975 North Carolina license number CM8561;

9. That having failed to contact defendant on October 22, 1975, Inspector Clay called on the defendant at his home the morning of October 23, 1975, and asked him to come to the North Carolina Highway Patrol office in High Point to discuss the stolen tractor located on the defendant's farm;

10. That the defendant was present the morning of October 23, 1975 at the North Carolina Highway Patrol Office in High Point; that Inspector Clay, with Detective Thompson present, read the defendant his constitutional rights but the defendant refused to sign a paper acknowledging his rights; that the defendant stated to Inspector Clay and Detective Thompson that he knew his constitutional rights; that he did not need or want an attorney present; and that he would answer any questions posed by the officers;

11. That the defendant told Inspector Clay and Detective Thompson in the interview at the North Carolina Highway Patrol Office on October 23, 1975 that the tractor had been at his farm for approximately three months; that the defendant further stated that he had received the tractor from a black male, referred to as "Judge," who had driven the tractor onto the defendant's used car lot, Boone's Auto Plaza, 116 South Main Street, High Point, North Carolina; that "Judge" said he wasn't using the tractor and said the defendant could use the tractor and drove it to the gate of the defendant's farm; that the defendant drove it to the barn and parked it under the shed; that the defendant then stated

that he did not have any money in the tractor and that if it was stolen then he did not want it on his property;

12. That the tractor was brought to the North Carolina Highway Patrol Office in High Point by an employee of the defendant and surrendered the tractor to Inspector Clay;

13. That as a result of a telephone call to Inspector Clay at his residence on November 8, 1975 Inspector Clay went to Dealers Wholesale, Incorporated, 347 South Main Street, High Point, North Carolina, on November 10, 1975; that Inspector Clay learned from Robert Foster, President of Dealers Wholesale, Incorporated, that the defendant presented on June 30, 1975 a notarized bill of sale on Boone's Auto Plaza stationery selling to the defendant from W. G. Dawkins a 1974 Ford 3000 tractor, diesel, serial number C471023; that the bill of sale was notarized by Jimmy Malpass, Notary Public, on June 30, 1975; that the bill of sale showed a cash selling price of three thousand, eight hundred and fifty dollars; that the defendant borrowed twenty-four hundred dollars, signing the chattel mortgage agreement with Dealers Wholesale Incorporated with Glenn Berger, Agent, of Dealers Wholesale, Incorporated as witness;

14. That on November 10, 1975, Inspector Clay and Detective Rich went to Boone's Auto Plaza, the business of the defendant; that the defendant was informed that they wanted to discuss the stolen tractor and also informed him again of his constitutional rights; that again the defendant stated that he knew his rights; that he did not need or want an attorney present, and that he would answer any questions; that the defendant stated to the officers that the bill of sale was made out solely to borrow money; that W. G. Dawkins was a white male who happened to be in his office when the bill of sale was manufactured and that he had intended to leave one number out of the serial number purposefully; that Inspector Clay informed the defendant that the serial number on the bill of sale was identical to the serial number of the stolen tractor; that the defendant then stated that he would not answer any more questions and demanded that the officers leave the car lot;

15. That Inspector Clay and Detective Rich obtained a warrant of arrest for the defendant and arrested the defendant in the afternoon of November 10, 1975.

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

1. That there was not a search in the meaning of the Fourth Amendment of the United States Constitution; that the tractor was found under a shed attached to a barn in plain and public view; that the barn was located in an open field and not within the curtilage of the defendant since there was not a dwelling place within the enclosure where the barn was located; that the residence of the defendant was one and one-half miles from the barn and the farm on which the barn was located was not contiguous to defendant's residence; furthermore, the property was not owned by the defendant but was solely in the name of his wife, Dorothy T. Boone. The officers were therefore not required to obtain either a search warrant or permission to inspect the serial number of the tractor since the tractor was in plain view and under an open lean-to.

2. That the statements made by the defendant on October 23, 1975 to Inspector Clay and Detective Thompson and on November 10, 1975 to Inspector Clay and Detective Rich were given freely, voluntarily, and with full knowledge and understanding of his constitutional rights and the defendant indicated that he freely and voluntarily waived such rights and stated he did not need or want an attorney present.

IT IS NOW, THEREFORE, ORDERED that all evidence concerning a Ford tractor with serial number C471023 is competent evidence in the trial of this case, and any statements made by defendant to Inspector Clay pertaining to said Ford tractor, serial number C471023, are also competent evidence."

Following the *voir dire* hearing, the State introduced testimony before the jury which was substantially in accord with Judge McConnell's findings of fact.

The threshold question is the legality of Officer Clay's entry onto the land of defendant's wife and his obtaining the serial

number from the tractor parked under the lean-to shed. The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

G.S. 15A-974 provides that upon timely motion evidence must be suppressed if its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina.

[1] Before resorting to the rules of search and seizure, it must first be determined whether the conduct complained of was within the sphere of Fourth Amendment protection. Though title to the real property on which the stolen tractor was discovered was in defendant's wife's name, it is clear that "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. . . ." *Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed. 2d 1154, 88 S.Ct. 2120 (1968). Thus, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967).

The crucial issue, therefore, is whether in light of all the circumstances the open lean-to shed under which the tractor was parked was an area in which defendant had a reasonable expectation of freedom from governmental intrusion. The shed was located in an open field on a 19.9 acre tract of land, some 100 feet from public school grounds, a place where the public had a right to be. The shed was an open-air type structure, and the tractor was visible from the school property. Defendant's home was located in the town of High Point, some 1½ miles from the property. There was no residence within the fenced-in area, nor was there a residence contiguous thereto. The lean-to and the barn to

which it was attached were the only structures within the fenced-in area. There were no "No Trespassing" signs on the property.

Whether a search or seizure is reasonable is to be determined on the facts of each individual case. *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968); *Cooper v. California*, 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788 (1967); *Preston v. United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964).

[2] Generally, an open field is not an area entitled to Fourth Amendment protection. The "open field" doctrine was enunciated by Justice Holmes in *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445 (1924). That case involved the discovery of illegal whiskey in a field by officers who went on defendant's premises without a search warrant. Speaking for the Court, Mr. Justice Holmes said:

> "It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. . . . The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226."

As is noted in *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir. 1966), ". . . This amendment [the Fourth] speaks of the 'houses' of persons, which word has been enlarged by the courts to include the 'curtilage' or ground and buildings immediately surrounding a dwelling. . . . The reach of the curtilage depends on the facts of a case. . . ."

More recent decisions by the federal courts have not abrogated the principles set forth in *Hester v. United States, supra.* Thus, in the recent case of *United States v. Capps*, 435 F. 2d 637 (9th Cir. 1970), the Court said: "[I]nformation gained as a result of a civil trespass on an 'open field' area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information. *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 68 L.Ed. 898 (1924); *Wattenburg v.*

United States, 388 F. 2d 853, 856 (9th Cir. 1968); *McDowell v. United States*, 383 F. 2d 599, 603 (8th Cir. 1967); *Giacona v. United States*, 257 F. 2d 450, 456 (5th Cir.), *cert. denied*, 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed. 2d 104 (1958); *Koth v. United States*, 16 F. 2d 59, 61 (9th Cir. 1926)."

This principle has been applied by this Court on prior occasions. In *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), the defendant contended that the officer involved had engaged in an illegal search and seizure because he had illegally visited a field where marijuana was growing, prior to the issuance of a search warrant. Justice Branch, speaking for the Court, stated:

> "Answer to this attack on the validity of the search warrant is found in *State v. Harrison*, 239 N.C. 659, 80 S.E. 2d 481:
>
> > "'It seems to be generally held that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site. Machen, The Law of Search and Seizure, page 95 (citing *Hester v. United States*, 265 U.S. 57, 44 Sup. Ct. 445, 68 L.Ed. 898); Cornelius, Search and Seizure, Second Edition, page 49; 48 C.J.S., Intoxicating Liquors, section 394, page 630, *et seq.*; 30 Am. Jur., Intoxicating Liquors, section 528, page 529; Anno. 74 A.L.R. 1454, where numerous cases on this point are collected, among them being: *Simmons v. Commonwealth*, 210 Ky. 33, 275 S.W. 369; *S. v. Cobb*, 309 Mo. 89, 273 S.W. 736; *Penney v. State*, 35 Okla. Crim. Rep. 151, 249 P. 167; *Sheffield v. State*, 118 Tex. Crim. Rep. 329, 37 S.W. 2d 1038; *Field v. State*, 108 Tex. Crim. Rep. 112, 299 S.W. 258.'"

[3] Accordingly, we hold, in light of the circumstances in this case, that the lean-to shed located in an open field was not an area in which there was a reasonable expectation of freedom from governmental intrusion, and that the checking of the serial number by Officer Clay was reasonable. This assignment of error is overruled.

In view of our holding that the obtaining of the serial number from the tractor was not an unreasonable search, we need not consider whether the search was justified by the fact that the tractor was in plain view. *See* 7 Strong, N.C. Index 2d, Searches and Seizures § 1, and cases cited therein.

Defendant's other assignments of error are without merit. There was ample evidence to go to the jury. The trial judge, on motion to suppress and after a hearing, made extensive findings of fact and conclusions of law in compliance with G.S. 15A-977(f). Defendant expressly requested that the trial judge charge the jury on defendant's failure to testify. The judge charged:

> "The laws of the State of North Carolina provide that the defendant may choose as he sees fit whether or not to testify. The fact that he does not testify does not create any presumption against him nor should it be considered by you against him."

[4] We have held that ordinarily it is better to give no instruction concerning defendant's failure to testify unless such an instruction is requested by defendant. If defendant does request such an instruction, as defendant did in this case, it is the duty of the trial judge to instruct the jury on this feature of the case. The judge charged that defendant's failure to testify "should not" be considered against him. Defendant contends that the judge erred because he failed to charge the jury that it "shall not" consider defendant's silence against him. While it is better practice to use the words of the statute, *i.e.*, "shall not create any presumption against him," G.S. 8-54, we do not think the use of the words "should not" is such error as to require a new trial. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971).

After a careful examination of the entire record, we find no prejudicial error in the trial, and the decision of the Court of Appeals is affirmed.

[5] An unusual situation exists, however, concerning the sentence imposed upon the defendant. The following appears in the record:

"The Court by statement in open court to counsel for the defendant, with the defendant present, indicated that he would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty and the jury had returned a verdict of guilty as charged of a violation of G.S. 14-70. In soliloquy between counsel for the defendant and the Court it was indicated by the presiding judge that the prison sentence would be necessary although the Court was not familiar with the past record or character of the defendant. It was further placed in the record that during the trial of this cause the presiding judge had indicated in chambers to the defendant's counsel his intentions to give to the defendant an active prison sentence if he persisted in his plea of not guilty and did not accept a lesser plea proffered by the Assistant District Attorney."

A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights. *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967).

Under Article I, Section 24, of the North Carolina Constitution, no person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly, however, may provide other means of trial for misdemeanors with the right of appeal for trial *de novo*. No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial. This right ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence. The statement of the trial judge, expressed by him in open court, indicated that the sentence imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury. This we cannot condone. We agree with the Court of Appeals: "The trial judge may have sentenced defendant quite fairly in the case at bar, but there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State." Defendant

had the right to plead not guilty, and he should not and cannot be punished for exercising that right. *See State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651 (1966); *State v. Patton*, 221 N.C. 117, 19 S.E. 2d 142 (1942). The case must be remanded for entry of a proper judgment, without consideration of defendant's refusal to plead guilty to a lesser offense.

For the reasons stated, the judgment imposed is vacated and the case is remanded to the Court of Appeals for remand to Guilford Superior Court, High Point Division, for proper judgment.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT LEE THOMPSON

No. 61

(Filed 15 December 1977)

1. **Criminal Law § 102.7— jury argument—characterization of defense witnesses**

The district attorney's jury argument characterizing defendant's two female witnesses as "a couple of hot numbers" and referring to one of those witnesses as a "cohort" of the other could legitimately be inferred from the evidence and was not improper. Furthermore, any possible prejudice from such argument was cured when the court sustained defendant's objections thereto and gave the jury curative instructions.

2. **Criminal Law § 102.6— jury argument—absence of other alibi witnesses**

It was proper for the district attorney to ask questions and argue to the jury about the whereabouts of other potential witnesses who did not testify but who could have corroborated defendant's alibi if, in fact, his alibi evidence was accurate and truthful.

3. **Criminal Law § 102.7— jury argument—absence of motive by victim to accuse falsely**

In this rape prosecution, the district attorney's jury argument that the prosecuting witness lacked "the guts, the imagination, the intelligence and the reason to come into a court of law and just pluck some innocent fellow out of the public and send him off" was not improper.

4. **Criminal Law § 102.9— jury argument—defendant's interest in testifying falsely**

The district attorney's jury argument that defendant's testimony should be carefully scrutinized because a defendant "has a deep and abiding, vested

interest in telling you any sort of transparent fabrication his imagination can dream up and that he thinks you are gullible enough and naive enough to buy" was merely an assertion that a criminal defendant has an interest in testifying falsely if he believes the jury will give credence to his false testimony and was not improper.

5. **Criminal Law § 102.6— jury argument—blame for freeing criminals—curative instructions**

Any possible prejudice to defendant because of the district attorney's jury argument that juries must accept the blame if criminals are turned loose and set back on society was overcome when the trial court on its own motion instructed the district attorney that the defendant was not a criminal and was not to be referred to in such terms and instructed the jury not to consider any such reference to the defendant.

Justice EXUM concurring.

DEFENDANT appeals from judgment of *Preston, J.*, 28 February 1977 Session, ROBESON Superior Court.

Defendant was tried upon a bill of indictment charging him with the first degree rape of Naomi Hardin on 8 February 1975.

The State's evidence tends to show that on 8 February 1975 at about 12:45 a.m. Naomi Hardin and her estranged husband were sitting in a car parked in a secluded area known locally as Lover's Lane. The doors of the car were jerked open by two black males, both wearing masks and one carrying a sawed-off shotgun. Mr. and Mrs. Hardin were ordered from the car. Mr. Hardin attempted to flee but was caught and knocked unconscious by a blow from one assailant's shotgun. Mrs. Hardin attempted to flee, was caught and forced to walk through a wooded area to the assailants' car. There she was forced into a light colored 1966 Plymouth Fury with a loud muffler. She was blindfolded but her blindfold did not completely obscure her vision.

The assailants drove the car several miles down various roads and Mrs. Hardin was able to discern the route they followed. She was familiar with the roads followed because she sold insurance and had clients living in that area. During this journey her captors removed their masks and Mrs. Hardin was able to observe their features. She was also able to observe that the car had a black interior, a three-speed standard gear shift mounted on the steering column and a red oil or alternator light which blinked on and off continually.

The car stopped in front of a white frame house. Mrs. Hardin was forced to have sexual relations with one of her assailants in the front seat of the parked car. She was then escorted into the house where she was forced to have relations with the other assailant. She had slipped her blindfold up over her eyes and had an unobstructed view of this latter assailant, whom she later identified as defendant. She was then returned to the car which was driven toward Lumberton. During this journey she was raped again. Finally the rapists stopped the car in a wooded area and Mrs. Hardin was permitted to leave.

Mrs. Hardin subsequently identified a pale yellow 1966 Plymouth Fury belonging to defendant as similar to the car in which she had been abducted. Defendant's car had a black interior, a three-speed standard transmission mounted on the steering column, a loud muffler, and a red oil light which blinked on and off continually when the car was in motion. Mrs. Hardin also traced the route her assailants followed and directed officers to a white frame house which she identified as the place where defendant raped her. Defendant had been given permission to occupy this house in exchange for his promise to work for the man who farmed the property on which it was located. Mrs. Hardin identified defendant as one of her assailants and selected him from a lineup of nine men. On the first attempt to identify her assailants from this lineup, she selected another man but, after calming herself, she returned to the lineup and identified defendant and Willie Davis McEachern as her assailants. McEachern's conviction has heretofore been upheld. See 290 N.C. 431, 226 S.E. 2d 487.

Defendant's testimony tended to show that at the time Mrs. Hardin was raped he was talking with two girls at a local gathering place. Defendant stated that he had loaned his car to Willie McEachern, identified by Mrs. Hardin as the other man who had raped her, and that he talked to the two girls for one and one-half to two hours while waiting for McEachern to return the car. His testimony concerning his whereabouts at the time of the rape was corroborated by two young women, Billie Ann Leake and Geraldine McNatt.

Defendant was convicted of first degree rape and sentenced to life imprisonment. He appealed to the Supreme Court assigning errors noted in the opinion.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the state of North Carolina.

Arthur L. Lane and Paul B. Eaglin, attorneys for defendant appellant.

HUSKINS, Justice.

Defendant assigns as error various instances of alleged misconduct on the part of the district attorney, contending his actions and statements in questioning witnesses, addressing the court, and in his argument to the jury deprived defendant of a fair and impartial trial guaranteed by both federal and state constitutions. This assignment requires an examination of the challenged acts and the context in which they occurred.

Defendant testified that he was at Mauney's Supermarket and its environs from midnight until 2 a.m. on the night of 8 February 1975, talking to and riding around with Billie Ann Leake and Geraldine McNatt. This is the period during which Mrs. Hardin was raped. Defendant therefore contends he could not have been the rapist. His alibi was largely supported by the testimony of the two girls. During cross-examination of Geraldine McNatt, the district attorney attempted to demonstrate that she was unsure of the date defendant was in her presence. When she said she had not checked it out on the calendar, he asked: "So you don't really know which weekend you are talking about in reference to the 7th and 8th of February 1975; do you, girl?" Defense counsel objected "to this 'girl' bit." The objection was sustained, motion to strike allowed, and the district attorney then withdrew the question.

[1] During the course of his jury argument the district attorney referred to Geraldine McNatt and Billie Ann Leake as "a couple of hot numbers." Defendant's objection to this characterization was sustained, his motion to strike was allowed, and the jury was instructed to disregard the expression. Shortly thereafter the district attorney referred to one of those witnesses as a "cohort or friend" of the other. Defendant's objection to the word "cohort" was sustained.

The record reveals that on the night of 7-8 February 1975 when Mrs. Hardin was raped, Geraldine McNatt was twenty years of age and Billie Ann Leake was fifteen years of age. Ac-

cording to the testimony of these girls, Miss Leake had been out on the town that night until 4:30 a.m., frequenting nightspots and drinking beer. Miss McNatt had visited various local hangouts in the early hours of the morning. According to their testimony, they met defendant by chance at Mauney's, a local hangout, where they "walked over and started talking to him. . . . We talked about how to get high on anything—drugs, liquor, beer or anything." After talking with him for one and one-half hours they joined him in his car and went to the Patio Club where they remained until 2 a.m.—"when we got there the place was jumping." While there Miss McNatt testified she drank wine and beer, while Miss Leake confined her imbibing to beer alone. Miss Leake testified she stayed at the Patio about an hour and a half and got home about 4 or 4:30 a.m. Miss McNatt said she left the Patio Club about 2 a.m. with her cousins.

In our view the district attorney's characterizations of Geraldine McNatt and Billie Ann Leake may legitimately be inferred from the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975). In any event, the defendant's objections were sustained and the curative instructions of the judge sufficed to remove any possible prejudice that might have been engendered by the challenged remarks. *See State v. Britt, supra*; *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975).

[2] Defendant next objects to the district attorney's questions and jury argument concerning the whereabouts of other potential witnesses who did not testify but who could have corroborated defendant's alibi if, in fact, his alibi evidence was accurate and truthful. Defendant's challenge cannot be sustained. "It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and 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*, 286 N.C. 509, 212 S.E. 2d 125 (1975). It is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to produce exculpatory testimony from witnesses available to defendant. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974). *Compare*

State v. Thompson, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972).

[3] During the course of his jury argument the district attorney argued the truthfulness of the prosecuting witness by contending she lacked "the guts, the imagination, the intelligence and the reason to come into a court of law and just pluck some innocent fellow out of the public and send him off." An objection to this portion of his argument was sustained and the jury instructed not to consider it. In our view this argument was not improper. Hence further discussion is unnecessary.

[4] During the course of his jury argument the district attorney urged the jury to scrutinize defendant's testimony carefully in the following fashion:

> "The law says—and I think possibly the Judge may charge you something to this effect: That when a defendant walks around and places his hand on this Holy Bible and swears to tell you the truth, you, the jury, is to do something. What is it? You are to what? You are to scrutinize and you are to examine and you are to look at closely every single thing that he has to say. You know why? Because he has a deep and abiding, vested interest in telling you any sort of transparent fabrication his imagination can dream up and that he thinks you are—
>
> MR. LANE [defense attorney]: Objection.
>
> MR. BRITT: — gullible enough and naive enough to buy.
>
> MR. LANE: Objection.
>
> COURT: Overruled."

Defendant assigns the quoted argument and the ruling of the court as error.

This Court has held that it is improper for an attorney to express his personal opinion concerning the veracity of a witness. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). We have also held that it is proper for a district attorney to argue to the jury: "I submit to you, that [defense witnesses] have lied to you." *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). The argument of the district attorney quoted above, when shorn of its colorful verbiage, is an assertion that a criminal defendant has an interest in

testifying falsely if he believes the jury will give credence to his false testimony.

We have repeatedly held that it is proper for the trial judge to charge the jury that it should carefully scrutinize the testimony of a criminal defendant because he is interested in the outcome of the case. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Choplin*, 268 N.C. 461, 150 S.E. 2d 851 (1966); *State v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606 (1943). It is likewise proper for attorneys to so argue. As a general rule the argument of counsel must be left largely to the control and discretion of the presiding judge. *See, e.g., State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976), and cases there cited. "Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Taylor, supra,* at 227, 221 S.E. 2d at 362.

In light of the foregoing principles, we hold that the quoted portion of the district attorney's argument is within permissible bounds.

[5] Defendant objects to another portion of the district attorney's argument in which he contends that juries must accept the blame if criminals are turned loose and set back on society. The trial court intervened immediately and on its own motion instructed the district attorney that the defendant was not a criminal, was not to be referred to in such terms, and that the jurors should not consider any such reference to the defendant. We hold that the trial judge's curative instructions were adequate to overcome any possible prejudice conceivably caused by this particular line of argument.

Defendant finally argues that the cumulative effect of the foregoing actions on the part of the district attorney coupled with other instances of alleged misconduct—"screaming" questions at defense witnesses, continually interrupting the defense attorney in his attempt to address the court, mocking the defense attorney, arguing with the trial judge and making flippant responses to his rulings—served to create a biased atmosphere in which the defendant could not receive a fair trial. We have examined the record and the cases cited by defendant. The record does not reveal such prosecutorial misconduct nor such im-

proprieties as those involved in *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975), or *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). Nor does the record reveal an attempt to argue matters not legitimately arising on the evidence. *Compare State v. Roach*, 248 N.C. 63, 102 S.E. 2d 413 (1958). Moreover, no violation of G.S. 8-57 or G.S. 8-54 appears, as in *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), and *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

While the courtroom conduct of District Attorney Britt in many cases reflects a callous indifference to decisions of this Court, see in particular *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975), and *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), a fact we note in passing, we find in this case no impropriety of sufficient moment to warrant a new trial. The verdict and judgment must therefore be upheld.

No error.

Justice EXUM concurring.

I write to disassociate myself from what is at least an intimation in the majority opinion that the conduct of the district attorney complained of on appeal was overall not improper but merely another example of order-of-the-day, colorfully zealous advocacy. I cannot discern from the opinion itself whether the majority's view is that the district attorney's conduct, while improper, was not sufficiently prejudicial to warrant a new trial or whether it is that his conduct was not improper. In my view the district attorney's conduct goes beyond that which is permitted to zealous advocacy.

The North Carolina Code of Professional Responsibility, Disciplinary Rule 7-106(c)(2), 283 N.C. 783, 837 (1973), provides:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person."

The American Bar Association's Standards Relating to the Administration of Criminal Justice, The Prosecution Function, § 5.7(a), Compilation, p. 97, provides:

> "The interrogation of all witnesses should be conducted fairly, objectively and with due regard for the dignity . . . of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum."

The district attorney's cross-examination of the witness Geraldine McNatt and his reference to her and the witness Billie Ann Leake as "hot numbers" were unnecessary attempts to degrade, intimidate and humiliate these witnesses contrary to the ethical considerations set out above.

This Court said in *State v. Miller*, 271 N.C. 646, 657, 157 S.E. 2d 335, 344 (1967): "Defendants in criminal prosecutions should be convicted upon the evidence in the case, and not upon prejudice created by abuse administered by the solicitor in his argument." The North Carolina Code of Professional Responsibility, *supra*, provides: "Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system." Ethical Consideration 7-37, 283 N.C. at 834. The district attorney's argument to the jury was actually that *every* defendant "has a deep and abiding, vested interest in telling you any sort of transparent fabrication his imagination can dream up and that he thinks you are gullible enough and naive to buy." It constituted unwarranted abuse and haranguing and offensive tactic which violates the principles of *State v. Miller*, *supra*, and Ethical Consideration 7-37 of the Code of Professional Responsibility, *supra*. The argument is, furthermore, legally incorrect. It is proper, of course, to argue that a defendant has an interest in the outcome of the case which might *tempt him to lie* if he is in fact guilty, and that his testimony should therefore be scrutinized carefully. I know of no rule to the effect that *every* defendant has an interest in testifying falsely. To permit such an argument is, in effect, to strike a severe blow at the presumption of innocence to which all defendants are entitled. The argument, in effect, says that criminal defendants are all guilty and if they testify to the contrary in their own behalf they are simply lying. The trial judge committed error in not sustaining defendant's objection to this argument.

The same kind of error was committed when the district attorney referred, at least by implication, to the defendant as a

criminal. The trial judge, however, intervened and instructed the jury to disregard this argument.

Because in this case the trial judge properly intervened, sustained most of defendant's objections to these improper prosecutorial tactics and instructed the jury to disregard them; and because I believe the result in this case would have been the same even if the trial court had sustained the objection to the district attorney's improper argument on the one occasion when he erroneously overruled it, I am unwilling to vote that defendant is entitled to a new trial. Therefore I concur in the result reached by the majority.

STATE OF NORTH CAROLINA v. BROWNIE LEE McKEITHAN

No. 49

(Filed 15 December 1977)

1. **Criminal Law § 66.16— in-court identification of defendant—pretrial photographic identification—no taint**

In a prosecution for the murder of a convenience store employee committed during an armed robbery of the employee, and armed robbery of a customer of the store, the trial court properly allowed an in-court identification of defendant by the customer and properly concluded that the identification was not tainted by unnecessarily suggestive pretrial identification procedures where the evidence tended to show that, on the night of the crimes, the store and parking lot were well lighted; the customer was in the presence of the robber both inside and outside the building for a total of fifteen to twenty minutes; he had ample opportunity to observe the robber who was wearing no mask; the customer observed the robber closely and gave the officers a detailed description of him; the customer viewed numerous photographs on several occasions, but did not find the robber's picture among them; and the customer did identify the robber's photograph from among ten shown him by an officer approximately one month after the crime was committed.

2. **Criminal Law § 87.4— matters brought out on cross-examination—similar questions proper on redirect examination**

Where defendant's cross-examination of a police officer consisted, in part, of sustained inquiries concerning an alleged accomplice who was charged with the same crime as defendant, defendant could not complain of the district attorney's redirect examination of the officer concerning the accomplice and his role in the alleged crimes.

3. **Criminal Law § 89.4— prior inconsistent statements—admissibility for impeachment purposes**

The trial court did not err in allowing the district attorney to cross-examine a witness concerning answers he had given prior to trial to questions about his knowledge of and participation in various armed robberies immediately preceding the robbery and murder for which defendant was on trial, since the State contended that the witness's earlier responses were inconsistent with his testimony on direct examination, and prior inconsistent statements of a witness are always admissible for impeachment purposes.

DEFENDANT appeals from judgments of *McKinnon, J.*, 31 January 1977 Session, DURHAM Superior Court.

Defendant was charged in separate bills of indictment with (1) felony murder of Isaac Earl Hedrick, Jr., (2) armed robbery of Isaac Earl Hedrick, Jr., and (3) armed robbery of Lawrence Rogers, the State alleging that all three offenses were committed on 3 October 1975 at the 7-Eleven Store on Highway 54 in Durham County.

This case was first tried before Judge Lee in Durham Superior Court at the 5 May 1976 Session and resulted in a mistrial.

The State's evidence tends to show that Lawrence Rogers, thirty-two years of age, stopped at the Parkwood 7-Eleven Store on Highway 54 on the night of 2 October 1975. Isaac Hedrick, Jr., manager of the store, was there when Rogers arrived. While Mr. Rogers was purchasing a soft drink, a black male entered the store, pulled a gun and said, "I need money." At that time the robber was within two or three feet of Rogers. All the lights were on inside and outside the 7-Eleven Store. The robber wore no mask or hood to obscure his features. Mr. Rogers looked at him, then at Mr. Hedrick, then back at the robber and at that moment the first shot was fired. Mr. Hedrick screamed, grabbed his stomach and went to the floor. The robber ordered Rogers to go around and open the cash register and Rogers did so. There were two cash registers in the store and the one Mr. Rogers opened had no money in it. The robber said, "Not that register, white boy, this other register." Rogers went to the big chrome register and tried to open it but failed. The robber then walked to where Mr. Hedrick lay moaning, put the gun to Hedrick's head and pulled the trigger. Mr. Hedrick stopped moaning and made no further sound. The robber then walked up to Mr. Rogers and in-

quired if he had any money, watches or rings. Rogers gave him $22 in money and offered to write him a check. The robber refused a check, told Rogers to "get back and get down," and Rogers did. The robber then pulled the cash register off the counter and attempted to open it himself but failed. He picked up the cash register and said to Rogers, "Follow me, white boy." Rogers obeyed and they left the store by the front door. The robber carried the cash register into the woods where he told Rogers to carry it further into the woods. It weighed 60 to 70 pounds. Finally Rogers told the robber, "You are going to have to help me with it." When the robber grasped the cash register to assist in carrying it, Mr. Rogers dropped the entire weight on him and ran. The robber fired a shot at Mr. Rogers but missed. Rogers circled through the woods and returned to the 7-Eleven Store where his car was parked. He drove quickly to his home in Parkwood and called the sheriff's office.

Mr. Rogers told the officers there had been a robbery at the Parkwood 7-Eleven Store and a man had been killed. He described the robber as a black male, 5 feet 11 inches to 6 feet in height, moderate complexion, wearing a brown and green checkered flannel shirt, levis and black shoes and having a little goatee.

About five hours later, at 7:15 a.m. on 3 October 1975, Deputy Sheriff Wilkerson brought some photographs to the Rogers home. Over the next several weeks Rogers examined hundreds of photographs of young black males but told Officer Wilkerson that the robber was not among them. Approximately a month later Officer Wilkerson brought a series of ten photographs to Mr. Rogers' home and laid them out on the dining room table. Mr. Rogers examined them, pointed to one photograph and said, "There is the man." It was a photograph of defendant.

Officer Jerry Wilkerson testified he arrived at the 7-Eleven Store on Highway 54 around 1:10 a.m. on the morning of October 3 and found the dead body of Isaac Earl Hedrick, Jr. on the floor behind the counter. He took a statement from Lawrence Rogers, the only eyewitness on the scene, and Mr. Rogers later signed it. It was offered in evidence as State's Exhibit 8 and corroborates the in-court testimony of Rogers.

Officer Wilkerson further testified that he showed Mr. Rogers numerous photographs from time to time, including a microfilm lineup consisting of mugshots on microfilm, but Rogers identified no one. Finally, on 6 November 1975, he took ten photographs, including a picture of defendant, to the Rogers home, lined them up on the dining room table and numbered them from one to ten. He then called Mr. Rogers into the room and asked him to look at the photographic lineup. Mr. Rogers "started looking at them from left to right in numerical order. When he came to the photograph of the defendant, he stated 'this is the man' and backed away from the table. The defendant's photograph was number six in the lineup." These ten photographs were offered in evidence as State's Exhibit 9. Defendant was thereafter arrested and charged with the offenses giving rise to this case.

Officer Wilkerson further testified that a man named Claudie Eugene Cheek was also charged with these offenses but had not been taken. The officer said he was looking for an accomplice who might have been driving the car that night.

Defendant offered evidence but did not testify himself.

Larry Ravon Fleming testified that the officers took him into custody on 3 October 1975 and told him somebody had identified him as the robber who killed "the white man at Parkwood." While being detained at the sheriff's office, this witness testified that a man looked at him and said "he looks like the one." He said the solicitor offered to drop charges against him concerning other robberies in the Durham area if he could "come up with information"; that defendant's name was never mentioned but some man named Cheek was mentioned as a suspect. Thereafter, Fleming said, the only information he heard about the Parkwood robbery "through street sources" was that Cheek was wanted for murder and armed robbery of the 7-Eleven in Parkwood.

Mrs. Mary Shaw, a nurse, testified that defendant is her brother; that on the night of 2 October 1975 at about 8 p.m. he came to her home to get some medicine; that he returned to her house later that night about 11:30 p.m., talked for a while, and went to bed a little after midnight. He had a coughing spell around 1:30 a.m., she got up to give him some cough syrup and aspirin, and he slept on the couch in the living room the remainder of the night.

Mrs. Jenny McLeod testified that defendant is her son; that on Sunday, 5 October 1975, at about 10:15 p.m., defendant left her home in Durham going to Washington, D.C. to get his discharge papers straightened out so he could attend Durham Technical Institute. She said her son had never had a driver's license and does not drive a car. She did not know how he went to Washington except his statement that he rode the bus.

Mrs. Julia Baines testified that on the night of 2 October 1975 from 12:30 a.m. until 1:30 a.m., Claudie Eugene Cheek and his brother James Cheek were at her home in Durham; that a silver and white gun dropped out of Claudie Cheek's pocket as he sat on the sofa; that two weeks later she saw Claudie Cheek again at her home and, having read about the Parkwood killing, she advised Cheek to give himself up; that he had with him the same gun that had fallen out of his pocket on the night of 2 October.

The jury convicted defendant of felony murder of Isaac Earl Hedrick, Jr., armed robbery of Isaac Earl Hedrick, Jr., and armed robbery of Lawrence Rogers. He was sentenced to life imprisonment for the murder to begin at the expiration of a twenty-year sentence imposed for the armed robbery of Lawrence Rogers. Judgment was arrested in the other armed robbery case since it constituted the underlying felony in the felony-murder conviction. Defendant appealed the life sentence directly to the Supreme Court and we allowed motion to bypass the Court of Appeals in the armed robbery case to the end that both cases receive initial appellate review in the Supreme Court.

Rufus L. Edmisten, Attorney General; Thomas B. Wood. Assistant Attorney General, for the State of North Carolina.

Jerry B. Clayton; Robert W. Myrick; Kenneth B. Oettinger, attorneys for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends his in-court identification by the witness Lawrence Rogers was based on unnecessarily suggestive pretrial identification procedures which violated due process. He therefore argues that the identification testimony of this witness was erroneously admitted. This constitutes his first assignment of error.

A voir dire was conducted at the first trial to determine whether defendant's in-court identification was tainted by prior photographic identification procedures. The testimony of Lawrence Rogers on voir dire tends to show that the 7-Eleven Store on Highway 54 on the night in question was well lighted with overhead fluorescent lights and that the parking lot was well lighted with floodlights; that Rogers was in the presence of the robber, both inside and outside the store building, for a total of fifteen to twenty minutes; that he was very close to the robber and had ample opportunity to observe him while the crimes were being committed; that the robber was wearing no mask or other disguise; that Rogers observed the robber closely and gave the officers a detailed description of him.

Mr. Rogers further testified on voir dire that five hours after the robbery, Officer Wilkerson showed him a number of photographs and he told the officer the robber's picture was not among them. On two other occasions, numerous photographs in groups were shown to the witness and on each occasion he informed the officer that the robber's picture was not among them. On one occasion he went to the Durham Police Department to view suspects singly and informed the officers none of those men was the man who committed the robbery and killed Mr. Hedrick. On another occasion Mr. Rogers went to the police department and viewed literally hundreds of photographs and told the officers he had not seen the photograph of the man who committed the robbery and murder here in question. Finally, on 6 November 1975, Officer Wilkerson carried ten photographs of black males of about the same age to Mr. Rogers' home, laid them out on the table, numbered them from one to ten, then brought Mr. Rogers into the room and asked him to examine them. Mr. Rogers testified: "I viewed it, I would say, at least a minute—thirty seconds or somewhere like that. I did immediately identify him as I looked over those photographs as the man who had robbed me and shot Mr. Hedrick. There is no doubt in my mind now or then. That is the man that killed him sitting over there on the other side of Mr. Jerry Clayton near the end of that table," referring to defendant.

Defendant offered no evidence on voir dire.

Judge Lee made findings of fact substantially in accord with the testimony of Lawrence Rogers and, based thereon, concluded

that no illegal identification procedures were used or suggestions made which would taint the identification of defendant. The court further concluded that the in-court identification of defendant by Lawrence Rogers was of independent origin based solely on what the witness saw at the time of the crimes and did not result from any out-of-court photographic identification or any other pretrial identification procedure suggestive or conducive to mistaken identification. Judge McKinnon adopted these findings and conclusions at this, the second, trial.

"The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. . . ." *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). Here, the totality of the circumstances indicates that the identification of defendant by Lawrence Rogers was not based on suggestive procedures likely to lead to misidentification. Hence no violation of due process occurred.

Where, as here, the findings and conclusions of the trial court on voir dire are supported by competent evidence, they are conclusive on appeal and must be upheld. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966).

In the factual context of this case, our holding is supported by many decisions both state and federal, including *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *United States v. Zeiler*, 447 F. 2d 993 (3d Cir. 1971); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974); *State v. Tuggle*, *supra*; *State v. Lock*, 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972).

Defendant's in-court identification by Lawrence Rogers was properly admitted. His first assignment of error is overruled.

[2] In his redirect examination of Officer Wilkerson, the district attorney asked the witness if the officers were looking for an accomplice named Claudie Cheek who was allegedly driving the getaway car the night of the robbery and murder. Over objection Officer Wilkerson replied in the affirmative. In his closing argu-

ment, again over objection, the district attorney argued to the jury that defendant had an accomplice, namely Claudie Cheek, who transported defendant to and from the 7-Eleven Store but remained outside during the robbery and murder. Defendant's timely motions for mistrial due to admission of the challenged evidence and jury argument were overruled. His second assignment of error is based thereon.

The record shows that defendant's cross-examination of Officer Wilkerson consisted, in part, of sustained inquiries concerning Claudie Cheek. These inquiries elicited responses that Cheek was a "prime suspect" in the crime and had been charged with the "identical" crime as that for which defendant was on trial. Defendant's counsel then showed the witness "the bills of indictment of Claudie Cheek, charging him with the same identical crimes in the same identical language as the bills of indictment for defendant." Under such circumstances, defendant may not complain when the district attorney, on redirect examination, inquires as to whether Cheek was being sought as an accomplice to the robbery and murder. "[I]f on cross-examination evidence is developed without objection, the adverse party can offer evidence in reply relating to the same questions, even though such evidence in reply might have been incompetent in the first instance." *Willis v. New Bern*, 191 N.C. 507, 514, 132 S.E. 286, 289 (1926). It has been suggested that the rule stated above should be subject to some limitations and that exercise of the trial court's discretion is frequently necessary. McCormick, Evidence § 57, pp. 131-33 (2d ed. 1972). In the present case, however, we think the subject of the district attorney's redirect examination was entirely proper. Having so held, it is unnecessary to consider defendant's arguments concerning the general question of the admissibility of evidence tending to show the guilt of one other than the accused. The district attorney's jury argument constituted a legitimate exercise of his right to argue the facts in evidence and all legitimate inferences derived therefrom. Defendant's second assignment of error is overruled.

[3] The witness Larry Ravon Fleming testified on direct examination that when he was picked up following the Parkwood robbery and murder, the district attorney questioned him not only about Parkwood but also about the Chesterfield Motel robbery, the Wamble's robbery, "and several more armed robberies."

Fleming swore that he had not been involved in any of those robberies, had no knowledge of them, *and that he told the district attorney so.*

The district attorney was permitted, over objection, to cross-examine Fleming concerning the responses he gave in October 1975 to questions about his knowledge of and participation in various armed robberies immediately preceding the Parkwood robbery and murder, the State contending his earlier responses were inconsistent with his testimony on direct examination. The ruling of the court permitting such cross-examination constitutes defendant's third assignment of error.

Defendant relies on the general 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, citing *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972), and *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976). The rule enunciated and applied in those cases has no application to the facts of this case. Here, the witness Fleming is not the accused and the State's cross-examination of him was not designed, and did not tend, to show that defendant McKeithan had committed other separate crimes. Rather, the challenged cross-examination attacked Fleming's credibility and was designed to impeach his testimony on direct examination.

For impeachment purposes a witness may ordinarily be cross-examined concerning statements he has made on other occasions which are inconsistent with his testimony at the present trial. 1 Stansbury's North Carolina Evidence § 46 (Brandis rev. 1973). Both the State and the defendant have a right to cross-examine a witness to show his interest or bias, *State v. Wilson*, 269 N.C. 297, 152 S.E. 2d 223 (1967), and questions which challenge the credibility of a witness are competent. *State v. Hart*, 239 N.C. 709, 80 S.E. 2d 901 (1954). For purposes of impeachment prior inconsistent statements of a witness are always admissible. *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971). *See* 1 Stansbury's North Carolina Evidence § 46 (Brandis rev. 1973). Moreover, "cross-examination is not confined to matters brought out on the direct examination, but questions are permissible to impeach, diminish or impair the credit of the witness. These questions often take a wide range, but should be confined to questions within the bounds of reason—the materiality is largely left to the

discretion of the court." *State v. Dickerson*, 189 N.C. 327, 332, 127 S.E. 256, 259 (1925). Defendant's third assignment of error is overruled.

After careful examination of the entire record we conclude that defendant has had a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

BOBBY STRICKLAND v. ANTHONY KING, HAYNES JONATHAN BLANTON AND RAMSEY CHEVROLET CO., INC. AND RONNIE DALE SELLERS v. ANTHONY KING, HAYNES JONATHAN BLANTON AND RAMSEY CHEVROLET CO., INC.

No. 8

(Filed 15 December 1977)

1. **Master and Servant § 87— workmen's compensation—exclusion of common law action**

An employee subject to the Workmen's Compensation Act whose injuries arise out of and in the course of his employment may not maintain a common law action against a negligent co-employee.

2. **Master and Servant § 62.3— workmen's compensation—injury while leaving work on private road**

Plaintiffs were not injured by accident arising out of and in the course of their employment when they were injured in a collision between two automobiles driven by fellow employees while they were leaving work on a two mile long private road maintained by the employer to provide ingress to and egress from the employer's plant where defendants, in driving plaintiffs home pursuant to a private arrangement, were not performing assigned duties for their employer; the accident occurred one and one-half miles from the employer's plant and parking lot on a road which was designed and constructed like a public highway; and the risks the employees were exposed to on the private road were not materially different from those encountered on a public highway. Therefore, plaintiffs could properly maintain a common law action against their allegedly negligent fellow employees.

3. **Automobiles § 97— liability of joint owner**

Mere joint ownership of an automobile does not render one joint owner liable for injuries caused by another joint owner while the latter is using the vehicle for his own purposes unaccompanied by his co-owner.

PLAINTIFFS instituted this civil action to recover for personal injuries allegedly received in an automobile accident. Judgments of dismissal by *Fountain, J.*, February 1976 Civil Session, COLUMBUS County Superior Court, were affirmed by the Court of Appeals, 32 N.C. App. 222, 231 S.E. 2d 193 (1977), (Clark, J., concurred in by Morris and Arnold, JJ.). We allowed discretionary review 5 April 1977.

The allegations of the parties, along with evidence at the motion hearing, tended to show the following:

An automobile driven by defendant Blanton, jointly owned by Blanton and defendant Ramsey Chevrolet Company, collided with a car operated by defendant King at about 4:10 p.m. on 20 May 1972 on a paved two-lane road owned and maintained by E. I. DuPont de Nemours and Company in Brunswick County. This private road was about two miles long and was the sole means of ingress and egress from the parking lot at DuPont's plant to the public highway. There were no signs near the entrance to the road directing other traffic to keep out, although there was a sign indicating that the road was private property. At the time of the accident, plaintiffs and defendants Blanton and King were employed by DuPont and, since the day shift had ended, were leaving work at the plant along with approximately one hundred other cars.

Defendants alleged in their amended answers that plaintiffs' claims were barred by the provisions of the North Carolina Workmen's Compensation Act. After a hearing, the trial court concluded that plaintiffs were injured by accident arising out of and in the course of their employment within the meaning of G.S. 97-2(6) and thus were barred from maintaining their common law actions.

Further facts necessary to the decision are related in the opinion.

Williamson & Walton, by Benton H. Walton III, for plaintiff-appellant Bobby Strickland. Yow & Yow, by Douglas A. Fox, for plaintiff-appellant Ronnie Dale Sellers.

McGougan & Wright, by D. F. McGougan, Jr. for defendant-appellee Anthony King. Anderson, Broadfoot & Anderson, by Henry L. Anderson, Jr., for defendant-appellee Haynes Jonathan Blanton and Ramsey Chevrolet Company, Inc.

COPELAND, Justice.

Plaintiffs contend that the North Carolina Workmen's Compensation Act has no application to this case and they consequently should be permitted to pursue their remedies at common law. For reasons hereinafter indicated, we agree and reverse the decision of the courts below.

[1] The Workmen's Compensation Act, in G.S. 97-9, provides that the sole remedy for a covered employee against his employer or those conducting the employer's business is to seek compensation under the Act. Thus, an employee subject to the Act whose injuries arise out of and in the course of his employment may not maintain a common law action against a negligent co-employee. *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952).

[2] The principal issue in the instant case is whether plaintiffs' injuries arose out of and in the course of their employment. Injuries received by an employee while traveling to or from his place of employment are usually not covered by the Act unless the employer furnishes the means of transportation as an incident of the contract of employment. *Whittington v. A. J. Schnierson & Sons, Inc.*, 255 N.C. 724, 122 S.E. 2d 724 (1961). However, injuries sustained by an employee while going to or from the work place on premises owned or controlled by the employer are generally deemed to have arisen out of and in the course of employment. *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (1962). In the case under consideration, plaintiffs were injured while leaving work on a road owned and maintained by their employer, the design and construction of which substantially complied with specifications for State highways. Defendants, in driving plaintiffs home, were performing no assigned duties for their employer; thus, the only factor which would suggest that this accident arose out of the parties' employment was the ownership and maintenance of the road by DuPont. Yet, even though an accident occurred on the employer's premises at a time when the employee was within the compass of his employment, this alone is insufficient to justify a finding that the injury arose out of the employment. *Bryan v. T. A. Loving Company and Associates*, 222 N.C. 724, 24 S.E. 2d 751 (1943).

Injuries in parking lots owned and maintained for employees by employers while arriving at or departing from the work site

have often been held to arise out of and in the course of employment because the risk of injury in such lots is different in kind and greater in degree than that experienced by the general public. *See, e.g., Altman v. Sanders*, 267 N.C. 158, 148 S.E. 2d 21 (1966); *Maurer v. The Salem Company*, 266 N.C. 381, 146 S.E. 2d 432 (1966); *Davis v. Devil Dog Manufacturing Company*, 249 N.C. 543, 107 S.E. 2d 102 (1959); *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). In the instant case, however, the accident occurred a *substantial* distance (one and one-half miles) from the employer's plant and parking lot on a road which differed in no significant respect from a public highway, other than its character as private property. The risks employees were exposed to in going to and coming from the plant were not materially different from those encountered on a public highway. Further, merely by driving their fellow employees home under an arrangement set up among themselves, defendants could not be said to have been conducting their employer's business. Thus, it is our conclusion that under the circumstances in this case plaintiffs are not barred by the provisions of G.S. 97-9 from pursuing their common law actions against the defendant co-employees.

[3] As to defendant Ramsey Chevrolet Company, however, the dismissal by the trial court was proper. As pointed out by the Court of Appeals, the Workmen's Compensation Act would not bar plaintiffs' claims against this defendant, since it was not a co-employee. *Altman v. Sanders, supra.* Nonetheless, mere joint ownership of an automobile does not render one joint owner liable for injuries caused by another joint owner while the latter is using the vehicle for his own purposes unaccompanied by his co-owner. *Rushing v. Polk*, 258 N.C. 256, 128 S.E. 2d 675 (1962).

Thus, with the exception of the dismissal of plaintiffs' actions against Ramsey Chevrolet Company, the decision of the Court of Appeals was erroneous and is

Reversed and remanded.

STATE OF NORTH CAROLINA v. GERALD DERMONT CONRAD

No. 100

(Filed 15 December 1977)

Kidnapping § 1.2— confinement for purpose of terrorizing—insufficiency of evidence

Evidence was insufficient for the jury in a prosecution for kidnapping where the State contended that defendant, by threats and deception, confined the prosecuting witness for the purpose of terrorizing her and thereby forcing her to commit prostitution, but testimony by the prosecuting witness indicated that at no time was there any display of force to cause the witness to remain with defendant; the only physical contact between the witness and defendant was when he attempted to seduce her and, upon her refusal, immediately desisted; the witness was allowed to go shopping with other girls in defendant's employ, unaccompanied by defendant; the witness at all times had money in her possession which could have been used to escape; the witness was allowed to go horseback riding with another girl at a location forty-five to fifty-five minutes' drive from the motel where she practiced prostitution; the witness went to a poker game approximately one hour's drive from the motel with one of defendant's friends where she made $86 in tip money and later spent the night at the friend's house because he was unable to drive; and the witness was experienced in worldly affairs far beyond her years.

WE allowed petition for discretionary review of the decision of the Court of Appeals, 33 N.C. App. 638, 235 S.E. 2d 799 (1977), (Arnold, J., concurred in by Britt and Vaughn, JJ.), which found no error in judgment of *Ferrell, J.*, 13 August 1976 Session, DAVIDSON County Superior Court.

Defendant was indicted and convicted of kidnapping under G.S. 14-39(a)(3) which reads, in pertinent part, as follows:

> "Any person who shall confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (3) Doing serious bodily injury to or terrorizing the person so confined, restrained or removed or any other person."

Upon his conviction, defendant was sentenced to twenty-five years imprisonment. It also appears that defendant later entered a plea of guilty to operating a house of prostitution, for which he received and served a sixty-day sentence.

The State's evidence tended to show the following:

The prosecuting witness, Mildred Nannette Wayne, age 17, was a native of St. Louis, Missouri. On 1 May 1976, she left her home in St. Louis and went to Detroit, Michigan, where she stayed with a friend for three days. Mildred had run away from home on prior occasions, once to California to see the manager of a rock group. On 3 May 1976, Mildred left Detroit alone hitchhiking south, headed for Daytona Beach, Florida. After catching several rides with truck drivers, she arrived at Bill's Truck Stop near Lexington, North Carolina, on Thursday, 6 May 1976. At this time, she had changed her mind about going to Florida and had decided to go home and straighten things out with her parents.

After purchasing some cigarettes at Bill's Truck Stop, the prosecuting witness went over to the Shangri-La Motel nearby to get a room for the night. She had approximately $90.00 at this time which she had brought with her from Detroit. After dinner, Mildred contacted the manager of the motel because there was no hot water in her room. Defendant and another man came to her room and fixed the water. Following some preliminary conversation, defendant suggested that Mildred work for him as a prostitute in order to make some money. She accepted this proposal after a few minutes thought, but agreed to do it only for the weekend. For the next ten days, the prosecuting witness stayed at the Shangri-La and much of the time engaged in prostitution under defendant's supervision. During this period she twice went shopping with other girls in defendant's employ and on one occasion went horseback riding with one of the girls at a location some forty-five to fifty-five minutes' drive from the motel. In addition, on Sunday night, May 9, Mildred went to a poker game with one of defendant's friends where she had several customers and made some $86.00 in tip money.

On 16 May 1976, Mildred left the Shangri-La and called the Sheriff's Department from Bill's Truck Stop. An officer arrived seven minutes later and she left with him.

Other facts pertinent to the decision are related in the opinion.

Cahoon & Swisher, by Robert S. Cahoon, for defendant-appellant.

Rufus L. Edmisten, Attorney General, by Associate Attorney Nonnie F. Midgette, for the State.

COPELAND, Justice.

Defendant assigns many errors, among them the denial of his motion for nonsuit. For reasons hereinafter indicated, we conclude that the failure to grant nonsuit for defendant was error and reverse the decision of the Court of Appeals.

In considering a motion for nonsuit, the court must view the evidence in the light most favorable to the State. *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977). There must be sufficient evidence to provide a reasonable basis for the jury to find that (1) the crime charged was in fact committed, (2) by the person charged. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Evidence which merely raises surmise or conjecture of guilt is insufficient to withstand nonsuit. *State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976).

Prior to its amendment in 1975, G.S. 14-39 contained no definition of the crime of kidnapping. Under the common law definition as set out by our Court, it was essential that the victim be taken and carried away to some other place. *State v. Roberts*, 286 N.C. 265, 210 S.E. 2d 396 (1974); *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973). The 1975 General Assembly rewrote the statute to include *confinement* or *restraint* for certain specified purposes in the definition of the crime, thereby eliminating the asportation requirement.

In the instant case, the State contends that defendant, by threats and deception, confined the prosecuting witness for the purpose of terrorizing her and thereby forcing her to commit prostitution. We note that the State's case hinged on proof of confinement for the purpose of terrorizing the alleged victim, since prostitution is a midemeanor and therefore not within G.S. 14-39(a)(2) which proscribes confinement, restraint or removal for the purpose of facilitating the commission of a felony. In instructing the jury, the trial court defined "terrorize" as "to intentionally threaten, intimidate or appeal to the fears of another sufficient to place an ordinarily prudent person in fear for his life or per-

sonal safety." The word has further been defined, as it related to a statute prohibiting the making of "terroristic threats", as "to reduce to terror by violence or threats, and terror means an extreme fear or fear that agitates body and mind." *State v. Gunzelman*, 210 Kan. 481, 486, 502 P. 2d 705, 710 (1972).

The primary evidence relied on by the State as proof that defendant confined the prosecuting witness for the purpose of terrorizing her is as follows: On several occasions defendant shouted at her to stay in her room. Defendant told the prosecuting witness that the local law enforcement officials were his friends. In one instance, defendant told her to sit in a chair in his room. During this time he looked at a gun and billy club on the wall, although he never made any threat to use either of the weapons. Defendant remarked at another time that girls who did not make money got killed. Defendant also shouted at the witness for leaving her room, saying that if she wanted to get killed he could take care of it.

This evidence alone might well be sufficient to withstand a motion for nonsuit. In view of the remainder of the testimony of the prosecuting witness however, we find that a reasonable inference of defendant's guilt could not be drawn.

The primary factors which rebut any inference in favor of the State are: (1) At no time was there any display of force to cause Mildred to remain with defendant. (2) The only physical contact between the prosecuting witness and defendant was when he attempted to seduce her and, upon her refusal, immediately desisted. (3) The witness was allowed to go shopping with other girls in defendant's employ, unaccompanied by defendant. (4) She at all times had money in her possession which could have been used to escape. (5) She was allowed to go horseback riding with one of the girls at a location forty-five to fifty-five minutes' drive from the motel. (6) The witness went to a poker game approximately one hour's drive from the motel with one of defendant's friends, where she made $86.00 in tip money and later spent the night at the friend's house because he was unable to drive. (7) The prosecuting witness was experienced in worldly affairs far beyond her years.

While it is elementary that conflicts in the evidence must be resolved in favor of the State in ruling on a motion for judgment

of nonsuit, *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973), the unconflicting testimony of the prosecuting witness here completely belies any assertion that she was in fact confined against her will for the purpose of terrorizing her. Mildred appears to have been permitted to roam in an unfenced pasture, with little or no confinement or restraint. Although we find the alleged actions of defendant abhorrent, it is our conclusion that they present insufficient evidence to submit a kidnapping charge to the jury; therefore, the judgment and decision appealed from are

Reversed.

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

ARNOLD v. VARNUM

No. 55 PC.

Case below: 34 N.C. App. 22.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 December 1977. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 6 December 1977.

BOARD OF TRANSPORTATION v. BROWN

No. 88 PC.

Case below: 34 N.C. App. 266.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 15 December 1977. Motion of defendant to dismiss appeal for lack of significant public interest allowed 15 December 1977.

COOKE v. COOKE

No. 71 PC.

Case below: 34 N.C. App. 124.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1977.

ENGLISH v. ENGLISH

No. 73 PC.

Case below: 34 N.C. App. 193.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977.

MOHA CO. v. INGRAM

No. 77 PC.

Case below: 34 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977.

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

STATE v. ABSHER

No. 64 PC.

Case below: 34 N.C. App. 197.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977.

STATE v. ALLEN

No. 89 PC.

Case below: 34 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 December 1977.

STATE v. CHRISTMAS

No. 74 PC.

Case below: 34 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977.

STATE v. EDMISTEN

No. 10.

Case below: 34 N.C. App. 326.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 December 1977.

STATE v. FULCHER

No. 93 PC.

Case below: 34 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 15 December 1977.

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

STATE v. GREENE

No. 68 PC.

Case below: 34 N.C. App. 149.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 December 1977.

STATE v. MIMS

No. 78 PC.

Case below: 34 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 December 1977.

STATE v. NUNNERY

No. 51 PC.

Case below: 33 N.C. App. 756.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 December 1977.

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

STATE v. THOMPSON

No. 79 PC.

Case below: 34 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 December 1977.

STATE v. WALKER

No. 87 PC.

Case below: 34 N.C. App. 271.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 December 1977.

STATE v. WILLIAMS

No. 99 PC.

Case below: 34 N.C. App. 408.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 December 1977.

WILES v. CONSTRUCTION CO.

No. 70 PC.

Case below: 34 N.C. App. 157.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 December 1977.

APPENDIXES

AMENDMENTS TO RULES
OF THE JUDICIAL STANDARDS COMMISSION

AMENDMENTS TO RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO RULES RELATING TO
UNAUTHORIZED PRACTICE OF LAW COMMITTEE

AMENDMENT TO RULES GOVERNING
ADMISSION TO THE PRACTICE OF LAW

AMENDMENTS TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENTS TO RULES OF THE JUDICIAL STANDARDS COMMISSION

Adopted 27 January 1978

RULE 13

Rights of Respondent. In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, and the Chairman or Vice-Chairman or his designee shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 19

Transmission of Recommendations to Supreme Court. After reaching a recommendation to censure or remove a judge, when 10 days have expired after the transcript of the proceeding has been transmitted to the Judge and no objection has been filed, or when the record is settled after objection has been made, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the Judge a copy of the transcript (if the Judge objected to the original transcript, and settlement proceedings resulting in changes in the transcript were had), its findings, conclusions, and recommendation.

This is to certify that the foregoing amendments to Rules 13 and 19 are the amendments duly adopted by the Judicial Standards Commission this the 27th day of January, 1978.

Edward B. Clark
Chairman, Judicial Standards Commission

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendments to the Rules and Regulations and Certificate of Organization of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on July 15, 1977.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article IX, Discipline and Disbarment of Attorneys, as appears in 205 NC 861 and as amended in 253 NC 820 and 288 NC 743 be and the same is hereby amended by rewriting Section 5(A)(6); adding an additional sub-paragraph to Section 8(A) to be numbered (7); rewriting Section 13(10) and Section 21 and Section 23(A)(1) and (2) as follows:

§ 5. Chairman of the Grievance Committee—Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(6) to notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

§ 8. Chairman of the Hearing Commission—Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(7) to prepare and issue letters of private reprimand.

§ 13. Preliminary Hearing.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the private reprimand shall be served upon the accused attorney as provided in G.S. § 1A-1 Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee

and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, the following actions shall be taken:

(1) private reprimand. A private reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the private reprimand. The private reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary.

(2) public censure, suspension or disbarment. The Chairman of the Disciplinary Hearing Commission shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

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 and Certificate of Organization of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 23rd day of November, 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, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24 day of January, 1978.

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 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 24 day of January, 1978.

EXUM, J.
For the Court

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR RELATING TO UNAUTHORIZED PRACTICE OF LAW COMMITTEE

The following amendments to the Rules and Regulations and Certificate of Organization of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on October 27, 1977.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article VI, Section 5 e., as appears in 221 N.C. 587, be and the same is hereby amended by adding sections 1 through 9 as follows:

ARTICLE VI

Section 5. **Standing Committees of the Council—**

e. Committee on Unauthorized Practice of not less than three Councilors selected by the President.

§ 1. General Provisions.

The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Code of Professional Responsibility which in the public interest, lawyers are bound to observe.

§ 2. Proceeding for Prohibition of Unauthorized Practice of Law.

The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings into unauthorized practice of law matters, but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in

this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) Appellate Division: The Appellate Division of the General Court of Justice.

(2) Chairman of the Unauthorized Practice of Law Committee: councilor appointed to serve as chairman of the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(3) Complainant or Complaining Witness: any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint: a formal pleading filed in the name of The North Carolina State Bar in the Superior Court against a person, firm or corporation after a finding of probable cause.

(5) Council: The Council of The North Carolina State Bar.

(6) Councilor: a member of The Council of The North Carolina State Bar.

(7) Counsel: the Counsel of The North Carolina State Bar appointed by the Council.

(8) Court or Courts of this State: a court authorized and established by the Constitution or laws of the State of North Carolina.

(9) Defendant: any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Unauthorized Practice of Law Committee: the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(11) Investigation: the gathering of information with respect to alleged unauthorized practice of law.

(12) Investigator: any person designated to assist in investigation of alleged unauthorized practice of law.

(13) Letter of Caution: communication from the Unauthorized Practice of Law Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(14) Letter of Notice: a communication to an accused individual or corporation setting forth the substance of the alleged conduct involving unauthorized practice of law.

(15) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(16) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(17) Party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(18) Plaintiff: after a complaint has been filed, The North Carolina State Bar.

(19) Preliminary Hearing: hearing by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(20) Probable Cause: a finding by the Unauthorized Practice of Law Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(21) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(22) Supreme Court: the Supreme Court of North Carolina.

§ 4. State Bar Council—Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) to supervise the administration of Unauthorized Practice of Law Committee in accordance with the provisions hereinafter set forth.

(2) to appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

§ 5. Chairman of the Unauthorized Practice of Law Committee—Powers and Duties.

(A) The Chairman of the Unauthorized Practice of Law Committee shall have the power and duty:

(1) to supervise the activities of the Counsel.

(2) to recommend to the Unauthorized Practice of Law Committee that an investigation be initiated.

(3) to recommend to the Unauthorized Practice of Law Committee that a complaint be dismissed.

(4) to direct a Letter of Notice to accused person or corporation.

(5) to notify an accused and any complainant that a complaint has been dismissed.

(6) to call meetings of the Unauthorized Practice of Law Committee for the purpose of holding preliminary hearings.

(7) to issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(8) to administer oaths or affirmations to witnesses.

(9) to file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Unauthorized Practice of Law Committee shall perform the functions of the Chairman of the Unauthorized Practice of Law Committee in any matter when the Chairman is absent or disqualified.

§ 6. Unauthorized Practice of Law Committee—Powers and Duties.

The Unauthorized Practice of Law Committee shall have the power and duty:

(1) to direct the Counsel to investigate any alleged unauthorized practice of law by any person, firm or corporation in the State of North Carolina.

(2) to hold preliminary hearings, find probable cause and direct the complaints be filed.

(3) to dismiss complaints upon a finding of no probable cause.

(4) to issue a Letter of Caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

§ 7. Counsel—Powers and Duties.

The Counsel shall have the power and duty:

(1) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) to recommend to the Chairman of the Unauthorized Practice of Law Committee that a matter be dismissed because the complaint is frivolous or falls outside the Council's jurisdiction; that a Letter of Notice be issued; or that the matter be passed upon by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(3) to prosecute all unauthorized practice of law proceedings before the Unauthorized Practice of Law Committee and the courts.

(4) to represent The North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

(5) to appear on behalf of The North Carolina State Bar at hearings conducted by the Unauthorized Practice of Law Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding.

(6) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the Council may from time to time authorize.

(7) to maintain permanent records of all matters processed and the disposition of such matters.

(8) to perform such other duties as the Council may from time to time direct.

§ 8. Secretary—Powers and Duties in Unauthorized Practice of Law Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) to receive complaints for transmittal to the Counsel.

(2) to issue summons and subpoenas when so directed by the President or the Chairman of the Unauthorized Practice of Law Committee.

(3) to maintain a record and file of all complaints not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Unauthorized Practice of Law Committee.

§ 9. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Unauthorized Practice of Law Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the complaint as may be appropriate and submit to the Chairman of the Unauthorized Practice of Law Committee a report detailing the findings of the investigation.

(2) The Chairman of the Unauthorized Practice of Law Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused in writing or otherwise; or (3) send a Letter of Notice to the accused party.

(3) If a Letter of Notice is sent to the accused individual or corporation, it shall be by registered mail and shall direct that a response be made within fifteen (15) days of receipt of the Letter of Notice.

(4) If a timely response to a Letter of Notice is made, the Chairman shall direct the Counsel to conduct further investigation or to terminate the investigation and place the item on the agenda for the next forthcoming Unauthorized Practice of Law Committee meeting.

(5) If, after the expiration of fifteen (15) days from the date of the receipt of the Letter of Notice, the individual or corporation has failed or refused to respond or has given a response that is insufficient to resolve the matter, the Chairman may direct Counsel to proceed to seek injunctive relief to enjoin such unauthorized practice pursuant to General Statute 84-37 or direct Counsel to notify the District Attorney of the Judicial District wherein the accused individual or corporation resides to bring injunctive or criminal proceedings against that individual or corporation pursuant to 84-7 et seq.

Section 10. **Preliminary Hearing.**

At the regular quarterly meeting of the Unauthorized Practice of Law Committee, the Committee shall consider all matters presented to it by Counsel and shall determine whether or not probable cause exists in each matter tending to establish that a person, firm or corporation is engaged in the unauthorized practice of law in North Carolina.

If no probable cause is found, the Committee shall recommend to the Council that the matter be dismissed. If probable cause is found the Committee shall then recommend to the Council that the matter be prosecuted in the General Court of Justice as by law provided.

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 and Certificate of Organization of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given under my hand and the Seal of The North Carolina State Bar, this the 2nd day of January, 1978.

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, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of January, 1978.

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 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 24 day of January, 1978.

EXUM, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The amendment below to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by repealing Section .1203 (a) and (b), Examination Review Hearing, as appears in 289 NC 735, 756 as follows:

.1203 EXAMINATION REVIEW HEARING

(a) Before any person can request a formal hearing in connection with a review of the written portion of his bar examination, he must have reviewed his examination under the procedures set out in Section .1000 of this Chapter.

(b) Petitioner must bear the cost of reproducing his written bar examination for each board member.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 26th day of October, 1976.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of November, 1976.

SUSIE SHARP
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 4 day of November, 1976.

EXUM, J.
For the Court

The amendments below to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar on July 15, 1977.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by rewriting Rules .0103 and .0202; adding Rule .0206; rewriting Rule .0403; deleting Rules .0406 and .0501; rewriting Rules .0502 and .0701; deleting Rule .1100; and rewriting Rule .1200 as appear in 289 NC 735, 738, 739, 741, 742, 751, 754-758; and 291 NC 723 as follows:

Rule .0103 MEMBERSHIP

The Board of Law Examiners of the State of North Carolina consists of eleven members of the North Carolina Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

Rule .0202 DEFINITIONS

(a) The term "board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the board.

(d) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(e) As used in these rules, the word "chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

Rule .0206 NONPAYMENT OF FEES

Failure to pay the fees as required by these rules shall result in a denial of the registration or application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the registrant or applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the board.

Rule .0403 FILING DEADLINE

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon petition to the board and for good cause shown and upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than the third Tuesday in February of the year in which the applicant applies to take the written bar examination.

Rule .0406 BAD CHECK POLICY (to be deleted)

Rule .0501 REQUIREMENTS FOR GENERAL APPLICANTS

(4) be a citizen of the United States; (to be repealed)

Rule .0502 REQUIREMENTS FOR COMITY APPLICANTS

(1) be a citizen of the United States; (to be repealed)

(5) prove to the satisfaction of the board:

(a) that the applicant is licensed to practice law in a state, the District of Columbia or a territory of the United States having comity with North Carolina; and

(b) that in such state, the District of Columbia or a territory of the United States having comity with North Carolina the applicant has been, for at least three

years out of the last five years immediately preceding the filing of his application with the secretary, actively and substantially engaged in:

(i) the practice of law as defined by G.S. 84-2.1, or

(ii) activities which would constitute the practice of law if done for the general public, or

(c) that in such state, the District of Columbia, or a territory of the United States having comity with North Carolina the applicant has been, for at least three years out of the last five years immediately preceding the filing of his application with the secretary, serving as,

(i) a judge of a court of record, or

(ii) a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or

(d) that the applicant has been, for at least three years out of the last five years immediately preceding the filing of his application with the secretary, serving as

(i) a full-time teacher in a North Carolina law school approved by the Council of the North Carolina State Bar, or

(ii) a full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill.

Time spent in active military service of the United States, not to exceed three years, may be excluded in computing the five-year period referred to in subsection (b) above. Time spent in North Carolina in activities which would constitute the practice of law if done for the general public, not to exceed three years, may be included in computing the five-year period referred to in subsections (b), (c) and (d) above.

Rule .0701 GENERAL EDUCATION

Each applicant to take the examination must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

Rule .1100 RULEMAKING PROCEDURES
(entire section to be repealed)

Section .1200 **Board Hearings**

Rule .1201 NATURE OF HEARINGS

(a) All general applicants may be required to appear before the board at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board to satisfy the board that he or she has met all the requirements of Rule .0502.

Rule .1202 NOTICE OF HEARING

(a) The chairman will schedule the hearings before the board and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

Rule .1203 WHO SHALL CONDUCT HEARINGS

All hearings shall be heard by the board except that the chairman may designate three or more members to serve as a panel to conduct these hearings. A panel will report to the board its findings and if called for, a favorable recommendation. If no recommendation is made by the panel, the chairman will schedule a de novo hearing before the full board.

Rule .1204 CONTINUANCES; MOTIONS FOR

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

Rule .1205 SUBPOENAS

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

Rule .1206 DEPOSITIONS AND DISCOVERY

(a) A deposition may be used in evidence when taken in compliance with the N. C. Rules of Civil Procedure, G.S.

1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N. C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

Rule .1207 REOPENING OF A CASE

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or his attorney and made a part of the record of the hearing.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 22nd day of July, 1977.

B. E. JAMES, Sectretary-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, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 1977.

SUSIE SHARP
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 23 day of August, 1977.

EXUM, J.
For the Court

The amendment below to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar on January 13, 1978.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by substituting a "comma" for the "period" in the last line of Rule .0502(4)(d)(ii) [formerly Rule .0502(5)(d)(ii)] and inserting the word "or" as appear in 289 NC 735, 291 NC 723 and 293 N.C. 761, and adding the following:

"(e) that the applicant has been for at least three years out of the last five years immediately preceding the filing of his application with the secretary, serving in the Armed Forces of the United States of America and has been actively and substantially engaged in:

(i) the practice of law as defined by G.S. 84-2.1, or

(ii) activities which would constitute the practice of law if done for the general public."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of

North Carolina and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 18th day of January, 1978.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23 day of February, 1978.

SUSIE SHARP
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 23 day of February, 1978.

EXUM, J.
For the Court

AMENDMENTS TO NORTH CAROLINA STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY

The following amendments to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on January 13, 1978.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article X, Canon 2 of the Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of The North Carolina State Bar, as appears in 205 NC 865 and as amended in 212 NC 840; 216 NC 809; 221 NC 592; 241 NC 750; 243 NC 748; 250 NC 734; 251 NC 857; 253 NC 819; 261 NC 784; 275 NC 702; 281 NC 770; and 283 NC 783 be and the same is hereby amended as follows:

CANON 2

A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

ETHICAL CONSIDERATIONS

RECOGNITION OF LEGAL PROBLEMS

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers, and a lawyer who participates in such activities should shun personal publicity.

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does

not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

SELECTION OF A LAWYER: GENERALLY

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about (1) the availability of lawyers, (2) the practice preferences of particular lawyers, and (3) the expense of legal representation leads laypersons to avoid seeking legal advice.

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, or other media, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, for example, one or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law; and (4) permitted fee information. Self-laudation is unprofessional and improper.

SELECTION OF A LAWYER: LAWYER ADVERTISING

EC 2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulations of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant and is disseminated in an objective and understandable fashion. A lawyer should strive to communicate such information without undue emphasis upon style and advertising strategems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. And change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. Because of the absence of controls to insure the existence of special competence, a lawyer should not hold himself out as a specialist, or as having special training or ability, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law, using designations authorized for that purpose by The North Carolina State Bar. If a lawyer discloses areas of law in which he practices or limits his practice, he should avoid any implication that he is in fact especially competent.

DISCIPLINARY RULES

DR 2-101 **Publicity**

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential customers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, information in print media or over radio or television.

Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101 (A) and be presented in a dignified manner without the use of the lawyer's voice or portrait and without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or pictures. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation and degrees awarded;

(6) Foreign language ability;

(7) Whether credit cards or other credit arrangements are accepted;

(8) Office and telephone answering service hours;

(9) Fee for an initial consultation;

(10) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(11) Contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(12) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(13) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(14) Fixed fees for an uncontested divorce, an uncontested adoption, an uncontested personal bankruptcy, a change of name, and other specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the categories described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101 (B), or to provide for its dissemination through other forums may apply to The North Carolina State Bar. Any such application shall be served upon The North Carolina State Bar, which shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as amendments to DR 2-101 (B) and other affected ethical considerations and disciplinary rules, universally applicable to all lawyers.

(D) If the advertisement is communicated to the public over radio or television, it shall be pre-recorded and approved in advance by the lawyer. A copy of all written advertisements and a written transcript of the actual transmission of all broadcast advertisements, certified to be an accurate copy or transcript by affidavit of a representative of the publisher or broadcaster, shall be retained by the lawyer for a period not less than three years.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) If a lawyer publishes any fee information authorized under DR 2-101 (B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of

not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101 (B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101 (B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year. Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101 (B), the lawyer shall be bound by any representation made thereon for a period of not less than 30 days after such broadcast.

(G) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(H) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR 2-102 **Professional Notices, Letterheads, Offices, and Law Lists**

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, law lists, legal directory

listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of

that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing in a reputable law list, legal directory, or a directory published by a state, county or local bar association, giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. The published data may include the information allowed by DR 2-101 (B) together with the following: scholastic distinctions; public or quasi-public officers; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; names and addresses of references; and, with their consent, names of clients regularly represented;

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P. C." or "P. A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 **Recommendation of Professional Employment**

(A) A lawyer shall not, except as authorized in DR 2-101 (B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D).

(C) A lawyer **shall** not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, and may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, whether or not organized for profit, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, at his own expense, select counsel in addition to that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 **Suggestion of Need of Legal Services**

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103 (D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

DR 2-105 **Designation of Areas of Practice.**

A lawyer shall not hold himself out publicly as a specialist or as having better qualifications than others. But a lawyer may in a manner consistent with DR 2-101 and DR 2-102 hold himself out publicly as practicing in certain areas of law or as limiting his practice as follows:

(A) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(B) Any lawyer may publicly disclose the field or fields of law in which the lawyer or the law firm practices, or to which the practice is limited, but only by using the practice area designations authorized by The North Carolina State Bar and published in its official publications.

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 a 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 18th day of January, 1978.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments to the Code of Professional Responsibility of The North Carolina State Bar by the Council of The North Carolina State Bar on January 13, 1978, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24 day of January, 1978.

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 by the Council of The North Carolina State Bar on January 13, 1978 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 24 day of January, 1978.

EXUM, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N.C. Index 3d (Abandonment of Property—Public Officers) and N.C. Index 2d (Quasi Contracts—Witnesses).

TOPICS COVERED IN THIS INDEX

ABANDONMENT OF PROPERTY

§ 1. Abandonment Generally

Even if bills of indictment issued in 1767 and 1768 were intentionally thrown away by the clerk of court, such action by the clerk would not constitute an abandonment by the sovereign of its property. *S. v. West*, 18.

ACCOUNTS

§ 1. Open and Running Accounts

The Court of Appeals properly determined that a current or running account existed between the parties at the time of defendant's final payment but erred in concluding that the payment was not an acknowledgement by defendant of the entire indebtedness. *Electric Service, Inc. v. Sherrod*, 498.

ARREST AND BAIL

§ 3.1. Requirement of Probable Cause for Arrest

Officers had probable cause to arrest defendant without a warrant after he had been observed near the body of the homicide victim. *S. v. Small*, 646.

ASSAULT AND BATTERY

§ 5.3. Relation of Assault With Deadly Weapon to Other Crimes

Defendant was not subjected to double jeopardy when he was charged with and convicted of discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury. *S. v. Shook*, 315.

§ 11.1. Indictment Charging Assault With a Deadly Weapon

Indictment charging assault with "a stick, a deadly weapon" without further description showing the deadly character of the stick is sufficient to support a verdict of guilty of assault with a deadly weapon. *S. v. Palmer*, 633.

§ 14.7. Sufficiency of Evidence of Secret Assault

Evidence was insufficient for the jury in a prosecution for secret assault. *S. v. Chapman*, 585.

§ 15.5. Instruction on Defense of Self Required

In a prosecution for assault with a deadly weapon with intent to kill, trial court erred in failing to instruct on self-defense. *S. v. Marsh*, 353.

§ 16. Necessity for Submitting Lesser Degrees of the Offense

In a prosecution for assault with a deadly weapon, a stick, with intent to kill inflicting serious injury, trial court erred in failing to submit to the jury the issue of simple assault where the stick used by defendant was not a deadly weapon as a matter of law. *S. v. Palmer*, 633.

ATTORNEYS

§ 12. Grounds for Disbarment Proceedings

The State Bar was not entitled to summary judgment in a disciplinary action on the basis of a nolo contendere plea by respondent in a prosecution for receiving stolen goods. *State Bar v. Hall*, 539.

AUTOMOBILES

§ 79. Contributory Negligence in Intersection Accidents

In an action to recover for injuries received in an intersection accident, the trial court erred in failing to grant a judgment n.o.v. in favor of the third party defendant since his failure to see defendant's vehicle until just before the collision was not a concurring proximate cause of the accident, the third party defendant being entitled to assume that defendant, who was on the servient road, would yield the right of way to him. *Snider v. Dickens*, 356.

§ 97. Liability of Owner Generally

Mere joint ownership of an automobile does not render one joint owner liable for injuries caused by another joint owner while the latter is using the vehicle for his own purposes unaccompanied by his co-owner. *Strickland v. King*, 731.

§ 122. "Highway" Within Purview of Statute

A petitioner who drove a motor vehicle only within the limits of the area beneath a highway bridge did not drive on a "highway" as that term is used in the statute dealing with the breathalyzer test. *Smith v. Powell*, 342.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

A judge's pretrial order of discovery of "other papers, documents, photographs, mechanical or electronic recordings, tangible objects in control of the State relative to said case" applied only to those materials defendants are permitted to receive under G.S. 15A-903(d), as limited by G.S. 15A-904(a). *S. v. Hardy*, 105.

The court has no statutory authority to order the pretrial discovery of a prosecution witness's prior recorded statement, but the court should order disclosure of a nonprivileged statement upon motion at trial if the statement is favorable and material to the defense. *Ibid.*

When a request is made at trial for the disclosure of competent evidence in the State's possession, the court should order an in camera examination and make findings of fact, and if the court denies the request, it should order the evidence placed in the record for appellate review. *Ibid.*

Trial court did not err in failing to require the State to produce photographs which were subject to a discovery order but which the State had failed to provide defendant prior to trial. *S. v. Cross*, 296.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3.2. Sufficiency of Description of Stolen Property

Allegation and proof in a burglary case that defendant intended to commit the crime of larceny were sufficient, and additional allegation specifying an intent to steal a 10-speed bicycle and proof concerning its ownership were surplusage and harmless. *S. v. Wilson*, 47.

§ 5.8. Sufficiency of Evidence of Breaking and Entering of Residential Premises

There was sufficient evidence of a breaking in a first degree burglary case where the victim testified that all outside doors to her home were closed. *S. v. Carelock*, 577.

§ 6.3. Instructions on Felony Attempted or Committed During Burglary

The trial court properly instructed the jury on the definition of assault with intent to commit rape and properly instructed that in order to convict defendant of

CONSTITUTIONAL LAW — Continued

§ 61. Discrimination in Jury Selection Process on Basis Other than Race

Defendant failed to show systematic exclusion of blacks, women, and 18 through 21-year-olds from the grand jury. *S. v. Hardy*, 105.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Defendant was not prejudiced by the exclusion of jurors opposed to the death penalty. *S. v. Roberts*, 1; *S. v. Finch*, 132.

§ 72. Use of Inculpatory Statement of Codefendant

Defendant's right of confrontation was not denied by the admission of a nontestifying codefendant's statements which were competent against defendant as an implied admission by silence. *S. v. Hardy*, 105.

§ 80. Death and Life Imprisonment Sentences

Sentence of life imprisonment is substituted for the death sentence imposed for first degree murder, *S. v. Woods*, 58; *S. v. Hardy*, 105; *S. v. Finch*, 132; for first degree rape, *S. v. Roberts*, 1.

CRIMINAL LAW

§ 5. Insanity

The burden of proving the affirmative defense of insanity is on defendant, and Mullaney v. Wilbur, 421 U.S. 684, does not require that the burden of proof be transferred to the State. *S. v. Caldwell*, 336.

Evidence of defendant's insanity would have been admissible under defendant's plea of not guilty entered after the court rejected defendant's plea of not guilty by reason of insanity. *S. v. Mathis*, 660.

§ 14. Commission of Offense Within State

When jurisdiction is challenged, the State must carry the burden and show beyond a reasonable doubt that N.C. has jurisdiction to try the accused. *S. v. Batdorf*, 486.

Where jurisdiction was challenged in a homicide case, the trial court's instructions on the place where the body was found were proper. *Ibid.*

§ 15. Venue

The burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment, but venue need not be shown beyond a reasonable doubt. *S. v. Batdorf*, 486.

§ 22. Arraignment and Pleas

G.S. 15A-943(a) must be construed to require not only that the solicitor calendar arraignments as provided but also that every arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. *S. v. Shook*, 315.

Defendant had a statutory right not to be tried without his consent during the week following his not guilty plea at his arraignment, and the infringement of this right was reversible error. *Ibid.*

§ 24. Plea of Not Guilty

Trial court erred in imposing a greater sentence upon defendant because of his insistence on pleading not guilty. *S. v. Boone*, 702.

CRIMINAL LAW — Continued

§ 42.4. Identification of Weapon and Connection With Crime

Evidence was sufficient to identify a gun as the one stolen in a burglary and robbery to permit its admission in evidence. *S. v. Bishop*, 84.

§ 42.5. Identification of Object and Connection with Crime

Trial court did not err in exclusion of a tire, offered for the purpose of showing the location of bullet damage to the tire, on the ground that the identity and unchanged condition of the tire had not been established. *S. v. Harbison*, 474.

§ 43. Maps, Diagrams

An armed robbery victim properly used a blackboard sketch to illustrate his testimony though the demonstration did illustrate the victim's paralysis to the jury. *S. v. Lee*, 570.

§ 46.1. Evidence of Defendant's Flight

An officer's testimony that he obtained a warrant for defendant's arrest on February 1 but could not locate defendant until February 6 was competent to show flight by defendant. *S. v. Carter*, 532.

§ 48. Silence as Implied Admission

Defendant's right of confrontation was not denied by the admission of a nontestifying codefendant's statements which were competent against defendant as an implied admission by silence. *S. v. Hardy*, 105.

§ 51.1. Sufficiency of Showing of Qualifications of Experts

Trial court's overruling of defendant's objections to two witnesses' testimony based upon the alleged lack of qualifications necessarily implied a finding by the court that the witnesses were qualified as experts. *S. v. Shaw*, 616.

§ 60.3. Testimony of Expert Regarding Fingerprints

A witness's opinion concerning the freshness of fingerprints at the crime scene was properly admitted. *S. v. Cates*, 462.

§ 61.2. Shoe Print

Testimony as to a shoe print was properly admitted in a rape case although officers admitted that the print could have been made a month prior to the crime. *S. v. Long*, 286.

§ 62. Lie Detector Tests

Defendants were not prejudiced when witnesses referred to lie detector tests where there was no testimony as to the result of any test or as to the particular statement of the witness to which any such test related. *S. v. Kirkman*, 447.

§ 63. Evidence as to Sanity of Defendant; Nonexpert Witness

The opinion of a lay witness as to the mental capacity of another witness was based on observations too remote in time and was properly excluded by the trial judge. *S. v. Finch*, 132.

§ 66. Evidence of Identity by Sight

There is nothing in N. C. law which requires that identification evidence obtained subsequent to an illegal arrest be excluded, nor does an unconstitutional arrest require the exclusion of identification testimony that is otherwise competent. *S. v. Finch*, 132.

CRIMINAL LAW — Continued

§ 66.1. Identification of Defendant; Opportunity for Observation

Trial court properly concluded that a rape victim's in-court identification of defendant was based upon her independent recollection of the event. *S. v. Roberts*, 1.

A burglary victim had sufficient opportunity to observe defendant in her bedroom so as to render competent her in-court identification of defendant. *S. v. Wilson*, 47.

§ 66.3. Pretrial Lineups

In-court identification of defendant by a rape victim was competent where the victim observed defendant at the crime scene and identified defendant as her assailant from a pretrial lineup which was properly conducted. *S. v. Witherspoon*, 321.

§ 66.5. Right to Counsel at Lineup

Defendant was not entitled to counsel at a lineup conducted during investigation of the crime. *S. v. Finch*, 132.

§ 66.9. Suggestiveness of Photographic Identification Procedure

A rape victim's photographic identification of defendant at the police station was not the result of impermissibly suggestive procedures. *S. v. Long*, 286.

Evidence supported trial court's conclusion that in-court identifications of defendant by a service station employee and a convenience store employee were untainted by pretrial photographic identification procedures. *S. v. Lee*, 570.

§ 66.12. Identification of Defendant; Confrontation in Courtroom

A rape victim's identification of defendant at an unrelated district court proceeding was not the result of impermissibly suggestive procedures. *S. v. Long*, 286.

§ 66.16. Identification of Defendant; Effect of Pretrial Photographic Procedures

In-court identification of defendant was not tainted by pretrial photographic identification. *S. v. McKeithan*, 722.

§ 66.18. Voir Dire to Determine Admissibility of In-Court Identification

Trial court did not err in failing to reopen the voir dire examination of a rape victim concerning the admissibility of her testimony identifying defendant as her assailant when defendant thereafter ascertained during cross-examination of the victim that her vision was impaired by cataracts. *S. v. Alston*, 553.

§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification; Findings

There was no error where the trial court orally stated its ruling that the objection of defendant to the proposed in-court identification by the rape victim was overruled, the court stated it would enter written findings of fact and its order in accord with the ruling orally announced, and such findings were entered during the course of the trial. *S. v. Witherspoon*, 321.

§ 67. Evidence of Identity by Voice

Trial court in a rape case did not err in excluding the victim's testimony as to what she meant when she testified that the voice of her assailant "was not the voice of an average colored man." *S. v. Currie*, 523.

§ 71. Shorthand Statements of Fact

The victim's use of the word "rape" was a shorthand statement of fact. *S. v. Goss*, 147.

CRIMINAL LAW — Continued

§ 72. Evidence as to Age

Evidence of defendant's in-custody admission of his age without the Miranda warnings was not prejudicial in a rape case. *S. v. Shaw*, 616.

§ 73.2. Statements Not Within Hearsay Rule

Testimony that the district attorney and investigating officers had told witnesses "to tell the whole truth" was not hearsay. *S. v. Kirkman*, 447.

Testimony that a murder victim had said "that he had plenty of money on him" was not hearsay where its purpose was to prove that the statement was made in the presence of defendant's girl friend. *Ibid.*

In a prosecution for first degree murder committed during an attempted armed robbery, the trial court did not err in allowing a witness to testify that another person suggested the robbery in defendant's presence, since such testimony was not hearsay but was admissible to show defendant's knowledge that his companions planned to rob a supermarket when defendant and his companions entered it. *S. v. Foster*, 674.

§ 73.3. Statements Showing State of Mind

Testimony that a witness overheard defendant's girl friend tell defendant about money the victim had on him was not hearsay where its purpose was to establish that the statement was, in fact, made to defendant, thus providing a motive for the killing of the victim. *S. v. Kirkman*, 447.

§ 75. Admissibility of Confession

Defendant's oral statements, made and transcribed prior to any violation of his constitutional rights, were not rendered inadmissible merely because he failed to sign them until after he asked for an attorney. *S. v. Cole*, 328.

§ 75.2. Effect of Threats or Promises of Officers

Defendant's in-custody statement did not result from threats or promises by officers. *S. v. Small*, 646.

§ 75.8. Warnings Before Resumption of Interrogation

It was not necessary for officers to repeat Miranda warnings and have defendant execute a waiver of rights when he was questioned in Fayetteville some seven hours after he had been given the Miranda warnings in Georgia and had signed a waiver of rights form in that state. *S. v. Cole*, 328.

Failure of police officers to repeat Miranda warnings after a 30 minute break in the interrogation of defendant did not render his confession inadmissible. *S. v. Small*, 646.

§ 75.10. Waiver of Constitutional Rights

In a prosecution of defendant for the murder of her child, trial court properly admitted statements made by defendant to officers when they first arrived at her home and during subsequent interrogations. *S. v. Jones*, 413.

§ 75.11. Sufficiency of Waiver of Constitutional Rights

Defendant's contention that a waiver of rights form was ineffectual because defendant printed his name instead of signing it is without merit. *S. v. Roberts*, 1.

CRIMINAL LAW — Continued

§ 82.1. Attorney-Client Privilege

The work product privilege is waived when the defendant or the State seeks at trial to make a testimonial use of the work product; therefore, when the State elected to use as a witness a person who had given a tape recorded statement to the police, it waived its right to claim the recorded statement was privileged with respect to matters covered in the witness's testimony. *S. v. Hardy*, 105.

§ 84. Evidence Obtained by Unlawful Means

Trial court in a homicide case did not commit prejudicial error in permitting a police officer to testify concerning a statement made by defendant to her father in a conversation in an interview room at the sheriff's office, which was overheard by the officer while observing the participants without their knowledge through a one-way mirror, although the evidence was unconstitutionally obtained. *S. v. Jones*, 413.

§ 85.2. State's Character Evidence

Testimony by defendant's father that he had stated in a prior trial of defendant for other crimes that he had tried to raise his boys right and couldn't help what had happened to his son did not constitute proof of defendant's bad character by evidence of specific acts of misconduct on defendant's part. *S. v. Currie*, 523.

§ 86.3. Prior Convictions; Effect of Defendant's Answer

Court did not err in permitting the district attorney to continue cross-examination of defendant about his criminal activities after defendant had admitted a lengthy criminal record. *S. v. Bishop*, 84.

Where defendant testified that he thought he had previously pleaded guilty to breaking into just one place, the prosecutor was properly allowed to "sift the witness" by asking defendant whether he had agreed as part of his probation to pay restitution to four named businesses. *S. v. Currie*, 523.

§ 87.3. Use of Writings to Refresh Recollection

Where a witness admitted that he used a written statement to refresh his recollection but left the statement at home, trial court did not err in not requiring the State to produce the statement for defendant's view. *S. v. Cross*, 296.

§ 88.2. Questions Impermissible on Cross-Examination

Trial court properly limited defendant's cross-examination of a State's witness concerning his participation in crimes in S. C. when the witness asserted his constitutional right against self-incrimination. *S. v. Bishop*, 84.

Trial court properly excluded an argumentative question to a witness as to whether "your entire case is just on [the victim's] words." *S. v. Alston*, 553.

§ 88.4. Cross-Examination of Defendant

Cross-examination of defendant concerning his behavior after the homicide was properly admitted by the trial court. *S. v. Willard*, 394.

§ 89.3. Prior Consistent Statements of Witnesses

Trial court in a homicide case did not err in refusing to strike an officer's corroborative testimony as to a joint statement to him by two witnesses on the ground that the officer was not able to state specifically which statements were made by each witness. *S. v. Kirkman*, 447.

CRIMINAL LAW — Continued

§ 89.4. Prior Inconsistent Statements of Witnesses

Prior inconsistent statements of a witness were admissible for impeachment purposes. *S. v. McKeithan*, 722.

§ 89.5. Variances in Corroborating Testimony

In a prosecution for murder committed in the perpetration of an armed robbery of decedent's companion, defendant was not prejudiced by an officer's noncorroborative testimony that decedent was also robbed. *S. v. Carter*, 532.

Defendants were not prejudiced by the court's failure to instruct the jury to disregard an officer's noncorroborative testimony that a witness told him that the first defendant "made a nodding motion" to the second defendant before the second defendant shot the victim. *S. v. Kirkman*, 447.

§ 89.10. Witness's Prior Criminal Conduct and Convictions

Where, for purposes of impeachment, a witness had admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. *S. v. Finch*, 132.

The trial court did not err in allowing the district attorney to question two witnesses concerning their criminal convictions and specific acts of misconduct while the district attorney was referring to arrest records. *S. v. Foster*, 674.

§ 91. Nature and Time of Trial; Speedy Trial

The State complied with G.S. 15-10.2(a) when a prisoner was tried upon detainer charges within eight months after defendant requested disposition of the charges. *S. v. Dammons*, 263.

G.S. 15A-711 does not require that a defendant confined in a penal institution be tried upon charges pending against him within six months after defendant files a written request for disposition of the charges but requires that trial be held within eight months after the written request. *Ibid.*

Provisions of the Interstate Agreement on Detainers do not apply to a N. C. prosecution of a defendant incarcerated in this State. *Ibid.*

§ 91.6. Continuance on Ground Defendant Needs Additional Time to Obtain Evidence

Defendant did not show error in trial court's denial of his motion for a continuance to review a taped confession which defendant had allegedly made to police officers in another state. *S. v. Woods*, 58.

Trial court in a rape case did not abuse its discretion in denying defendant's motion for continuance so that a second psychiatric examination of defendant could be arranged. *S. v. Mathis*, 660.

§ 91.7. Continuance on Ground of Absence of Witness

Trial court properly denied defendant's motion for continuance to obtain the presence of an alibi witness who was ill in another state. *S. v. Lee*, 570.

§ 98.3. Custody of Defendant During Trial

Defendant was not entitled to a new trial where there was only a possibility that the jury viewed him in handcuffs. *S. v. Cross*, 296.

§ 99.3. Expression of Opinion; Remarks in Connection With Admission of Evidence

Repeated statements by the trial judge in a rape prosecution that he could not see the relevance of a softball trophy won by defendant's team on the night of the crime did not constitute an expression of opinion. *S. v. Currie*, 523.

CRIMINAL LAW — Continued

§ 101.2. Exposure of Jury to Publicity Not Formally Introduced

Trial court did not abuse its discretion in denying defendant's motions for mistrial and voir dire of the jury after several jurors read a newspaper account of the first day of trial. *S. v. Woods*, 58.

§ 102.6. Comments of District Attorney in Jury Argument

District attorney's jury argument concerning the whereabouts of the other potential witnesses who did not testify but who could have corroborated defendant's alibi if his alibi in fact was truthful was not improper. *S. v. Thompson*, 713.

Court's instructions cured any prejudice resulting from district attorney's jury argument that juries must accept the blame if criminals are turned loose and set back on society. *Ibid.*

§ 102.7. Comment of District Attorney on Character and Credibility of Witnesses

The district attorney's jury argument characterizing defendant's two female witnesses as "a couple of hot numbers" and referring to one of those witnesses as a "cohort" of the other was not improper. *S. v. Thompson*, 713.

The district attorney's jury argument that a rape victim lacked "the guts, the imagination, the intelligence and the reason" to accuse an innocent person falsely was not improper. *Ibid.*

§ 102.9. District Attorney's Comment on Defendant's Character and Credibility

The district attorney's jury argument that defendant has an "interest in telling you any sort of transparent fabrication his imagination can dream up and that he thinks you are gullible enough and naive enough to buy" was not improper. *S. v. Thompson*, 713.

§ 102.12. Defense Counsel's Comment on Punishment

Defense counsel properly informed the jury of the consequences of a conviction of first degree burglary and properly argued that, in light of those consequences, the jury should give the matter close attention and its most serious consideration. *S. v. Wilson*, 47.

Trial court in a first degree burglary case properly excluded defense counsel's jury argument implying that identification of defendant was based on a fleeting view and was inadequate to convict in this case because the punishment is so severe. *Ibid.*

§ 111.1. Particular Miscellaneous Instructions

Trial court's remarks in jury instructions about appellate review did not suggest to the jury that its verdict was less binding because of later opportunities for review. *S. v. Finch*, 132.

Though the trial court upon defendant's request should have given a specific instruction with respect to the credibility of defendant's confession, a general instruction was sufficient. *S. v. Small*, 646.

§ 112.2. Particular Charges on Reasonable Doubt

Trial court's instructions on reasonable doubt were proper. *S. v. Shaw*, 616.

§ 112.6. Instructions on Insanity

Trial court in a prosecution of defendant for the first degree murder of her three-year-old child did not err in refusing defendant's request to instruct the jury with reference to insanity. *S. v. Jones*, 413.

CRIMINAL LAW — Continued

§ 113.1. Recapitulation of Evidence

Defendant in a first degree murder case was not prejudiced by the trial court's recapitulation of the evidence. *S. v. Willard*, 394.

Trial court's recapitulation of the evidence, though not in the witness's exact words, was not prejudicial to defendant. *S. v. Goss*, 147.

Defendant was not prejudiced by the court's recapitulation of the evidence and contentions as to the length of defendant's hair on the date of the crimes charged. *S. v. Bishop*, 84.

§ 113.5. Charge on Defense of Alibi

Trial court was not required to instruct on alibi evidence absent a request. *S. v. Willard*, 394.

§ 114.2. No Expression of Opinion by Court in Statement of Evidence

Defendant's contention that the trial court erred in instructing the jury on what the evidence presented in the case tended to show is without merit. *S. v. Roberts*, 1.

§ 114.3. No Expression of Opinion in Other Instructions

Trial court's statement made while instructing the jury that "there will be, you will be glad to know, no effort to restate all of the evidence" was not prejudicial to defendant. *S. v. Cates*, 462.

Trial court's instructions with regard to the presumption of innocence did not amount to an expression of opinion. *S. v. Shaw*, 616.

§ 116. Charge on Failure of Defendant to Testify

Defendant is entitled to a new trial where the court gave both correct and incorrect instructions with respect to defendant's failure to testify. *S. v. Carelock*, 577.

§ 116.1. Particular Charges on Defendant's Failure to Testify

Trial court's use of the words "should not" in instructing on the presumption arising from defendant's failure to testify was not error. *S. v. Boone*, 702.

§ 117. Charge on Character Evidence and Credibility of Witnesses

Trial court's error in a rape prosecution in limiting consideration of the victim's bad reputation to her credibility was not prejudicial to defendant. *S. v. Goss*, 147.

§ 117.1. Charge on Credibility

In the absence of a request, the court is not required to give a cautionary instruction that the jury scrutinize the testimony of a witness on the grounds of interest or bias. *S. v. Roberts*, 1.

§ 117.3. Charge on Credibility of State's Witnesses Generally

Trial court was not required to instruct the jury immediately before a witness's testimony that a witness was testifying under a grant of immunity, or to instruct the jury at that time that the witness was an interested witness. *S. v. Hardy*, 105.

was subject to lien did not support the clerk's removal of the administrator on the ground he had a private interest which would hinder his proper administration of the estate. *In re Taylor*, 511.

§ 5.5. Grounds for Revocation of Testamentary Letters; Other Matters

Clerk's removal of an administrator C.T.A. for misconduct or bad faith in carrying out his duties was not supported by a letter from the attorney for the administrator to the attorney for the decedent's widow seeking to collect assets of the estate, or by a finding that the administrator had not filed his accounting on time. *In re Taylor*, 511.

FRAUD

§ 11. Competency and Relevancy of Evidence

In an action to rescind three deeds allegedly procured through fraud, undue influence and duress, trial court did not err in admitting evidence tending to show the mental and physical condition of the aged landowners or evidence tending to show that defendant gave the landowners no assistance from one year after execution of the deeds. *Rush v. Beckwith*, 224.

§ 13. Instructions

In an action to rescind three deeds allegedly procured through fraud, undue influence and duress, evidence supported the court's instruction that there was evidence tending to show that at the time of the signing of the deeds "or at some earlier time on the same day" defendant threatened the aged property owner. *Rush v. Beckwith*, 224.

HABEAS CORPUS

§ 3. Review; Proceedings to Obtain Freedom from Unlawful Restraint

A defendant who was restrained under a judgment of life imprisonment and whose application for habeas corpus was denied by the superior court should have filed his petition for certiorari in the Supreme Court rather than in the Court of Appeals. *S. v. Niccum*, 276.

HOMICIDE

§ 17. Evidence of Motive

Defendant's statements prior to the homicide were admissible to show motive. *S. v. Willard*, 394.

§ 20. Real and Demonstrative Evidence

Clothing in plain view in defendant's residence and clothing given to officers voluntarily was properly admitted in a homicide prosecution. *S. v. Small*, 646.

In a prosecution for first degree murder committed during an attempted armed robbery, the trial court did not err in permitting the jury to view the scars from the wounds which, an accomplice testified, the victim had inflicted upon him with a butcher knife at the time he shot the victim, since the scars were illustrative of relevant and material testimony. *S. v. Foster*, 674.

HOMICIDE — Continued

§ 21.4. Sufficiency of Evidence of Identity of Defendant

Evidence was insufficient to show that defendant committed a murder by stabbing. *S. v. White*, 91.

Evidence was sufficient to permit the inference that defendant was the perpetrator of a murder committed during an armed robbery of a convenience store where it showed that defendant committed the armed robbery of another convenience store some two weeks earlier and that the gun used and the modus operandi were the same in both crimes. *S. v. Perry*, 97.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

Evidence was sufficient for the jury in a murder prosecution where it tended to show death by shooting. *S. v. Shuler*, 34.

Evidence of first degree murder of a supermarket cashier was sufficient for the jury. *S. v. Cross*, 296.

State's evidence was sufficient for the jury to find that defendant intentionally shot the victim after premeditation and deliberation. *S. v. Baggett*, 307.

Evidence was sufficient for jury in first degree murder case and did not require submission of lesser offenses where it tended to show that defendant killed deceased in the mistaken belief that he was killing someone else. *S. v. Cates*, 462.

There was sufficient evidence of malice and premeditation and deliberation for submission to the jury of a charge of first degree murder of a police officer whom defendant shot while the officer was walking toward defendant's home. *S. v. Constance*, 581.

§ 21.6. Homicide in Perpetration of Felony

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of murder committed during the perpetration of an armed robbery of a service station attendant. *S. v. Hardy*, 105.

State's evidence was sufficient for the jury in a prosecution of two defendants for first degree murder committed in the perpetration of a robbery. *S. v. Kirkman*, 447.

§ 25.1. Instructions; Felony Murder Rule

Trial court in a prosecution for murder committed during the perpetration of an armed robbery properly instructed the jury that the "armed robbery or attempted armed robbery need not be of a person who may have been shot." *S. v. Carter*, 532.

Use of the term "felony murder" in an issue submitted to the jury is expressly disapproved by the Supreme Court. *S. v. Foster*, 674.

§ 31. Verdict; Specifying Degree of Crime

Jury verdict of "guilty of felony murder" is interpreted as a verdict of guilty of murder in the first degree. *S. v. Foster*, 674.

§ 31.1. Punishment for First Degree Murder

Sentence of life imprisonment is substituted for the death sentence imposed for first degree murder. *S. v. Woods*, 58; *S. v. Hardy*, 105; *S. v. Finch*, 132.

Construction of a statute as making life imprisonment the proper sentence for a first degree murder committed prior to the U.S. Supreme Court decision invalidating the death penalty in this State for first degree murder does not violate the ex post facto clause of the State and Federal Constitutions. *S. v. Kirkman*, 447.

HOMICIDE — Continued

Sentence imposed upon conviction of the underlying felony in a felony murder case is arrested. *S. v. Small*, 646.

§ 31.7. Punishment for Second Degree Murder

The trial judge did not act arbitrarily in sentencing defendant to life imprisonment for second degree murder. *S. v. Harbison*, 474.

INDICTMENT AND WARRANT

§ 7.1. Formalities; Language of Indictment

The date the indictment was returned was not essential, and motion in arrest of judgment made on the ground that the indictment was deficient because it failed to show the date of return was properly denied. *S. v. Shaw*, 616.

INJUNCTIONS

§ 13.1. Preliminary Injunction; Probability of Ultimate Success of Suit; Irreparable Injury

Trial court erred in refusing to grant plaintiffs a preliminary injunction prohibiting the sheriff from selling their lands under the execution issued on an allegedly void default judgment enforcing a lien for labor and materials. *Investors, Inc. v. Berry*, 688.

INSURANCE

§ 79.1. Automobile Liability Insurance Rates; Approval or Disapproval by Comr. of Insurance

The Commissioner of Insurance did not usurp the rate making function of the Automobile Rate Office by orders essentially approving an automobile rate reclassification plan proposed by his own staff where the order merely revised or modified the plan proposed by the filing. *Comr. of Insurance v. Automobile Rate Office*, 365.

§ 79.3. Findings of Fact; Sufficiency of Evidence

There was material and substantial evidence in the record to support the Insurance Commissioner's approval of subclassification surcharge plans for liability and collision insurance based upon calculations derived from operator license statistics maintained by and a penalty point system used by the Department of Motor Vehicles. *Comr. of Insurance v. Automobile Rate Office*, 365.

Orders by the Commissioner of Insurance approving a reclassification plan for liability and collision insurance contained insufficient findings of fact. *Ibid.*

The Commissioner of Insurance exceeded his authority when he divided the "commuter" class into two subclasses for liability insurance and when he established only three primary classifications for collision insurance. *Ibid.*

§ 112. Subrogation of Liability Insurer

An automobile liability insurer was not entitled to reimbursement from a stranger to the insurance contract whose negligence caused the damages for which the insurer paid as a result of liability imposed by statute by reason of the reimbursement provisions of the contract or the provisions of G.S. 20-279.21(h), but the insurer was entitled to reimbursement from the stranger under principles of indemnity. *Insurance Co. v. Chantos*, 431.

assault was not an element of the kidnapping, and defendant could properly be convicted for both kidnapping and felonious assault. *S. v. Dammons*, 263.

§ 1.2. Sufficiency of Evidence

Evidence was insufficient for the jury in a prosecution for kidnapping where the State contended that defendant by threats and deception confined the prosecuting witness for the purpose of terrorizing her and thereby forcing her to commit prostitution. *S. v. Conrad*, 735.

§ 1.3. Instructions

In a trial upon an indictment alleging that defendant kidnapped the victim by "removing" her from one place to another for the purpose of feloniously assaulting her with a deadly weapon and terrorizing her, the trial judge erroneously presented to the jury possible theories of conviction which were not supported by the evidence or not charged in the indictment. *S. v. Dammons*, 263.

LABORERS' AND MATERIALMEN'S LIENS

§ 7. Sufficiency of Notice or Claim

Present owners of property have standing to attack the sufficiency of a claim of lien for materials and labor upon which a foreclosure action was based. *Investors, Inc. v. Berry*, 688.

§ 8. Enforcement of Lien

An action to enforce the lien is not required to be brought in the county in which the realty subject to the lien is located. *Investors, Inc. v. Berry*, 688.

A laborer's or materialman's lien is not a "contractual security" within the meaning of Rule 55(b)(1), and a clerk or assistant clerk of court is thus without jurisdiction to make orders in default judgments consummating foreclosure of such liens. *Ibid.*

Present owners of property subject to a claim of lien for labor and materials have standing to attack as void the default judgment establishing and enforcing the claim of lien, although they were not parties to such action. *Ibid.*

LIMITATION OF ACTIONS

§ 6. Accrual of Cause of Action on Accounts

A part payment on a current account which constitutes an acknowledgment begins the statute of limitations running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. *Electric Services, Inc. v. Sherrod*, 498.

MASTER AND SERVANT

§ 62.3. Workmen's Compensation; Injuries on Way To, From or on Parking Lot

Plaintiffs were not injured by accident arising out of and in the course of their employment when injured in a collision between two automobiles driven by fellow employees while they were leaving work on a two-mile long private road maintained by the employer for ingress to and egress from the employer's plant, and the employees could therefore properly maintain a common law action against their allegedly negligent fellow employees. *Strickland v. King*, 731.

NUISANCE

§ 7. Damages and Abatement

In an action to recover damages for flooding allegedly caused by defendants' placement of a culvert in the bed of a stream flowing from plaintiffs' land onto and through defendants' land, trial court erred in instructing the jury both on the reasonable use rule and the civil law rule with respect to surface water drainage, and in instructing that the jury might first determine whether defendants created a nuisance and then separately decide whether plaintiffs were harmed thereby, and in instructing on the effect of factors downstream. *Pendergrast v. Aiken*, 201.

PENALTIES

The penalty provided for a false return applies to process issued in criminal as well as civil cases. *Rollins v. Gibson*, 73.

PROCESS

§ 4. Proof of Service

Defendant's motion to set aside a judgment entered against him on the ground the purported service of summons upon him was invalid was properly denied since defendant filed in support of his motion only one affidavit, his own. *Guthrie v. Ray*, 67.

The penalty provided for a false return applies to process issued in criminal as well as civil cases. *Rollins v. Gibson*, 73.

RAPE

§ 1. Nature and Elements of the Offense

G.S. 14-21(a)(2) does not mean the victim's resistance must completely cease in order to be overcome by infliction of serious bodily injury but instead means that the assailant is guilty of first degree rape if the rape is accomplished by force and against her will after the victim's resistance is rendered ineffectual by the infliction of serious bodily injury. *S. v. Roberts*, 1.

§ 3. Indictment

An indictment failed to charge first degree rape where it charged neither use of a deadly weapon nor that defendant was more than 16 years of age, but it was sufficient to charge second degree rape. *S. v. Goss*, 147.

§ 4. Relevancy and Competency of Evidence

Evidence of pubic hair was properly admitted in a rape case though the evidence was not supplied to defendant pursuant to pre-trial discovery since it was provided defendant as soon as the district attorney learned of it. *S. v. Shaw*, 616.

§ 5. Sufficiency of Evidence and Nonsuit

Evidence in a first degree rape case was sufficient to support a finding that the victim suffered a serious bodily injury. *S. v. Roberts*, 1.

Evidence was sufficient for the jury in a rape prosecution. *S. v. Goss*, 147.

Evidence was sufficient for the jury in a second degree rape prosecution. *S. v. Witherspoon*, 321.

Evidence in a second degree rape case was sufficient to support the State's contention that defendant had carnal knowledge of the victim by force and against her will even though defendant made no verbal threats to the victim and though the victim offered no physical resistance. *S. v. Hall*, 559.

SEARCHES AND SEIZURES — Continued

§ 2. Consent to Search

Officers are not required to advise a suspect of his right to refuse consent for a search in order to validate either pre-custody or in-custody consent for the search. *S. v. Long*, 286.

SHERIFFS

§ 4. Civil Liabilities to Individuals

The penalty provided for a false return applies to process issued in criminal as well as civil cases. *Rollins v. Gibson*, 73.

Plaintiff's evidence was sufficient for the jury in an action against a sheriff to recover the penalty for a false return stating that defendant "after due and diligent search is not to be found." *Ibid.*

STATE

§ 1.5. Open Meetings

The Open Meetings Law does not require that notice of meetings be given to the public and does not apply to meetings of the faculty of the U.N.C. Law School. *Student Bar Association v. Byrd*, 594.

§ 2.1. Public Records

Even if bills of indictment issued in 1767 and 1768 were intentionally thrown away by the clerk of court, such action by the clerk would not constitute an abandonment by the sovereign of its property. *S. v. West*, 18.

The State established its right to possession of bills of indictment issued in 1767 and 1768. *Ibid.*

§ 11. Actions by the State

The three year statute of limitations did not apply in an action by the State to recover two bills of indictment issued in 1767 and 1768. *S. v. West*, 18.

TAXATION

§ 38. Remedies of Taxpayer Against Collection of Tax

A nonresident distributor voluntarily paid the soft drink tax by means of tax-paid crowns rather than by the less expensive alternate method and is not entitled to recover the excess amount paid, although the Court of Appeals held that the exclusion of nonresident distributors from the operation of the statute allowing the alternate method was unconstitutional. *Coca-Cola Co. v. Coble*, 565.

UNIFORM COMMERCIAL CODE

§ 58. Negotiation and Transfer of Documents of Title

A bank did not acquire 13 fraudulent negotiable warehouse receipts for grain by "due negotiation," and thus acquired only the rights of its transferor, where the receipts were delivered by the payee to the bank without the payee's indorsement and the payee's bookkeeper, who subsequently stamped the payee's name upon the reverse side of the receipts, had neither the authority nor intent to indorse them in the name of the payee. *Trust Co. v. Gill*, 164.

UNIFORM COMMERCIAL CODE — Continued

When a bank exchanged demand notes of a grain association and 16 negotiable warehouse receipts securing them for new demand notes and 13 new warehouse receipts which had been fraudulently issued by the warehouse manager, who was also an officer of the grain association, for the purpose of obtaining and canceling the old receipts and concealing a grain shortage in the warehouse, the bank did not acquire the 13 new warehouse receipts in good faith and without notice that they had been fraudulently issued, and the bank could not recover on the 13 fraudulent receipts. *Ibid.*

WAREHOUSEMEN

§ 3. Liability of Indemnifying Fund

The State Indemnifying and Guaranty Fund was created to protect those parties to or purchasers of warehouse receipts who, acting in good faith and without reason to know that the goods described thereon are misdescribed or nonexistent, suffer loss through their acceptance or purchase of the receipts. *Trust Co. v. Gill*, 164.

WATERS AND WATERCOURSES

§ 1. Surface Waters

The Supreme Court formally adopts the rule of reasonable use with respect to surface water drainage and abandons the civil law rule. *Pendergrast v. Aiken*, 201.

In an action to recover damages for flooding allegedly caused by defendants' placement of a culvert in the bed of a stream flowing from plaintiffs' land onto and through defendants' land, trial court erred in instructing the jury on the reasonable use rule and the civil law rule with respect to surface water drainage, and instructing that the jury must first determine whether defendants created a nuisance and then separately decide whether plaintiffs were harmed thereby, and in instructing on the effect of factors downstream. *Ibid.*

WEAPONS AND FIREARMS

Defendant was not subjected to double jeopardy when he was charged with and convicted of discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury. *S. v. Shook*, 315.

WORD AND PHRASE INDEX

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