# NORTH CAROLINA REPORTS

## VOLUME 294

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1977

SPRING TERM 1978

RALEIGH
1978

CITE THIS VOLUME

294 N.C.

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# THE SUPREME COURT
# OF
# NORTH CAROLINA

*Chief Justice*

SUSIE SHARP

*Associate Justices*

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

*Retired Chief Justice*

WILLIAM H. BOBBITT

*Retired Justices*

J. WILL PLESS, JR.
CARLISLE W. HIGGINS

*Clerk*

JOHN R. MORGAN

*Librarian*

FRANCES H. HALL

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ADMINISTRATIVE OFFICE OF THE COURTS

*Director*

BERT M. MONTAGUE

*Assistant Director*

FRANKLIN FREEMAN, JR.

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APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

*First Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | J. HERBERT SMALL | Elizabeth City |
| 2 | ELBERT S. PEEL, JR. | Williamston |
| 3 | ROBERT D. ROUSE, JR. | Farmville |
| | DAVID E. REID | Greenville |
| 4 | HENRY L. STEVENS III | Kenansville |
| | JAMES R. STRICKLAND | Jacksonville |
| 5 | BRADFORD TILLERY | Wilmington |
| | JOSHUA S. JAMES | Wilmington |
| 6 | RICHARD B. ALLSBROOK | Roanoke Rapids |
| 7 | GEORGE M. FOUNTAIN | Tarboro |
| | FRANKLIN R. BROWN | Tarboro |
| 8 | ALBERT W. COWPER | Wilson |
| | R. MICHAEL BRUCE | Mount Olive |

*Second Division*

| | | |
|---|---|---|
| 9 | HAMILTON H. HOBGOOD | Louisburg |
| 10 | JAMES H. POU BAILEY | Raleigh |
| | A. PILSTON GODWIN, JR. | Raleigh |
| | EDWIN S. PRESTON, JR. | Raleigh |
| | ROBERT L. FARMER | Raleigh |
| 11 | HARRY E. CANADAY | Smithfield |
| 12 | E. MAURICE BRASWELL | Fayetteville |
| | D. B. HERRING, JR. | Fayetteville |
| | COY E. BREWER, JR. | Fayetteville |
| 13 | GILES R. CLARK | Elizabethtown |
| 14 | THOMAS H. LEE | Durham |
| | ANTHONY M. BRANNON | Bahama |
| | JOHN C. MARTIN | Durham |
| 15A | D. MARSH MCLELLAND | Burlington |
| 15B | F. GORDON BATTLE | Chapel Hill |
| 16 | Henry A. MCKINNON, JR. | Lumberton |

*Third Division*

| | | |
|---|---|---|
| 17 | JAMES M. LONG | Yanceyville |
| 18 | WALTER E. CRISSMAN | High Point |
| | CHARLES T. KIVETT | Greensboro |
| | W. DOUGLAS ALBRIGHT | Greensboro |
| 19 | THOMAS W. SEAY, JR. | Spencer |
| | HAL HAMMER WALKER | Asheboro |
| | JAMES C. DAVIS | Concord |
| 20 | JOHN D. MCCONNELL | Southern Pines |
| | F. FETZER MILLS | Wadesboro |
| 21 | WILLIAM Z. WOOD | Winston-Salem |
| | HARVEY A. LUPTON | Winston-Salem |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 22 | ROBERT A. COLLIER, JR. | Statesville |
| | PETER W. HAIRSTON | Advance |
| 23 | JULIUS A. ROUSSEAU | North Wilkesboro |
| | *Fourth Division* | |
| 24 | RONALD W. HOWELL | Marshall |
| 25 | SAM J. ERVIN III | Morganton |
| | FORREST A. FERRELL | Hickory |
| 26 | FRED H. HASTY | Charlotte |
| | WILLIAM T. GRIST | Charlotte |
| | FRANK W. SNEPP, JR. | Charlotte |
| | KENNETH A. GRIFFIN | Charlotte |
| | CLIFTON E. JOHNSON | Charlotte |
| 27 | JOHN R. FRIDAY | Lincolnton |
| | ROBERT W. KIRBY | Cherryville |
| | ROBERT E. GAINES | Gastonia |
| 28 | HARRY C. MARTIN | Asheville |
| | ROBERT D. LEWIS | Asheville |
| 29 | J. W. JACKSON | Hendersonville |
| 30 | LACY H. THORNBURG | Webster |

## SPECIAL JUDGES

| | |
|---|---|
| ROBERT R. BROWNING | Greenville |
| RALPH A. WALKER | Greensboro |
| ROBERT L. GAVIN | Pinehurst |
| JAMES M. BALEY, JR.[1] | Asheville |
| DONALD L. SMITH | Raleigh |
| RONALD BARBEE | Greensboro |
| WILLIAM THOMAS GRAHAM | Winston-Salem |
| DAVID I. SMITH | Burlington |
| H. L. RIDDLE, JR.[2] | Morganton |

1. Retired 1 August 1978.
2. Appointed 25 August 1978.

# DISTRICT COURT DIVISION

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

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 10 | GEORGE F. BASON (Chief) | Raleigh |
| | S. PRETLOW WINBORNE | Raleigh |
| | HENRY V. BARNETTE, JR. | Raleigh |
| | STAFFORD G. BULLOCK | Raleigh |
| | GEORGE R. GREENE | Raleigh |
| | JOHN HILL PARKER | Raleigh |
| 11 | ROBERT B. MORGAN, SR. (Chief)[2] | Lillington |
| | W. POPE LYON | Smithfield |
| | WOODROW HILL | Dunn |
| | ELTON C. PRIDGEN | Smithfield |
| 12 | DERB S. CARTER (Chief) | Fayetteville |
| | JOSEPH E. DUPREE | Raeford |
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| | SOL G. CHERRY | Fayetteville |
| | LACY S. HAIR[3] | Fayetteville |
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| 15A | JASPER B. ALLEN, JR. (Chief) | Burlington |
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| | WILLIAM S. HARRIS | Graham |
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| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 18 | EDWARD K. WASHINGTON (Chief) | Jamestown |
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| | JOHN B. HATFIELD, JR. | Greensboro |
| | JOHN F. YEATTES | Greensboro |
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| 19 | ROBERT L. WARREN (Chief) | Concord |
| | L. T. HAMMOND, JR. | Asheboro |
| | FRANK M. MONTGOMERY | Salisbury |
| | ADAM C. GRANT, JR. | Concord |
| | L. FRANK FAGGART | Kannapolis |
| 20 | DONALD R. HUFFMAN (Chief) | Wadesboro |
| | EDWARD E. CRUTCHFIELD | Albemarle |
| | WALTER M. LAMPLEY | Rockingham |
| | KENNETH W. HONEYCUTT | Monroe |
| 21 | ABNER ALEXANDER (Chief) | Winston-Salem |
| | GARY B. TASH | Winston-Salem |
| | WILLIAM H. FREEMAN | Winston-Salem |
| | JAMES A. HARRILL, JR. | Winston-Salem |
| | R. KASON KEIGER | Winston-Salem |
| 22 | LESTER P. MARTIN, JR. (Chief) | Mocksville |
| | HUBERT E. OLIVE, JR. | Lexington |
| | PRESTON CORNELIUS | Troutman |
| | ROBERT W. JOHNSON | Statesville |
| 23 | RALPH DAVIS (Chief) | North Wilkesboro |
| | SAMUEL L. OSBORNE | Wilkesboro |
| | JOHN T. KILBY[4] | Jefferson |
| 24 | J. RAY BRASWELL (Chief) | Newland |
| | ROBERT HOWARD LACEY | Newland |
| 25 | LIVINGSTON VERNON (Chief) | Morganton |
| | JOSEPH P. EDENS, JR. | Hickory |
| | BILL J. MARTIN | Hickory |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | SAMUEL MCD. TATE | Morganton |
| | L. OLIVER NOBLE, JR. | Hickory |
| 26 | CHASE BOONE SAUNDERS (Chief) | Charlotte |
| | P. B. BEACHUM, JR. | Charlotte |
| | L. STANLEY BROWN | Charlotte |
| | LARRY THOMAS BLACK | Charlotte |
| | JAMES E. LANNING | Charlotte |
| | WILLIAM G. JONES | Charlotte |
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| | DAPHENE L. CANTRELL | Charlotte |
| 27A[5] | LEWIS BULWINKLE (Chief) | Gastonia |
| | J. RALPH PHILLIPS | Gastonia |
| | DONALD E. RAMSEUR | Gastonia |
| | BERLIN H. CARPENTER, JR. | Gastonia |
| 27B[5] | ARNOLD MAX HARRIS (Chief)[6] | Ellenboro |
| | GEORGE HAMRICK[7] | Shelby |
| 28 | CARY WALTER ALLEN (Chief) | Asheville |
| | JAMES O. ISRAEL, JR. | Candler |
| | WILLIAM MARION STYLES | Black Mountain |
| | GARY A. SLUDER | Asheville |
| 29 | ROBERT T. GASH (Chief) | Brevard |
| | HOLLIS M. OWENS, JR. | Rutherfordton |
| | ZORO J. GUICE, JR. | Hendersonville |
| 30 | ROBERT J. LEATHERWOOD III (Chief) | Bryson City |
| | J. CHARLES MCDARRIS | Waynesville |
| | JOHN J. SNOW, JR. | Murphy |

1. Appointed 15 June 1978 to succeed W. Milton Nowell who died 8 May 1978.
2. Retired 31 August 1978.
3. Appointed 15 May 1978 to succeed George Stuhl who retired 1 April 1978.
4. Appointed 20 July 1978.
5. District 27 divided into 27A and 27B effective 1 July 1978.
6. Appointed Chief Judge 1 July 1978.
7. Appointed 1 July 1978.

# ATTORNEY GENERAL OF NORTH CAROLINA

*Attorney General*

## RUFUS L. EDMISTEN

*Administrative Deputy Attorney General*

CHARLES H. SMITH

*Deputy Attorney General For Legal Affairs*

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*Special Assistant to the Attorney General*

JOHN A. ELMORE

*Senior Deputy Attorneys General*

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ANDREW A. VANORE, JR.
ROBERT BRUCE WHITE, JR.

*Deputy Attorneys General*

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MILLARD R. RICH, JR.
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WILLIAM A. RANEY, JR.
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*Assistant Attorneys General*

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ALAN S. HIRSCH
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ACIE L. WARD
JOAN H. BYERS
J. MICHAEL CARPENTER
BEN G. IRONS II
AMOS C. DAWSON III
JAMES L. STUART
DONALD W. GRIMES
JAMES E. SCARBROUGH
NONNIE F. MIDGETTE
ISAAC T. AVERY III
JO ANN SANFORD
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
MARY I. MURRILL

# DISTRICT ATTORNEYS

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

# CASES REPORTED

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

# GENERAL STATUTES CITED AND CONSTRUED

## 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 individuals listed below were admitted to the practice of law in North Carolina by comity on the dates indicated.

On June 14, 1978 the following individual was admitted:

DONALD HASKELL BESKIND ..... Durham, applied from Colorado

On July 5, 1978 the following individuals were admitted:

ALBERT M. ZIGLER ..... Greensboro, applied from New York
GARY BRIAN GOODMAN ..... Greensboro, applied from Ohio

Given over my hand and seal, this the 17th day of July, 1978.

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 individuals listed below have been admitted to the practice of law in North Carolina by comity on the dates indicated:

On October 27, 1977, the following individuals were admitted:

ROBERT WALTER BENSON ..... Greensboro, applied from New York
ROBERT SHERWOOD CARLES ..... Charlotte, applied from Ohio
MAX H. CROHN, JR. ..... Winston-Salem, applied from D. C.
MANFORD RAY HAXTON ..... Winston-Salem, applied from Illinois
STEPHEN DOUGLAS HOPE ..... Charlotte, applied from New York
ELEANOR DEARMAN KINNEY ..... Durham, applied from Ohio
SCOTT R. LOWDEN ..... Charlotte, applied from Massachusetts
HOWARD RANDOLPH MCLEAN ..... Charlotte, applied from Virginia
PATRICK WAYNE MUMFORD ..... Advance, applied from Tennessee
PAUL J. POLKING ..... Charlotte, applied from Iowa
PETER H. RAMM ..... Winston-Salem, applied from Virginia
JOHN M. SAVAGE ..... Greenville, applied from New York
LEONARD ALFRED WILLSON, JR. ..... Raleigh, applied from Virginia
WILFORD L. WISNER ..... Greensboro, applied from New York

On January 27, 1978, the following individuals were admitted:

KATHRYN V. CREAN ..... Durham, applied from New York
RAYMOND A. HUST ..... Asheville, applied from New York
FRANK J. SIZEMORE III ..... Greensboro, applied from D. C.
JOHN P. TAYLOR ..... Durham, applied from Pennsylvania

On March 9, 1978, the following individuals were admitted:

RUDOLPH ANDREW BATA ..... Andrews, applied from D. C.
FRANK PARROTT GRAHAM ..... Asheville, applied from Tennessee

THOMAS E. HARRIS ..... New Bern, applied from Kentucky
GEORGE W. HOUSEWEART ..... Greensboro, applied from Pennsylvania
MARK PAUL KLEIN ..... Durham, applied from New York
GEORGE R. MAHONEY, JR. ..... Charlotte, applied from New York
PAUL A. REICHS ..... Charlotte, applied from Illinois
RICHARD STANLEY SILVERMAN ..... Winston-Salem, applied from D. C.

On May 10, 1978, the following individuals were admitted:

DOUGLAS EDWARD CANDERS ..... Fayetteville, applied from Texas
THURMAN B. HAMPTON ..... Durham, applied from Iowa
JOHN THOMAS REED ..... Charlotte, applied from Kentucky

Given under my hand and seal, this 2nd day of June, 1978.

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

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FALL TERM 1977

STATE OF NORTH CAROLINA v. JASPER DAVID LOONEY

No. 47

(Filed 24 January 1978)

1. **Conspiracy § 4; Criminal Law § 10— indictment for conspiracy—accessory before the fact not lesser offense**

One indicted for conspiracy to murder may not, upon that indictment, be convicted as an accessory before the fact since the actual commission of the contemplated murder is an essential element of the offense of being an accessory before the fact to the murder but is not an essential element of the offense of conspiracy to murder.

2. **Conspiracy § 4; Criminal Law § 10— indictment for accessory before the fact—conspiracy not lesser offense**

One may not be convicted of conspiracy to commit murder upon an indictment for being an accessory before the fact to such murder since the reaching of an agreement is an essential element of the offense of conspiracy but is not an essential element of being an accessory before the fact.

3. **Conspiracy § 3; Criminal Law § 10— conviction of both conspiracy and accessory before the fact**

The offense of conspiracy and the offense of being an accessory before the fact are separate, distinct crimes which do not merge into each other and neither of which is a lesser included offense of the other. A person may, therefore, be lawfully convicted of and punished for both a conspiracy to commit a murder and being an accessory before the fact to the same murder.

**4. Criminal Law § 117.4— plea bargain by State's witness—credibility—erroneous instruction—error cured by further instruction**

The trial court's inadvertent error in instructing the jury that testimony by a prosecution witness that he had been allowed to plead guilty to a reduced charge of second degree murder in exchange for his testimony in defendant's case was immaterial to the jury's determination of the facts in defendant's case was cured when the court thereafter instructed that such testimony was material upon the question of the witness's credibility but not otherwise.

**5. Criminal Law § 65— testimony that man's eyes "lit up"—non-expert opinion**

In this prosecution for conspiracy to murder and accessory before the fact to murder, a witness was properly allowed to testify that when a man whose appearance was similar to defendant's met the perpetrator of the murder on a city street, the man's eyes "lit up," that is, "showed like he knew the man," since the testimony constituted a shorthand description of the reaction of the other person to meeting the perpetrator, and the emotion displayed by such person on the given occasion was a proper subject for opinion testimony by a non-expert witness.

**6. Criminal Law § 101.4— sequestration of jury—discretion of court**

Whether the jury should be sequestered during deliberations was a matter within the discretion of the trial judge.

**7. Criminal Law § 113.1— recapitulation of evidence—absence of objection**

Defendant's contention that the trial court erred in failing sufficiently to review the evidence solicited on cross-examination of two State's witnesses is without merit since the law does not require the recapitulation of all of the evidence in the charge, and since no alleged omission in the court's recapitulation of the evidence was brought to the attention of the court prior to the jury's retirement to consider its verdict.

**8. Criminal Law § 89.7; Witnesses § 1— absence of authority to order psychiatric examination of witness**

A trial judge in North Carolina does not have the authority to order a psychiatric examination of a proposed witness on the question of credibility as a condition to receiving the testimony of that witness.

**9. Criminal Law § 89.7; Witnesses § 1— refusal to order psychiatric examination of State's witness—no abuse of discretion**

Even if it were held that judges of trial courts in North Carolina have inherent power, in their discretion, to order an unwilling witness to submit to a psychiatric examination, the trial court in a prosecution for conspiracy to murder and accessory before the fact to murder did not abuse that discretion in the denial of defendant's pretrial motion for an order requiring the State's chief witness—the actual perpetrator of the murder—to submit to an examination by a psychiatrist selected and compensated by defendant to determine whether the witness is a "psychopathic liar" where: a psychiatric examination of the witness had already been made in the witness's own case by the staff of Dorothea Dix Hospital to determine his capacity to stand trial and his mental responsibility for crime, and the staff report and the testimony of the examin-

ing psychiatrist were available to defendant; without a further psychiatric examination, the defendant was in a position to show that the witness had committed the murder with exceptional brutality, which defendant contended was an indication of his mental abnormality; defendant was further in the position to show that the witness originally gave the police a statement completely at variance with his present testimony and recanted that statement in exchange for permission to plead guilty to second degree murder; and there was, therefore, no showing of any compelling necessity for a further psychiatric examination of the witness in order to enable defendant to present to the jury his contention that the witness's testimony was not worthy of their belief.

Justice EXUM concurring.

APPEAL by defendant from *Herring, J.*, at the 14 February 1977 Session of CUMBERLAND.

Upon separate indictments, each proper in form, the defendant was convicted of conspiracy to commit murder and of being an accessory before the fact to the murder of his wife, Gloria Jean Looney, a third charge of murder of Gloria Jean Looney having been dismissed by the court at the close of all of the evidence. Upon the charge of conspiracy to commit murder, the defendant was sentenced to imprisonment for 10 years. Upon the charge of being an accessory before the fact to murder, he was sentenced to imprisonment for the term of his natural life, this sentence to commence at the expiration of the sentence imposed for conspiracy to commit murder.

From the judgment so imposed the defendant appealed, his appeal from the judgment sentencing him to imprisonment for life on the charge of being an accessory before the fact of murder being, as a matter of right, an appeal to the Supreme Court and his appeal from the judgment sentencing him to imprisonment for 10 years on the charge of conspiracy to commit murder being to the Court of Appeals. The Supreme Court allowed the defendant's motion to hear the latter appeal prior to its determination by the Court of Appeals and the two were heard together in the Supreme Court.

Uncontroverted evidence for the State is ample to show that Gloria Jean Looney was murdered in her home in Fayetteville on 30 December 1974 by Richard Stanley Matthews, that Matthews, when charged with this murder, was permitted to enter a plea of guilty to murder in the second degree and that, upon such plea,

he was sentenced to imprisonment for life, which sentence he was serving at the time of the trial of the defendant Looney. The uncontroverted evidence further shows that such murder was perpetrated with extreme brutality, the victim having been struck upon the head numerous times with a hammer, so that her skull was fractured in several places, and having been stabbed in the throat and in numerous other areas of her body with a knife and with a pair of scissors, there being a number of such injuries which, independently, would have been sufficient to cause her death. The questions at issue in the trial of the present defendant related to what connection, if any, he had with the murder.

When arrested shortly after the murder of Gloria Jean Looney, Matthews gave to the investigating officers a written statement admitting that he killed her, using the hammer, knife and scissors. In this statement the present defendant was not mentioned, Matthews saying that he, looking for a job, went to the Looney home, rang the door bell and was admitted into the house by the deceased in response to his request to use the telephone, the deceased having come to the door clad only in a thin negligee. According to this statement, as they conversed, Matthews made sexual advances to the deceased which she repulsed. This angered him and he proceeded to kill her.

Matthews was then committed to Dorthea Dix Hospital, presumably upon the motion and request of his counsel, for an examination to determine his competency to stand trial and his ability to distinguish right from wrong and to know the nature and consequences of his actions at the time of the alleged crime. He was returned to the court by the hospital as competent to stand trial, the report of the hospital showing:

> "His memory appeared to be intact for recent and remote events. * * * In brief, there was not evidence of any psychosis at the time of the initial examination. * * * [He] is, at the present time, capable of cooperating with counsel. He is aware of the nature of the charges against him and the possible consequences of conviction. * * * Psychiatric examination of the defendant [Matthews] does not reveal the presence of a psychiatric disorder which would render the patient unable to know right from wrong or unable to know the nature and consequences of his actions. The patient denies

the alleged crime. He also denies mental or emotional difficulty but claims he was in a situational stress because of lack of employment.

"PSYCHIATRIC DIAGNOSIS: Without Psychosis,

"Not Insane."

Several months thereafter, the indictments against the present defendant (Looney) were returned as true bills by the grand jury, Matthews, meanwhile, before entering a plea in his own case, having informed the investigating officers that the defendant (Looney) hired Matthews to kill the defendant's wife. The defendant, thereupon, moved in the Superior Court for an order directing that Matthews submit himself, under proper supervision, to a psychiatric examination by a psychiatrist not under the direct control of the State and that a copy of the report of such psychiatrist be furnished to the defendant, the defendant asserting that the acts of Matthews were those of an independent, psychopathic killer and that Matthews is a pathological liar, subject to extreme fantasies and unable to distinguish fantasy from reality. This motion was heard and denied by Judge McKinnon.

Subsequently, the defendant again moved in the Superior Court that Matthews "be required to undergo a psychiatric examination by a psychiatrist chosen by the defendant and at the defendant's expense," asserting that, since Judge McKinnon's ruling on the earlier motion, the results of the psychiatric examination of Matthews at Dorthea Dix Hospital, above mentioned, had become available to the defendant, and that the matters shown in such report, together with the fact that Matthews had been allowed to enter the plea of guilty to second degree murder in his own case in exchange for his testimony against the present defendant (Looney), required that Matthews undergo a complete and independent psychiatric examination prior to the trial of the defendant. This motion was heard and denied by Judge Clark. Its denial is assigned by the defendant as error upon the present appeal.

Upon the trial of the present defendant, Matthews testified as a witness for the State. In addition to the circumstances of the killing of the defendant's wife, Matthews testified to the following effect:

He first became acquainted with the defendant in 1973, seeing him socially on several occasions. He asked the defendant, an automobile salesman, to help him get a job. Matthews then left Cumberland County and went to New York City, returning in December 1974. A week later, the defendant picked him up in his car and, when Matthews told him he still needed a job, replied that he would keep Matthews in mind. A few days later, the defendant drove his car to Matthews' house, picked him up and, as they drove about, told Matthews he had a job for him. They then agreed that for $3,000 Matthews would kill the "woman who was living with" the defendant, the defendant saying that he wanted "the job to look like a maniac had done it." It was then agreed that Matthews would gain access to the house by telling "the woman" the defendant had sent him to make a preliminary examination preparatory to the building of a fireplace. The defendant also directed Matthews as to how he should leave the house after accomplishing the killing. It was first agreed that the killing was to be done the next morning, but when Matthews went to the Looney home, no one answered the door and he left, so reporting to the defendant. It was then agreed that the defendant would get back in touch with Matthews for another effort. On the morning of 30 December 1974, while Matthews was temporarily away from home, the defendant telephoned Matthews' home and left a message with Matthews' wife. As a result, Matthews went to the Looney home, accomplishing the killing in accordance with the plan and so reported to the defendant by a telephone call to his place of employment.

Other evidence offered by the State tended to show:

At the time of the death of Gloria Jean Looney, there were in effect life insurance policies upon her life, naming the defendant as beneficiary, or co-beneficiary, in the amounts of $5,000, $1,000 and $12,000. There was also in effect a mortgage term life insurance policy for $50,000 which was taken out approximately four months prior to the murder, and of which he was a beneficiary.

In the Spring of 1974, the defendant became acquainted with a 16 year old girl named Carolyn Brown and asked her "to be his woman." Ultimately, she agreed and they began having sexual relations periodically about the middle of December 1974. After the death of the defendant's wife, he told Carolyn Brown he

"would be getting around $50,000." Carolyn Brown, who testified to these things, originally gave investigating officers a statement to the above effect, but subsequently wrote a letter to the District Attorney and to the defendant's attorney repudiating this statement.

Matthews' wife and their neighbor, witnesses for the State, testified to having seen the defendant and Matthews talking to each other in the defendant's conspicuous automobile, parked in front of the Matthews' home. Matthews' wife further testified that early in the morning, "one or two days before New Year's," the defendant came to her home while Matthews was absent and told her that he had a job for him and Matthews was to go to his office "on Murchison Road" and to be there by 11 o'clock. Murchison Road is near the defendant's home, apparently not near his place of employment. Shortly after this, Matthews returned home and was given the message. Matthews left a few minutes later and did not return until late afternoon. After his arrest, Matthews' wife found among his papers a scrap of paper bearing the defendant's telephone number and the name of "David Lonnie," which paper she delivered to the police. It was introduced in evidence. Matthews' wife called this number, asked to speak to "Mr. David Lonnie." After a short delay a man's voice, which she recognized as that of the man who had so come to her home and left the message for her husband, came on the phone but seemed to know nothing about Matthews, so the conversation terminated. A few minutes later, the same person called Matthews' wife, saying he could not talk to her on the first call for fear that it might be "intercepted," and that he was then calling from a pay telephone. He told her to go to another pay telephone and call the number of the phone from which he was speaking, and also told her that if anyone asked her anything, "You don't know nothing." Matthews' wife did not return that telephone call. Subsequently, while riding with police officers, looking for it, she pointed out the car occupied by the man whom she had seen in conversation with Matthews in front of their home. This was the automobile of the defendant.

The General Manager of the automobile dealer for whom the defendant then worked testified that he saw the defendant about 9:30 a.m. the morning of the murder and he "appeared real nervous." This witness also testified that approximately 30 to 60

days before the murder he spoke to the defendant concerning the defendant's "going with" a girl, who was neither the defendant's wife nor Carolyn Brown, telling the defendant he could do as he wished on his own time so long as it did not reflect on the employer. The defendant "got upset" about this.

Another witness for the State, who in 1973 was a fellow-employee of the defendant, testified that the defendant asked the witness if he knew how to get in contact with a "hit man," which the witness told him he did not know how to do. This witness also testified that, "concerning his relationship with his wife, David Looney told me he was unhappy."

Still another witness for the State testified that he knew Matthews and the defendant in December 1974 and, on one occasion, prior to the murder, while the witness was in conversation with Matthews on a street corner, the defendant drove up, Matthews got in the defendant's car and the two drove off together after the defendant spoke to the witness.

The defendant, on the other hand, offered evidence of a number of character witnesses who testified to his good character and to his being an exceptionally successful and happily married automobile salesman.

Another witness for the defendant testified that, while he was in jail with the defendant and Matthews, the witness being a trusty, Matthews sent the witness to the defendant with a message that he (Matthews) "would change his story and tell the truth" if the defendant would give him "two bills." The defendant sent back a message that he did not have any money.

The defendant, testifying as a witness in his own behalf, flatly contradicted the testimony of Matthews, the testimony of Carolyn Brown as to his relationship with her, and the testimony of the other witnesses for the State who claimed to have seen him in the company of Matthews. He testified that he, himself, took out the $50,000 mortgage life insurance policy, it covering his life as well as that of his wife, he and the daughter being the beneficiaries in the event of the wife's death and the wife and daughter being the beneficiaries in the event of his death. The Looney home was mortgaged to the extent of $28,000. He testified that he did not know of the $5,000 policy, a group policy applicable to the employees of the company for which his wife

worked, that he gave his wife a Cadillac automobile and a color television set for Christmas just before her death, that they were happily married, that he had never said anything to his wife about building a fireplace in their home, that he never saw Matthews the day his wife was killed, that he did not talk to Matthews' wife that day and had never seen either of them at that time to his knowledge, saying, "I don't think I have ever spoken to Richard Stanley Matthews in my life," and that he had never had Matthews ride in his automobile.

Another witness for the defendant testified that he did not notice any nervousness or anything else unusual about the defendant the morning of the murder before he received the telephone call telling of his wife's death, but, when he received the call, he was in a state of shock and was "torn all to pieces." This witness had visited in the Looney home and believed the defendant and his wife were very happy.

Dr. William N. Taylor, a witness for the defendant, was a staff psychiatrist for Dorthea Dix Hospital at the time Matthews was committed and examined there. He participated in the examination of Matthews. It was then his opinion that Matthews was competent to stand trial. He testified that Matthews denied killing Gloria Jean Looney, that he scored in the normal range of intelligence, that he showed no evidence of brain damage, and that he did not appear to be a maniac, but the results of the tests "indicated the possibility of a psychopathic personality." Dr. Taylor further testified: "There were indications that he probably had difficulty postponing gratification, which is characteristic of a psychopathic personality. A psychopath is a person who is lacking in conscience and unable to feel guilt or pain for suffering they might inflict on others. They are antisocial in behavior. As a result of my psychological testing and interviews with Richard Stanley Matthews, I found evidence indicating that he had personality characteristics of a psycopath. * * * The characteristics of a psychopathic personality reveal one that is notoriously disloyal, unable to form trusting relationships, dishonest, feels no guilt over pain and suffering they inflict on others, unable to postpone gratification and will do anything they can to get their way." In the opinion of Dr. Taylor, conduct such as that in which Matthews engaged in killing Gloria Jean Looney "is highly suggestive but not necessarily diagnostic of a psycopath," it being also possible to consider it "consistent with schizophrenia." He

did not find any evidence of psychotic disorder in Richard Stanley Matthews, but his conduct in killing Gloria Jean Looney "would suggest psychopathic personality disorders." Dr. Taylor testified that he does not have any opinion as to whether or not Matthews was capable of committing a "contract killing."

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

*William L. Senter and Joe McLeod for Defendant.*

LAKE, Justice.

The defendant contends that the offense of conspiracy to commit a murder is a lesser included offense of being accessory before the fact to such murder and, consequently, the court erred in failing to require the State to elect the charge upon which it would proceed and in imposing sentences for both offenses. In this contention we find no merit. G.S. 14-5 provides:

> "*Accessories before the fact; trial and punishment.*—If any person shall counsel, procure or command any other person to commit any felony, *** the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felony, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. *** Provided, that no person who shall once be duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense."

In *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961), quoting with approval from C.J.S., Criminal Law, § 90, this Court said:

> "There are several elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime."

In *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d 505 (1968), speaking through Justice Higgins, we said:

> "'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. [Citing many cases.].' *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 * * *. The crime is complete when the agreement is made. * * * Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act."

**[1]** Thus, the actual commission of the contemplated felony, in this case murder, by the principal (Matthews) is an essential element of the offense of being an accessory before the fact to the murder. This is not an essential element of the offense of conspiracy. Consequently, one indicted for conspiracy to murder may not, upon that indictment, be convicted as an accessory before the fact.

**[2]** Conversely, the reaching of an agreement is an essential element of the offense of conspiracy. It is not an essential element of the offense of being an accessory before the fact for one may counsel, command or encourage another to commit a crime which such other person then commits, without ever reaching an agreement with the first party that it shall be done. Thus, upon an indictment for being an accessory before the fact to a murder, one may not be convicted of conspiring to commit such murder.

**[3]** It follows that the offense of conspiracy and the offense of being an accessory before the fact are separate, distinct crimes, which do not merge into each other and neither of which is a lesser included offense of the other. A person may, therefore, be lawfully convicted of and punished for both a conspiracy to commit a murder and being an accessory before the fact to the same murder. We so held in *State v. Branch*, 288 N.C. 514, 551, 220 S.E. 2d 495 (1975), *cert. den.*, --- U.S. ---, --- S.Ct. where, speaking through Justice Copeland, we said:

> "Accessory before the fact to murder is a lesser included offense of murder and has similarly never been interpreted as negating the separate offense of conspiracy. *** It was not intended to relieve the party to murder who was an ac-

cessory before the fact from the penalty provided for conspiring with others."

This assignment of error is, therefore, overruled.

**[4]** Matthews testified, after recounting the details of his killing of the defendant's wife:

> "I recall being arrested at the Trailway Bus Station in the cafeteria. The police officers took me to the law enforcement center and I gave them a statement. I later entered a plea of guilty to second degree murder. I was sentenced to life imprisonment and I am now confined at Central Prison. I am in my second year of imprisonment.
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> * * *
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> "After I gave that statement I was charged with first degree murder and was facing the possibility of the death penalty.
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> "As a result of my testimony in this case the charges against me were reduced to second degree murder. I was allowed to plead guilty to a lesser offense than first degree murder. I was sentenced to life imprisonment. I have not been promised anything about being considered for parole if I testified in this case."

After the jury had been deliberating for a time, it returned to the courtroom and requested of the court "a reclarification of why the charge [against Matthews] was reduced from first degree murder." The court replied:

> "Why the charge was reduced from first degree murder to second degree murder. The only way I can answer that is, I believe, that it's really not material to your determination of the facts in this case. There was, as I recall, some evidence that had some bearing on that question. There again, I cannot go into that and summarize what I recall the evidence was. Again, it is your duty to make that determination."

The jury then retired and resumed its deliberations. Thereafter, it again returned to the courtroom for a recess and before it again resumed deliberations the court instructed the jury:

"I have something I want to say about the question that was earlier put. The question put by the foreman of the jury earlier, as I recall it, dealt with why the witness Richard Stanley Matthews was allowed to plead guilty to second degree murder, and as I recall my answer at that time, I advised you that it was immaterial and that it was your duty to recall the evidence and to consider the evidence. I now correct that statement by instructing you that it is immaterial in this case that Richard Stanley Matthews pleaded guilty to second degree murder except that it is a factor that you may consider in determining whether to believe his testimony or not, and if you do believe it, in determining what weight you will give his testimony. And you may consider any evidence presented in the trial of this case as to how, when, or why he did plead guilty to second degree murder while he was charged with first degree murder if you find from the evidence presented that such was the case. Again, I instruct you that it is your duty to recall all of the evidence presented as it came from the various witnesses, and I cannot now recapitulate a part of what the evidence tended to show or allow a part of the record by the court reporter to be read back to you, and there are reasons for that which I will not go into in the instructions."

The defendant contends that these instructions by the court constituted an expression of opinion to the effect that the reason for Matthews' pleading guilty to second degree murder was immaterial. We find no merit in this assignment of error. This circumstance was, of course, as the court last instructed the jury, material upon the question of Matthews' credibility but not otherwise. The latter instruction of the court upon this point corrected the earlier inadvertent error and was a correct statement of law. Strong, North Carolina Index 3d, Criminal Law, § 168.1.

**[5]** The State's witness Bradford testified that on one occasion while he was in the company of Richard Stanley Matthews on a Fayetteville Street, they met a man, whose appearance was similar to that of the defendant, and that, when so confronted by Matthews, the man's eyes "lit up," that is, "showed like he knew the man." The defendant now assigns as error the overruling of his motion to strike this testimony. There is no merit in this assignment. This is but the witness' shorthand description of the

reaction of the other person to meeting Matthews. The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness. Stansbury, North Carolina Evidence, Brandis Rev., § 129.

**[6]** There is likewise no merit in the defendant's Assignment of Error to the trial court's denial of his motion that the jury be sequestered during their deliberations. This was a matter in the discretion of the trial court. *State v. Bynum* and *State v. Coley*, 282 N.C. 552, 193 S.E. 2d 725 (1973), *cert. den.*, 414 U.S. 836.

**[7]** The defendant's Assignment of Error No. 6 is likewise without merit. It is that the court, in its charge to the jury, failed sufficiently to review the evidence solicited on cross-examination of the witnesses Matthews and Carolyn Brown. The law does not require recapitulation of all of the evidence in the charge of the court to the jury. Strong, North Carolina Index 3d, Criminal Law, § 113.1. Furthermore, the record does not show that any alleged omission in the court's recapitulation of the evidence was brought to the attention of the court prior to the jury's retirement to consider its verdict.

The defendant's Assignment of Error No. 7 to the denial of his motion to set aside the verdict and award a new trial for errors committed during the course of the trial was merely formal and requires no discussion.

The defendant's Assignments of Error, originally numbered 5, 8 and 10 have not been brought forward in his brief and are, therefore, deemed abandoned. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 671, 741.

**[8]** The defendant's first Assignment of Error is the one which he argues most earnestly in his brief. It relates to the denials by Judge McKinnon and by Judge Clark of his successive, pretrial motions that the court order a psychiatric examination of Matthews. The first motion, denied by Judge McKinnon, was "that a court order issue whereby he [Matthews] is to submit himself under proper supervision to a psychiatric examination by a psychiatrist not under the direct control of the State of North Carolina, and that a copy of that report be furnished to the defendant, through his counsel, prior to the trial of this action." The second motion, denied by Judge Clark, was that Matthews be required to undergo a psychiatric examination by a psychiatrist

chosen by the defendant and at the defendant's expense. Judge Clark, after hearing the defendant upon this motion, found as a fact, which finding is not controverted, "that Richard Stanley Matthews received an examination at Dorothea Dix Hospital on March 10, 1975, and a copy of said report has been made available to defense counsel in this case." We find no merit in this assignment of error.

While Matthews' own indictment for this murder was pending in the Superior Court, the court, presumably upon motion of his counsel, ordered him committed to Dorothea Dix Hospital for an examination to determine whether he was competent to stand trial and whether he was able to know right from wrong and the nature and consequences of his actions at the time of the alleged crime. This report, which is set forth in the record, and which Judge Clark found was made available to the defendant's counsel prior to trial, shows the conclusion of the examining psychiatrist, Dr. Taylor, that Matthews was "without psychosis, not insane," and capable of cooperating with his counsel. It also shows the absence of any indication of "psychiatric disorder which would render the patient unable to know right from wrong or unable to know the nature and consequences of his actions." Dr. Taylor, the examining psychiatrist, testified as a witness for the defendant in the present trial. The record does not indicate any objection to or any adverse ruling upon any question propounded to Dr. Taylor by the defendant's counsel.

Stansbury, in his textbook on North Carolina Evidence, says:

> " 'The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts of the case.' *State v. Nelson*, 200 N.C. 69, 156 S.E. 154 (1930). Any circumstance tending to show a defect in the witness's perception, memory, narration or veracity is relevant to this purpose. *** Cross-examination may be employed to test a witness's credibility in such an infinite variety of ways that an attempt to list them would be futile. *** The existence of a mental or physical impairment which would affect the witness's powers of observation, memory or narration, may be shown in order to discredit his testimony. Thus it is proper to show that the witness is mentally deficient, *Moyle v. Hopkins*, 222 N.C. 33, 21 S.E. 2d 826

(1942) ***; *State v. Armstrong*, 232 N.C. 727, 62 S.E. 2d 50 (1950) *** that his memory is weak, or that he was intoxicated at the time of the events about which he has testified." Stansbury, North Carolina Evidence, Brandis Rev., §§ 38, 42, 44.

The defendant does not contend that the trial court rejected any evidence offered by him to discredit the testimony of Matthews or to show that, by reason of mental unsoundness, Matthews was disqualified to testify or that his testimony was not credible. He does not contend that the court erred in allowing Matthews to testify. In *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939), this Court, speaking through Justice Barnhill, later Chief Justice, with reference to the testimony of a co-defendant in a trial for murder, said:

> "There was evidence that the witness Leon Cody was a person of low mentality and had theretofore been confined in the insane asylum. There was further evidence that he knew right from wrong, and that he had the mentality of a child varying in age from 7½ years to 16 or 17 years. The defendant assigns as error the refusal of the court below to strike the testimony of this witness. The jury heard the testimony as to his mental condition and the court in its charge fully stated the defendant's contention that he was of such mentality that his testimony should not be given any weight or considered adversely to the defendant. Conceding that this witness was of low mentality, it was discretionary with the court as to whether it would permit him to testify. We find nothing in the record that tends to show any abuse of this discretion."

The defendant's contention is that he is entitled to a new trial because the court denied his pretrial motion for an order requiring Matthews to submit to a psychiatric examination by a psychiatrist to be selected by and compensated by the defendant. It is his contention that Matthews' testimony "was the key to the prosecution's case against the defendant," and, consequently, his credibility was a most important factor in the jury's determination of the defendant's guilt, which it was. He further contends that the extreme brutality of the killing shows that Matthews was not "mentally normal," that his subsequent recanting of his

original statement is "evidence of some emotional or mental problem with direct bearing on his credibility" and certain conclusions in the report of Dr. Taylor, above mentioned, raise "serious questions about Mr. Matthews' psychiatric soundness." Therefore, he contends that he had a right to a court order compelling Matthews to submit to a further psychiatric examination designed to determine whether Matthews is a "psychopathic liar."

The defendant contends that the examination of Matthews at Dorothea Dix Hospital, above mentioned, was conducted by a psychiatrist employed by the State and he directs our attention to the Statement of the Supreme Court of New Jersey in *State v. Butler*, 27 N.J. 560, 143 A. 2d 530 (1958), "[I]t is fundamentally unfair for one interested party to obtain an examination by self-selected experts and to oppose a granting of the same right or privilege to the other." This statement has no proper application to the present situation. Here, the examination of Matthews at Dorothea Dix Hospital was not made at the instance of the State for the purpose of building its case against this defendant. It was made in Matthews' own case for the purpose of determining Matthews' capacity to stand trial and his mental responsibility for crime. Furthermore, the examination was made by the staff of a hospital whose primary function is the care and treatment of insane persons. In such a situation the staff of the hospital is in the position of a witness for the court, not a witness for the prosecution. The implied charge of bias against the present defendant in the obtaining of that psychiatric examination has no foundation in fact.

This Court has not previously been called upon to determine the authority of a trial court of North Carolina to order a psychiatric examination of a proposed witness or to determine, if such authority exists, how such order is to be enforced. It is to be observed that the denial of the defendant's motion for such order by Judge Clark was not upon the ground that the court lacked the authority to make such order but upon the ground that, under the circumstances of this case, such order would not be issued.

Examination of decisions of courts in other states of the Federal courts discloses that in a number of these jurisdictions some authority in the trial court to enter such an order is recognized, but its extent and the circumstances which justify its exercise are not matters as to which these courts have agreed.

The issuance of orders requiring a witness to submit to a psychiatric examination before testifying is a matter of relatively recent development. If it did not originate therein, it received its chief impetus in Dean Wigmore's pronouncement: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3 Wigmore, Evidence, § 924a. Notwithstanding our great respect for this eminent authority on the law of Evidence, this statement never has been and is not in accord with the law of this State and is, in our opinion, completely unrealistic and unsound.

Obviously, there are types of sex offenses, notably incest, in which, by the very nature of the charge, there is grave danger of completely false accusations by young girls of innocent appearance but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits. These are, however, but a small proportion of the sex offenses brought to trial in the courts of this State and, even as to these, our observation leads us to believe that the typical jury is not so naive in such matters as Dean Wigmore appears to have thought.

Our examination of the decisions of courts which have asserted the authority of a trial court to order a psychiatric examination of a proposed witness indicates that, in the earlier decisions, the practice was largely limited to cases of sex offenses and to examination of the alleged victim. Apparently, these courts were persuaded by the Wigmore view that adolescent females are particularly subject to mental unsoundness and, therefore, likely to be guilty of pathological perjury in connection with accusations of sexual abuse practised upon them. With the current rise in homosexual offenses and other recent sociological developments, it would seem reasonable to suppose that these courts would now apply the same rules to the alleged male victims of sex offenses.

The leading case upon the subject is *Ballard v. Superior Court of San Diego County*, 64 Cal. 2d 159, 410 P. 2d 838, 18 A.L.R. 3d, 1416 (1966). There the defendant, a physician charged with rape of a patient to whom he allegedly administered an anesthetic in order to prevent resistance, sought a psychiatric examination of his female accuser. The decision of the California court was that "although the trial court may in its discretion order a *complaining* witness *in a sex violation case* to submit to a

psychiatric examination, the prosecutrix in the instant case should not presently be required to undergo such an examination." 410 P. 2d at 840-41. (Emphasis added.) The Court, speaking through Justice Tobriner, said:

> "A number of leading authorities [text books, law review articles and a report of the American Bar Association Committee on the Improvement of the Law of Evidence] have suggested that in a case in which a defendant faces a charge of sex violation, the complaining witness, if her testimony is uncorroborated, should be required to submit to a psychiatric examination.
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> * * *
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> "The courts in this state, however, *in cases not involving sex violations, have rejected psychiatric testimony* as to the mental or emotional condition of a witness for purposes of impeachment.
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> * * *
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> "We do not mean to suggest that psychiatric testimony of the mental and emotional condition of the prosecutrix must necessarily be admitted in every case. We recognize that psychiatric evaluation is not absolute but only relatively illuminating; its utility in the ascertainment of the prosecutrix' condition must depend upon its posture in the whole picture presented to the trial court. That court can properly determine *in its discretion* whether psychiatric testimony as to the mental and emotional condition of the complaining witness *should be admitted.*
>
> * * *
>
> "[A] general rule requiring a psychiatric examination of complaining witnesses in every sex case or, as an alternative, in any such case that rests upon the uncorroborated testimony of the complaining witness would, in many instances, not be necessary or appropriate. Moreover, victims of sex crimes might be deterred by such an absolute requirement from disclosing such offenses.
>
> "Rather than formulate a fixed rule in this matter we believe that discretion should repose in the trial judge to

order a psychiatric examination of the complaining witness in the case involving a sex violation if the defendant presents a compelling reason for such examination.

* * *

"We therefore believe that the trial judge should be authorized to order the prosecutrix to submit to a psychiatric examination if the circumstances indicate a necessity for an examination. Such necessity would generally arise only if little or no corroboration supported the charge and if the defense raised the issue of the effect of the complaining witness' mental or emotional condition upon her veracity. Thus, in rejecting the polar extremes of an absolute prohibition and an absolute requirement that the prosecutrix submit to a psychiatric examination, we have accepted a middle ground, placing the matter in the discretion of the trial judge.

* * *

"*The complaining witness should not, and realistically cannot, be forced to submit to a psychiatric examination or to cooperate with a psychiatrist. In the event that the witness thus refuses to cooperate, however, a comment on that refusal should be permitted.*" 410 P. 2d at 846-49. (Emphasis added throughout.)

It will be observed that the law of this State differs from that of California, in general, as to the admissibility of properly obtained evidence of a witness' psychiatric abnormalities. Here, we are not concerned with the admissibility of such evidence, but with how it may be obtained.

In *State v. Franklin*, 49 N.J. 286, 229 A. 2d 657 (1967), the question arose in the review of a conviction for murder unrelated to a sex offense. A witness for the state refused to submit to a psychiatric examination. The defendant's motion for an order compelling her to do so was denied by the trial court. The Supreme Court of New Jersey said:

"There can be no question of the power of the court to order such an examination. [Citing *State v. Butler*, 27 N.J. 560, 604, 143 A. 2d 530 (1958)]. We believe such an examina-

tion should have been ordered here." Franklin, 229 A. 2d at 658.

The witness in question in this New Jersey case was an adult woman alcoholic who had previously been committed to mental institutions because of her heavy drinking. The Supreme Court remanded the matter to the trial court with instructions that the trial judge direct the witness to submit herself to a psychiatrist for a psychiatric examination, that the court should take the testimony of the psychiatrist and, thereupon, report to the Supreme Court as to whether he found the witness competent and, if so, to comment upon whether such further evidence could have changed the result of the trial. The trial judge, following this direction, reported to the Supreme Court that he found such additional evidence would not have affected the outcome of the trial. On the second appeal, *State v. Franklin*, 52 N.J. 386, 245 A. 2d 356, 363 (1968), the Supreme Court of New Jersey concluded that the trial judge "in cutting short the defense counsel's cross-examination of Miss Pitts when he sought to affect her credibility, visited substantial prejudice on defendant," observing that the jury did not have the benefit "of what we now know of [the witness'] drinking habits, the physical and mental effects of alcohol upon her (including hallucinating), and her hospital admissions, so that it could reach an informed judgment as to whether her testimony was to be believed." Consequently, the Supreme Court on the second appeal reversed the conviction and ordered a new trial in which the defendant would have the "fullest opportunity to develop all available facts relating to [the witness'] drinking on the night of [the alleged offense] and prior thereto, the history of her addiction to alcohol and the effects which drinking had upon her, including the need for institutional treatment."

Had the *Franklin* case arisen in this State, it would clearly have been proper for defense counsel in cross-examining the witness, or by offering through other witnesses evidence, otherwise admissible, to impeach her credibility by showing her drinking habits and past commitments to institutions on that account. This, of course, is an entirely different matter from requiring the witness to submit to a psychiatric examination against her will.

Likewise, in *State v. Butler*, 27 N.J. 560, 143 A. 2d 530 (1958), the question arose in a trial for homicide unrelated to a sex of-

fense. The witness was a participant who testified for the state against the defendant. Speaking through Justice Francis, the Supreme Court of New Jersey said:

> "Coleman's [the witness] mental competency and credibility were of transcendent importance.
>
> "Prior to trial both the State and the defense learned that Coleman had been a mental patient in the Crownsville State Hospital in Maryland.
>
> * * *
>
> "In advance of the trial date defendants applied to the court for an order for psychiatric examination. The State, aware of Coleman's impending appearance as its witness, arranged for such an examination in its own interest, with his consent and that of his counsel. The prosecutor opposed the defendant's motion and Coleman's attorney indicated that he would not consent. *** The court denied the request, declaring *** that he would give the defendants such portions of the reports of the State's doctors as would show their opinion on this subject. *** However, they do not appear to have received copies of any portions of the medical reports. The undisputed facts are that the reports were privately submitted to the trial court, who considered them *ex parte* and concluded that Coleman was competent to testify. He decided also that the defendants' motions for copies of the reports should be denied.
>
> * * *
>
> "*When reasonable ground for doubt as to a person's mental capacity as a witness becomes known to the parties and to the court, and lives may depend upon his testimony,* the proper administration of justice in the public interest ought to stimulate a cooperative voluntary effort to establish a means of mutual solution of the problem. A variety of methods suggest themselves: agreement (a) that the court may appoint an impartial expert, (b) that each party may select one expert and the court a third, for joint examination, or (c) that each party may engage the services of an independent expert. *** *In such a situation it is fundamentally unfair for one interested party to obtain an examination by*

*self-selected experts and to oppose the granting of the same right or privilege to the other.*" 143 A. 2d at 552-53. (Emphasis added.)

In the Butler case, the New Jersey Court appears to have overlooked the right of the witness in its appropriate concern for fair play as between the prosecuting attorney and defense counsel.

The rule in Connecticut appears to be that a court has no authority to compel a witness to submit to a psychiatric examination until he is actually offered as a witness, and not then unless there is some indication of insanity. *Taborsky v. State*, 142 Conn. 619, 116 A. 2d 433 (1955).

The Supreme Court of Oregon first rejected the view that a trial court has power to order even the complaining witness in a sex case to undergo a psychiatric examination. *State v. Walgraeve*, 243 Ore. 328, 412 P. 2d 23 (1966). The Court there said that to hold otherwise would invade the province of the jury to evaluate the credibility of witnesses, by subjecting the testimony of the witness to attack by expert opinion based upon an interview conducted outside the presence of the jury. It was also of the opinion that a parade of experts, with conflicting opinions, would confuse rather than enlighten the jury, would delay the trial and would distract the jury from the issue of the guilt or innocence of the accused and that, rather than undergo such examination, timid victims of crime would simply not report such crimes to the police. The Court said that such a fundamental change in policy should come from the Legislature. However, two years later, in *State v. Clasey*, 252 Ore. 328, 446 P. 2d 116, 117 (1968), a sex offense case, the Court apparently approved the California rule, in principle, but affirmed the denial of the defendant's motion for such order on the ground that "there was no compelling reason stated in the motions and there was corroboration of the victim's testimony."

In *State v. Kahinu*, 53 Haw. 536, 547, 498 P. 2d 635 (1972), *cert. den.*, 409 U.S. 1126, 35 L.Ed. 2d 258, 93 S.Ct. 944 (1973), The Supreme Court of Hawaii, in a case involving burglary and assault with intent to rape, said that a trial judge, in his discretion, may order a witness to take a psychiatric examination when the movant shows a compelling reason therefor, but the trial

court had properly refused to order such an examination when the motion therefor was "based upon nothing more compelling than a bald allegation that the complainant may be mentally ill."

In *Easterday v. State*, 254 Ind. 13, 256 N.E. 2d 901 (1970), the alleged offense was sodomy committed on a 10-year-old girl who had previously accused other men of acts of sexual misconduct, including her brothers and an uncle, and who admitted "telling stories" about such activities. The Court said:

> "From the above cited cases, it is apparent that the defendant has no right to subject a prosecuting witness, in a trial on a sex offense, to a psychiatric examination. The trial court can, however, on timely motion of the defendant, order such an examination where in its sound discretion it determines one to be necessary." 254 Ind. at 16-17, 256 N.E. 2d 903.

The Court then held that, under the peculiar circumstances of that case, the refusal to grant the request for a psychiatric examination of the prosecutrix was not "based on sound judicial discretion," and a new trial was ordered.

In *State v. Miller*, 35 Wis. 2d 454, 151 N.W. 2d 157 (1967), the Supreme Court of Wisconsin found no abuse of discretion in the trial court's denial of a motion for a pretrial psychiatric examination of the complaining witness in a sex offense case. Speaking through Justice Beilfus, it said:

> "As pointed out in *Goodwin* [*v. State*, 114 Wis. 318, 90 N.W. 170 (1902)] in cases where the court has serious doubt of the mental capacity of a witness, in the exercise of its sound judicial discretion, it can order the witness to submit to a medical examination *as a condition of allowing the witness to testify. Of course the witness might refuse, but there is no power in the court to compel such an examination.* (Emphasis added.)
>
> "Because of the possible indignity of such an examination and the natural reluctance of persons to appear as witnesses if they were to be subjected to such examination, we believe a strong and compelling reason should appear before a trial court in the exercise of its discretion should

order a medical examination even as a condition of testifying at the trial." 35 Wis. 2d at 471, 151 N.W. 2d at 165.

In these Wisconsin cases, the court appears to have been dealing with an examination to determine the witness' competency to testify rather than one to relate to the credibility to be accorded a competent witness.

In *People v. Glover*, 49 Ill. 2d 78, 273 N.E. 2d 367 (1971), the defendant was charged with an unnatural sex assault on an adult woman. The Court said, "There is no question of the court's jurisdiction to order an examination of the complaining witness in a case involving a sex violation *** and it may, in the exercise of its discretion, do so when the defendant presents a compelling reason therefor." 49 Ill. 2d at 82, 273 N.E. 2d at 370. However, the Court held that, under the circumstances of that particular case, there was no abuse of discretion in denying the motion.

In *State v. Klueber*, 81 S.D. 223, 132 N.W. 2d 847 (1965), the defendant was convicted of indecently molesting a 12-year-old child. The Court said:

> "In an article entitled Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, in Vol. 48 Cal. L. Rev. 648, at page 663, this conclusion is reached: 'Most of the courts which have dealt with this problem have recognized the authority of the trial judge to order a psychiatric examination *of a witness on the question of credibility*. The principle established by the majority of the cases is that the judge has the discretion to order such an examination, although the failure to do so has rarely been held an abuse of discretion.' We are not aware of any good reason why that should not be the rule concerning *complaining witnesses in sex offenses*. *** We think defendant's showing for the requested examination falls far short of this requirement." 81 S.D. at 229-30, 132 N.W. 2d at 850. (Emphasis added.)

In *United States v. Skillman*, 442 F. 2d 542 (8th Cir., 1971), and in *United States v. Russo*, 442 F. 2d 498 (2d Cir., 1971), *cert. den.*, 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 669 (1972), the courts of appeal found no abuse of discretion in the denial by the District Judge of a motion for the psychiatric examination of a witness,

neither case involving a sex offense. In the *Russo* case, Circuit Judge Moore said, "Ordering a witness to undergo a psychological examination is a drastic measure." 442 F. 2d at 503.

In *United States v. Barnard*, 490 F. 2d 907 (9th Cir., 1973), *cert. den.*, 416 U.S. 959, 40 L.Ed. 2d 310, 94 S.Ct. 1976 (1974), Circuit Judge Duniway, speaking for the Court said:

> "As we have seen, competency [of a witness] is for the judge, not the jury. Credibility, however, is for the jury—*the jury is the lie detector in the courtroom.* *** It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries, and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. *Perhaps.* The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral, but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it." 490 F. 2d at 912-13. (Emphasis added.)

As above noted, such testimony, if otherwise competent, would be admissible in North Carolina, to bear upon the credibility of the witness.

In Massachusetts the trial judge is given, *by statute*, the power, in his discretion, to order such examination of a witness. *Commonwealth v. Welcome*, 348 Mass. 68, 201 N.E. 2d 827 (1964). Nevertheless, in the *Welcome* case, which involved an indecent assault on a 7-year-old girl, the Supreme Judicial Court of Massachusetts found no error in the trial court's denial of the motion for such examination.

We perceive no sound basis for distinction, in this matter, between cases involving sex offenses and cases involving other crimes, between male and female witnesses, youthful and adult witnesses, complaining witnesses and other witnesses, witnesses for the State and witnesses for the defendant.

To require a witness to submit to a psychiatric examination, by a psychiatrist not selected by the witness, is much more than

a handicap to the party proposing to offer him or her. It is a drastic invasion of the witness' own right of privacy. To be ordered by a court to submit to such an examination is, in itself, humiliating and potentially damaging to the reputation and career of the witness.

The courts which have adopted the view that such an examination may be ordered have not laid down any guidelines for the protection of the witness. Is the witness entitled to the presence of counsel at such examination? Must counsel be afforded an indigent witness? A person, voluntarily consulting a psychiatrist of his own choice, may refuse to answer what he or she deems an impertinent question delving into his or her private, personal affairs and history. What, if any, limitations are or should be imposed upon the questioning of a witness by a psychiatrist pursuant to such a court order? If the defendant obtains such an order, is the District Attorney entitled to insist upon an examination by his expert? Where there are multiple defendants, is each entitled to an examination of his alleged victim by his own psychiatrist?

As the California, Connecticut, and Wisconsin Courts have observed, the court has no actual authority to compel the witness to cooperate with the psychiatrist, but the ordinary witness does not know this and will be fearful of refusing to do so. To require the alleged victim, especially in a sex offense case, to submit to such an inquisition into her most personal and private relations and past history, as a condition precedent to permitting her to testify against her alleged assailant would certainly discourage the honest, innocent victim of a genuine assault from going to the authorities with a complaint. This is not in the public interest. A zealous concern for the accused is not justification for a grueling and harassing trial of the victim as a condition precedent to bringing the accused to trial.

The danger of perjury is always present in any trial but as Circuit Judge Duniway observed in *United States v. Barnard, supra*, at 912, "The jury is the lie detector in the courtroom." Even pathological liars sometimes tell the truth. It is for the jury to determine in the particular case whether the particular witness is or is not telling the truth. Assuming a psychiatric examination of the witness has been made, the examining psychiatrist cannot make that determination but can only express

his opinion as to whether the witness, by reason of the psychiatrist's opinion as to his mental health, is more or less likely to tell the truth than is a person in normal mental health.

To hold that a trial court in this State may require a witness, against his will, to subject himself to a psychiatric examination, as a condition to his or her being permitted to testify, is also a serious handicap to the State in the prosecution of criminal offenses. If the witness simply refuses, there may well be nothing the prosecuting attorney can do to induce the witness to comply with the order. In many instances, a material witness for the State is none too eager to testify under any circumstances. To permit the defendant to obtain a court order, directing him or her to submit to a psychiatric examination as a condition precedent to his testifying, may well further chill his or her enthusiasm for taking the stand or at least give him a way out of doing so. In many cases, there would be no insurmountable difficulty in the way of a hard-pressed defendant's obtaining such an order and bringing this escape route to the attention of the witness.

**[8]** In our opinion, the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them.

We think that so drastic a change in the criminal trial procedure of this State, if needed, should be brought about, as was done in Massachusetts, by a carefully considered and drafted statute, not by our pronouncement leaving the matter to the unguided discretion of the trial judge.

**[9]** If, however, we were to hold that judges of trial courts in North Carolina have inherent power, in their discretion, to order an unwilling witness to submit to a psychiatric examination, we would hold that, under the circumstances of the present case, it was not an abuse of that discretion to deny the motion of this defendant. In the present case, unlike many cases of alleged sex offenses, the question was not whether the offense of murder occurred but whether the defendant was a party thereto. The State's witness Matthews had already been given a psychiatric examination by the staff of Dorothea Dix Hospital and its report

was available to the defendant, as was the testimony of the examining psychiatrist. Without a further psychiatric examination, the defendant was in a position to show that the witness had committed the murder with exceptional brutality, which, as the defendant says in his brief, indicates his mental abnormality. The defendant was further in a position to show that this witness originally gave the police a statement completely at variance with his present testimony and recanted that statement in exchange for permission to plead guilty to second degree murder. There is in this case no showing of any compelling necessity for a further psychiatric examination of Matthews in order to enable the defendant to present to the jury his contention that Matthews' testimony was not worthy of their belief.

We, therefore, conclude that there was no error in the denial of the defendant's motions for an order directing the pretrial psychiatric examination of Matthews. The defendant's Assignment of Error No. 1 is, therefore, overruled.

No error.

Justice EXUM concurring.

As have most of the well-considered decisions on the subject, to which the majority refers, I would conclude that our trial judges have the power, to be carefully used in the exercise of their sound discretion, to order in appropriate circumstances the psychiatric examination of any witness as a condition to receiving the testimony of that witness. In this case the denial of defendant's motion for such an examination was well within the discretion of the trial judge and should not be held for error.

As the majority wisely recognizes the witness' rights must be given due consideration. Defendant should be required to make a strong showing that the witness' mental make up is such that a psychiatric examination would probably reveal either that the witness is incompetent or that the witness' credibility may be subject to serious question. Situations calling for the entry of such an order would, it seems, be rare indeed. But if called for, our judges should have the power to enter the order.

STATE OF NORTH CAROLINA v. BOBBY ERVIN HOOD

No. 31

(Filed 24 January 1978)

**1. Criminal Law § 15— change of venue—motion by State on defendant's behalf**

The trial court did not err in granting the State's motion for change of venue under G.S. 1-84 (amended, Chapter 12, 1977 Session Laws, to apply only to civil actions) on the grounds that defendant could not receive a fair and impartial trial in the county in which the case was pending, and it was especially proper for the State to move for change of venue since defendant was not represented by counsel at the time.

**2. Criminal Law § 15.1— pretrial publicity—change of venue proper**

The trial court's refusal to grant defendant's motion for change of venue to the county where the case was initially scheduled for trial was a proper exercise of that court's discretion where there was no evidence that the county in which defendant was tried was not an impartial forum or that defendant was prejudiced or unduly burdened in any way by the transfer of his case to that county; moreover, the evidence tended to show that defendant would have been prejudiced by pretrial publicity had his case not been removed from the county where it was originally scheduled.

**3. Criminal Law §§ 73.2, 87.1— leading questions—hearsay testimony—evidence properly admitted**

Defendant's contention that the trial court erred by allowing the district attorney to elicit testimony from State's witnesses by leading questions or questions calling for hearsay answers is without merit, since the allegedly leading questions objected to either were not leading or were within the trial court's discretion, and the questions calling for allegedly hearsay testimony in fact did not show the truth of the matters asserted but simply proved that certain statements were made.

**4. Homicide § 31.1— homicide statute providing for death penalty—death penalty invalidated—trial under statute proper**

The trial court in a first degree murder prosecution did not err in overruling defendant's motion to dismiss for the reason that the death penalty provided for by G.S. 14-17 had been declared unconstitutional and the General Assembly had not enacted new legislation providing a different punishment, since the punishment statute in effect at the time of the crime in question provided that in the event it was determined by the U. S. Supreme Court that the death penalty could not be imposed, the punishment would then be life imprisonment.

**5. Criminal Law § 113.7— acting in concert—jury instructions proper**

Defendant in a first degree murder prosecution was not prejudiced by the trial court's instructions on acting in concert where the jury must have understood that it would have to find that defendant and others were acting together in planning and executing the crime before it could find that defend-

ant acted in concert with another person, and the jury must have understood from the judge's instruction that if either defendant's companion or defendant shot and killed the victim while acting together, both would be guilty.

6. **Criminal Law § 112.4— circumstantial evidence—jury instructions proper**

Defendant's contention that the trial court erred in his charge on circumstantial evidence is without merit where defendant did not specify the error; defendant presented no request for instructions; and the court, although not required to do so, did instruct the jury on circumstantial evidence and did instruct concerning the intensity of proof required for such evidence.

7. **Homicide § 21.5— first degree murder—conspirators' testimony—sufficiency of evidence**

In a prosecution for first degree murder, testimony by two of defendant's companions in the crime concerning the planning and execution of the murder and defendant's participation therein was sufficient to overcome defendant's motion for a directed verdict of not guilty.

APPEAL by defendant from *Grist, J.*, at the 16 August 1976 Special Session of MCDOWELL Superior Court.

On a bill of indictment, proper in form, defendant was tried and convicted of the first-degree murder of Herman Lee Philyaw and was sentenced to life imprisonment.

The State introduced evidence tending to show that in the early morning of 7 May 1975, David Lee Philyaw, the victim's son, and Reuben Clark were riding to work in rural Caldwell County with David's father, in a pickup truck belonging to David's father, Herman Lee Philyaw. While traveling on a private road near State Highway 90, north of Collettsville, Herman Lee Philyaw stopped the truck so that one of the passengers could clear some brush off the road. David then heard a loud explosion, whereupon the side glass on the driver's side shattered and his father slumped forward in the driver's seat. The truck began rolling, and as David Lee Philyaw grabbed the steering wheel he recognized Bobby Burns with a rifle in his hand running along the road. Burns and another individual were trying to enter a white Ford automobile which was leaving the scene, but were unable to do so. David steered the truck toward Burns, overtook him and pinned him against a bank. The other individual ran across the road toward the river. David jumped out of the truck, grabbed a .22 sawed-off rifle from Burns' hands, and started beating Burns with the weapon. He then ran up to his grandfather's house and had him call the sheriff and an ambulance.

David Philyaw had known Bobby Burns several years, and Burns had lived in his father's house at one time. David did not recognize either the driver of the white Ford which left the scene, or the person who tried to get into that vehicle just before it sped away.

Herman Lee Philyaw died from the gunshot wound shortly afterward.

Bobby Burns, Isaiah Hood, Edith Philyaw (deceased's wife) and the defendant were all charged with the murder of Herman Lee Philyaw. Bobby Burns and Isaiah Hood pled guilty to second degree murder and testified for the State at defendant's trial.

Bobby Burns testified that he worked at Harper's Furniture Company with Edith Philyaw and Isaiah Hood. He had previously lived in the Philyaw home for some nine months and was in love with Mrs. Philyaw; and on one occasion Burns and Mrs. Philyaw had spent the weekend together. Burns also testified that approximately one month prior to 7 May 1975, Edith Philyaw gave him an envelope containing money which he was to deliver to Isaiah Hood, defendant's nephew, and that on the day prior to the killing, Burns, Isaiah Hood and defendant met and planned the murder of Herman Lee Philyaw. At this time defendant said that he would shoot Philyaw. Burns was to accompany him and shoot his .22 rifle into the back of the vehicle to slow it down. Isaiah was to drive the getaway car.

Burns further testified that early on the morning of 7 May, the three men travelled to a spot which Philyaw normally passed on his way to work. They put some brush in the road, and defendant and Burns took up positions on opposite sides of the road. Defendant had a shotgun and Burns had a .22 rifle. When the victim's truck approached Burns heard defendant yell, "Get ready, here he comes." When the truck stopped Burns heard a loud explosion, whereupon he jumped and his rifle went off into the air. On cross-examination the witness admitted to having made prior inconsistent statements to police, and further admitted that, prior to the killing, he had made the statement that he would kill Herman Philyaw.

Isaiah Hood testified that Bobby Burns gave him an envelope containing several hundred dollars, and that he then gave this to his uncle, the defendant. On the morning of 7 May 1975, he drove

Burns and defendant to a spot near Collettsville, let them out and then parked his car on the side of the road. He did not see either defendant or Burns with a gun, nor did he know whether or not someone else was in the woods with Bobby Burns.

S.B.I. employee Frederick Hurst, a firearm and tool marks examiner, testified that fragments and wadding taken from the victim's person and his truck could only have been fired from a 12 gauge shotgun, and could not have been fired from a .22 rifle.

Howard Mathes testified that on the morning of 7 May 1975 at 7:30 a.m., defendant came by his house just off Highway 90 near Collettsville. Defendant was on foot, and asked Mathes to take him to his home in Harpertown.

Defendant offered no evidence.

*Attorney General Rufus L. Edmisten; Assistant Attorney General Isaac T. Avery III and Deputy Attorney General William W. Melvin for the State.*

*Bruce W. Vanderbloemen for defendant appellant.*

MOORE, Justice.

Defendant assigns as error the trial court's denial of his motion for a change of venue from McDowell County to Caldwell County, the county in which the alleged crime occurred. Defendant's case was initially scheduled for trial in Caldwell County, along with the trials of his three codefendants, Bobby Burns, Isaiah Hood and Edith Philyaw. On 2 July 1975, Edith Philyaw moved for a change of venue pursuant to G.S. 1-84 (amended, Chapter 12, 1977 Session Laws, to apply only to civil actions). On 18 August 1975, two of the codefendants, Burns and Isaiah Hood, pled guilty to the charges against them. On 20 August 1975, Judge Briggs granted defendant's attorneys' motion that they be permitted to withdraw from the case. A further hearing was held that same day to determine codefendant Philyaw's motion for change of venue.

By order dated 21 August 1975, Judge Briggs removed Mrs. Philyaw's case to McDowell County for trial for the reason that Mrs. Philyaw could not receive a fair and impartial trial in Caldwell County. On the same day Judge Briggs entered a similar order in the case against defendant, based upon motion of the

district attorney. In this order Judge Briggs found facts and concluded that ". . . it could be difficult for defendant to receive a fair trial in Caldwell County due to pretrial publicity." Pursuant to G.S. 1-84 he then ordered that defendant's case be transferred and set for trial in McDowell County. It appears from the record that, at the time the State's motion for change of venue was heard by Judge Briggs, defendant was not represented by counsel. Though it does not appear in the record, defendant says that both he and Bruce W. Vanderbloemen, the attorney appointed for him after the hearing, orally objected to a change of venue of the case.

On 9 September 1975, the defendant moved in open court in McDowell County that his case be transferred back to Caldwell County. This motion was denied by Ervin, J., on that date.

Defendant's case and the case against Edith Philyaw were scheduled for joint trial at the 17 November 1975 Special Session of McDowell County Superior Court. In a motion filed 17 November 1975, defendant objected a third time to trial in McDowell County, and moved, pursuant to G.S. 1-84, that the case be tried in Wilkes County or some other county adjoining Caldwell County, the county in which the case originated. This motion was denied by Grist, J., on 18 November 1975. From this denial, defendant gave notice of appeal to the Court of Appeals, pursuant to G.S. 1-84. The State then proceeded with the trial of Edith Philyaw, having severed the case against defendant due to his appeal of the order denying his motion for change of venue.

On 15 January 1976, defendant was granted an extension of time until 21 February 1976 to serve the case on appeal on the district attorney, and an extension of 150 days from 17 November 1975 to docket the appeal in the Court of Appeals. Defendant failed to serve the case on appeal on the district attorney and failed to perfect the appeal. On 5 May 1976, pursuant to Rule 25 of the Rules of Appellate Procedure, the district attorney moved the court for an order dismissing defendant's appeal of the venue issue, and on 12 May 1976, Jackson, J., dismissed the appeal. Judge Jackson found that defendant's attorney had prepared the case on appeal, but on 20 February 1976, defendant had informed his attorney that he did not wish to perfect the appeal.

Defendant's case was then scheduled for trial at the 16 August 1976 Special Session of McDowell Superior Court. At a pretrial hearing on 26 July 1976, the defendant, through his attorney, moved again for a change of venue from McDowell County to Caldwell County. This motion was denied in an order by Thornburg, J. The trial then proceeded in McDowell County, and defendant was convicted on 19 August 1976.

Venue is controlled by statute. *State v. Lewis*, 142 N.C. 626, 55 S.E. 600; *State v. Woodard*, 123 N.C. 710, 31 S.E. 219. Article 3 of Chapter 15A, General Statutes, sets forth the statutory provisions governing venue. Generally, venue in a criminal case remains in the county in which the crime was committed. G.S. 15A-131(c) provides:

> "Venue for probable cause hearings and trial proceedings in cases within the original jurisdiction of the superior court lies in the county where the charged offense occurred."

Session Laws 1973, c. 1286, s. 31, and Session Laws 1975, c. 573, provide that Chapter 15A, Criminal Procedure Act:

> ". . . becomes effective on September 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. . . ."

The case against defendant was pending at the time Chapter 15A went into effect on 1 September 1975; therefore the provisions of G.S. 15A-131(c) as set out above are applicable, and the proper venue in this case initially lay in Caldwell County.

At the time of the proceedings against defendant, however, G.S. 1-84 stated:

> § 1-84. Removal for fair trial. — In all civil and criminal actions in the superior and district courts, when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by af-

> fidavits: Provided, that when a case has been removed to another county for trial on motion of the solicitor, the defendant may, upon call of the case for trial, object to trial therein and move that the case be sent for trial to some other county adjacent to the county from which removed, and in the event the objection is overruled, the defendant may forthwith appeal. If the motion of the defendant is sustained the judge shall order the case tried in some other county adjacent to the county from which the case was first removed. If, upon appeal, the court shall find error in the order denying the motion or if it shall suggest that the case probably ought to be removed then, and in such event, it shall be the duty of the judge at the next session of court of the county to which the case was first removed to order the case sent for trial to some other county adjacent to the county where the bill of indictment was found.

G.S. 1-84 was amended as of 16 February 1977 so as to apply only to civil actions. *See* Chapter 12, 1977 Session Laws. For the present statutes concerning removal for purposes of a fair trial, *see* G.S. 15A-957 and G.S. 15A-133.

G.S. 1-84 afforded both the defendant and the State the right to move for a transfer of a criminal case to another county for purposes of obtaining a fair and impartial trial. The proviso of G.S. 1-84 specifically granted a defendant an immediate right of appeal from an order by a trial court overruling defendant's objection to trial in a county to which an action had been removed on motion of the solicitor. In the present case, pursuant to this proviso, defendant objected to trial in McDowell County and moved for trial in a county adjacent to Caldwell County. This objection was overruled, and defendant exercised his right of immediate appeal. Defendant's failure to perfect this appeal operates as a waiver of any right to removal he may have had under G.S. 1-84. However, the failure to perfect the appeal under G.S. 1-84 is not dispositive of this assignment of error. For, by its terms, G.S. 1-84 limits the interlocutory review contemplated to a consideration of whether the trial court erred in refusing to remove the case to a county adjacent to the county from which the case was initially removed. The review contemplated by the statute does not include review of the question whether the ini-

tial removal from Caldwell County, on the motion of the solicitor, was proper. We now turn to this question.

Defendant insists that he has a right to be tried in the county where the charged crime allegedly occurred. He does not argue the nature of this right, but in this State the right is statutorily based, and is not a right grounded in the Federal or State Constitutions. *See* G.S. 15A-131; *State v. Lewis, supra; State v. Woodard, supra.* While G.S. 15A-131 grants a defendant the right to be tried in the county where the alleged offense occurred, it is clear that G.S. 1-84, at the time of defendant's trial, also granted the State the right to remove a defendant's case to another county, provided the State shows ". . . probable grounds . . . that a fair and impartial trial cannot be obtained in the county in which the action is pending. . . ."

Defendant contends that the State's right to move for a change of venue under G.S. 1-84 is limited to those instances where the prosecution could not get a fair and impartial trial. Defendant argues that the State should not be permitted to obtain removal of his case on grounds that he, the defendant, could not get a fair trial.

**[1]** Though this is, admittedly, an unusual situation, we feel that the trial court did not commit error in granting the State's motion for change of venue under G.S. 1-84. At the time of the then codefendant's motion for change of venue, the defendant was not represented by counsel. Two other codefendants, Burns and Isaiah Hood, had pled guilty in this case just two days prior to the hearing; and this fact, as well as other aspects of the case, was highly publicized in the vicinity of Caldwell County. Upon the basis of these facts, the trial judge granted codefendant Philyaw's motion, as well as that of the State, for change of venue on grounds that the defendants could not receive fair and impartial trials in Caldwell County.

G.S. 1-84 does not limit the prosecutor, in applying for a change of venue, to those cases where he might believe that the State cannot get a fair trial in the county where the indictment is laid. The statute itself is comprehensive enough to include a motion by the State where the prosecutor believes that the defendant could not get a fair and impartial trial. *See State v. Wheat,*

111 La. 860, 35 So. 955, where a similar statute was so construed. In that case the court said:

> "In contemplation of law it is as much the duty of a prosecuting officer to insure the man accused of crime of a fair and impartial trial as it is his duty to demand such for the State."

In *State v. Archer*, 32 N.M. 319, 255 P. 396, the New Mexico court held similarly in the absence of a specific statute. We hold, under the facts of this case and the terms of then existing G.S. 1-84, and especially since the defendant was not represented by counsel at the time, that it was proper for the State to move for change of venue on the grounds that defendant could not receive a fair and impartial trial in the county in which the case was pending.

**[2]** A further question involved here is whether the court erred in removing defendant's case from Caldwell to McDowell County, and whether the court erred in refusing to transfer the case back to Caldwell on motion of defendant. A motion for change of venue on account of local prejudice or pretrial publicity is addressed to the sound discretion of the trial court, and the court's ruling will not be overturned unless there is a showing of manifest abuse of discretion. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521, and cases cited therein.

In the present case, based on affidavits and press clippings submitted by attorneys for Mrs. Philyaw, the court concluded as a matter of law:

> "1. That it could be difficult for the Defendant to receive a fair trial in Caldwell County due to pretrial publicity;
>
> 2. That, in the interest of justice, a change of venue should be granted in this case."

Defendant offered no evidence to show that there was an abuse of discretion in the granting of the motion for change of venue. There is nothing to show that McDowell County was not an impartial forum, or that defendant was prejudiced or unduly burdened in any way by the transfer of his case to McDowell County. To the contrary, in view of the findings of fact by Judge Briggs in removing defendant's case, it appears that defendant would have been prejudiced by pretrial publicity had this case not been

removed from Caldwell County. Thus, we hold that the trial court's refusal to grant defendant's motions for change of venue to Caldwell was a proper exercise of that court's discretion. This assignment of error is overruled.

**[3]** Defendant next contends that the trial court erred on numerous occasions by allowing the district attorney to elicit testimony from State's witnesses by leading questions, questions calling for hearsay answers, and questions which assumed facts not in evidence.

On direct examination, the district attorney asked State's witness Bobby Burns the following:

> "Q. What, if anything, did Mrs. Philyaw ever give you to give to Isaiah Hood? . . . .
>
> A. It was an envelope."

Objection to this question was entered by defendant on grounds that it presumed hearsay, and the objection was overruled. The question is not leading; nor does it call for a hearsay answer. If Mrs. Philyaw did in fact direct the witness to give something to Isaiah Hood, the witness's testimony regarding her directive would not be hearsay. Such testimony would not concern the truth or falsity of what was said, but rather, would concern merely the issue of what was said, and whether it was in fact said. "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." 1 Stansbury, North Carolina Evidence, sec. 138 (Brandis rev. 1973); *State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353. Testimony regarding a direction by Mrs. Philyaw that the witness give an envelope to another is not offered to prove the truth of the matter asserted, but rather is offered simply to prove that the statement was made.

During the course of State's witness Burns' testimony the following occurred:

> "Q. All right, tell the Jury everything that Bobby Hood said or you said in Mr. Hood's presence.
>
> A. Well, we set there . . . .

MR. VANDERBLOEMEN: Objection to the leading.

THE COURT: Overruled.

A. Bobby Hood and I and Isaiah set there and we discussed about putting the brush. . . .

MR. VANDERBLOEMEN: Objection, your Honor.

THE COURT: Just the discussion between you and Bobby Hood.

A. Well, the way it was I suppose to he said I supposed to set upon the bank. . . .

MR. VANDERBLOEMEN: Objection and move to strike.

THE COURT: Overruled.

EXCEPTION NO. 6

A. I suppose to set upon the bank and shoot through the windshield, back windshield.

Q. At what point?

A. As soon as he come upon the brush and slowed down.

MR. VANDERBLOEMEN: Objection and move to strike, 'I was suppose to'.

THE COURT: Overruled.

EXCEPTION NO. 7

Q. Is this what Bobby Hood said?

A. Yes sir.

MR. VANDERBLOEMEN: Objection to the leading.

THE COURT: Overruled.

EXCEPTION NO. 8."

It is evident that the error, if any, in allowing this broad request to be answered by the witness was harmless, for the witness's answers do not amount to hearsay. The witness's response that he "was suppose to set upon the bank [etc.] . . ." indicates that defendant directed the witness to do certain things. Such a response is not hearsay in that it is offered only to show that the statement was made, and not to show the truth of mat-

ters asserted in the statement. The probative force of such testimony, *i.e.*, that the statement was made, depends on the credibility of the witness himself, and not on the credibility of some person other than the witness producing such testimony. *Cf. State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830; *Chandler v. Jones*, 173 N.C. 427, 92 S.E. 145; 1 Stansbury, N. C. Evidence, sec. 138 (Brandis rev. 1973). As is stated in *State v. Lassiter*, 191 N.C. 210, 131 S.E. 577: ". . . The inherent vice of hearsay testimony consists in the fact that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." The value of the testimony here depends on the credibility of the witness, Bobby Burns, and not on the credibility of defendant. It is not, therefore, hearsay.

As regards the question "Is this what Bobby Hood said?", and the witness's answer to that question, the allowance of this leading question was in the discretion of the trial judge. Such rulings on the use of leading questions are discretionary and reversible only for abuse of discretion. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, and cases cited therein. As we held in *State v. Smith*, *supra*, leading questions are permissible when that mode of questioning is best calculated to elicit the truth. This question indicates that it was asked for purposes of clarification of the witness's prior testimony. While the question could have been phrased differently, allowing it in this context was not an abuse of discretion.

The remaining objections and exceptions raised by defendant under this assignment of error have been considered and found to be without merit. The allegedly leading questions objected to are either not, in fact, leading, or else are within the trial court's discretion. This assignment of error is overruled.

**[4]** The defendant next assigns as error the trial judge's action in overruling his motion to dismiss for the reason that the death penalty provided for by G.S. 14-17 had been declared unconstitutional, and the General Assembly had not enacted new legislation providing for a different punishment.

The murder for which the defendant was convicted occurred on 7 May 1975. G.S. 14-17 was rewritten by Session Laws 1973, c. 1201, effective 8 April 1974, to provide that in the event it was determined by the Supreme Court of the United States that the

death penalty could not be imposed, the punishment would then be life imprisonment. The death penalty under G.S. 14-17 was invalidated by the Supreme Court of the United States in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976). Under the provision of G.S. 14-17, as rewritten, the punishment for murder in the first degree in North Carolina then became life imprisonment; and, as we held in *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976):

> "[T]here was no error in failing to dismiss the indictments because this Court may substitute life imprisonment for the death penalty by authority of the provisions of the 1973 Sess. Laws, c. 1207, § 7 (1974 Session)."

*See also State v. Woods*, 293 N.C. 58, 235 S.E. 2d 47 (1977); *State v. Hardee*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976).

This assignment of error is without merit and is overruled.

**[5]** Defendant excepts to the following portion of the charge:

> "Members of the jury, one of the principles of law involved in this case involves the law relating to ACTING IN CONCERT. For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of murder, each of them is held responsible for the acts of the others done in the commission of the crime of murder.
>
> * * *
>
> ". . . If the State has satisfied you from the evidence beyond a reasonable doubt that the defendant, Bobby Ervin Hood acting either by himself or acting together either with Bobby Joe Burns or Isaiah Hood or both of them and either Bobby Ervin Hood himself, or either Bobby Joe Burns or Isaiah Hood acting in concert with Bobby Ervin Hood on May 7th, 1975, unlawfully and with malice shot and killed Herman Lee Philyaw with a firearm and the State has further satisfied you from the evidence beyond a reasonable doubt that the defendant, Bobby Ervin Hood or persons acting in concert with him shot and killed Herman Lee Philyaw with a firearm, such as a shotgun, willfully, in execution of an actual specific

intent to kill formed after premeditation and deliberation, as these terms have been defined to you and that the death of Herman Lee Philyaw was proximately caused by the wound so inflicted, the defendant would be guilty of murder in the first degree."

The defendant argues that the trial court did not give a sufficient explanation of the meaning of "acting in concert." It must be noted here that, on being asked by the trial judge if he requested further instructions, defendant's attorney indicated that he was satisfied with the trial court's instructions.

In *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976), we considered a similar charge. There the defendant asserted that the trial court ". . . erred in instructing the jury on 'acting in concert' so as to, in effect, charge the jury that it should convict both defendants if either one is found guilty." Chief Justice Sharp then said:

"The crucial question in this case was the identity of the men who robbed the cash register in Grant's grocery on the night of 28 December 1973. When the charge is construed as a whole we think the jury must have understood the judge to mean that if they were satisfied beyond a reasonable doubt that Davis and Foster were acting together while in the course of or attempt to rob Grant's store, and that either one of them shot and killed Grant both would be guilty of first degree murder, but the issue of the guilt of each defendant was to be considered individually."

In the present case, Bobby Burns testified:

"Bobby Hood said that he would shoot Mr. Philyaw. He said what I was to do. I was supposed to take the .22 I had and shoot through the back windshield and slow him down." This witness further testified that he saw the defendant put a shotgun together that had been dismantled and go behind a tree. He heard the defendant say, "Get ready, here he comes" and heard a loud explosion.

According to this testimony, defendant and witness Burns were "acting in concert." Considering the instruction as a whole the jury must have understood that it would have to find that defendant and others were acting together in planning and ex-

ecuting the crime before it could find that defendant acted in concert with another person. And the jury must have understood from the judge's instruction that if either Burns or defendant shot and killed Mr. Philyaw while acting together, both would be guilty. Furthermore, according to all of the evidence, the defendant actually fired the fatal shot. Hence he could not have been prejudiced by this instruction.

**[6]** Under this same assignment of error, defendant contends that the trial judge erred in his charge on circumstantial evidence. The defendant does not say wherein the error lies.

As we said in *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973): "A general and correct charge as to the intensity or quantum of proof when the State relies wholly or partly on circumstantial evidence is adequate unless the defendant tenders request for a charge on the intensity of proof required for such evidence. [Citations omitted.] When such request is aptly tendered, the trial judge should charge that circumstantial evidence must point unerringly to defendant's guilt and exclude every other reasonable hypothesis." (Citations omitted.)

In the present case, defendant presented no request for instructions. Furthermore, although not required to do so, the trial judge did instruct the jury on circumstantial evidence and concluded by saying: "Do the circumstances lead unerringly to the guilt of the defendant and exclude every other reasonable conclusion except that of guilty? If so, the evidence is sufficient to convict, otherwise, it is not."

This assignment of error is overruled.

**[7]** Finally, the defendant says the evidence presented by the State is not sufficient to overcome his motion for a verdict of not guilty at the close of all the evidence. Clearly, this assignment is without merit.

On a motion for a directed verdict of not guilty, or for judgment as of nonsuit, the trial judge is required to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion should be overruled. *State*

*v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

The testimony of Bobby Burns, coupled with the testimony of Isaiah Hood, was sufficient to overcome defendant's motion for a directed verdict of not guilty.

A careful examination of the record does not disclose error which would justify disturbing the verdict reached or the judgment imposed; hence, in the trial, we find

No error.

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STATE OF NORTH CAROLINA v. MARION HOWARD BUNDRIDGE

No. 75

(Filed 24 January 1978)

1. **Criminal Law §§ 5, 29— mental capacity to stand trial—insanity at time of crime—tests**

In determining a defendant's capacity to stand trial, the test is whether he has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel so that any available defense may be interposed; on the other hand, when an accused enters a plea of not guilty by reason of insanity, the test of his mental responsibility is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter of investigation.

2. **Criminal Law § 5.1— evidence of insanity—exclusion improper—no prejudice**

An order entered by the trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible on the question of his insanity; however, the trial court's exclusion of this evidence was not prejudicial error since the trial judge's order was based largely upon the testimony of a doctor who testified for defendant at trial, and the testimony of this doctor, another expert witness and lay witnesses placed before the jury a complete history and description of defendant's mental condition.

3. **Criminal Law § 113.8— "guilty by reason of insanity"—erroneous instruction—no prejudice**

Defendant was not prejudiced by the trial court's instruction to the jury that they could possibly return a verdict of "guilty by reason of insanity," since the error was so obvious that the jury could not possibly have been misled by it; the trial judge on three separate occasions charged to the effect that

if the jury found that defendant did not have mental capacity to know right from wrong, the jury should return a verdict of not guilty; and the trial judge submitted correct written issues to the jury.

4. **Robbery § 5— possible verdicts—erroneous instructions—no prejudice**

Where the trial judge instructed the jury with respect to armed robbery that the possible verdicts were "guilty, not guilty by reason of insanity or guilty," defendant was not prejudiced by the judge's failure to submit the possible verdict of "not guilty," since the court had just given proper instructions as to the possible verdicts, and the jury, at all times during their deliberations, had written issues before them which correctly gave the possible verdicts which they might return.

5. **Criminal Law §§ 5, 119— acquittal by reason of insanity—commitment procedures—instructions not limited to request—no error**

Defendant's contention that the trial judge erred by fully instructing on the commitment procedures applicable to a defendant acquitted by reason of insanity when defendant only requested that the court instruct on the existence of such procedures is untenable, since the instructions given were favorable to defendant, and, further, to limit the instructions as defendant requested would create unanswered questions which would confuse, rather than assist, the jury in reaching a verdict.

6. **Criminal Law § 66.9— pretrial photographic identification—no impermissible suggestiveness—in-court identification proper**

Though the State was unable to produce at trial photographs used in a pretrial identification procedure and though there was some contradictory evidence as to whether defendant or his alleged accomplice were both identified in the first identification procedure conducted by officers, such evidence did not disclose a photographic procedure so impermissibly suggestive as to violate defendant's constitutional right to due process; but even if the pretrial photographic identification of defendant was impermissibly suggestive, the robbery victim's in-court identification of defendant would have been properly admitted into evidence, since the victim had ample opportunity to observe the robber in good light both before and during the attack and the victim identified defendant independent of any pretrial identification procedure.

7. **Criminal Law § 42.3— blood-stained clothing—connection with crime—admissibility**

In a prosecution for armed robbery and assault with a deadly weapon the trial court properly allowed into evidence items of clothing taken from defendant's residence, though there was no evidence that defendant had worn those clothes on the night of the assault and no evidence that the stains on the clothes were human blood of the same type as that of the victim, since the victim had been assaulted in such a manner that one might reasonably expect the assailant's clothing to be spattered with blood, and, within a short time after defendant had been implicated, clothing apparently covered with fresh blood was found in his apartment.

Justice EXUM dissenting.

**State v. Bundridge**

APPEAL by defendant from *Howell, J.*, 14 February 1977 Schedule "B" Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in separate bills of indictment with armed robbery and assault with a deadly weapon with intent to kill inflicting serious injuries. The charges were consolidated for trial. At arraignment, defendant stood mute, and the court entered a plea of not guilty for defendant in each case.

The State offered evidence tending to show that about 9:00 p.m. on 4 October 1975, Grady Lawrence Williams encountered David Adams in downtown Charlotte. Adams introduced Williams to defendant, Marion Howard Bundridge, and the three of them walked together to a railroad trestle near the intersection of 5th and 6th Streets. At that place, defendant seized Williams, placed a sharp instrument to his throat, and commanded that Williams give him his money. After Williams gave Adams his wallet and money, defendant cut Williams' throat, stabbed him in the back, and cut him around the head, shoulders, and chest. Williams testified that the place where he met defendant was in front of the Jiffy House on West Trade Street which was a well-lighted area. He further stated that he never lost consciousness during the time he was being assaulted by defendant. An unidentified lady called the police, and he was taken to the hospital where a severed windpipe and other wounds were sutured. His left arm was partially paralyzed as a result of the assault.

Later, on the night of 4 October 1975, police officers went to defendant's residence and after identifying themselves entered the residence at defendant's invitation. They observed blood-stained trousers, a blood-stained coat, and shoes which appeared to be spotted with fresh blood. These items of clothing were taken by officers with defendant's consent.

Defendant did not testify but offered expert testimony which indicated that he suffered from paranoid schizophrenia. He also offered testimony of lay witnesses who testified to certain irrational acts including statements by defendant that the government subjected him to laser beams in an attempt to control his mind. The lay witnesses also testified that, in their opinion, defendant was suffering from some sort of mental disorder.

The jury returned verdicts of guilty of armed robbery and guilty of assault with a deadly weapon with intent to kill inflict-

ing serious injuries. Defendant appealed from judgment sentencing him to life imprisonment for armed robbery and twenty years on the charge of assault. The judgment in the assault case provided that the sentence imposed therein would run concurrently with the sentence in the robbery case.

*Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., Associate Attorney, for the State.*

*Lila Bellar, for the defendant appellant.*

BRANCH, Justice.

Defendant assigns as error the ruling of the trial judge which sustained the State's objection to the admission of Judge Grist's order of 30 January 1976 finding defendant mentally incapacitated and incapable of proceeding to trial. It is defendant's position that, since he had the burden of proving his insanity to the satisfaction of the jury, it was prejudicial error to deny him the benefit of this recent adjudication. In support of his position, he relies on *State v. Duncan*, 244 N.C. 374, 93 S.E. 2d 421 (1956), and cases there cited.

In *Duncan*, the defendant was tried upon an indictment charging him with murder. Upon arraignment, it was suggested to the court that the defendant was insane and without sufficient mental capacity to understand his defense or to receive sentence upon his conviction. The trial judge, pursuant to G.S. 122-84, impaneled a jury and held an inquisition concerning the defendant's mental condition. An issue was submitted to and answered by the jury as follows: "Is the defendant insane and without sufficient mental capacity to undertake his defense or to receive sentence in this case? Answer: Yes." The trial judge committed the defendant to the state hospital for treatment and further ordered that if his sanity be restored he be returned to the Chatham Superior Court for trial. This adjudication was offered into evidence at trial, and the court sustained the State's objection. Holding this ruling to be prejudicial error, this Court speaking through Justice Parker (later Chief Justice) in part stated:

> The rule is well established that in criminal cases, when insanity is relied on as a defense, an adjudication declaring the defendant to be an insane person made prior to the alleged offense or subsequent to the alleged offense for which

> the defendant is being tried is not conclusive of the insanity of the defendant at the time of the inquisition, and is admissible in evidence for the consideration of the jury on the issue as to whether or not he was insane when the offense was committed, provided the time of the adjudication bears such relation to the person's condition of mind at the time of the crime as to be worthy of consideration in respect thereto. [Citations omitted.] 244 N.C., at 378, 93 S.E. 2d, at 423.

One of the cases cited in *Duncan* and relied upon by defendant is *McCully v. State*, 141 Ark., 450, 217 S.W. 453 (1920). There the defendant entered a plea of not guilty by reason of insanity and in the course of the trial, he sought to introduce a record of the probate court showing that he had been committed to an insane asylum approximately a year before. The court did not permit the introduction of the evidence and, in finding error in this ruling, the Supreme Court of Arkansas, *inter alia*, declared:

> "When insanity is relied on as a defense to a crime, great latitude is allowed in admitting evidence having any tendency to throw light on the mental condition of the defendant at the time of the commission of the crime. *** It is competent to go into the mental condition of the prisoner both before and after the commission of the act. . . ."
>
> * * *
>
> Such inquisitions, it thus appears, are simply received as a part of the evidence for the consideration of the jury, they are not conclusive of the fact adjudged, and the matter is still left open for the jury to determine from all the facts adduced as to whether the prisoner was insane at the time of the alleged offense. 141 Ark., at 451-452, 217 S.W., at 454.

**[1]** The State agrees that a judicial adjudication of insanity prior or subsequent to the alleged offense is admissible but contends that Judge Grist's order finding that defendant's mental condition was such that he could not proceed to trial did not come within this rule. To buttress its argument, the State points to the difference between the standard for determining defendant's capacity to stand trial and determining whether an accused was legally insane when he committed the crime. In determining a defendant's capacity to stand trial, the test is whether he has capacity

to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed. On the other hand, when an accused enters a plea of not guilty by reason of insanity, the test of his mental responsibility is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter of investigation. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968).

Although *Duncan* and *McCully* consistently refer to the insanity of the accused, we note that in *Duncan* the evidence rejected grew out of an inquiry pursuant to G.S. 122-84 as to whether defendant had sufficient mental capacity to proceed to trial. We also note that in *McCully* the reported case only recites that the evidence rejected was a record that the defendant had been committed to an insane asylum. The pertinent portion of G.S. 122-84 provides that, "When a person accused of the crime of murder . . . shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until inquisition shall be had in regard to his mental condition. . . . When a person committed to a state facility under this section as unable to plead shall have been reported by the facility to the court having jurisdiction as being mentally able to stand trial and plead, the said patient shall be returned to the court to stand trial as provided in G.S. 122-87." This was the action taken by Judge Grist. Judge Grist's actions were consistent with the provisions of this statute.

*Duncan* differs from instant case in that an issue was submitted to a jury. However, it is now settled that when there are proceedings under G.S. 122-84, determination may be made by the court with or without a jury. *State v. Propst, supra.* Here it seems clear that Judge Grist proceeded under the mandate of G.S. 15A-1002 and held a hearing consistent with the provisions of G.S. 122-84. Although there was no declaration of insanity in instant case, the purpose and resulting orders were the same as in *Duncan* and *McCully.* We are therefore unable to validly distinguish the holdings in *Duncan* and *McCully* from instant case as to the *admissibility* of this evidence.

**[2]** Further, it is well established in this jurisdiction that in criminal cases, every circumstance that is calculated to shed any

light upon the supposed crime is admissible into evidence. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). Likewise, our courts have allowed wide latitude in admitting evidence having a tendency to throw light upon the mental condition of a defendant who has entered a plea of not guilty by reason of insanity. For example, we allow opinion evidence by lay witnesses and lay testimony reciting irrational acts prior or subsequent to the alleged offense. *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); 1 Stansbury's North Carolina Evidence, Section 97 (Brandis Rev. 1973) [hereinafter cited as Stansbury]. We are, therefore, of the opinion that the order entered by Judge Grist declaring defendant mentally incapacitated and unable to proceed to trial was *some* evidence of defendant's mental condition and was admissible on the question of his insanity. We emphasize that when such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision.

However, under the circumstances of this case, we do not find the ruling of the trial judge to be prejudicial error. Judge Grist's order was based largely upon the testimony of Dr. Groce who testified for defendant. Dr. Groce's testimony, the testimony of another expert witness, and the testimony of lay witnesses placed before the jury a complete history and description of defendant's mental condition. In view of the evidence admitted concerning defendant's mental condition, we are unable to discern that any real prejudice to defendant resulted from the exclusion of Judge Grist's order.

Defendant next contends that the trial judge committed prejudicial error in his charge to the jury. We will consider the two portions of the charge under attack separately.

**[3]** The trial judge charged the jury that if "you should further find to your satisfaction that the defendant at the time charged, and in regard to the particular act charged, did not have mental capacity or ability to distinguish right from wrong, or to understand the nature and consequences of his acts, he would not be responsible and it would be your duty to return a verdict of *guilty by reason of insanity* with respect to any particular charge, to which you found the State has proved beyond a reasonable doubt the defendant committed." [Emphasis ours.] This part of the charge was clearly error. In fact, it was such obvious error that

we are disposed to believe that any reasonably intelligent person would not believe that under our system of justice an accused could be convicted of a crime "by reason of insanity." We assume that the jury was made up of reasonably intelligent persons. Further, the trial judge on three separate occasions charged to the effect that if the jury found that defendant did not have mental capacity to know right from wrong, the jury should return a verdict of not guilty.

Additionally, the trial judge submitted written issues to the jury as follows:

ISSUES (75CR58429)

INDICTMENT I

1. With respect to assault with a deadly weapon with intent to kill inflicting serious injury, is the defendant (guilty) (not guilty by reason of insanity) or (not guilty)?

* * *

ISSUE (75CR58430)

INDICTMENT II

1. With respect to the charge of robbery with a dangerous weapon, do you find the defendant (guilty) (not guilty by reason of insanity) or (not guilty)?

These issues were in possession of the jury during the time they considered and deliberated upon their verdict. The written issues therefore effectively precluded a verdict of guilty by reason of insanity.

Although we are bound by the record, we are constrained to observe that in view of diligent counsel's failure to call this clearly erroneous statement to the attention of the trial judge and in light of the lack of anything tending to show that the jury was confused, there is a strong probability that there was error in recording the charge.

**[4]** In his instruction on the armed robbery charge, the trial judge stated: "With respect to Indictment II you may enter one of three verdicts: guilty, not guilty by reason of insanity or guilty." Unquestionably, defendant was entitled to have all permissible

verdicts submitted to the jury under proper instruction. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). Here the judge erroneously failed to submit the possible verdict of "not guilty." However, immediately prior to this misstatement, he had correctly charged and submitted the possible verdict of not guilty as to the armed robbery charge. Even so, we think that this error might have been prejudicial except that, at all times during their deliberations, the jury had written issues before them which correctly gave the only possible verdicts which they might return.

Under these circumstances and upon considering the charge contextually, as we must, we are of the opinion that these isolated errors in the charge did not mislead the jury in its search for a verdict which spoke the truth.

**[5]** Defendant's third assignment of error is as follows:

> III. The trial court committed prejudicial error by charging the jury as to the commitment procedures under North Carolina law applicable to the defendant by reason of his alleged mental illness whereas defendant merely requested that the court charge as to the existence of such procedures.

Defendant submitted a written request for special instructions which included a request that the court "instruct the jury of the existence of commitment procedures under North Carolina law applicable to a defendant acquitted by reason of mental illness."

In *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), we held that when a defendant interposes a defense of insanity and requests an instruction setting out the procedures for commitment set forth in G.S. 122-84.1, it is prejudicial error for the court not to give such instructions. The gist of G.S. 122-84.1 is that the trial judge shall hold a defendant who is acquitted on the grounds of insanity for further hearings to determine whether he is imminently dangerous to himself or others. In *Hammonds*, the Court reasoned that failure to give such instructions was prejudicial because the jury might tend to return a verdict of guilty so as to ensure that the accused would be incarcerated for the safety of the public and for his own safety.

Defendant's position that the trial judge erred by fully instructing on the commitment procedures when he only requested

that the court instruct on the *existence* of such procedures is patently untenable. The fallacy in defendant's argument is that the instructions given were favorable to him. Further, to so limit the instructions would create unanswered questions which would confuse, rather than assist, the jury in reaching a verdict.

**[6]** Defendant also assigns as error the denial of his motion to suppress the in-court identification of defendant by the victim and the ruling admitting testimony concerning the photographic identification procedures.

Upon defendant's motion to suppress the in-court identification of defendant, the trial judge conducted a *voir dire* hearing to determine its admissibility. The victim, Grady Lawrence Williams, testified that on the night of 4 October 1975 he encountered David Adams who in turn introduced him to defendant. This encounter took place in a well-lighted area in front of the Jiffy House located on West Trade Street in Charlotte. The three men then walked to the interesection of Cedar and Fifth Streets where the assault and robbery occurred. The assault took place under a nearby train trestle in an area which was well lighted by street lights and lights on the trestle. During the assault, Williams did not lose consciousness and was able to observe defendant's face. He testified, "As long as I live, I will never forget him (defendant)." After the assault, he was taken to Memorial Hospital where sometime later Officer Mullis arrived with several photographs. Williams stated that he picked out the photograph of Adams but that he did not see a photograph of defendant at that time. Approximately a month later Detective Kerr visited Williams in the rehabilitation center and showed him a group of photographs. Williams was able to pick out photographs of both Adams and defendant. He said that neither of the officers had suggested that he should pick out any of the photographs shown to him or had told him which photograph to select. Williams specifically testified, "My identification today in the courtroom is based upon sighting these two men that attacked and robbed me."

Officer Mullis testified that on the evening of the assault, he visited Williams in the emergency room and obtained a description of the assailants. A day or so later Officer Mullis again visited Williams, this time to have Williams look at seven or eight photographs, one of which was of defendant. Williams was unable

to speak but indicated with a nod of his head that he recognized defendant as the man who had stabbed him. According to Mullis, there was no picture of Adams in the first group of photographs shown to Williams. He further testified that he had been subpoenaed that day to bring the photographs to court but was unable to do so because he did not know where the photographs were. Officer Mullis also corroborated Williams' testimony concerning the lighting conditions in the area of the assault.

Detective W. F. Kerr testified that on 5 October 1975, he questioned Adams who admitted his part in the robbery and implicated defendant Bundridge. Bundridge was picked up and photographed. The detective then sent Officer Mullis to the hospital with seven photographs including pictures of Adams and Bundridge. He further testified that upon returning, Officer Mullis reported that Williams had identified both Adams and Bundridge. In November, Kerr himself took the same photographs to the rehabilitation center where Williams unhesitatingly identified both Adams and Bundridge from the group of photographs. He did not tell Williams that there was a picture of someone who might have robbed him. Neither did he tell him whom to pick out. Kerr further stated that he had not seen the photographs since he gave them to one of the solicitors at a preliminary hearing. Upon examination of the court, Detective Kerr said that Officer Mullis did not have Adams' picture during the first photographic identification session with Williams. This witness also gave testimony which corroborated Williams' testimony as to the lighting at the scene of the assault and robbery.

Defendant Bundridge testified as to his confinement in a mental hospital and said he went to bed about nine or ten o'clock on the night of 4 October 1975 and remained there until he was awakened by the police.

At the conclusion of the *voir dire* hearing, the trial judge found facts consistent with those above recited and concluded:

> 1. That the pretrial identification procedures conducted by the police in this case were uncoordinated; no proper record was made of the results thereof; that the photographic evidence used is not available to this court, due to mishandling;

2. That notwithstanding the pretrial identification procedures conducted, or attempted to be conducted by the police in this case, there were no procedures of whatever nature which were so impermissively suggestive as to taint or affect the witness Williams' identification of the defendant in this case.

3. That the witness's identification of the defendant, Marion Bundridge, in this courtroom on this the 15th day of February 1977, is based upon the witness's observation of Marion Bundridge at West Trade Street and on Sixth Street in the City of Charlotte at or about 10:00 p.m. on October 4, 1975, and is not tainted by any suggestion when he saw him at any preliminary hearing, in any possible photographic identification immediately after the incident on October 5th or at a later date when he was at a hospital, or at any pretrial hearing, and consequently the "in-court" identification of the defendant, Marion Bundridge, is of independent origin, based solely upon what the witness saw at the time of the offense and does not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures conducive to mistaken identification.

The court thereupon denied defendant's motions to suppress the identification testimony.

It is well established that a "photographic lineup" is an acceptable basis for an in-court identification. *Simmons v. U.S.*, 390 U.S. 377 (1968); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). However, if the pretrial identification procedures are "so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification," the evidence is inadmissible as a matter of constitutional law. *Simmons v. U.S.*, *supra*, at 384. *See also*, *Foster v. California*, 394 U.S. 440 (1969); *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied*, 396 U.S. 1024 (1970). It is equally settled that in-court identification of a defendant by a witness who was a party to such an unconstitutional pretrial identification procedure must be excluded unless it is first determined by the trial judge, on *voir dire*, that the in-court identification has an origin independent of the invalid pretrial procedure. *U.S. v. Wade*, 388 U.S. 218 (1967); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified as to death sentence*, 428 U.S. 902 (1976).

In instant case, the fact that the State was unable to produce the photographs at trial and the presence of some contradictory evidence as to whether defendant or his alleged accomplice were both identified in the first procedure makes the photographic identification procedures less than exemplary. However, there was clear and uncontradicted evidence that approximately seven pictures of black males were presented to Williams on two different occasions. On each occasion, he made an identification without any suggestion by the police officers. We are of the opinion that this record does not disclose a photographic procedure so impermissibly suggestive as to violate defendant's constitutional right to due process.

Even were we to hold that the pretrial photographic identification of defendant was impermissibly suggestive, the in-court identification of defendant would nevertheless have been properly admitted into evidence. At the conclusion of the *voir dire* hearing, Judge Howell found, *inter alia*: (1) Williams had the opportunity to see and did see defendant after they had been first introduced; (2) that defendant accompanied Williams for more than six blocks; (3) that the assault took place in a well-lighted area; (4) Williams had ample opportunity to see his assailant during the assault; and (5) that independent of any photograph, previous encounter, or other pretrial procedure preceding trial, Williams had identified defendant as his assailant. There was ample competent evidence to support these findings of fact, and we are bound by them. *State v. Henderson, supra; State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). These findings in turn support the Court's conclusion that "the in-court identification of the defendant, Marion Bundridge, is of independent origin, based solely upon what the witness saw at the time of the offense and does not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures conducive to mistaken identification." We therefore hold that the trial judge properly admitted both the in-court identification of defendant and the testimony concerning the photographic identification procedures.

**[7]** Finally, defendant contends that the trial judge erred by admitting into evidence items of clothing taken from defendant's residence. He argues that these items were of no probative value since the State failed to show that defendant had worn the clothes on the night of the alleged crime or that the stains on the

clothes were human blood of the same type as that of the victim Williams.

It is well settled in this jurisdiction that in a criminal case, any evidence which sheds light upon the supposed crime is admissible. *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020 (1966). Evidence meets the test of relevancy if it has any logical tendency, however slight, to prove a fact in issue. 1 Stansbury, Section 77. The elasticity of the standard of admissibility of evidence based on relevancy is well stated in the following quote:

> . . . In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable*, or *open and visible*, connection rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it, at the same time pointing out that the evidence need not bear *directly* on the issue and that the inference to be drawn need not be a *necessary* one. . . . 1 Stansbury, Section 78, p. 237.

Admittedly, it would have been better for the State to have introduced evidence tending to show that defendant had worn these clothes on the night of the assault and to have introduced evidence of chemical analysis of the stains. The absence of such evidence does not, however, eliminate the relevance of the evidence. The victim in instant case had been assaulted in such a manner that one might reasonably expect the assailant's clothing to be spattered with blood, and, within a short time after defendant had been implicated, clothing apparently covered with fresh blood was found in his apartment. Under these circumstances, the "connection" of the clothing to the crime is a reasonable one. Thus, the challenged evidence is a link in a chain of circumstances which would permit, but not require, the jury to draw an inference that defendant's clothes became bloodstained during the assault. Both the clothing and the opinion testimony of Officer Rankin to the effect that the stains were blood were therefore admissible into evidence. *See, e.g., State v. Henry*, 51 W.Va. 283, 41 S.E. 439 (1902). See also, 3 Wharton's Criminal Evidence, Section 612 (13th ed. 1973). That there was no direct evidence showing that defendant had in fact worn this clothing during the assault goes to the weight of the evidence rather than to its admissibili-

ty. *See, e.g., Commonwealth v. Dougherty*, 343 Mass. 299, 178 N.E. 2d 584 (1961).

Even had the evidence been without probative value, we fail to perceive how its admission was prejudicial to defendant. The record discloses that when the clothes were displayed to the jury, only a few, brown, faded stains were visible. The admission of this evidence might well have mitigated the testimony of Officer Rankin that the clothes were "covered with blood." Certainly we see nothing gory or inflamatory in the introduction of this evidence, particularly when compared with the account of the senseless and vicious assault upon the victim.

We have carefully considered this entire record and find nothing to justify disturbing the verdicts or the judgments.

No error.

Justice EXUM dissenting.

I cannot agree that the error in sustaining the state's objection to the admission of Judge Grist's 30 January 1976 order was harmless. Defendant had the burden of proof on his insanity defense—always a heavy burden in a criminal trial. Judge Grist's order finding defendant mentally incapable of proceeding to trial was, as the majority recognizes, probative of the issue and should have been admitted. It is true that defendant offered other evidence on the question. Who knows, however, how much evidence it takes to persuade a jury? They might well have been persuaded by the evidence offered plus the evidence which defendant should have been allowed to offer but which the trial judge improperly kept out.

In both *State v. Duncan*, 244 N.C. 374, 93 S.E. 2d 421 (1956) and *McCully v. State*, 141 Ark. 450, 217 S.W. 453 (1920), this kind of error was held prejudicial entitling defendant to a new trial. I vote for a new trial in this case.

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, UNIGARD MUTUAL INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, MIDWEST MUTUAL INSURANCE COMPANY, UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND BALBOA INSURANCE COMPANY IN THE MATTER OF RATES AND RATING CLASSIFICATIONS FOR MOTORCYCLE INSURANCE; ORDER OF THE COMMISSIONER ENTERED AUGUST 22, 1975

No. 88

(Filed 24 January 1978)

**1. Insurance § 79.3— motor vehicle insurance—classifications required by statute—applicability to motorcycles**

The General Assembly did not by the enactment of G.S. 58-30.3 and 58-30.4 in 1975 intend to remove motorcycles from the primary use classification and safe driver subclassification plans applicable to motor vehicles generally, and the Commissioner of Insurance exceeded his authority when he refused to apply the classifications provided for in G.S. 58-30.4 to motorcycle liability insurance and established only two premium rates for such insurance based solely on the size of the engine of the insured motorcycle.

**2. Statutes § 5— parts of same statute construed as whole**

Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole.

**3. Statutes § 5— effect of administrative construction**

The construction of statutes adopted by those who execute and administer them is evidence of what they mean.

**4. Statutes § 11— repeal by implication**

Repeals by implication are not favored, and statutes dealing with the same subject matter will be reconciled and effect will be given to all unless some are irreconcilable with others.

**5. Statutes § 5— construction—avoidance of absurd consequences**

In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the

legislature acted in accordance with reason and common sense and did not intend untoward results.

6. **Insurance § 79.3— motorcycle insurance—rate classification plan—erroneous order—proceeding superseded—no remand**

An order in which the Commissioner of Insurance exceeded his authority by refusing to apply to motorcycle liability insurance the classifications required by a statute enacted in 1975, former G.S. 58-30.4, will simply be vacated without remanding the proceeding to the Commissioner for further action where the proceeding has in effect been superseded by a new proceeding and new rates under statutes enacted in 1977, notwithstanding classifications based on age and sex may have been in effect between 1 September 1975 and 1 September 1977 contrary to the provisions of G.S. 58-30.3, since the Commissioner may not now enter a retroactive order complying with the applicable statutes.

APPEAL by Commissioner of Insurance from a decision of a divided panel of the Court of Appeals, reported at 30 N.C. App. 477, 227 S.E. 2d 621 (1976), reversing an order entered by the Commissioner and remanding the matter for further proceedings. Argued as No. 147, Fall Term 1976.

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*Allen, Steed and Allen, P.A., by Arch T. Allen, Thomas W. Steed, Jr., and Arch T. Allen III; Bailey, Dixon, Wooten, McDonald and Fountain, by Wright T. Dixon, Jr.; 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 Appellees.*

EXUM, Justice.

The most important question raised, and one which is determinative of the appeal, is whether the Commissioner exceeded his statutory authority by abolishing the primary use classifications and safe driver subclassifications for motorcycle liability insurance. The Court of Appeals concluded that he did, and we agree. We therefore vacate the order entered by him.

A full factual statement outlining the proceedings leading to the Commissioner's order is set out accurately in the opinion of the Court of Appeals. We will not repeat it here. Briefly these

proceedings were precipitated by the enactment on 18 June 1975 of Chapter 666, 1975 Session Laws, hereinafter referred to as House Bill 28.[1] On 20 June 1975 the Commissioner issued his notice to the North Carolina Automobile Rate Administrative Office (hereinafter "Rate Office") that he would conduct public hearings to "rehear and determine a filing of the North Carolina Rate Administrative Office dated May 7, 1970, for a 'Revised Classification and Rating Procedure—Motorcycles' . . . abolish age discrimination in motorcycle insurance classifications pursuant to . . . House Bill 28 . . . review the present weight classification system for motorcycle liability insurance . . . determine whether the rates in general for motorcycle liability insurance are excessive or otherwise not in compliance with law; and to issue such corrective orders as are necessary." Hearings were conducted before the Commissioner on 11 July 1975 when two witnesses were presented by the Insurance Department's staff. After their testimony the Commissioner recessed the hearings until 24 July 1975. Meanwhile on 15 July 1975 the Rate Office filed on behalf of all of its member companies its revised classification and subclassification plan for motorcycle liability insurance which was also designed to comply with the mandates of House Bill 28. Hearings were then held on 24 July 1975, at which time the Rate Office presented its testimony which tended to explain its filing. On 4 August 1975 the hearings continued. Mr. Paul L. Mize, general manager of the Rate Office, explained an amendment to the Rate Office filing, and the principal witness for the Insurance Depart-

1. Codified as G.S. 58-30.3 and 58-30.4, the act provides:

"§ 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."

ment's staff, Mr. Robert Holcombe, explained the staff's proposals for revising motorcycle liability rates.

The Rate Office contended that while House Bill 28 mandated the elimination of any classifications on the basis of age or sex, it did not abolish and, rather, required that motorcycles be classified according to uses and their operators be subclassified the same as automobiles and automobile operators pursuant to the provisions of General Statute 58-30.4.[2] The Rate Office also proposed that motorcycles with an engine size of 324 cubic centimeters or less be rated at 50 percent of the applicable private passenger car rate and motorcycles with an engine size of 325 cubic centimeters or more be rated at the applicable private passenger automobile rate.[3]

The Department Staff, on the other hand, took the position that House Bill 28 actually abolished the primary use classification and safe driver subclassification plan for motorcycles. It proposed, consequently, only two premiums for motorcycle liability insurance: one premium for motorcycles with an engine size of not more than 324 cubic centimeters and another for motorcycles with an engine size in excess of 324 cubic centimeters. The Department Staff also offered evidence tending to show that the premiums proposed by the Rate Office for motorcycle liability insurance and the premiums which had been charged in the past for such insurance resulted in grossly low loss ratios for the companies writing this business.[4]

2. For a complete description of this classification and subclassification scheme, *see Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, --- S.E. 2d --- (1977).

3. This has been the traditional approach for motorcycle liability insurance ratings. For many years motorcycles and their operators have been classified and subclassified in the same manner as automobiles and their operators. Motorcycles having a gross unladen weight of 300 pounds or less traditionally have been rated at 50 percent of the private passenger automobile rate, and those having a gross unladen weight of more than 300 pounds have been rated at the full applicable private passenger automobile rate. *See Commissioner of Insurance v. Automobile Rate Office*, 24 N.C. App. 223, 210 S.E. 2d 441 (1974), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 801 (1975).

4. The loss ratio represents incurred losses on claims filed divided by the earned premiums on insurance written for the same period. The Department Staff's evidence tended to show, for example, that the loss ratio in 1972 for bodily injury liability coverage on small motorcycles was .238 and, for large motorcycles, was .287. This means, in effect, that 23.8 percent and 28.7 percent, respectively, of earned premiums were used to pay claims losses and loss adjustment expenses. The Department Staff's evidence tended further to show that normally for motor vehicle liability insurance it would be expected that something in the neighborhood of 60 percent of earned premiums would be used to pay losses and loss adjustment expenses, for a loss ratio of .60, the rest of the premium dollar being used for sales expenses, general administration, and other miscellaneous types of expenses. Thus, while the Rate Office proposed a minimum limits liability premium at the lowest possible rate of $33 for small motorcycles and $65 for large motorcycles, the Insurance Commissioner in his order, based on evidence developed by his staff, promulgated minimum limits premiums for small motorcycles of $17 and, for large motorcycles, $38.

[1] The Commissioner in his final order concluded in part that, "Motorcycle insurance is not subject to that part of Chapter 666 of the 1975 Session Laws . . . identified as G.S. 58-30.4." In the decretal portions of his order he in effect abolished all primary classifications on the basis of use and all safe driver type subclassifications, both prescribed in G.S. 58-30.4, and established only two premiums for basic limits motorcycle liability insurance: one premium for small motorcycles and another for large motorcycles.

Thus the principal and dispositive legal question on this appeal is whether, indeed, House Bill 28 authorized this action on the part of the Commissioner. Applying well-established canons of statutory construction, we think it clear that it did not. As we said in *Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 392, 239 S.E. 2d 48, 65 (1977):

> "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)."

The primary purpose of House Bill 28 was obviously to abolish age and sex as criteria for classifying motor vehicle—both automobile and motorcycle—insurance.

The Commissioner's position that the legislature by enacting House Bill 28 also intended to abolish all primary classification and subclassification plans with regard to motorcycle liability insurance is based on his assertion that when House Bill 28 was initially introduced the word "motorcycles" appeared in that portion of the bill codified as G.S. 58-30.4. When the bill was

ultimately enacted, however, the word "motorcycles" was deleted from that portion of the bill.[5]

There were essentially three substantive changes made in that part of House Bill 28 codified as G.S. 58-30.4 before it was ratified.[6] This first was to give to the Rate Office rather than the Commissioner the responsibility of initiating and filing with the Commissioner a revised classification plan which would eliminate age and sex as classification criteria. The second was to establish specified basic classifications and subclassifications which would supersede the old basic classification and subclassification plans. The third was to change the fraction of total premiums to be derived from subclassification surcharges from not less than one-third to not less than one-fourth. In making this last change House Bill 28 as finally enacted provided, "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." (Emphases supplied.) The provision in the bill as originally introduced comparable to this sentence read, "to the end that surcharges assessed against insured operators having bad driving records will provide not less than *one-third* of the total amount of the premium income needed by insurers in writing and servicing coverages on private passenger automobiles *and motorcycles* in this state." (Emphases supplied.)

We are satisfied that the purpose of the legislature in amending this clause in House Bill 28 was to change the fraction of total premiums produced by the subclassification surcharges and not to change the coverages to which the surcharges applied. We see no substantive difference in the use of the words "in writing and servicing coverages on private passenger automobiles and motor-

5. The part of House Bill 28 codified as G.S. 58-30.3 was ultimately enacted precisely as it was introduced on 22 January 1975. That part of the bill, however, denominated G.S. 58-30.4 as originally introduced provided in pertinent part: "*Revised classifications and rates.* — The Commissioner of Insurance shall establish classification rate differentials based on Department of Motor Vehicles' driving records for convictions and accidents resulting from violations of insured operators, to the end that surcharges assessed against insured operators having bad driving records will provide not less than *one-third* of the total amount of the premium income needed by insurers in writing and servicing coverages on private passenger automobiles *and motorcycles* in this state.

The Commissioner is authorized and directed to implement the plan provided for in this section on September 2, 1975, and to abolish all other classification plans in respect to these vehicles." (Emphases supplied.)

6. Compare notes 5 and 1, *supra*.

cycles in this state" and the words "in writing and servicing the aforesaid coverages in this state." The reference to "coverages on private passenger automobiles and motorcycles" in G.S. 58-30.4 as originally introduced obviously echos the reference to "private passenger automobiles or motorcycles" in G.S. 58-30.3 as originally introduced. Likewise it seems abundantly clear that the words "the aforesaid coverages" in the amendment refers to the first use of the word "coverages" in G.S. 58-30.4 as ratified, where the section speaks of "coverages on private passenger (nonfleet) automobiles . . . *affected by the provisions of G.S. 58-30.3*." (Emphasis supplied.) The provisions of G.S. 58-30.3 expressly refer to both automobiles and motorcycles.

**[2]** Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); *In re Hickerson*, 235 N.C. 716, 71 S.E. 2d 129 (1952). Considering the legislation contextually and as a whole, we are satisfied that the purpose of the General Assembly in inserting the word "motorcycles" in G.S. 58-30.3 was to insure that age and sex would be eliminated as classification criteria in both automobile and motorcycle insurance. There was no need, thereafter, to continue to refer to automobiles *and* motorcycles each time coverages "affected by the provisions of G.S. 58-30.3" were mentioned.

We are fortified in this opinion by these further considerations:

In *Commissioner of Insurance v. Automobile Rate Office*, 24 N.C. App. 223, 210 S.E. 2d 441 (1974), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 801 (1975), the Court of Appeals had occasion to review an order of the Commissioner in which he then, before the enactment of House Bill 28, attempted to abolish all classification and subclassification plans for motorcycle liability insurance rates. In holding that he thus exceeded his statutory authority the Court of Appeals said, 24 N.C. App. at 226, 210 S.E. 2d at 443:

> "Such authority as the Commissioner has with respect to motorcycle liability insurance rates is contained in Article 25 of G.S. Chap. 58, which also provides for the creation and prescribes the functions of the North Carolina Automobile Rate Administrative Office. The word 'motorcycle' does not appear in Article 25 of G.S. Chap. 58, but the statutes in that

> Article use the words 'automobile' and 'motor vehicles which are private passenger vehicles' and 'private passenger vehicles' interchangeably, and although none of these terms are further defined in G.S. Chap. 58, we hold that 'automobile' liability insurance includes 'motorcycle' liability insurance and that the same laws apply to both."

Since 1964 motorcycles, pursuant to the provisions of Article 25 of Chapter 58 of the General Statutes, have been classified and subclassified precisely like automobiles for insurance rate making purposes. *See Commissioner of Insurance v. Automobile Rate Office, supra.*

**[3]** The construction of statutes adopted by those who execute and administer them is evidence of what they mean. *McPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200, 61 A.L.R. 3d 1119 (1973). Thus before the enactment of House Bill 28 those charged with the administration of Article 25 of Chapter 58, dealing with motor vehicle insurance, had interpreted these provisions to include motorcycles. The Court of Appeals has expressly so interpreted these provisions. The Commissioner, nevertheless, argues that House Bill 28 repealed these provisions insofar as they required motorcycles to be classified and subclassified for insurance rate making purposes like other motor vehicles. House Bill 28, however, does not expressly remove motorcycles from the general classification scheme. The Commissioner's argument is that it does so by implication.

**[4]** Repeals by implication are not favored, *D&W, Inc., v. Charlotte*, 268 N.C. 577, 151 S.E. 2d 241, supp. op. 268 N.C. 720, 152 S.E. 2d 199 (1966), and statutes dealing with the same subject matter will be reconciled and effect given to all unless some are irreconcilable with others. *Person v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 163, 184 S.E. 2d 873 (1971). We are satisfied that, had the legislature desired to treat motorcycles differently from other types of motor vehicles for insurance rate making purposes, it would have done so explicitly and unambiguously, and not by implication as the Commissioner suggests.

On the face of it, moreover, it is difficult to perceive why motorcycles and their operators should not be subject to the same classifications for insurance rate making purposes as automobiles and their operators. Certainly motorcycles, like automobiles, are

subject to being used purely for pleasure, for driving to and from work, and for business. The Insurance Department staff's own witness in these proceedings, qualified by the Commissioner as an expert in the marketing of motorcycles in North Carolina, testified that motorcycles were variously used "for around town transportation, back and forth to school, back and forth to work, a day to day transportation type of vehicle" and as purely pleasure vehicles. He also testified that "the experience factor seems to be most dominant in motorcycle accidents" and more important "than the type of motorcycle being operated or the size of the motorcycle being operated." He said further, "I think the driving record and attitude of the operator are the key factors" and that the "driving record of the operator" is a "proper method" for rate classifications. He said "inexperienced operators are more prone to having accidents than experienced operators."

**[5]** In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970); *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970). That the interpretation urged upon us by the Commissioner would produce, on this record, a somewhat bizarre result, is an additional reason for our refusing to adopt it.

Finally, we note that the 1977 General Assembly enacted new and comprehensive legislation for the purpose of regulating motor vehicle and other types of insurance rate making. Article 25 of Chapter 58 dealing with motor vehicle insurance was expressly repealed. *See Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977). The legislation was enacted as Chapter 828 of the 1977 Session Laws and is codified in Chapter 58 in the 1977 Cumulative Supplement to Volume 2B of the General Statutes. In the definitional section of the new legislation, G.S. 58-131.35, a "private passenger motor vehicle" is defined to mean, in part, "a motorcycle, motorized scooter or other similar motorized vehicle not used for commercial purposes."[7] Chapter 828 of the 1977 Session Laws re-enacted

7. Other definitions of "private passenger motor vehicle" contained in this subsection are:

"a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or

General Statute 58-30.3, but it substantially amended General Statute 58-30.4.[8] As amended General Statute 58-30.4 refers to revised basic and subclassification plans for coverages on "private passenger (nonfleet) motor vehicles in this state." Because of the definition of a "private passenger motor vehicle" in General Statute 58-131.35(8), it is clear beyond question that the legislature intended to classify and subclassify motorcycles in the same manner as automobiles for insurance rate making purposes.

Indeed, pursuant to Chapter 828 of the 1977 Session Laws the newly created North Carolina Rate Bureau filed on 1 September 1977 a new classification and subclassification plan for automobiles and motorcycles for the Commissioner's approval. *See Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977). The plan proposes that motorcycles with an engine size of 324 cubic centimeters or less be rated at 50 percent of the applicable automobile rate and those with an engine size of 325 cubic centimeters or more be rated at the applicable automobile rate. After hearings this plan was approved by the Commissioner by order dated 10 November 1977.

**[1]** In view, therefore, of the subsequent legislation enacted only two years after the legislation here in question, we think it manifest that the General Assembly did not by the enactment of House Bill 28 in 1975 intend to remove motorcycles from the primary and subclassification plans applicable to motor vehicles generally.

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"b. A motor vehicle with a pick-up body, a delivery sedan or a panel truck that is owned by an individual or by husband and wife or individuals who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm copartnership or corporation shall be considered owned by an individual for purposes of this Article."

8. 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 approximately 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.*"

**[6]** The Commissioner then exceeded his authority under House Bill 28 when he refused to apply the classifications provided for in G.S. 58-30.4 to motorcycles. This kind of error would normally result in our vacating his order and remanding the case to him for further proceedings. This proceeding, however, has in effect been superseded by new proceedings and new rates under new statutes. Thus it would be futile to remand this case. We therefore simply vacate the order of the commissioner, as we did in *Commissioner of Insurance v. Automobile Rate Office*, *supra*, (hereinafter No. 89).

We note that the Commissioner in a petition to rehear No. 89 urges that we should have remanded it to him for further proceedings. His argument is that by simply vacating his order we have, in effect, nullified the provisions of General Statute 58-30.3 which flatly prohibit the use of motor vehicle insurance classifications based on age and sex after 1 September 1975. Assuming, as the Commissioner argues, that such classifications have been in effect until at least 1 September 1977, the date of the new proceedings already alluded to, we nevertheless must reject this argument.

It is true that General Statute 58-30.3 as re-enacted in 1977 continues to prohibit age and sex as criteria for motor vehicle insurance rate making classifications "after September 1, 1975." Nothing we said in No. 89 indicates to the contrary. But House Bill 28, by which this section was originally enacted, did more. It prescribed (and present General Statute 58-30.4 continues to prescribe) the procedure for abolishing these criteria. The procedure originally contained in House Bill 28 provided for the filing with the Commissioner "for his approval or other action as provided in G.S. 58-248.1" a revised classification plan as thereafter described in the statute. Thus House Bill 28 mandated (and present General Statute 58-30.4 continues to mandate)[9] that both the Rate Office and the Commissioner take such steps as would culminate in the promulgation of not just any plan abolishing age and sex classification criteria but of a plan which complied with the revised classifications as set out in the statute. The Commis-

9. Present G.S. 58-30.4 provides *in part*: "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, 58-129, and 58-130."

sioner both in this case and in No. 89 failed to promulgate a plan which complied with these revised classifications.

Because of the new rates which have gone into effect pursuant to new statutes and a new order of the Commissioner, a remand in this case, as in No. 89, would be futile. The reason is that rates are made prospectively, not retroactively. The Commissioner could not now enter an order which might comply with applicable statutes and make the order retroactive to September, 1975. To effect such a rate change retroactively would be an expensive and impractical, if not an impossible, task for insurers. "It is not only impractical to fix premium rates retroactively, it is expressly required by G.S. 58-131.2 that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established. Consequently, the entire procedure contemplates a looking to the future." *In re Filing by Fire Insurance Rating Bureau*, 275 N.C. 15, 32, 165 S.E. 2d 207, 219 (1969). General Statute 58-131.2, a provision in former Article 13 of Chapter 58 dealing with fire and casualty insurance before it was repealed by Chapter 828, 1977 Session Laws, provided in part:

> "Any reduction or increase of rates ordered by the Commissioner shall be applied by the Rating Bureau subject to his approval within 60 days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval."

Before they were repealed by Chapter 828, 1977 Session Laws, the provisions in Article 25 of Chapter 58 dealing with motor vehicle insurance did not contain the exact counterpart to the quoted portion of General Statute 58-131.2. It is clear, however, from other language in these provisions and in present Chapter 58 that these statutes also contemplate fixing rates which will operate in the future, not retroactively. For example, General Statute 58-131.42, as enacted in Chapter 828, 1977 Session Laws, precludes any order of the Commissioner altering rates from affecting "any contract or policy made or issued prior to the expiration of the period set forth in the order."

The situation this Court faced in *Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977), relied on by the Commissioner in his petition for rehearing Case No. 89, is

distinguishable on its facts and law applicable thereto. We held in that case that the Utilities Commission could not authorize the collection of certain fuel adjustment charges in violation of the clear mandate of General Statute 62-134(e) precluding their collection beyond a certain date. The fuel adjustment charges collected in that case pursuant to the unlawful order of the Utilities Commission had to be refunded. The refund was required because this Court reversed and vacated the order which permitted them.

As we noted in *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471, 481, 234 S.E. 2d 720, 725 (1977), "Chapter 58 of the General Statutes contains no provision . . . comparable to G.S. 62-135 whereby a public utility . . . may put its proposed rate increase into effect by filing a bond to assure refund of the collected increase to the extent that it may ultimately be disallowed." We concluded in that case, 292 N.C. at 482, 234 S.E. 2d at 726, in face of "the silence of Chapter 58" on the subject, that rates placed into effect under the so-called "deemer" provision of then General Statute 58-131.1 were lawful rates and that although the Commissioner in subsequent proceedings might disapprove these rates, "[s]uch disapproval takes effect from the date of the order but is not retroactive and does not render unlawful the collection of premiums made prior thereto so as to require, or authorize the requirement of, a refund thereof."

In the case now before us as well as in No. 89, the Commissioner's orders have been determined to be unlawful. Therefore no collection of insurance premiums could take place under them. The companies have, perforce, continued to collect rates under previous, presumably lawful orders of the Commissioner. They could not be made to alter these rates retroactively by any order the Commissioner might now enter on remand from this Court. Any such order would have to operate *in futuro*.

There is evidence in this case that premiums for motorcycle liability insurance are higher than they should be. The Commissioner has the power under present provisions of Chapter 58, *see* particularly G.S. 58-124.21 and G.S. 58-131.42, upon proper proceedings, to reduce these rates. He may not, however, reduce rates by unlawfully abolishing classifications and subclassifications which are required by statute.

For the reasons given, the decision of the Court of Appeals vacating the order of the Commissioner is

Affirmed.

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NORTH CAROLINA STATE PORTS AUTHORITY, AN AGENCY OF THE STATE OF NORTH CAROLINA v. LLOYD A. FRY ROOFING COMPANY, A CORPORATION, UNITED PACIFIC INSURANCE COMPANY, A CORPORATION, DICKERSON, INC., A CORPORATION, AND E. L. SCOTT ROOFING COMPANY, A CORPORATION

No. 42

(Filed 24 January 1978)

**1. Negligence § 2— negligent performance of contract—when recovery is allowed**

Though a breach of contract ordinarily does not give rise to a tort action by the promisee against the promisor, there are many cases of the N. C. Supreme Court holding a promisor liable in a tort action for a personal injury or damage to property proximately caused by his negligent, or wilful, act or omission in the course of his performance of his contract. However, such decisions fall into four general categories: (1) the injury was to the person or property of someone other than the promisee; (2) the injury was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee; (3) the injury was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm; and (4) the injury was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

**2. Contracts § 21.1— failure to perform contract—no action in tort**

A tort action will not lie against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.

**3. Contracts § 25.1— improper roof installation—breach of contract—no action in tort against contractor**

Where plaintiff alleged that defendant general contractor contracted to construct buildings, including roofs thereon, in accordance with agreed plans and specifications and plaintiff alleged that defendant did not so construct the roofs, the only basis for recovery against defendant alleged in the complaint was breach of contract, and the Court of Appeals was in error in its view that the complaint "alleges an action in tort" against defendant.

**4. Limitation of Actions § 4.3— improper roof installation—action against contractor—accrual from time of completion of entire job**

Where plaintiff instituted this action to recover the cost of repairing leaking roofs on two buildings constructed by defendant general contractor, the plaintiff's alleged cause of action for breach of contract accrued "during the summer of 1968" when construction of the buildings was completed, rather than during the summer of 1967 when the roofing work was completed, since, so long as the buildings were still under construction by defendant, defects therein were subject to correction by defendant and would not give rise to a cause of action by the plaintiff for breach of contract.

**5. Limitation of Actions § 4.3— hidden defects—statute extending period of limitations—applicability to breach of contract actions**

The Court of Appeals erred in concluding that G.S. 1-15(b) does not apply to actions for breach of contract, since the statute, by its terms, applies to any cause of action (other than one for wrongful death, and except where otherwise provided by statute) if an "essential element" thereof is a defect in property, which defect originated under circumstances making it "not readily apparent to the claimant" at the time of its origin.

**6. Limitation of Actions § 4.3— action against contractor—hidden defect—effect of statute extending limitation period**

The trial court's judgment on the pleadings that the plaintiff's alleged cause of action against defendant for breach of contract was barred by the statute of limitations was erroneously entered where it appeared from plaintiff's complaint that defendant's work on the buildings in question was completed sometime during the summer of 1968, but it did not appear whether plaintiff's claim was barred before enactment of G.S. 1-15(b), which extended the time of accrual of an action based on a hidden defect, or whether G.S. 1-15(b) was applicable to plaintiff's cause of action, there being a question whether defects in the buildings' roofs originated under circumstances making them not readily apparent to plaintiff at the time of their origin.

**7. Limitation of Actions § 4.3— ten year limitation—contract not under seal—statute inapplicable**

The ten year statute of limitations contained in G.S. 1-47(2) was not applicable to a contract between plaintiff and defendant general contractor where there was no allegation in the complaint and no showing that the contract was under seal.

**8. Limitation of Actions § 4.3— six year limitation—no defective or unsafe condition—statute inapplicable**

The six year statute of limitations contained in G.S. 1-50(5) did not apply in this action by plaintiff to recover from defendant general contractor the cost of repairing leaking roofs on a warehouse and transit shed, since that statute applies to actions involving injury to property arising out of a defective or unsafe condition of an improvement to real property but does not apply to an action, such as this, for a simple breach, by defective performance, of a contract to construct an improvement on real property.

**9. Contracts § 14.2— improper installation of roofs—third party beneficiary—no action against subcontractor**

The trial court properly dismissed plaintiff's action against a roofing subcontractor since allegations in the complaint that the subcontractor was the roofing subcontractor of the defendant general contractor and that the subcontractor failed properly to apply roofing material to two buildings, in consequence of which failure the roofs leaked, simply amounted to an allegation that the subcontractor did not properly perform its contract with the general contractor, and such allegation did not allege a cause of action in tort in favor of the plaintiff against the subcontractor. Nor could plaintiff sue the subcontractor for the breach of the subcontractor's contract with the general contractor on the theory that plaintiff was the third party beneficiary thereof, since plaintiff was only an incidental beneficiary of such contract.

ON certiorari to the Court of Appeals to review its decision, reported in 32 N.C. App. 400, 232 S.E. 2d 846 (1977), reversing so much of the judgment of *Rouse, J.*, at the 29 March 1976 Session of CARTERET as dismissed the plaintiff's action against the defendant Dickerson, Inc.

The plaintiff, an agency of the State, instituted this action 7 August 1973 to recover the cost of repairing leaking roofs on two buildings at the plaintiff's facility in Morehead City, Carteret County.

For a first claim for relief, the complaint alleges: In 1967, the plaintiff contracted with Dickerson, Inc., hereinafter called Dickerson, as general contractor, for the construction by Dickerson of a transit shed and a warehouse; Dickerson and E. L. Scott Roofing Company, hereinafter called Scott, then entered into a subcontract for the construction by Scott of the roofs on these two buildings; Lloyd A. Fry Roofing Company, hereinafter called Fry, manufactured and supplied the materials used in the construction of the roofs by the subcontractor; Fry, as principal, and United Pacific Insurance Company, as surety, executed a guaranty bond in favor of the plaintiff guaranteeing the roofs to be watertight; during the summer of 1968, the two buildings were completed and were occupied by the plaintiff; on or about 24 April 1972, the plaintiff experienced difficulties in the form of leaks in both roofs; upon inspection of the roofs, it was ascertained that the roofing membrane had bubbled and blistered; the leaks "were caused by defective materials *or* the defective installation thereof." (Emphasis added.)

Fry and United Pacific Insurance Company are sued upon the theory of breach of their alleged guaranty bond. The present appeal has no relation to the plaintiff's alleged cause of action against these two defendants and it is, therefore, unnecessary to set forth herein the plaintiff's allegations with reference to these defendants or their answers to the complaint.

The complaint further alleges that, on or about 11 July 1973, a portion of the transit shed, including a portion of the roof which leaked, collapsed, but it is not alleged that this was due to the leaking of the roof or to any other act or default of either Dickerson or Scott.

For a second claim for relief, the complaint alleges: "Roofing work on these two buildings was performed during the summer of 1967 by defendant Scott under the supervision and control of defendants Fry and Dickerson"; these defendants "failed to allow the roofs on the buildings in question to dry properly before applying the roofing material *or* the defendants failed to allow the roofing materials themselves to properly dry before being installed" (emphasis added); "the bubbles and blisters in the roofing membrane and the resulting leaks were caused by the negligent failure of the defendants to exercise proper care and workmanship in the application of the roofs"; as a result of the leaks, the plaintiff, at great expense, had to move goods stored in the warehouse and in the transit shed.

For a third claim for relief (added by amendment to the complaint) against the defendant Dickerson, the complaint alleges: The plaintiff contracted with Dickerson "to install, or have installed, roofs on the warehouse and transit shed in accordance with plans and specifications outlined by the plaintiff;" the above mentioned leaks were "caused by the failure of defendant Dickerson to install or have installed, the roofs in accordance with the plans and specifications," whereby Dickerson broke its contract with the plaintiff.

The prayer for relief as to Dickerson and Scott is that the plaintiff have and recover reimbursement "for all necessary repairs to the roofs" and that the plaintiff recover its expenses incurred in moving the above mentioned goods from the warehouse and transit shed, together with the cost of the action.

In its answer, Dickerson admitted that it entered into a contract with the plaintiff for the construction of the warehouse and the transit shed on or about 24 January 1967. It denied that the leaks were caused by defective materials or defective installation and asserted that the cause of the leaks was failure of the plaintiff properly to maintain the roofs. It admitted that roofing work on the two buildings was performed during the summer of 1967 by Scott under the supervision and control of Fry and Dickerson. It denied any failure by these defendants to allow the roofs or the roofing materials to dry properly and denied that the leaks were caused by any negligent failure of these defendants to exercise proper care and workmanship in the application of the roofs.

With respect to the third claim for relief, which was added to the complaint by amendment, Dickerson filed answer denying any breach by it of its contract with the plaintiff and denying that any failure of the roof occurred within the warranty period of the contract.

By way of further answer and defense, Dickerson alleged in its answer: (1) The complaint fails to state a claim upon which relief may be granted; (2) plaintiff and Dickerson contracted that Dickerson "agreed to guarantee its work for a period of twenty-seven months following final acceptance of the work"; the plaintiff accepted the work of Dickerson on or about 16 May 1969; Dickerson pleads as a bar to the plaintiff's action this specific guaranty which expired on or about 16 August 1971; (3) this action is barred by the three-year statute of limitations set forth in G.S. 1-52; and (4) as a requirement of the contract between the plaintiff and Dickerson, the plaintiff required Dickerson have and furnish to the plaintiff a twenty-year roof bond, which Dickerson furnished; the acceptance by the plaintiff of the roof and of the said bond was in lieu of any other guaranty on the part of Dickerson and constituted a waiver of further claims against it by the plaintiff.

In its answer, Dickerson also alleged a cross-action in its favor against Scott, alleging that the latter agreed in its contract with Dickerson for the roofing work "to protect and hold harmless the general contractor [Dickerson] from all claim accounts, demands, actions and proceedings, and sums of money by reason of any act, cause, matter, or thing whatsoever attributable

to the work of E. L. Scott Roofing Company." In this cross-action, Dickerson alleged that Scott performed its agreement in accordance with the terms and specifications of the contract between the plaintiff and Dickerson, but, if the court should find otherwise, Dickerson asserted its right to indemnity against Scott and prayed judgment against it for its expense in defending this action and for such indemnity.

Dickerson also, by way of further answer and a cross-action, alleged an agreement between Scott and Fry for the issuance of a "roofing bond"; that such bond was issued with United Pacific Insurance Company as surety thereon to secure the plaintiff against loss by reason of failure properly to install the product of Fry upon the said roof; that such bond was also for the benefit of Dickerson as general contractor and, therefore, if the plaintiff should recover from Dickerson, in this action, then Dickerson should also recover of Fry and its surety by way of indemnity. The prayer of Dickerson for relief was that the plaintiff's complaint be dismissed and that Dickerson have and recover of the other defendants, by way of indemnity, any sums recovered of Dickerson by the plaintiff.

Scott filed answer to the complaint denying any default by it and any liability upon it to the plaintiff, pleading also as a further defense the three-year statute of limitations.

Scott further filed answer to the cross-action against it by Dickerson, alleging that it fully performed its agreement with Dickerson, properly performing all such work without negligence and further pleading the three-year statute of limitations.

Dickerson moved, pursuant to Rule 12(c) of the Rules of Civil Procedure, for judgment in its favor on the ground that the allegations of the complaint and the admissions in its answer show that the plaintiff's right to relief against it is barred. Alternatively, Dickerson moved, pursuant to Rule 12(b) of the said Rules, to dismiss the plaintiff's claim against it on the ground that the complaint fails to state a claim upon which relief may be granted against Dickerson.

Judge Rouse heard the matter upon the said motion by Dickerson and upon the answer of Scott, which asserts that the complaint fails to state a claim upon which relief can be granted against it. It appearing to him that the plaintiff's right of action,

if any, against these defendants accrued during the summer of 1967 and that more than three years had elapsed from the accrual thereof at the time of the commencement of the action, he concluded that the claim of the plaintiff against these defendants is barred by the statute of limitations as set forth in G.S. 1-52(1) and (5). He, therefore, ordered the plaintiff's action be dismissed as against Scott and Dickerson, with prejudice, and taxed the costs against the plaintiff. From this order the plaintiff appealed to the Court of Appeals.

The Court of Appeals affirmed the order of Rouse, J., insofar as that order dismissed the plaintiff's action against Scott, but reversed the order insofar as it dismissed the plaintiff's action against Dickerson.

The Court of Appeals was of the opinion that the complaint alleges a cause of action in tort against Dickerson for negligent construction of the roofs, saying that negligent performance of a contract may constitute a tort as well as a breach of contract. It held that Judge Rouse properly dismissed the third cause of action alleged by the plaintiff in its amended complaint for the reason that it was an action in contract and was barred by the three-year statute of limitations.

The Court of Appeals said that the cause of action for negligent construction arose when Dickerson delivered the buildings to the plaintiff "some time during the summer of 1968," so that the three-year statute of limitations, then applicable to this cause of action, would have run at some time during the summer of 1971 but the exact date on which such three-year statute would have run could not be determined from the pleadings.

On 21 July 1971, the General Assembly enacted G.S. 1-15(b). The Court of Appeals held this statute does not apply to actions for breach of contract, so that it did not extend the time for bringing the plaintiff's action for breach of contract. However, said the Court of Appeals, G.S. 1-15(b) did extend the time for bringing the plaintiff's action for the alleged negligent construction of the roofs, provided such action was not barred on 21 July 1971 when G.S. 1-15(b) was enacted. Since the pleadings do not show that the buildings were completed and delivered over to the plaintiff prior to 21 July 1968 (three years before the enactment of G.S. 1-15(b)) but show only that the construction of the

buildings was completed and that they were occupied by the plaintiff "during the summer of 1968," the Court of Appeals said it does not appear from the pleadings that this cause of action was barred when G.S. 1-15(b) was enacted and, therefore, the dismissal of this claim of the plaintiff against Dickerson under Rule 12(b)(6) was error.

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

*Dawkins & Glass by W. David Lee for Dickerson, Inc.*

*White, Allen, Hooten & Hines by Thomas J. White III for E. L. Scott Roofing Company.*

LAKE, Justice.

The Superior Court gave judgment on the pleadings dismissing the plaintiff's action against Dickerson for the reason that the plaintiff's claim is barred by the statute of limitations, having accrued more than three years prior to the institution of this action on 7 August 1973.

Such judgment on the pleadings is proper if, but only if, it appears upon the face of the complaint that the plaintiff's right to recover is barred by the lapse of time properly pleaded. *Speas v. Ford*, 253 N.C. 770, 117 S.E. 2d 784 (1961); *Nowell v. Hamilton*, 249 N.C. 523, 107 S.E. 2d 112 (1959); *Mobley v. Broome*, 248 N.C. 54, 102 S.E. 2d 407 (1958); *Latham v. Latham*, 184 N.C. 55, 113 S.E. 623 (1922); *Stubbs v. Motz*, 113 N.C. 458, 18 S.E. 387 (1893); McIntosh, North Carolina Practice and Procedure, 2d Ed., § 373; G.S. 1A-1, Rule 12. Otherwise, the question is a mixed question of law and fact, the plaintiff having the burden of proving that his action was brought within the time allowed by the applicable statute, but having the right to offer such proof. *Stubbs v. Motz, supra.* As stated in McIntosh, "When the statute has been properly pleaded, it raises an issue of fact to be tried by a jury; and no reply is necessary by the plaintiff, but if it appears on the face of the complaint that the action is barred, and defendant pleads the statute, and there is nothing to show that the bar does not operate, the Court may decide the question upon the facts admitted." McIntosh, North Carolina Practice and Procedure, 2d Ed., § 373.

In the third claim for relief set forth in the complaint, the plaintiff alleges it contracted with Dickerson for the construction of the two buildings, including the roofs thereon, "in accordance with plans and specifications outlined by the plaintiff, and Dickerson broke this contract, as the result of which breach the roofs leaked."

The plaintiff's only prayer for relief under its first claim set forth in the complaint is against Fry and United Pacific Insurance Company upon their guaranty bond. In this portion of the complaint, the plaintiff alleges that the leaks in the roofs were caused by the use of defective materials or by improper installation thereof. If this claim for relief be deemed to allege a cause of action against Dickerson, it is clearly for a breach of the same contract which is the subject of the third claim for relief and adds nothing thereto.

In the second claim for relief set forth in the complaint, the plaintiff alleges "roofing work" on these buildings was performed in the summer of 1967 by Scott under the supervision of Dickerson, that Scott and Dickerson negligently failed to allow the roofs (i.e., the subsurface portions thereof) to dry properly before applying the roofing material or failed to allow the roofing material itself to dry properly before installing it, and that the leaks in the roofs were caused by this negligent failure to exercise proper care and workmanship in the construction of the roofs.

**[1]** Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966); *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132 (1964); *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961); *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951). It is true that there are many decisions of this and other courts holding a promisor liable in a tort action for a personal injury or damage to property proximately caused by his negligent, or wilful, act or omission in the course of his performance of his contract. *Insurance Co. v. Sprinkler Co., supra; Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965); *Toone v. Adams, supra; Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957); *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893 (1955); *Insurance Co. v. Parker*, 234 N.C. 20, 65 S.E. 2d 341; *Council v. Dickerson's, Inc., supra; Powers v. Trust Co.*, 219 N.C. 254, 13 S.E. 2d 431 (1941); *Williamson v. Dickens*, 27 N.C. 259

(1844). *See also*: Corbin on Contracts, § 1019; Prosser, Law of Torts, 4th Ed., § 1. However, such decisions by this Court, which have been brought to our attention, appear to fall into one of four general categories:

(1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee. *See*: *Pinnix v. Toomey, supra*; *Council v. Dickerson's, Inc., supra.*

(2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee. *See*: *Insurance Co. v. Sprinkler Co., supra* (promisee's merchandise damaged by water as the result of negligence in the installation of a sprinkler system); *Jewell v. Price, supra* (promisee's house burned as the result of negligence in the installation of a furnace); *Toone v. Adams, supra* (baseball umpire injured by an irate spectator allegedly due to the Club owner's failure to supply adequate protection); *Shearin v. Lloyd, supra* (medical malpractice).

(3) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee. *See*: *Insurance Co. v. Parker*, 234 N.C. 20, 65 S.E. 2d 341 (1951) (automobile stolen from a parking lot inviting public patronage).

(4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor. *See*: *Williamson v. Dickens, supra* (conversion of notes by a bailee for collection); *Simmons v. Sikes*, 24 N.C. 98 (1841) (conversion or wilful destruction of a canoe by a bailee).

**[2]** It may well be that this enumeration of categories in which a promisor has been held liable in a tort action by reason of his negligent, or wilful, act or omission in the performance of his con-

tract is not all inclusive. However, our research has brought to our attention no case in which this Court has held a tort action lies against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.

**[3]** In the present case, according to the complaint, Dickerson contracted to construct buildings, including roofs thereon, in accordance with agreed plans and specifications. It is alleged that Dickerson did not so construct the roofs. If that be true, it is immaterial whether Dickerson's failure was due to its negligence, or occurred notwithstanding its exercise of great care and skill. In either event, the promisor would be liable in damages. Conversely, if the roofs, as constructed, conformed to the plans and specifications of the contract, the promisor, having fully performed his contract, would not be liable in damages to the plaintiff even though he failed to use the degree of care customarily used in such construction by building contractors. Thus, the allegation of negligence by Dickerson in the second claim for relief set forth in the complaint is surplusage and should be disregarded. Consequently, the only basis for recovery against Dickerson, alleged in the complaint, is breach of contract and the Court of Appeals was in error in its view that the complaint "alleges an action in tort" against Dickerson.

**[4]** The complaint alleges, "During the summer of 1968, the construction of these buildings was completed." It also alleges, "Roofing work on these two buildings was performed during the summer of 1967." Assuming that this latter allegation is intended to mean that all of the roofing work was completed during the summer of 1967, and further assuming, as the complaint alleges, that such work was improperly performed, so that the roofs were not built in accordance with the plans and specifications, the plaintiff's cause of action against Dickerson did not accrue in the summer of 1967 but in the summer of 1968 when Dickerson finished its work on the entire building. Dickerson's contract was for the construction of a building (actually two buildings). So long as the building was still under construction by Dickerson, defects therein were subject to correction by Dickerson and would not give rise to a cause of action by the plaintiff for breach of contract. A building contractor is not subject to suit instantaneously whenever his employee negligently fastens a beam or a shingle in

place. Thus, the plaintiff's alleged cause of action for breach of contract accrued "during the summer of 1968."

At that time, an action for breach of contract, regardless of the nature of the breach, was barred by the statute of limitations after three years from the time the cause of action accrued. G.S. 1-52(1). This action was instituted 7 August 1973. Consequently, had there been no change in the applicable statute of limitations, this action would have been barred and, since this appeared on the face of the complaint, the judgment of the Superior Court would have been correct.

On 21 July 1971, G.S. 1-15(b) was ratified and took effect. It provides:

> "(b) Except where otherwise provided by statute, *a cause of action*, other than one for wrongful death, *having as an essential element* bodily injury to the person or *a defect in* or damage to *property which originated under circumstances making the* injury, *defect* or damage *not readily apparent to the claimant at the time of its origin*, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that *in such cases* the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief." (Emphasis added.)

Prior to the enactment of G.S. 1-15(b), the plaintiff's alleged cause of action for breach of contract by Dickerson accrued and the statute of limitations began to run when Dickerson's purported performance of the contract was completed, irrespective of the facts, if they be facts, that the defect in the roofs which constituted the breach of contract was then neither known nor "readily apparent" to the plaintiff and the roofs did not actually leak until a substantial time thereafter. *Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973); *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967); *Jewell v. Price, supra.*

In *McCrater v. Engineering Corp.*, 248 N.C. 707, 710, 104 S.E. 2d 858 (1958), Justice Johnson, speaking for the Court, said: "[I]t is well settled that the time within which an action may be brought may be enlarged as to pending causes *not barred*, and that such legislation [extending the time] is not deemed retroactive and does not impair vested rights." (Emphasis added.) To the

same effect, see: *Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933) and McIntosh, North Carolina Practice and Procedure, 2d Ed., § 275.

**[5, 6]** The Court of Appeals was of the opinion that G.S. 1-15(b) does not apply to actions for breach of contract. In this we think the Court of Appeals was in error. *See*, Lauerman, "The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina," 8 Wake Forest Law Review 327. The statute, by its terms, applies to any cause of action (other than one for wrongful death, and except where otherwise provided by statute) if an "essential element" thereof is a defect in property, which defect originated under circumstances making it "not readily apparent to the claimant" at the time of its origin. In the present case, the alleged breach of the contract by Dickerson consists of a defect in the roofs. Thus, "A defect in *** property" is "an essential element" of the plaintiff's cause of action. If this defect "originated under circumstances making it not readily apparent to the claimant at the time of its origin," G.S. 1-15(b) applies to the plaintiff's cause of action and extends the time for the institution of such action, provided Dickerson completed its purported performance of its contract less than three years prior to 21 July 1971 when this statute took effect.

It does not appear upon the face of the complaint either (1) that the defect in the roofs was readily apparent to the plaintiff at the time of its origin, or (2) that Dickerson's work on the buildings was finished prior to 21 July 1968 (three years prior to the effective date of G.S. 1-15(b). G.S. 1-15(b) does not apply to this action for breach of contract unless both of these questions are resolved in favor of the plaintiff; that is: (1) The defect in the roofs originated under circumstances making it not readily apparent to the plaintiff at the time of its origin, and (2) Dickerson's work in performance of its contract was completed on or after 21 July 1968. Since the inapplicability of G.S. 1-15(b) does not appear upon the face of the complaint, the judgment on the pleadings that the plaintiff's alleged cause of action against Dickerson for breach of contract was barred by the statute of limitations was erroneously entered. The plaintiff is entitled to an opportunity to prove both (1) the defect was not so apparent to it, and (2) Dicker-

son's work upon the buildings was not completed prior to 21 July 1968.

Thus, notwithstanding the above mentioned errors in its reasoning, the Court of Appeals reached the correct result in reversing the judgment of the Superior Court insofar as that judgment dismissed the plaintiff's action against Dickerson.

The plaintiff did not petition this Court for review of the judgment of the Court of Appeals. Dickerson and Scott petitioned for review of that judgment "in part and only as to that Court's reversal of the Trial Court judgment dismissing Plaintiff's action in tort as to the Defendant Dickerson." However, Rule 16 of the Rules of Appellate Procedure, 287 N.C. 671, 720, permits an appellant in the Court of Appeals (the plaintiff), who is the appellee in this Court, or a respondent to a petition for certiorari, to present in his brief in this Court, without a cross-assignment of error to the decision of the Court of Appeals, any question which he properly presented to the Court of Appeals. Scott, being presently before this Court by its own petition, Rule 16 permits the plaintiff to present in its brief in this Court the matter of the validity of the judgment of the Superior Court dismissing with prejudice the plaintiff's action against Scott and also to present the plaintiff's contentions that the ten-year statute of limitations (G.S. 1-47(2), applicable to actions on contracts under seal) or the six-year statute of limitations (G.S. 1-50(5), applicable to certain actions for injuries to property) are applicable to its action against Dickerson.

**[7]** As the Court of Appeals observed, there is nothing in the record before us to indicate that the contract made by Dickerson with the plaintiff was a contract under seal. It is not so alleged in the complaint. Therefore, for the purposes of this appeal, it must be deemed a simple contract and the ten-year statute of limitations contained in G.S. 1-47(2) is not applicable. There was no error in the decision of the Court of Appeals upon this question.

**[8]** Likewise, there was no error in the decision of the Court of Appeals that the six-year statute of limitations contained in G.S. 1-50(5) has no application to this action. That statute applies to an action "to recover damages for any injury to property, real or personal *** arising out of the defective and unsafe condition of an improvement to real property." The complaint does not allege,

and nothing in the record before us indicates, any injury to property arising out of any "defective and unsafe condition" of the roofs in question. That statute was designed to apply to actions such as *Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973), and *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965), in which the plaintiff sued for damages for the burning of a dwelling by reason of defects in a furnace improperly installed by the defendant. It does not apply to an action, such as this, for a simple breach, by defective performance, of a contract to construct an improvement on real property.

**[9]** There was also no error in dismissing the action against Scott. Scott asserted in its answer the defense that the complaint fails to state a claim upon which relief may be granted against it. In this, Scott was correct. Although the complaint states that the plaintiff seeks recovery against Scott "in tort for the negligent installation of the roofs on these two buildings," it alleges that the defendant Scott was the roofing subcontractor of Dickerson, the general contractor, and that Scott failed properly to apply the roofing material, in consequence of which failure the roofs leaked. This is simply an allegation that Scott did not properly perform its contract with Dickerson and, for the reasons above set forth, does not allege a cause of action in tort in favor of the plaintiff against Scott.

As Scott asserts in its answer, it "did not enter into any contract with the plaintiff for the construction of the roofs and there exists no privity of contract between this answering defendant and the plaintiff." The plaintiff may not sue Scott for the breach of Scott's contract with Dickerson on the theory that the plaintiff is the third party beneficiary thereof, it being only an incidental beneficiary of such contract. In § 779D of his Treatise on Contracts, Professor Corbin states:

> "Where A owes money to a creditor, or to several creditors, and B promises A to supply him with the money necessary to pay such debt, no creditor can maintain suit against B on this promise. The same is true in any case where A is under a contractual duty to C the performance of which requires labor or materials, and B promises A to supply him such labor or materials; C has no action against B on this promise.

"The foregoing is applicable to most cases of contracts between a principal building contractor and subcontractors. Such contracts are made to enable the principal contractor to perform; and their performance by the said subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. *It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary.* The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from the performance must be regarded as merely incidental." (Emphasis added.)

Again, in § 787 of his Treatise, Professor Corbin states:

"A promise to pay money to a debtor for him to use in paying his debts is not a promise to pay the debt; and the creditor has no enforceable right. So, also, if the principal contractor contracts with a subcontractor for the supply of materials to be used by the former in erecting a structure, the owner is not a beneficiary of the subcontract. The same will ordinarily be true even though the subcontractor undertakes the incorporation of the materials into the structure, for the reason that this incorporation will not discharge the contractual duty of the principal contractor and the parties do not contemplate that it should. It is the principal contractor's duty to erect and deliver the complete structure according to plans and specifications; and the subcontractor's work does not discharge that duty to any extent. His work is merely a preliminary step that will enable the principal contractor to perform."

The following cases, cited by Professor Corbin, are in accord with his observations: *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927); *Carolus v. Arkansas*

*Light & Power Co.*, 164 Ark. 507, 262 S.W. 330 (1924); *Police Jury of St. Landry v. Alexander Gravel Co.*, 146 La. 1, 83 So. 316 (1919); and *Majestic Mfg. Corp. v. Riso & Sons Bldg. Co.*, 27 N.Y.S. 2d 845, Aff'd, 27 N.Y.S. 2d 846, 261 App. Div. 1099 (1941).

In *Cox v. Curnutt*, 271 P. 2d 342 (Okla., 1954), a contractor employed a subcontractor to perform certain required cement work. The work was improperly done by the subcontractor, due, it is alleged, to his negligence. In a suit by the owner against both the general contractor and the subcontractor, the court held that the subcontract was not made for the owner's benefit and, consequently, the owner had no action against the subcontractor for the defective performance of the work. *Accord, National Cash Register Co. v. Unarco Industries, Inc.*, 490 F. 2d 285 (1974), as to subcontractor's failure to perform.

In *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970), the landowner sued the subcontractor for breach of the latter's contract with the general contractor of a construction project to supply and install materials therein. Speaking through Justice Huskins, this Court held the plaintiff was a mere incidental beneficiary of the construction subcontract and could not maintain an action against the subcontractor for its breach and thus the subcontractor's motion for summary judgment should have been allowed, citing Corbin on Contracts, § 779D as authority.

Thus, as to the action of the plaintiff against Scott, we do not reach the question of whether the statute of limitations had run when the action was instituted.

The dismissal of the plaintiff's action against Scott does not, of course, bar Dickerson's cross-action against Scott for damages for the alleged breach of the subcontract in the event that Dickerson is ultimately held liable to the plaintiff for damages for breach of the general contract.

The Court of Appeals was, therefore, correct in affirming the judgment of the Superior Court dismissing the plaintiff's action against Scott and in reversing the judgment of the Superior Court dismissing the plaintiff's action against Dickerson. The judgment of the Court of Appeals is, therefore, affirmed.

Affirmed.

IN RE INQUIRY CONCERNING JUDGE HERBERT W. HARDY

No. 62

(Filed 24 January 1978)

**1. Statutes § 5— construction—purpose**

If a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded.

**2. Statutes § 5— construction—context of words and phrases**

Words and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.

**3. Statutes § 5— construction—object of the statute**

A construction which will defeat or impair the object of a statute must be avoided if that can reasonably be done without violence to the legislative language; and, where possible, the statute should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent.

**4. Statutes § 5— construction of "may"**

Ordinarily when the word "may" is used in a statute, it will be construed as permissive and not mandatory.

**5. Statute § 5— construction—mandatory or directory word**

Whether a particular word in a statute is mandatory or merely directory must be determined in accordance with the legislative intent; and legislative intent is usually ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other.

**6. Judges § 7— recommendation of censure by Judicial Standards Commission—power of Supreme Court to remove judge**

G.S. 7A-376 and 7A-377 authorize and empower the Supreme Court, unfettered in its adjudication by the recommendation of the Judicial Standards Commission, to make the final judgment whether to censure or remove a judge or justice or whether to remand or dismiss the proceeding. Therefore, the Supreme Court may order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured.

**7. Judges § 7— censure of district court judge**

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 actions in (1) disposing of traffic cases when the court was not in session and without notice to the prosecuting attorney, (2) changing a verdict of guilty in a traffic case to not

guilty while the court was not in session and without the knowledge of the prosecuting attorney, and (3) writing a letter to another district court judge requesting that such judge enter a prayer for judgment continued upon payment of costs in a pending traffic case and forwarding a check from the defendant for the payment of the costs in that case.

Justice LAKE concurring in part and dissenting in part.

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

THIS proceeding is before the Supreme Court upon the recommendation of the Judicial Standards Commission (Commission), filed with this Court on 30 December 1976, that Herbert W. Hardy, a judge of the General Court of Justice, District Court Division, Eighth Judicial District (Respondent), be censured for wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. See Article IV, section 17(2) of the North Carolina Constitution and G.S. 7A-376 (1975 Cum. Supp.).

This proceeding was instituted before the Commission by the filing of a verified complaint on 3 November 1976 which alleged that Respondent had engaged in wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The various acts of misconduct alleged in the complaint are hereinafter set out in the Commission's Findings of Fact.

Respondent filed a verified answer averring: (1) that the statute under which the Commission attempts to proceed is unconstitutional; (2) that Respondent was not properly notified of the investigation of him, the nature of the charge and whether the investigation was on the Commission's own motion or upon written complaint, and that Respondent was not afforded a reasonable opportunity to present relevant matters, in violation of Rule 7(b) of the Rules of the Judicial Standards Commission; (3) that the complaint itself is not properly verified; (4) that Respondent did release Roland Coley from jail for time served due to the sheriff's complaint of over-crowded jail conditions but such conduct was not prejudicial to the administration of justice; (5) that Respondent did write a letter to Judge F. Fetzer Mills on behalf of C. B. Henson but such act was not wilful misconduct and was not prejudicial to the administration of justice; and (6) that Respondent has no independent recollection of all other events

alleged in the complaint to constitute wilful misconduct and such allegations are denied.

Upon due notice Respondent was accorded a full adversary hearing before the Commission on 18 February 1977 at which time he was present and represented by counsel. Millard R. Rich, Jr., Deputy Attorney General and special counsel, presented the evidence in support of the charges. Respondent, represented by his attorneys of record, did not testify in his own behalf but offered many witnesses who testified to his good character. After hearing all evidence the Commission made written findings of fact from which it concluded as a matter of law that the conduct of Respondent, detailed in the findings, constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The specific findings upon which the Commission based these conclusions are as follows:

"7. That on November 15, 1974, Jim Rastus Grimsley, Route 1, Box 395, Ayden, N. C., in case no. 74CR14498, Wayne County, was charged in a warrant issued on said date by Magistrate W. H. Greenfield with unlawfully and wilfully operating a motor vehicle on a public street or highway at a speed of 75 miles per hour in a 55 mile per hour zone. On January 7, 1975, defendant Grimsley pled guilty to speeding 70 miles per hour in a 55 mile per hour zone in District Court of Wayne County, presided over by the Respondent. That on April 16, 1975, the Respondent, while presiding over the Wayne County District Criminal Court, caused to be stricken by an official of the Court the guilty verdict previously entered in said case and caused to be entered a judgment of not guilty in said case. That the striking of the judgment entered on January 7, 1975, and the entry of the not guilty verdict on April 16, 1975, was done by Respondent while court was not in session, while the defendant Grimsley was not present, while the Assistant District Attorney Paul Wright, who was prosecuting the docket, was not present and without the knowledge or consent of Assistant District Attorney Paul Wright.

8. That on December 15, 1975, James Edward Gurganus was charged in criminal action no. 75CR14649, Wayne County, with wilfully and unlawfully operating a motor vehicle on

a public street or highway at a speed of 55 miles per hour in a 45 mile per hour zone. On April 1, 1976, the Respondent dismissed said case not in open court and without the knowledge or consent of the District Attorney or his Assistant Paul Wright, who was scheduled to prosecute the docket on April 5, 1976, when said case was scheduled for trial.

9. That on or about September 7, 1973, Respondent wrote a letter to F. Fetzer Mills, a District Court Judge of the Twentieth Judicial District, requesting that Judge Mills enter a judgment of Prayer for judgment continued with the payment of cost in a criminal action pending in the District Court of Stanly County wherein C. B. Henson was charged with wilfully and unlawfully operating a motor vehicle on a public street or highway at a speed of 70 miles per hour in a 55 mile per hour zone. Respondent also forwarded to Judge Mills at said time a check dated September 7, 1973, No. 49, drawn on the Southern Bank and Trust Company, payable to the Clerk of Superior Court of Stanly County in the amount of $16.00 signed by C. B. Henson, the defendant in said action.

10. That Respondent, while presiding over the District Court of Greene County on or about June 25, 1976, entered or caused to be entered a judgment of 'exceeding a safe speed' in File No. 76CR1279 (wherein Evelyn A. Stancill was charged with operating a motor vehicle on a street or highway at a speed of 68 miles per hour in a 55 mile per hour zone). That said judgment was entered while court was not in session and without the knowledge or consent of the Assistant District Attorney, Ms. Libby Jones, prosecuting the docket on said date.

11. That Respondent, while presiding over the District Court of Greene County on or about June 25, 1976, entered or caused to be entered a judgment of 'exceeding a safe speed' in File No. 76CR1369 (wherein Brantley Hinson was charged with operating a motor vehicle on a street or highway at a speed of 68 miles per hour in a 55 mile per hour zone). That said judgment was entered while court was not in session and without the knowledge or consent of the Assistant District Attorney, Ms. Libby Jones, prosecuting the docket on said date.

12. 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 "that respondent be censured by the Supreme Court for said conduct."

Respondent petitioned this Court for a hearing upon the censure recommendation, which was granted, and the proceeding was calendared as Case No. 120 at the Spring Term 1977. Respondent thereupon filed a brief and was heard through counsel on oral argument before this Court on 14 July 1977.

On 18 July 1977, before passing upon the censure recommendation, the Court *ex mero motu* set the matter for reargument at the Fall Term on the following questions:

1. Whether this Court may order *the removal* of a judge upon a recommendation to the Court by the Judicial Standards Commission that the judge be censured.

2. If so, whether the respondent judge in this case should be removed.

The arguments of Respondent and the Commission on these points were heard by this Court on 14 October 1977.

*Rufus L. Edmisten, Attorney General; Millard R. Rich, Jr., Deputy Attorney General; James E. Scarbrough, Associate Attorney for the Judicial Standards Commission.*

*Duke and Brown by John E. Duke; Herbert B. Hulse; Thomas J. White, Jr., attorneys for respondent.*

HUSKINS, Justice.

We overrule without discussion Respondent's contentions (1) that Article 30 of Chapter 7A of the General Statutes is unconstitutional because it was enacted prior to the time the Constitution was amended authorizing its enactment, (2) that the General Assembly unconstitutionally delegated its legislative powers to the Judicial Standards Commission, and (3) that the procedures followed by the Commission violate Respondent's due process rights under both federal and state constitutions. All these arguments have been answered adversely to Respondent in

*In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). We therefore put these matters aside and go directly to the questions remaining: Is the Supreme Court authorized and empowered to order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured? If so, should the Respondent Judge in this case be censured as recommended by the Commission or should he be removed from office?

G.S. 7A-376 provides in pertinent part: "Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for wilful misconduct in office, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

G.S. 7A-377 provides in pertinent part: "A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation."

The provisions of these statutes are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore *in pari materia* and must be construed accordingly. 73 Am. Jur. 2d, Statutes, § 189; *Redevelopment Comm. v. Bank*, 252 N.C. 595, 114 S.E. 2d 688 (1960); *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956); *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640 (1916).

In construing the language of statutes we are guided by the primary rule of construction that the intent of the Legislature controls. "In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law." 73 Am. Jur. 2d, Statutes, § 145; *State v. Spencer*, 276 N.C. 535, 546, 173 S.E. 2d 765, 773 (1970).

**[1]** If a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded. *State v. Barksdale*, 181 N.C. 621, 107 S.E. 505 (1921).

**[2]** Words and phrases of a statute may not be interpreted out of context, but individual expressions "must be construed as a

part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 210, 69 S.E. 2d 505, 511 (1952).

**[3]** A construction which will defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte*, 235 N.C. 484, 70 S.E. 2d 575 (1952). Where possible, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent. 73 Am. Jur. 2d, Statutes, § 157. *See State v. Spencer*, supra. "It would violate the elementary rule of construction not to construe it in that way, for we are told that the words in a statute are to be construed with reference to its subject-matter and the objects sought to be attained . . . as well as the legislative purpose in enacting it; and its language should receive that construction which will render it harmonious with that purpose, rather than that which will defeat it. . . ." *Manly v. Abernathy*, 167 N.C. 220, 221-22, 83 S.E. 343, 344 (1914).

It now becomes our duty to construe and interpret G.S. 7A-376 and -377 in light of these rules.

We first look at Article IV, section 17(2) of the Constitution of North Carolina which reads in pertinent part as follows: "The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, . . . for the censure and removal of a justice or judge of the General Court of Justice for wilful misconduct in office, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." In obedience to this mandatory provision of the Constitution, the General Assembly enacted Article 30 of Chapter 7A of the General Statutes creating the Judicial Standards Commission, prescribing the grounds for censure or removal and fixing the procedures to be followed. See G.S. 7A-375, -376, and -377. By such enactment it was the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for wilful misconduct in office, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. When G.S. 7A-376 and -377 are read aright they provide that upon recommendation of the Judicial Standards Commission the Supreme Court *may* censure

or remove any justice or judge, *may* approve or reject the recommendation of the Commission, or *may* remand the matter for further proceedings.

**[4, 5]** Ordinarily when the word "may" is used in a statute, it will be construed as permissive and not mandatory. *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938); *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923). Whether a particular word in a statute is mandatory or merely directory must be determined in accordance with the legislative intent; and legislative intent is usually ascertained not only from the phraseology of the statute but also from *the nature and purpose of the act* and the consequences which would follow its construction one way or the other. *Art Society v. Bridges, State Auditor*, 235 N.C. 125, 69 S.E. 2d 1 (1952); *State v. Earnhardt*, 170 N.C. 725, 86 S.E. 960 (1915).

A recommendation of the Commission that a justice or judge be disciplined in some fashion brings the controversy before the Supreme Court for such action as the Court deems proper. The Commission can neither censure nor remove. It functions 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. "Its recommendations are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either." *In re Nowell*, 293 N.C. 235, 244, 237 S.E. 2d 246, 252 (1977). The General Assembly designated the Supreme Court as the adjudicatory body to provide the final scrutiny and make the final judgment whether to censure, remove, remand or dismiss the proceeding. Our conclusion in this regard is supported by courts in other jurisdictions which have considered the question. *See Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P. 2d 1, 110 Cal. Rptr. 201 (1973); *In re Robson*, 500 P. 2d 657 (Alaska 1972); *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 532 P. 2d 1209, 119 Cal. Rptr. 841 (1975); *In re Kelly*, 238 So. 2d 565 (Fla. 1970); *In re Diener*, 268 Md. 659, 304 A. 2d 587 (1973).

**[6]** We therefore hold that all options listed in G.S. 7A-376 and -377 are permissive options available to the Supreme Court in disposing of any disciplinary proceeding. G.S. 7A-376 and -377 authorize and empower the Court, unfettered in its adjudication by the recommendation of the Commission, to make the final

judgment whether to censure, remove, remand for further proceedings or dismiss the proceeding. This interpretation is in harmony with the rules of statutory construction and promotes the legislative purpose to suppress wilful misconduct by judicial officers and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**[7]** We now turn to the question whether Judge Hardy should be removed from office, censured, or whether the proceedings against him should be dismissed.

First we conclude that the Commission's findings of fact are supported by clear and convincing evidence. We therefore accept the facts as established by the findings and adopt them as our own. The conduct of Respondent established by Findings 7, 8, 9, 10 and 11 heretofore quoted verbatim, constitutes wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *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 (1976); *In re Stuhl*, 292 N.C. 379, 233 S.E. 2d 562 (1977); *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977).

A comparison of Judge Hardy's indiscretions with the judicial misconduct in *Crutchfield*, *Edens* and *Stuhl* reveals striking similarity. Since we followed the Commission's recommendation in prior cases and only censured the offender, fairness requires a similar result here. In view of the Court's power to remove from office a justice or judge for misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, it is appropriate to emphasize that in the future the result in each case will be decided upon its own facts.

For the reasons stated we conclude that Respondent should be censured in accordance with the recommendation of the Judicial Standards Commission.

Now, therefore, it is ordered by the Supreme Court in conference that Judge Herbert W. Hardy be and he is hereby censured by this Court for the conduct specified in the Findings of Fact.

Justice LAKE concurring in part and dissenting in part.

Being bound by the decision of this Court in *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977), from which I dissented (see

also my dissent in *In re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1975), I accept as presently authoritative the majority's position that Article 30 of Chapter 7A of the General Statutes is constitutional and binding upon this Court. I also concur in the majority's conclusion that the findings of fact made by the Judicial Standards Commission concerning the actions of Judge Hardy are supported by clear and convincing evidence, that these actions constitute wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Consequently, I concur in the conclusion of the majority that he should be censured in accordance with the recommendation of the Judicial Standards Commission.

I respectfully dissent from the conclusion and holding of the majority opinion that this Court has authority to order the removal from office of a judge when the Judicial Standards Commission has not so recommended but, on the contrary, has recommended that the judge be censured only.

The following statements in the majority opinion, as here interpreted and applied by the majority, are, in my view, incorrect and are not supported by authority:

> "A recommendation of the Commission that a justice or judge be disciplined *in some fashion* brings the controversy before the Supreme Court *for such action as the Court deems proper*. The Commission *** functions 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. *** We, therefore, hold that all options listed in G.S. 7A-376 and -377 are permissive options available to the Supreme Court in disposing of any disciplinary proceeding. G.S. 7A-376 and -377 authorize and empower the Court, *unfettered in its adjudication by the recommendation of the Commission*, to make the final judgment whether to censure, remove, remand for further proceedings or dismiss the proceeding." (Emphasis added.)

Upon these statements the majority rests its holding that this Court has authority to remove a judge from office although the Judicial Standards Commission has made no such recommendation. This decision of the majority is, in my opinion, a usurpation of power in which I am unable to concur.

Never before in the history of this State has this Court asserted that any such power resides in it. So strange is this assertion of power to our law that the majority, in the present instance, feels "fairness requires" that the power not be exercised in this case. In the future, however, the majority says that if the Judicial Standards Commission, acting pursuant to its statutory authority, makes a finding of fact, supported by evidence, that a justice or judge at any level in the General Court of Justice has engaged in any "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," four members of this Court can decree his removal from office even though the Judicial Standards Commission thought the conduct merited no more than a censure and the other three members of this Court agree with the Commission.

The majority opinion states that its conclusion is supported by decisions of courts in California, Alaska, Florida and Maryland. In interpreting statutes, decisions of courts of other jurisdictions are not as helpful as are decisions of those courts upon questions of the common law. As the majority opinion states, the determinative question in construing a statute is, What did the Legislature intend? In making this determination, the history, constitutional, legislative and political, of the state in question is significant and this varies widely from state to state. This is particularly important where, as here, we are called upon to determine whether the Legislature of North Carolina, by the enactment of Article 30 of Chapter 7A of the General Statutes, intended to give to the majority of this Court the power to remove from office a judge elected to that office by the people.

With the exception of the special judges of the Superior Court, who are appointed, and may be reappointed, by the Governor, all District Court judges, judges of the Superior Court, judges of the Court of Appeals, and justices of this Court are elected to office by the people of the State (or, in the case of the district judges, by the people of the district) for a limited term, at the conclusion of which they must be reelected or cease to serve. The removal of a judge from office on the ground of misconduct in office or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" is a matter of the most serious consequences to him. He is, thereby, not only deprived of the honor, power and emoluments of the office for the remainder

of his term, but is also permanently disqualified from holding further judicial office in this State and G.S. 7A-376 expressly provides that he "receives no retirement compensation," regardless of how many years he has served with fidelity and distinction or how much he had paid into the State Retirement Fund pursuant to the provisions of the Retirement Act. But these are not the only consequences of his removal from office. The more serious consequence is that the people, who elected him to be their judge, are deprived of his services for the remainder of his term. It is not a light thing for this Court to assume the power to say to the people of North Carolina, "You have lawfully elected this judge, but we have determined that he cannot serve you."

Types of conduct which any right-minded person would deem to disqualify a man or woman to hold judicial office readily come to mind, but, fortunately, the history of the North Carolina judiciary, at all levels in the judicial hierarchy, shows that these have been and are exceedingly rare in the actual life of this State. Should they occur, this Court is not the only hope of the people for the removal of such a judge from office. Unlike judges of the Federal courts, a judge of any court in North Carolina (except the special judges of the Superior Court mentioned above) can be removed from office by the people themselves at the next election. But this is not all. Such a judge may be removed during his term of office by either of two methods. (1) He may be removed by impeachment. (2) He may be removed by action of this Court *when the Judicial Standards Commission has properly so recommended.* Thus, it is perfectly clear that the present holding of the majority opinion cannot be justified on the ground that it is necessary in order to protect the people of North Carolina from gross misconduct, in or out of office, by judges.

It is my opinion that it is equally clear that G.S. 7A-376 and 7A-377, relied upon by the majority opinion, do not support its conclusion.

Prior to 7 November 1972, Article IV, § 17, of the Constitution of North Carolina, provided that any justice of the Supreme Court, judge of the Court of Appeals or judge of the Superior Court could be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each House of the General Assembly, and expressly provided, "Removal from office for any other cause shall be by im-

peachment." Then, as now, Article IV, § 4, of the Constitution of North Carolina, provided, "The Court for the Trial of Impeachments shall be the Senate." Article IV, § 17(2), provided, "The General Assembly shall provide by general law for the removal of District Judges and Magistrates for misconduct or mental or physical incapacity." Obviously, prior to the 1972 Amendment to this provision of our Constitution, this Court did not have the authority which it now asserts.

In the general election of 7 November 1972, the voters of this State approved and placed into our Constitution an amendment of Article IV, § 17. Paragraph (1) of that section, as so amended, provides for removal of a justice or judge of the General Court of Justice by the General Assembly. Paragraph (2) now reads as follows:

> "(2) *Additional method of removal of Judges.* — The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice 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."

Obviously, the 1972 Amendment to Article IV, § 17, conferred upon this Court no power to remove a judge from office. Such power, if it exists, must be derived from G.S. Chapter 7A, Article 30, enacted by the General Assembly, contingent upon the approval by the people at the general election of 1972 of the above mentioned amendment to Article IV, § 17, of the Constitution of North Caorlina. The pertinent provisions of that article are G.S. 7A-376 and G.S. 7A-377. The pertinent provisions of those portions read as follows:

> "G.S. 7A-376. *Grounds for censure or removal.* — Upon recommendation of the Commission the Supreme Court may censure or remove any 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 ***"

"G.S. 7A-377. *Procedures;* ***. — (a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. *** At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. *** *The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation.* ***" (Emphasis added.)

By the express language of this statute this Court has no authority to take any action whatsoever except "upon recommendation of the Commission." It is a distortion of the plain language of this statute to say that once the Commission makes a recommendation for censure the Supreme Court can take whatever action it thinks proper. The clear import of the statutory language, "Upon recommendation of the Commission," is that the Supreme Court may censure the respondent judge if the Commission so recommends or it may remove him from office if the Commission so recommends.

However, we are not left to the construction of this phrase in G.S. 7A-376. The Legislature has expressly stated what this Court may do in response to a recommendation by the Judicial Standards Commission. It has said, "The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation." This Court has no other authority.

To remove from office a judge, as to whom the Commission has recommended censure, is certainly not an approval of that recommendation. It is not a remand for further proceedings. It is a rejection of the Commission's recommendation, but it is more than that. It is a rejection of the Commission's recommendation and the substitution for that recommendation of this Court's conclusion as to what the recommendation should have been. This, the statute simply does not permit this Court to do.

The Judicial Standards Commission is not, as the majority opinion says it is, "An arm of this Court." It is not like a special master or referee, appointed by this Court to conduct an inquiry, which this Court, itself, could conduct, and make a report to this Court. The Commission is an independent body created by the Legislature. It is the heart of the machinery created by the Legislature as an alternative to impeachment. Impeachment is, throughout, a legislative procedure, with which this Court has no concern whatever. Constitution of North Carolina, Article IV, §§ 1 and 4. The only function of this Court in the new alternative procedure is to act as a check and restraint upon the Judicial Standards Commission. As the majority opinion states, the Judicial Standards Commission has not been given by the Legislature the final authority either to censure or to remove a judge. Clearly, the Legislature did not intend for the Commission to have the Legislature's unbridled authority of impeachment, but it is just as clear that the Legislature did not intend to give this Court the unbridled authority. The Legislature, itself, retains that power, the House of Representatives having the power to impeach and the Senate being the Court for the Trial of Impeachments. North Carolina Constitution, Article IV, § 4.

This Court's only function in the new alternative to impeachment is to act "upon the recommendation of the Commission," i.e., to "approve the recommendation, remand for further proceedings, or reject the recommendation." The decision of the majority in the present case lays claim to a fourth power—the power to impose upon the offending judge a sanction not recommended by the Commission.

This Court has no authority to remove Judge Hardy from office in this proceeding. Therefore, its decision not to remove him is not a matter of judicial grace. The Court is simply without that power.

Justices BRANCH and MOORE join in this opinion.

STATE OF NORTH CAROLINA v. JOHNNY LOWELL THOMAS

No. 104

(Filed 24 January 1978)

1. **Criminal Law § 91.1— motion for continuance—discretion—constitutional right—appellate review**

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; however, if the motion is based on a right guaranteed by the Federal and State constitutions, the question presented is one of law and not of discretion, and the ruling of the trial court is reviewable on appeal.

2. **Criminal Law § 91.6— motion for continuance—EEG examination—no abuse of discretion in denial**

The trial court did not abuse its discretion in the denial of defendant's motion for a continuance so that defendant could undergo an EEG examination to determine whether defendant suffered from reduced impulse control where defendant had had two prior continuances for psychiatric examinations; prior to trial defendant had undergone two psychiatric examinations at Dix Hospital and examinations by a private psychiatrist and a private psychologist; all the doctors who examined defendant had similar opinions regarding his mental condition; and the psychiatrist and psychologist who recommended the EEG stated that it probably would yield no new information.

3. **Criminal Law § 91.6— motion for continuance—EEG examination—denial not violation of constitutional rights**

The denial of defendant's motion for a continuance in order to obtain an EEG examination to determine whether he suffered from reduced impulse control did not deprive defendant of his rights of confrontation and due process, since the "irresistible impulse doctrine" is not recognized in North Carolina, and the examination could not have established an insanity defense.

4. **Jury § 6— motion to examine jurors individually—discretion of court**

A motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process.

5. **Jury § 6— denial of motion to examine jurors individually**

The trial court did not err in denying a murder defendant's motion to examine each prospective juror separately because of pretrial newspaper publicity where, prior to the *voir dire* examination, the trial court asked the prospective jurors whether any of them had formed or expressed an opinion about defendant's guilt or innocence; defense counsel and the district attorney stipulated that each juror who served on the jury had stated that he did not know of anything which would prevent him from giving defendant and the State a fair trial; and the three newspaper reports about the crime which were filed with the motion were not inflammatory or biased.

**6. Jury § 7.6— post-trial motion to examine jurors—knowledge of prior conviction**

In this homicide prosecution, the trial court did not abuse its discretion in the denial of defendant's post-trial motion to ask jurors about their knowledge of defendant's previous conviction of another murder and the effect, if any, it may have had upon their deliberations, where defendant had the opportunity to examine each juror on *voir dire* regarding his or her exposure to pretrial publicity about the prior conviction, and defendant failed to exhaust his peremptory challenges.

**7. Homicide § 21.1— illustrative photographs**

In this homicide prosecution, the trial court properly admitted for illustrative purposes six photographs showing the bloodstained interior of the house where deceased was allegedly stabbed, three photographs depicting the exterior of the house and the street where deceased was stabbed a second time, and four photographs showing bruises on either side of deceased's face, a chest wound, and a wound in the abdomen.

**8. Homicide § 20.1— photograph of knife**

In this homicide prosecution, a photograph of a butcher knife found in the yard of a home near where deceased was killed was properly admitted to illustrate the testimony of an SBI agent concerning the location of the knife when found and its description.

**9. Criminal Law § 42.2; Homicide § 20— identification of knife**

In this homicide prosecution, testimony of a witness describing the knife used by defendant to stab deceased and evidence that a freshly bloodstained knife answering this description was found in the yard of a home near the crime scene were sufficient identification of the knife so found to permit its introduction into evidence.

**10. Homicide § 21.5— first degree murder—premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation to go to the jury on the question of defendant's guilt of first degree murder of his wife where the State's evidence tended to show that defendant broke into the house occupied by his wife and her son after he had been refused admittance; defendant approached his wife with arms outstretched as if to embrace her, pulled a concealed butcher knife from underneath his shirt and stabbed her; defendant then followed his wife into the yard, and, as she was lying upon the ground, knelt beside her and, without provocation, plunged the knife into her abdomen; and the two stab wounds caused the wife's death almost immediately.

APPEAL by defendant from *Seay, J.*, at the 2 May 1977 Session of SURRY Superior Court.

Upon an indictment, proper in form, defendant was tried and convicted of the first degree murder of Clara Chandler Thomas, and was sentenced to life imprisonment.

The State introduced evidence, summarized as follows:

On 4 October 1976 the defendant was living with his wife, Clara Chandler Thomas, at 130 West Elm Street in Mount Airy. Two of Mrs. Thomas's sons, Ralph Chandler and Michael Chandler, were living with the couple.

On the morning of 4 October 1976, after having slept in her bedroom with defendant, Mrs. Thomas had a black eye and bruise marks about her face, none of which she had the preceding day. On seeing the bruises, Ralph Chandler told defendant that it would be best for him to leave. Defendant did leave that day around noon, carrying certain of his belongings. He returned at five o'clock that afternoon. The front screen door was locked, and Ralph and his mother refused to let him in. Defendant jerked the screen door open and entered the house. He extended his arms and approached Mrs. Thomas as if to hug her. When he was about a foot from Mrs. Thomas, he suddenly pulled a butcher knife from underneath his shirt and stabbed her in the right posterior chest underneath her shoulder blade. Mrs. Thomas fell into the dining room.

Defendant then turned and started swinging the knife at Ralph. He chased Ralph around the house, and cut him on the face and ripped his clothing several times with the knife. Ralph then grabbed a baseball bat from his room and swung it at defendant. By this time Mrs. Thomas was on her feet, and she and Ralph ran out the front door. Mrs. Thomas ran down the street toward the house next door and fell in the yard of the house at 120 West Elm Street. Ralph ran to a neighboring house to call an ambulance and the police. When he returned a police officer was present, and Mrs. Thomas was dead.

Teresa H. Howell, who lived across from Mrs. Thomas, saw Ralph Chandler and his mother come out of their house in the late afternoon of 4 October 1976. Mrs. Thomas was bleeding. Mrs. Howell ran to her phone to call the police. When she returned to her front door she saw Mrs. Thomas lying on her back in front of 120 West Elm Street, and defendant coming out of the house at 130 West Elm Street. He walked down the street to where Mrs. Thomas lay and leaned down beside her. Defendant apparently talked to Mrs. Thomas for a minute or more. He then took a

knife, held it to Mrs. Thomas's abdomen, and stabbed her. After this, he got up and walked away.

Don White, a Mount Airy police officer, drove to 130 West Elm Street at around 5:00 p.m. on 4 October 1976, pursuant to a radio call. There he saw Mrs. Thomas lying dead near the sidewalk.

David Beal, an S.B.I. agent, arrived on the scene shortly after 5:00 p.m. When he arrived, Mrs. Thomas was dead. Upon inspection of her body he discovered a small stab wound in her abdomen, and a large stab wound in her back near the shoulder blade. A large butcher knife with fresh blood on its blade was found in the yard of a nearby home.

Paul Shelton is the defendant's cousin and lives in Sheltontown, near Mount Airy. He went to his mother's home at 9:30 on the evening of 4 October 1976, and found defendant sitting in the living room talking with Shelton's mother. Afterwards, Shelton and defendant bought some beer and rode around. Defendant informed Shelton that he wanted to go back to Mount Airy because he had stabbed a drug pusher that afternoon and wanted to return home to check on his neighborhood. Shelton drove the defendant back to Elm Street in Mount Airy. He then drove defendant by the Mount Airy police station, but defendant refused to go inside. Shelton then suggested that they go to the hospital to see whether they could find out anything. At the hospital Shelton learned that a woman had been brought into the hospital that afternoon who had died of stab wounds. When he so informed the defendant, defendant stated: "Yes, I know, that is my wife. I killed her."

Mrs. Thomas died as a result of the wound to the right posterior chest.

The defendant offered evidence, summarized as follows:

Defendant lived with his mother, Mrs. Nora Thomas, in 1975 before he married the deceased. During this time he insisted on cooking his own food and refused to eat anything prepared by his mother, saying he was afraid that his mother was trying to poison him. On one occasion, about 3:00 a.m., defendant was discovered acting as though he were hanging curtains in the room. When asked about this the following morning he remembered nothing

about it. Defendant tried to hang himself two or three times prior to 4 October 1976. In January 1976 he had jumped from a tree with a rope around his neck. The rope broke and the defendant got up and walked into the house. When his mother asked him about this incident, defendant told her that he did not remember it, and further told her that he did not think she was his mother.

After his arrest but prior to 28 March 1977, defendant underwent two psychiatric examinations at Dix Hospital. Both times he was found to be capable of proceeding to trial. When Dr. James R. Isreal, a psychiatrist, examined him on 28 March 1977, the defendant did not have a psychosis. In Dr. Isreal's opinion, defendant suffered from alcoholism, had a personality disorder termed "passive dependent and passive aggressive," and had probably experienced psychotic episodes, or departures from reality, including hallucinations and paranoid delusions, at some time prior to his examination. On cross-examination the doctor admitted that none of the personality defects he referred to would prevent a person from functioning normally in society, and further admitted that the defendant was functioning in reality at the time he was examined. Dr. Isreal further testified that defendant scored 114 on his IQ test, above average and in the bright normal range.

Other facts pertinent to the decision are set out in the opinion.

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

*Stephen G. Royster for defendant appellant.*

MOORE, Justice.

Defendant's first assignment of error is based on the contention that the trial judge erred in denying his motion for continuance for purposes of obtaining further psychiatric examination to determine his sanity.

Defendant was arrested on 4 October 1976. On 26 October 1976 counsel for defendant filed a motion requesting that defendant be committed to Dorothea Dix Hospital for evaluation to determine defendant's capacity to proceed to trial as well as his sanity at the time of the commission of the crime. This motion

was granted and defendant underwent examination for two weeks at Dix Hospital. In a Diagnostic Conference Report filed by Billy W. Royal, M.D., dated 16 November 1976, the physician determined that the defendant was mentally capable of proceeding to trial. The defendant was also found to have reduced responsibility at the time of the crime, this being related to significant alcoholic ingestion.

On 22 December 1976 counsel for the defendant moved that defendant be recommitted to Dorothea Dix Hospital for further examination due to the initial examining physician's failure to give his opinion as to defendant's ability to distinguish between right and wrong. This motion was granted and defendant was recommitted to Dix Hospital. In a Diagnostic Conference Report filed 21 January 1977 by Bob Rollins, M.D., that physician stated that the defendant was able to plan and carry out goal-directed activity even though intoxicated, and that defendant met the minimum criteria for premeditation and deliberation. In his opinion the defendant did have diminished responsibility at the time of the offense, this being due to intoxication.

On 15 February 1977 defendant filed a motion for continuance on the ground that he had an appointment on 27 March 1977 to be examined by a private psychiatrist. At the March Term of Surry Superior Court defendant's case was continued until the May Term.

On 28 March 1977 defendant was examined by a private psychiatrist, J. Ray Isreal, M.D., and by a psychologist, Dr. David A. Hill, of the Bowman Gray School of Medicine. Dr. Hill administered certain uniform tests to defendant and submitted his findings to Dr. Isreal on 4 April 1977. The psychologist found that defendant's test scores were within normal limits and were above average in terms of intellectual functioning. The defendant was found to be impulsive and hostile. The psychologist suggested than an electroencephalogram test (EEG), or brain wave test, might possibly resolve questions as to whether or not defendant had suffered cerebral insult, but added that even if such condition were found it would not necessarily interfere with defendant's ordinary daily functioning.

For reasons not apparent from the record, Dr. Isreal did not submit a written evaluation to defendant's counsel until 25 April

1977. In Dr. Isreal's opinion the defendant had sufficient mental capacity to stand trial. He also found no evidence that the defendant suffered from a thought disorder. The defendant was found, however, to suffer from alcoholism, and was found likely to act impulsively, especially when intoxicated. Pursuant to the suggestion by Dr. Hill, Dr. Isreal recommended that the defendant have an electroencephalogram to determine if there had been ". . . prior cerebral insult which may have affected areas of the brain which might reduce impulse control and further contribute to his loss of impulse control when under the influence of alcohol. It is conceded that electroencephalographic examination probably would not help clarify this question. . . ."

On 28 April 1977 defendant moved for a continuance so that he might have an EEG examination as recommended by Dr. Isreal. This motion was denied by Seay, J., and defendant proceeded to trial at the 2 May 1977 Term of Surry Superior Court.

**[1]** A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling is not subject to review absent abuse of discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975); *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, the question presented is one of law and not of discretion, and the ruling of the trial court is reviewable on appeal. *State v. Brower, supra; State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1975); *State v. Smathers, supra.* Whether a defendant bases his appeal upon an abuse of judicial discretion or a denial of his constitutional rights, he must show both that there was error in the denial of the motion and that he was prejudiced thereby before he will be granted a new trial. *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1967). Defendant urges both abuse of discretion and denial of his constitutional rights as error.

We first take up the issue whether there was an abuse of the trial judge's discretion in denying defendant's motion. At the pretrial hearing on defendant's motion on 2 May, the following occurred:

> "COURT: That motion is denied. In denying the motion I make the finding that the record reflects and the statement

of counsel reflects that the defendant was arrested on October 1976, and had counsel appointed October of 1976, and that at the January Session of the Superior Court of Surry County, the defendant moved to continue the case, requesting that the accused or the defendant be sent for a second examination at the Dorothea Dix Hospital, that the request to the trial judge that the defendant be sent for an examination was denied and that counsel then contacted the resident judge, James Long, who agreed to sign the order sending the defendant for the second examination and motion for the defendant to continue the case was then granted, this event having occurred January 5, 1977. And the defendant has had more than an adequate time and opportunity to secure examination.

"MR. ROYSTER: Your Honor, if I may say this, I might have misled your Honor, my client was sent twice to Dorothea Dix and this is a private psychiatrist that examined the defendant March the 21st, or 22nd.

"COURT: Well, I will find that you have had an opportunity to have it done since that time. That motion is denied."

Defendant argues that the trial judge erred in finding that defendant had an opportunity to have the desired examination, since he did not receive the report from Dr. Isreal recommending the examination until 25 April 1977, and his case was called for trial on 2 May 1977. Defendant argues that this alleged error constitutes abuse of discretion. We do not agree.

The trial court found that the defendant had been arrested in October 1976. He was sent to Dix Hospital for psychiatric examination in November 1976. At the January Session of Surry Superior Court defendant moved for, and was granted, a continuance of his trial so that he could be examined a second time by a different physician at Dix Hospital. The results of this examination were similar to those of the initial examination—a finding that defendant was capable of proceeding to trial and capable of premeditation and deliberation. A second motion for continuance was made in February 1977 so that defendant might be examined a third time, and defendant's case was again continued and set for the May Term. Defendant was examined by Drs. Isreal and Hill the last week in March, and as early as 4 April 1977 Dr. Hill made

his recommendation to Dr. Isreal that the defendant undergo an EEG examination. Defendant's counsel apparently did nothing between the date of examination and 25 April (the date he alleges he first heard from Dr. Isreal) to find out if further examinations would be necessary before the trial in May.

**[2]** Clearly, on these facts, the trial judge would be justified in his discretionary denial of a last minute motion for continuance. The defendant had had two prior continuances; had undergone four psychiatric examinations by four different doctors, all of whom had similar opinions regarding defendant's mental condition; and those doctors who recommended the EEG examination stated that it probably would yield no new information. No abuse of discretion has been shown.

**[3]** We now turn to the contention that the denial of the motion for a continuance was a denial of defendant's constitutional rights. In *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975), this Court, quoting from *State v. Farrell*, 223 N.C. 321, 26 S.E. 2d 322 (1943), said:

> "The authority to rule a defendant to trial in a criminal prosecution attaches only after the constitutional right of confrontation has been satisfied. The question is not one of guilt. Nor does it involve the merits of the defense he may be able to produce. It is whether the defendant has had an opportunity fairly to prepare his defense and present it. . . .
>
> " 'The rule undoubtedly is, that the right of confrontation carries with it not only the right to face one's "accuser and witnesses with other testimony" [N.C. Const. art. I, sec. 23 (1971)], but also the opportunity fairly to present one's defense. . . .' "

*See State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Lane*, 258 N.C. 349, 128 S.E. 2d 389 (1962). And, as we said in *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970): "Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. [Citations omitted.]"

The specific question presented here is whether the denial of defendant's motion for a continuance in order to obtain an EEG examination deprived defendant of his right of confrontation and his right to due process under the federal and State constitutions. We think not. Had the EEG test been administered to determine whether defendant suffered from reduced impulse control, and had such reduced impulse control been discovered, such findings would not have established an insanity defense.

The test of insanity as a defense to a criminal charge was stated by Ervin, J., in *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948), as follows:

> "[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act. [Citations omitted.]"

Subsequent decisions of this Court are in strict accord: *See State v. Potter*, 285 N.C. 238, 249, 204 S.E. 2d 649, 656-57 (1974), and cases cited therein. And, as Justice Branch, speaking for the Court, said in *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973): ". . . North Carolina, as well as many other jurisdictions, has steadfastly refused to recognize the 'irresistible impulse doctrine' as a test of criminal responsibility. [Citations omitted.]" *See State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967), *rev'd on other grounds*, 392 U.S. 649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290 (1968); *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1948); *State v. Brandon*, 53 N.C. 463 (1862).

Since the so-called "irresistible impulse doctrine" is not recognized in North Carolina as a valid defense, the denial of the motion for continuance in order to take an EEG examination could not have infringed on defendant's constitutional rights. As stated in *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1976), a similar case on its facts: ". . . Due process does not include the right to fish in psychiatric ponds for immaterial evidence." De-

fendant has shown no error in the denial of his motion for continuance. This assignment of error is overruled.

On 18 April 1977 defendant filed a motion requesting that he be permitted to examine each venireman privately before accepting or rejecting such prospective juror. On 22 April 1977 defendant filed an amendment to this earlier motion, and on 29 April 1977 he filed a supplement to the motion. Attached to the motion and supplement were three newspaper clippings from a local paper, all of which revealed that defendant was charged with the crime for which he was tried, and which also revealed that defendant was convicted of second degree murder in 1957 for the shooting death of one Sammy Belton. Defendant's motion to examine each prospective juror privately was denied in a pretrial hearing before the trial judge. The trial court found that such pretrial publicity ". . . would not prevent the defendant from having a fair trial under the law and wouldn't prevent counsel for the defendant from making inquiry of the jurors as to their fitness and competency to serve as jurors. . . ."

**[4]** Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729 (1970). *See also* G.S. 9-15(a). However, ". . . the actual conduct of the trial must be left largely to the sound discretion of the trial judge so long as the defendant's rights are scrupulously afforded him." *State v. Perry, supra.* Therefore, a motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Perry, supra. See also* 47 Am. Jur. 2d, Jury § 197; Annot., Voir Dire—Personal Examination, 73 A.L.R. 2d 1187, 1203 (1960). Contrary to defendant's contentions, the suggestion contained in *State v. Boykin, supra* (*viz*, that the lawyer in that case should have requested that prospective jurors be examined separately to determine if any had heard certain rumors about that defendant), does not give a defendant a right to separately examine each prospective juror for reasons of pretrial publicity. In fact, the Court in Boykin reaffirmed the trial judge's discretion

in regulating the manner and extent of inquiry at the *voir dire*. 291 N.C. at 272, 229 S.E. 2d at 919.

**[5]** In the present case the jury was selected in the manner approved by this Court in *State v. Perry, supra*, and in numerous other cases. *See State v. Young, supra; State v. Dawson*, 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Cutshall*, 281 N.C. 588, 189 S.E. 2d 176 (1972); *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410 (1971), *rev'd as to death penalty*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971). Prior to the *voir dire* examination the trial judge asked the prospective jurors the following: "[A]re any of you familiar with the alleged events of October the 4th, 1976, involving a Johnny Lowell Thomas or Clara Chandler Thomas; do any of you have personal knowledge about those events; have any of you formed or expressed an opinion concerning this case? . . . Then I take it that the twelve of you sitting there have not formed or expressed an opinion about the guilt or innocence of this defendant in this case. . . ." Counsel for defendant and the district attorney stipulated that they asked each and every juror whether they knew of anything which would prevent them from giving the defendant or the State a fair trial, and each of those jurors who served on the jury answered that he did not know of any reason why he could not. Furthermore, there was nothing inflammatory or biased about the three news reports of this crime. Based on these facts, we hold that there was no abuse of discretion by the trial judge in denying defendant's motion to examine the prospective jurors separately. *See State v. Young, supra; State v. Perry, supra; State v. Jarrette, supra.* The precautions taken by the trial judge were sufficient to safeguard defendant's right to a fair and impartial jury.

**[6]** Neither did the trial judge err in denying defendant's post-trial motion to ask jurors concerning their knowledge of defendant's previous conviction of murder, and the effect, if any, it may have had on their deliberations. Defendant had the opportunity to examine each juror on *voir dire* regarding his or her exposure to any pretrial publicity concerning the case. This opportunity, coupled with defendant's failure to exhaust his peremptory challenges, operates as a waiver of any right to object to the trial court's denial of his post-trial motion. *Cf. State v. Boykin, supra.* Denial of this motion also was in the sound discretion of the trial judge.

Defendant's sixth assignment of error addresses a related point. He contends that the trial court failed to give due consideration to his pretrial motion to examine each prospective juror separately, and that this alleged failure to duly consider his written motion is prejudicial error. Since we have held, *supra*, that the trial judge did not err in refusing to grant defendant's pretrial motion to question each prospective juror separately, and that the trial judge took precautions to insure that no juror had prior knowledge of defendant's crime, any alleged failure to consider the facts underlying defendant's pretrial motion could not have been prejudicial to the defendant. Additionally, the record shows that the trial judge did in fact consider the evidence presented with defendant's pretrial motion. This assignment of error is overruled.

**[7]** During the trial the State introduced a number of photographs for the purpose of illustrating the testimony of witnesses concerning the location of wounds on the body of the deceased and the presence of bloodstains in various places within the house. Defendant contends it was prejudicial error to introduce so many photographs (a total of twelve), especially so many showing bloodstains. Six of the photographs showed the bloodstained interior of the house where deceased was allegedly stabbed. These photographs were offered for the purpose of illustrating the testimony of Ralph Chandler, who described the location of the stabbing and his mother's actions and movements after the stabbing, and the testimony of witnesses who described the interior of the house and bloodstains found therein shortly after the stabbing. Three other photographs depict the exterior of the house and the street. These photographs illustrate testimony concerning Mrs. Chandler's movements after she exited the house, and the spot where she was stabbed a second time. Only four of the photographs were of the deceased. Two of these showed the bruises on either side of deceased's face; a third, the chest wound; and the fourth, the wound in the abdomen. These photographs illustrated the testimony of the witness Ralph Emerson Chandler and that of the pathologist who examined the body of the deceased. Only one photograph of each severe wound was introduced. There was nothing gory or gruesome about any of these.

Photographs are admissible in this State to illustrate the testimony of a witness and their admission for that purpose under proper limiting instructions is not error. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). *See generally* 1 Stansbury, North Carolina Evidence § 34 (Brandis rev. 1973). When a photograph is properly authenticated as a correct portrayal of conditions observed and related by the witness who uses it to illustrate his testimony, it is admissible for that purpose. *State v. Crowder, supra; State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967). The photographs in this case were used in accordance with the rule, and defendant's assignment of error is overruled.

**[8]** Under the same assignment of error defendant objects to the introduction of a photograph of the butcher knife found in the yard of a nearby home. This photograph was introduced to illustrate the testimony of David Beal, the S.B.I. agent investigating the homicide, who testified concerning the location of the knife when found, and also described the knife itself. It was competent for that purpose. *State v. Crowder, supra; State v. Atkinson, supra; State v. Porth, supra.*

**[9]** Defendant next assigns as error the introduction of the butcher knife into evidence. The evidence of the witness Ralph Emerson Chandler describing the knife used by defendant, and evidence that a freshly bloodstained knife answering this description was found nearby, were sufficient identification to allow its introduction into evidence. In *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975), a murder case in which a hammer was found some 385 feet from the scene of the murder, we stated: "Any object which has a relevant connection with the case is admissible in evidence and weapons may be admitted when there is evidence tending to show that they were used in the commission of the crime. [Citations omitted.] . . ." The fact that the knife in question was found some distance from the scene of the crime would not render the evidence incompetent but would only affect its probative force. *State v. King, supra; State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85 (1972); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938).

**[10]** Finally, defendant assigns as error the failure of the trial judge to sustain his motion to dismiss on the charge of first degree murder at the close of the State's evidence and at the close of all the evidence. Defendant contends that there was not sufficient evidence of premeditation and deliberation to go to the jury on the question of first degree murder, and that his motion, therefore, should have been allowed.

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.

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*.

When there is a motion for judgment as of 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).

In present case the State offered evidence tending to show that defendant broke into the house occupied by his wife, the victim, and her son after he had been refused admittance. Defendant approached his wife with arms outstretched as if to embrace her, pulled a concealed butcher knife from underneath his shirt and stabbed her, inflicting a wound which subsequently caused her death. Not content with this defendant followed his wife into the yard, and, as she was lying upon the ground, knelt beside her and without provocation plunged the knife into her abdomen. These two wounds caused her death almost immediately. In our opinion, when taken in the light most favorable to the State, this evidence was sufficient to permit the jury to reasonably infer that defendant, with malice, after premeditation and deliberation, formed a fixed purpose to kill his wife 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. This assignment of error is overruled.

We have carefully examined the entire record and find no error that would justify disturbing the verdict or judgment.

No error.

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JAMES N. DUGGINS, JR. v. NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

No. 87

(Filed 24 January 1978)

**1. Accountants § 1— accountancy—regulation by State**

The practice of accountancy—a profession or calling requiring knowledge and skill—is subject to regulation by the State.

**2. Accountants § 1— certification of CPA—experience requirement—rules promulgated by Board—no enlargement of statutory requirement**

Rule (9)(c)(1) of the Board of CPA examiners which sets forth the experience requirements for certification does not enlarge the experience requirement of G.S. 93-12(5) in excess of the Board's authority, since the statute, like the rule, requires that an applicant for certification who relies upon two years' experience on "the field staff" of a CPA must have worked under a CPA *in public practice.*

**3. Accountants § 1— public practice of accountancy—definition**

A certified public accountant is engaged in the public practice of accountancy if he holds himself out to the public as an accountant prepared and offering to perform any and all the services enumerated in G.S. 93-1(5), that is, the services ordinarily rendered by one whose profession is accountancy.

**4. Accountants § 1— licensing of CPA—experience requirement—supervision of CPA in public practice of accountancy**

Plaintiff's contention that the range of experience contemplated by G.S. 93-12(5) before licensing as a CPA will necessarily be acquired by one working with any CPA regardless of the nature of his work or specialization is insupportable, since, to achieve the statutory purpose that only competent and experienced applicants be certified, G.S. 93-12(5) must be interpreted as requiring that an applicant's experience not only be received under the supervision of an accountant but that it be in the public field of accountancy.

**5. Accountants § 1— licensing of CPA—experience requirement**

The requirement that an applicant for certification have two years of experience under the tutelage of an accountant engaged in the public practice of accountancy is rationally related to the legislative purpose of ensuring that only an applicant qualified and prepared to enter the public practice by himself be certified.

**6. Accountants § 1; Constitutional Law § 20.1— certification of CPA—experience requirement—no violation of equal protection clause**

Plaintiff's contention that G.S. 93-12(5) which sets forth the experience requirements for licensing as a CPA is unconstitutional on its face because it violates the equal protection clauses of the federal and state constitutions is without merit, since the classification of applicants for CPA certification into two groups, those with two years' experience with a CPA in public practice and those without, is reasonably related to the purpose of the legislature, which is to certify only qualified applicants, and the classification is not invidiously discriminatory.

**7. Accountants § 1; Constitutional Law § 20.1— certification of CPA—failure to meet experience requirement—statute constitutionally applied**

Plaintiff's contention that G.S. 93-12(5) and Rule (9)(c)(1) were unconstitutionally applied to him because his experience working under a lawyer who was also a CPA was exactly the same as that which an applicant working with a CPA in public practice would receive is without merit, since the equal protection clauses of the state and federal constitutions are not violated by mere "incidental individual inequality," and the same rule which disqualified plaintiff from certification as a CPA would disqualify all other lawyers similarly situated.

ON petition for discretionary review of the decision of the Court of Appeals (25 N.C. App. 131, 212 S.E. 2d 657 (1975)), which reversed the judgment of *Bailey, J.*, entered at the 7 July 1974

Session of WAKE Superior Court, docketed and argued as Case No. 16 at the Fall Term 1975.

Petitioner-appellant, James N. Duggins, Jr. (Duggins), graduated from the University of North Carolina School of Business in June 1965, with a major in accounting. In May 1965 he "passed satisfactorily" the examination given by the State Board of Certified Public Accountant Examiners (Board). However, in addition to passing this examination, at that time N.C. Gen. Stats. § 93-12(5) (1965) also required that an applicant for a certificate of qualification to practice as a certified public accountant (CPA) "shall have had at least two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice, or shall have served two or more years as an internal revenue agent or special agent under a District Director of Internal Revenue or at least two years on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant and shall have the endorsement of three certified public accountants as to his eligibility."[1] Advanced degrees in economics or business administration may be substituted for one year of experience. The statute authorized the Board to permit persons otherwise eligible to take its examination and to withhold certificates until such persons shall have had the required experience.

In August 1965 the Board notified Duggins that his certification was being held "in suspense" until he had acquired the necessary experience and submitted the proof required by rule (9)(c)(1), Section II, Rules of the Board:

"Each applicant must submit proof, acceptable to the Board, that he has had:

"(1) AT LEAST TWO YEARS' EXPERIENCE ON THE FIELD STAFF OF A CERTIFIED PUBLIC ACCOUNTANT IN PUBLIC PRACTICE OR A NORTH CAROLINA PUBLIC ACCOUNTANT IN PUBLIC PRACTICEE." (Emphasis Supplied.)

1. By 1975 N.C. Sess. Laws, ch. 107 and 1977 N.C. Sess. Laws, ch. 804, the General Assembly rewrote the second sentence of the second paragraph of G.S. 93-12(5) (1965). These revisions, however, do not affect Duggins' right of certification. See N.C. Gen. Stats. 93-12(5) (Cum. Supp. 1977).

"(2) Or, shall have served two or more years as an internal revenue agent or special agent under a District Director of Internal Revenue.

"(3) Or, shall have served at least two years on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant.

"(4) A master's or more advanced degree in economics or business administration from an accredited college or university as provided in Rule (9)(b)(2) may be substituted for one year of experience."

Duggins' file remained in suspense until 20 December 1972. In the meantime, Duggins graduated from the University of North Carolina Law School in the spring of 1968. In August 1968 he passed the North Carolina Bar Examination and was licensed to practice law in this State. During the summer months of 1966 and 1967 he worked a total of 939 hours as a staff accountant for a firm of certified public accountants engaged in public practice in Durham, North Carolina. In the fall of 1968 Duggins joined the law firm of Smith, Moore, Smith, Schell & Hunter of Greensboro. There he worked under the direct supervision of one of the partners, Richard J. Tuggle, a lawyer and a CPA in good standing.

For more than four years Duggins spent over fifty percent of his time working on tax accounting matters under Tuggle's supervision. In this work he accumulated over 9,000 hours in the preparation of individual, corporate, and fiduciary income tax returns, state inheritance and federal estate tax returns, and in preparing tax protests; in making detailed analysis of financial information, verifications of financial transactions, books, accounts, and records; and in representing taxpayers at the agent level, conference level, and in the appellate division of the Internal Revenue Service.

On 20 December 1972 Duggins applied to the Board for his license as a CPA. His application, which recited his experience as detailed above, was supported by an affidavit from Mr. Tuggle. Upon receiving notice that the Board intended to deny his application on the ground that he had not acquired the experience

required by G.S. 93-12(5), Duggins requested a public hearing. At this hearing on 26 May 1973 Duggins testified to the facts summarized above. In a decision dated 21 August 1973, the Board denied Duggins' application. In addition to the facts set out above, the Board found as a fact "that the sole reason the Board rejected [petitioner's] application . . . is that he has been employed under the supervision of a lawyer who is also a CPA and not in the public practice of accountancy."

The Board concluded as a matter of law that "being an employee of a law firm [and] working under the supervision of a lawyer who is also a licensed certified public accountant not in the public practice of accountancy does not meet the experience requirements of the licensing statute and rules of the Board." Additionally, the Board noted that its administrative interpretation of G.S. § 93-12(5) had long been that "employment by a licensed certified public accountant engaged in the practice of law is not experience which would qualify an applicant for licensing by the Board as a certified public accountant."

Upon Duggins' appeal to the Wake County Superior Court, Judge Bailey reversed the Board's decision and directed it to issue a certificate to Duggins. The Board appealed this ruling to the Court of Appeals, which held that the Board's interpretation of G.S. 93-12(5) and its decision were in all respects proper. We granted Duggins' petition to review that decision.

*Daniel W. Donahue for petitioner appellant.*

*Allen, Steed and Pullen, P.A., by Lucius W. Pullen and D. James Jones, Jr., for respondent appellees.*

SHARP, Chief Justice.

This appeal presents three questions: (1) Is Rule (9)(c)(1) of Section II of the Rules of the Board of Certified Public Accountant Examiners (Board) consistent with N. C. Gen. Stats. § 93-12(5) (1975) and thus within the Board's rule-making authority? (2) If so, are the statute and rule prima facie constitutional? (3) If so, have the statute and rule been discriminatively applied to appellant in violation of the due process and equal protection rights guaranteed him by the Fourteenth Amendment and by N. C. Const. art. I, § 19?

**[1]** As Duggins concedes, the practice of accountancy—a profession or calling requiring special knowledge and skill—is subject to regulation by the State. In the exercise of its police power, for the purpose of protecting the general public from unqualified and inexperienced accountants, the General Assembly enacted N. C. Gen. Stats., ch. 93 (Chapter 93). *See State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949); *State v. Scott*, 182 N.C. 865, 878, 109 S.E. 789, 797 (1921); 2 Strong's N. C. Index 2d, *Constitutional Law* § 12 (1967). Section 93-12 of Chapter 93 (G.S. 93-12) created the Board and, *inter alia*, authorized it to make rules for the examination of applicants seeking certificates of qualification as certified public accountants, to conduct such examinations, and to issue certificates to applicants having the qualifications specified in G.S. 93-12(5). In addition to requirements of citizenship, residence, age, character, and education, this statute specifies at least two years of practical experience, which may be obtained in several ways.

Pursuant to its rule-making authority, the Board promulgated Rule (9)(c)(1) to implement the alternative experience requirements of G.S. 93-12(5). The first alternative specified in the statute is proof by the applicant that he has had "at least two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice." It is this requirement which Duggins claims to have satisfied. As the Board construes this provision the phrase "in public practice" modifies both "a certified public accountant" and "a North Carolina public accountant." Under this construction therefore, whether an applicant's experience be acquired on the field staff of a certified public accountant (C.P.A.) or of a North Carolina public accountant, the accountant must have been *in public practice.*

It is Duggins' contention that G.S. 93-12(5) requires only "the North Carolina public accountant" (not the C.P.A.) under whom an applicant has worked for two years to be in public practice. Duggins does not contend that Mr. Richard J. Tuggle, the C.P.A. under whose supervision he had worked "more than 50% of his time" for over four years, is engaged in the public practice of accountancy. Mr. Tuggle, in addition to being a C.P.A. in good standing, is a lawyer and a partner in a large law firm engaged in the general practice of law. He, like Duggins, is an attorney specializing in tax matters. Their work for the firm "covers the full gamut of tax-related matters."

**[2]** The first question we must consider, therefore is whether the Board's Rule (9)(c)(1) enlarges the experience requirement of G.S. 93-12(5) in excess of its authority. We conclude that it does not. Accordingly, we affirm the decision of the Court of Appeals that G.S. 93-12(5) requires that an applicant for certification who relies upon two years' experience on "the field staff" of a C.P.A. must have worked under a C.P.A. *in public practice.* This construction effects the intent of Chapter 93 as manifested by both its language and legislative history. Moreover, this construction is the Board's long-standing interpretation of G.S. 93-12(5) and is therefore entitled to "great consideration." *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E. 2d 200, 206 (1973).

In attempting to ascertain the legislative intent—the task of the judiciary—courts resort first to the words of the statute. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). In interpreting an ambiguous statute, "the proper course is to adopt that sense of the words which promotes in the fullest manner the object of the statute." 73 Am. Jur. 2d *Statutes* § 159 (1974). To determine the sense of the crucial phrases used in the experience requirement of G.S. 93-12(5) which is applicable to Duggins we must look to G.S. 93-1, which declares that the following terms are defined as follows:

"(3) A 'certified public accountant' is a person engaged in the public practice of accountancy who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter.

"(4) A 'public accountant' is a person engaged in the public practice of accountancy who is registered as a public accountant under the provisions of this Chapter.

"(5) A person is engaged in the 'public practice of accountancy' who holds himself out to the public as an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or

certification and the interpretation of such service through statements and reports."

**[3]** From the foregoing definition it is clear that the term "certified public accountant," as defined in Section (3), incorporates the concept of public practice. A certified public accountant is engaged in the public practice of accountancy if he holds himself out to the public as an accountant prepared and offering to perform any and all the services enumerated in Section (5) above, that is, the services ordinarily rendered by one whose profession is accountancy.

We find nothing in the language of G.S. 93-12(5) to displace the definition in G.S. 93-1 and the concept of a certified public accountant as a person engaged in the "public practice" of accountancy. As Judge Morris succinctly stated in the opinion of the Court of Appeals, "the phrase 'in public practice' as used in that portion of G.S. 93-12(5), which reads 'two years' experience on the field staff of a certified public accountant or a North Carolina public accountant 'in public practice' is equivalent to the phrase 'public practice of accountancy.' " *Duggins v. Board of Examiners*, 25 N.C. App. 131, 134, 212 S.E. 2d 657, 660.

The requirement that an applicant's experience be on the "field staff" of a C.P.A. further evidences the legislative intent that the accountant under whom he serves his apprenticeship be in public practice. Although the term is not defined in the statute, "field staff" is a common expression understood alike by both laymen and accountants. The word *field* "has been defined as meaning the sphere of practical operation, as of an organization or enterprise; also the place or territory where direct contacts, as with a clientele, may be made or first-hand knowledge may be gained; sphere of action or place of contest, either literally or figuratively; hence any scene of operations or opportunity for activity." 36A C.J.S. at 390 (1961).

Duggins asserts that "it is manifestly obvious that the administrative differentiation between C.P.A. aspirants studying under Certified Public Accountants 'in public practice' and those not bears no reasonable, rational relationship to the one constitutionally permissible state (sic) objective of Chapter 93 . . . *i.e.*, to insure the capability and fitness of an applicant to practice accountancy." Thus, he contends that a C.P.A. need not be in public

practice for his "field staff" to obtain firsthand knowledge of "professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems. . . ." G.S. 93-1(5).

**[4]** The proposition that the range of experience contemplated by G.S. 93-12(5) will necessarily be acquired by one working with any C.P.A. regardless of the nature of his work or specialization is insupportable. As the Board recognized when it promulgated Rule (9)(c)(1), to achieve the statutory purpose that only competent and experienced applicants be certified, G.S. 93-12(5) must be interpreted as requiring that an applicant's experience not only be received under the supervision of an accountant but that it be in the public field of accountancy. If Mr. Tuggle's activities as a lawyer-C.P.A. were limited entirely to tax litigation no one would seriously contend that Duggins, by working with Tuggle or on his staff, would receive the type of experience which accomplished the purpose of the statute. For obvious reasons, when a profession or calling requires special skill or knowledge, and the General Assembly has specified certain qualifications, training, or experience as a condition precedent to the right to practice that profession or calling, the statutory specifications must be complied with strictly. The General Assembly discovered long ago that to allow the Board to accept "equivalent" experience or educational qualifications in lieu of those specified in the statute would not do. A provision permitting such acceptance, once in the law, was excised by 1951 N.C. Sess. Laws, Ch. 844.

The history of legislation in this State mandating experience in the practice of accountancy for an applicant before he becomes eligible for certification as a C.P.A. is ably recounted in the Court of Appeals' opinion in *Duggins v. Board of Examiners*, *supra* at 135-37, 212 S.E. 2d at 660-61. A recapitulation of that history here would serve no useful purpose. Suffice it to say that from the time the State first began to regulate the profession of accountancy, it has required that applicants for certification have several years' experience in the public practice.

Moreover, after the publication of the opinion of the Court of Appeals in this case, an attempt was made to amend G.S. 93-12(5) so as to render eligible for certification persons, like Duggins, whose experience has been under a C.P.A. not engaged in the public practice of accountancy. Senate Bill 263 (1977) proposed an

amendment which, *inter alia*, would have rewritten the first alternative experience requirement of the statute to read as follows: "An applicant who has received a bachelor's degree, in addition to passing satisfactorily the examinations given by the board, shall have had two years' experience under the direct supervision of a person who holds a certificate as a certified public accountant. . . ."

Senate Bill 263 (1977) received an unfavorable committee report and did not become law. Thus, in all its enactments regulating the certification of public accountant, the General Assembly has clearly manifested its intent that an applicant's experience be acquired *in the field of public accounting*. The continuity in the law requiring such experience remains unbroken, and Board Rule (9)(c)(1) continues to express the intent of G.S. 93-12(5).

Duggins next argues that G.S. 93-12(5), as interpreted by the Board and the Court of Appeals, is unconstitutional on its face because, under the guise of promoting the general welfare, it imposes arbitrary and unnecessary restrictions upon his pursuit of a lawful occupation in violation of N.C. Const. art. I, § 19 and the "due process" and "equal protection" provisions of U.S. Const., amend. XIV.

Duggins bases his argument that he has been denied due process on two grounds. First, he contends that the experience requirement of the statute is invalid because it serves no legitimate public purpose; that it does nothing more than create a compulsory apprentice system by which applicants are forced to make their skills available, for a set period, to certified public accountants, North Carolina public accountants, and the other persons or entities mentioned in the statute. Secondly, Duggins argues that the requirement that an applicant's experience be received from a C.P.A. *in public practice* as opposed to any accountant who holds a certificate (*e.g.*, a C.P.A. engaged in the practice of law) is not rationally related to the permissible legislative objective that only competent, moral, and experienced applicants receive certification.

**[5]** After careful consideration we hold the requirement that an applicant for certification have two years' experience under the tutelage of an accountant engaged in the public practice of ac-

countancy is rationally related to the legislative purpose of ensuring that only an applicant qualified and prepared to enter the public practice by himself be certified.

The General Assembly reasonably concluded that an applicant would be exposed to a wider range of experience and acquire more benefit therefrom while working under a C.P.A. in public practice than under one with a specialized practice. Since the regulatory statutes envision that most C.P.A.s will enter public practice it is logical that they require applicants to obtain experience in the public arena prior to certification. By clear implication the General Assembly has found that such experience and tutelage will provide, at least potentially, the everyday working knowledge so vital to the competent practice of the complex profession of accountancy. We cannot substitute our judgment for that of the legislature.

In this regard we note that the General Assembly has imposed an experience requirement as a prerequisite to entry into many of the licensed professions and occupations in North Carolina. *E.g.*, G.S. 88-12 (cosmetologists); G.S. 90-61 (pharmacists); G.S. 90-210.25 (funeral directors and embalmers); G.S. 90-270.11(a) (practicing psychologists).

We note further that North Carolina is not unique in requiring applicants for a C.P.A. certificate to have had supervised experience in the practice of public accounting. Reference to the *Accountancy Law Reporter* (CCH) indicates that more than half the states require one or more years of public accounting experience prior to certification. The Board asserts in its brief (citing the *Accountancy Law Reporter*) that "at least 33 states require from one to five years of accounting apprenticeship."

**[6]** What we have previously said is also relevant to Duggins' contention that G.S. 93-12(5) is unconstitutional on its face because it violates the equal protection clauses of the federal and state constitutions. In his view the statute creates two classes of applicants—those who have two years' experience with a C.P.A. in public practice and those who have two years' experience with a C.P.A. not in public practice. Certificates are issued to those in the former class but not to those in the latter. Duggins asserts that the classification is unreasonable and unrelated to the State's

permissible objective of ensuring the capability and fitness of the applicants for a C.P.A. certificate.

At the outset we note that this case involves neither a suspect classification nor a fundamental interest specifically guaranteed by the federal or state constitutions. *See San Antonio School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973); 53 N.C.L. Rev. 551 (1975). The classifications we consider here deal with qualifications prescribed by the State for practitioners of a profession which the State regulates in the public interest. In this area, if the challenged classification bears any reasonable relation to the purpose of the statute it will not be set aside merely because it results in some inequalities in practice. Since this statute does not involve suspect classifications or fundamental interests it need not pass strict judicial scrutiny or the compelling State interest test. *Kotch v. Pilot Comm'rs*, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093 (1947); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970); *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522 (1975). The North Carolina cases applying the equal protection clause of the state and federal constitutions to challenged classifications have used the same test the federal courts used in the cases cited above. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976); *Smith v. Keator*, 285 N.C. 530, 206 S.E. 2d 203 (1974); *Variety Theatres v. Cleveland County*, 282 N.C. 272, 192 S.E. 2d 290 (1972); *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972); *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971); *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968).

Thus, in *In re Moore*, *supra*, this Court said: "The equal protection clauses of the United States and North Carolina Constitutions impose upon lawmaking bodies the requirement that any legislative classifications 'be based on differences that are reasonably related to the purpose of the Act in which it is found'. . . . Such classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety." (Citations omitted.) 289 N.C. at 104, 221 S.E. 2d at 313.

Applying these principles, we conclude that the classifications complained of are reasonably related to the purpose of the legislature and disclose no invidious discrimination. As we have heretofore pointed out, the purpose of Chapter 93 is to protect the public from unqualified accountants by ensuring that only knowledgeable, experienced applicants are issued certificates. An accountant seeks certification for the prestige it engenders and the confidence the public reposes in the designation "C.P.A." Ordinarily an accountant obtains certification for the purpose of holding himself out to the public as a C.P.A. It is logical, therefore, that experience in the "public practice" be deemed a prerequisite to certification. Further, the legislature could reasonably expect the type of experience received with a C.P.A. in public practice or with the Internal Revenue Service or State Auditor to be more varied than the experience available under one who does not hold himself out to the public as an accountant.

Basically Duggins is arguing that it is irrational and unreasonable for the legislature to choose one type of experience as being sufficient to qualify an applicant but to refuse a similar type which *may* be equally satisfactory in result. We considered and overruled this contention in *Guthrie v. Taylor*, *supra*. In *Guthrie* a teacher challenged a regulation of the State Board of Education governing the renewal of teaching certificates. In upholding the regulation we pointed out that the legislature does not act arbitrarily when it requires that recertification be obtained "by one or more procedures, which may reasonably be deemed likely to produce the desired result, to the exclusion of other procedures which might also be deemed reasonably likely to do so. Such choice between possibly effective procedures is for the rule making authority, not for this Court." 279 N.C. at 714, 185 S.E. 2d at 201. Nor is it material, the Court said, whether the teacher be correct in his contention that the experience he sought to substitute for that required by the regulation is an equally efficacious method for maintaining and improving the quality of instruction. There being a reasonable basis for the regulation issued by the Board of Education in the exercise of the power conferred upon it by the Constitution, this Court is not authorized to substitute its judgment for that of the State Board and invalidate the regulation "on the ground that, in our opinion, some other method for earning the required credits for renewal would be

equally as satisfactory in result." 279 N.C. at 715-16, 185 S.E. 2d at 202.

**[7]** Duggins' final argument is that, even assuming G.S. 93-12(5) and Rule (9)(c)(1) to be prima facie constitutional they have been unconstitutionally applied to him. Apparently he contends that his experience is exactly the same as that which an applicant working with a C.P.A. in public practice would receive; that he was denied certification solely because Tuggle was not technically engaged in the public practice of accountancy; and that such denial was, therefore, arbitrary.

Even if we were to assume that Duggins' experience was substantially similar to that which an applicant working with a C.P.A. in public practice might receive (and the evidence does not require that conclusion), we would not necessarily conclude that he was unconstitutionally denied his certificate. The equal protection clauses of the state and federal constitutions are not violated by mere "incidental individual inequality." *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed. 2d 5 (1961) (*per curiam*); *Phelps v. Board of Education*, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937). Whenever any classes are made the lines distinguishing them must be drawn. Of necessity some individuals will fall just short of the line while others will just barely cross it, and the differences between the two groups will often be slight. This result occurs regardless of where the line is drawn. To hold that the equal protection clauses prohibited this type of incidental individual inequality would be to effectively eliminate classification systems. Furthermore, to require an administrative agency, and ultimately the courts, to carefully weigh and balance the qualifications of each applicant who admittedly fails to meet the letter of the regulations, *vis-a-vis* applicants who do, would be an unwarranted drain upon judicial and administrative resources. *Martin v. Davis*, 187 Kan. 473, 357 P. 2d 782 (1960), *appeal dismissed*, 368 U.S. 256, 7 L.Ed. 2d 5, 82 S.Ct. 1 (1961).

Duggins' situation, as he recounted it to the Board, is this: When he graduated from the Business School at Chapel Hill in 1965 after having received numerous scholastic honors and been named Accounting Student of the Year, "he firmly intended to go into public accounting." To further his career in that profession he decided to obtain a law degree. While in law school he spent two summers working for a firm of accountants in public practice.

By the end of his second year he "had developed an interest in the tax area" and had made the decision "to do tax work." In 1968 he graduated with honors from the Law School at Chapel Hill and immediately accepted an offer to join the law firm in which Mr. Tuggle was a partner. "My work under Mr. Tuggle," he said, "would allow me to practice in the tax area."

Thus, Duggins voluntarily and deliberately chose to begin the practice of law instead of working for two years on the field staff of a C.P.A. in public practice. This choice now renders him ineligible for certification, but the Board has not discriminated against him or singled him out. The same rule which now disqualifies him will disqualify all other lawyers similarly situated. If inequality sometimes results from the application of G.S. 93-12(5) and Board Rule (9)(c)(1) it is neither invidious nor arbitrary. There is therefore no question of constitutional dimensions.

The decision of the Court of Appeals reversing the judgment of the trial court is affirmed. The case will be remanded to the Superior Court of Wake County with directions to enter judgment in accordance with this opinion.

Affirmed.

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STATE OF NORTH CAROLINA v. WILLIAM EARL McKOY

No. 72

(Filed 24 January 1978)

**1. Constitutional Law § 50— speedy trial—constitutional provisions**

The right of every person formally accused of crime to a speedy and impartial trial is secured by the fundamental law of this State and guaranteed by the Sixth Amendment to the federal constitution, made applicable to the State by the Fourteenth Amendment.

**2. Constitutional Law § 50— speedy trial—characteristics of right**

The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

**3. Constitutional Law § 50— speedy trial—factors used to determine denial**

The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant.

**4. Constitutional Law § 52— speedy trial—wilful neglect by prosecution**

Defendant in a first degree murder prosecution was denied his right to a speedy trial where there was a 22 month delay between his arrest and trial, and the delay for ten of those months was due to the wilful neglect of the prosecution but could have been avoided by reasonable effort.

**5. Constitutional Law § 52— speedy trial—showing that delay was due to wilful neglect of prosecution—burden of proof**

Where defendant carries the burden of proof by offering evidence which tends to show *prima facie* that the delay is due to the wilful neglect of the prosecution, the State should offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing or risk dismissal.

**6. Criminal Law § 91— trial sixteen months after detainer filed—failure of defendant to notify district attorney—no dismissal**

Defendant's contention that the trial court erred in denying his motion to dismiss because his trial was held more than sixteen months after a detainer was filed against him and thus in violation of G.S. 15-10.2 is without merit, since defendant failed to comply with the statute by failing to send to the district attorney a notice and request for trial by registered mail.

Justice MOORE dissenting.

Chief Justice SHARP joins in the dissenting opinion.

DEFENDANT appeals from decision of the Court of Appeals, 33 N.C. App. 304, 235 S.E. 2d 98 (1977), upholding judgment of *McLelland, J.*, 9 August 1976 Regular Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of James Franklin Lee on 12 October 1974.

The State's evidence tends to show that around noon on 12 October 1974 defendant was in an apartment at 211 N. State Street in Raleigh. Edmond Lee Gibson, James Franklin (Frankie) Lee, Anna Wright, Charles Daniel Goodwin, Mary Virginia Justice Watson, and perhaps others, were also present. A dispute arose between defendant and Frankie Lee. Defendant slapped Lee who went to his girl friend's house and returned with a gun. Defendant borrowed a shotgun while Lee was gone and upon

Lee's return ordered him to leave the premises by the count of ten and told Anna Wright to begin counting. When she reached eight or nine, defendant shot Frankie Lee. Lee died from gunshot wounds in the head.

Defendant offered no evidence. The jury convicted him of voluntary manslaughter and he was sentenced to eighteen years imprisonment. He appealed to the Court of Appeals contending (1) that the trial court erred in denying his motion to dismiss for lack of a speedy trial and (2) that the trial court erred in denying his motion to dismiss because his trial was held more than sixteen months after a detainer was filed against him and thus in violation of G.S. 15-10.2. The Court of Appeals found no error and defendant appealed to the Supreme Court as of right pursuant to G.S. 7A-30 urging involvement of a substantial constitutional question, *i.e.*, denial of the right to a speedy trial. His petition for discretionary review was also allowed by this Court.

Facts necessary to an understanding of the speedy trial issue are narrated in the following numbered paragraphs:

1. Defendant was arrested on 18 November 1974 upon a warrant charging him with the murder of James Franklin Lee on 12 October 1974. At the time of his arrest defendant was on parole from a seven-to-ten year sentence for involuntary manslaughter in Fayetteville in 1966. Shortly after his arrest his parole was revoked and he was returned to Central Prison to serve the remainder of his sentence. He also had an additional sentence of three years which would terminate on 19 May 1981.

2. A true bill of indictment charging him with the murder of James Franklin Lee was returned by the grand jury on 10 February 1975 and a detainer was filed against him in April 1975.

3. The case was first set for trial on 2 June 1975 but continued at that time on motion of the State for reasons not appearing in the record.

4. Defense counsel Joseph B. Cheshire, V, was appointed in November 1974. On 22 January 1976 Mr. Cheshire filed a motion to dismiss and an affidavit in support thereof alleging, among other things, as follows: (a) The case was scheduled for trial on 2 June 1975 but continued on motion of the State, and counsel orally requested on June 3, 4 and 11 that the district attorney fix a

new trial date and was informed on each occasion that the trial would be set at the earliest possible date; (b) on July 14 and 22, 1975 defense counsel approached the prosecuting attorney concerning a new trial date and was told that "there was no reason to have this defendant tried because he was in prison where he belonged" and the district attorney saw no reason or need to try him; (c) again in August, September, October and December of 1975 defense counsel made inquiry concerning a new trial date and was told by the prosecutor in charge that the case had not been set and would not be set because defendant was in Central Prison where he belonged; (d) defendant's parole in a former case had been revoked because of his arrest in this case; and (e) during all this time defense counsel had attempted to contact but had been unable to locate four material witnesses, namely, Charles Goodwin, Edmond Gibson, Mary Virginia Justice Watson and Clare Jones, all of whom defendant believed to be important to his defense.

On 3 March 1976 Judge McKinnon entered an order denying defendant's motion to dismiss "without prejudice to the defendant's right to show new circumstances when the case is calendared for trial." He ordered the case calendared for trial at or before the 3 May 1976 Session of the court.

5. On 19 February 1976 defendant filed a motion for a material witness order, pursuant to G.S. 15A-803, for the four witnesses named above and for Anna Wright. At the same time he filed a request and motion for a voluntary discovery, pursuant to G.S. 15A-902(a) and a motion for examination of witnesses. On 27 February 1976 Judge McKinnon entered an order granting substantially the relief requested in these motions.

6. The case was subsequently set for trial on 12 April 1976 but defense counsel was unavailable for trial and the case was not called. For reasons not disclosed by the record, the district attorney was thereafter unable to try the case by 3 May 1976 and Judge McKinnon orally extended the time for trial, allegedly for thirty days. When 3 June 1976 passed and the case had not been calendared, defendant, on 8 June 1976, filed a second motion to dismiss for failure to grant a speedy trial, assigning the lapse of time and the unavailability of defense witnesses, particularly Anna Wright. The case was thereafter calendared for trial at the 9 August 1976 Regular Session, Wake Superior Court. When the

case was called defendant renewed his motion to dismiss for lack of a speedy trial. After a hearing upon the motion, Judge McLelland entered an order in pertinent part as follows:

> "Upon consideration of the defendant's motion of August 9, 1976, for dismissal for failure to grant a speedy trial, the court after considering the record, the affidavits of counsel for the defendant, the testimony of witnesses for the defendant and of counsel for the State, makes these findings: That the defendant's first motion for prompt or speedy trial was heard by Judge McKinnon on January 30, 1976. Before entry of an order respecting the ruling on that motion, the motion for material witness order was heard by Judge McKinnon on 27 February 1976 and was continued to permit counsel for the State and defendant to determine whether the witnesses alleged to be material voluntarily would permit interviews by the counsel for the defendant and counsel for the State; that the motion for material witness order was again continued on April 1, 1976, by Judge Godwin, upon a failure of all, save one of such, witnesses to appear at the hearing on that date; that a material witness order was never issued; that the order of Judge McKinnon on 3 March 1976 denying defendant's motion to dismiss recited that it was issued without prejudice to the defendant's right to show new circumstances when trial of the action should be calendared, directed trial of the action on or before May 3, 1976; that trial was calendared for April 12, 1976, but not held and the case not called for trial; that defendant's counsel was unavailable for trial; that during the month of June, Judge McKinnon extended the time specified in his order of March 30 [March 3], 1976, for the trial of the action and the evidence is not sufficient to support a finding by this court as to whether such extension was to a limited time; that the trial was next calendared for this session, August 9, 1976; that all of the witnesses alleged to be material, save Anna Pearl Wright, are available at the session; that Anna Pearl Wright is regarded by defendant as a material and crucial witness and there is no showing that Anna Pearl Wright was not available at the April 12, 1976 Session; that there is no sufficient showing that Anna Pearl Wright is a crucial witness.

"WHEREFORE, the court concludes that the delay in calendaring trial from April 12, 1976, until this date, a period of four months, was not a violation of the March 30 [March 3], 1976 order of Judge McKinnon requiring trial by May third; and further that such delay has not been shown to be unreasonable; that possible prejudice to the defendant from the unavailability of the witness, Anna Pearl Wright, has not been shown to be due to the delay in rescheduling trial following April 12, 1976; that the failure to determine the materiality of the several witnesses mentioned in defendant's motion for a material witness order has not been shown to be due to the failure of the State to act nor to a deliberate effort by the State to harass or prejudice the defendant; that the delay in rescheduling trial after April 12, 1976, until this date is not constitutionally unreasonable and prejudicial to the defendant such as to warrant dismissal of the action.

"THEREFORE, IT IS ORDERED that the motion to dismiss be, and is, hereby denied."

The case was thereupon tried at the 9 August 1976 Regular Session, Wake Superior Court and resulted in a verdict of guilty of voluntary manslaughter and a sentence of eighteen years imprisonment. The Court of Appeals found no error.

*Joseph B. Cheshire V and William J. Bruckel, Jr., Attorneys for defendant appellant.*

*Rufus L. Edmisten, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State of North Carolina.*

HUSKINS, Justice.

Defendant contends that the Court of Appeals erred (1) in upholding the trial court's refusal to dismiss the charges against him on the ground that his Sixth Amendment right to a speedy trial had been violated, and (2) in upholding the trial court's refusal to dismiss the charges on the ground that he was not brought to trial within eight months after a detainer was filed against him in violation of G.S. 15-10.2(a). These contentions constitute his only assignments of error. We shall discuss them in the order listed.

**[1]** The right of every person formally accused of crime to a speedy and impartial trial is secured by the fundamental law of this State, *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965), and guaranteed by the Sixth Amendment to the federal constitution, made applicable to the State by the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967). Prisoners confined for unrelated crimes are entitled to the benefits of this constitutional guaranty. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

**[2]** The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).

**[3]** So, unless a fixed time limit is prescribed by statute, a claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. *Barker v. Wingo, supra; State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976); *State v. Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972); *State v. Johnson, supra.* No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Barker v. Wingo, supra.* See Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478, n. 15 (1968), for a slightly different approach.

Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution. *State v. Johnson*, supra. An accused who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice. *Barker v. Wingo*, *supra; State v. Wright*, *supra; State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965); *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed* 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965).

**[4]** With these principles in mind we now weigh the four balancing factors in light of the evidence in this case.

The length of delay between defendant's arrest and trial, almost twenty-two months, is unusual. Of course some delay is permissible in any case because minimal delays are inherent in every trial. "The possibility of unavoidable delay is inherent in every criminal action. The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. *Pollard v. United States*, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957)." *State v. Johnson*, 275 N.C. at 273, 167 S.E. 2d at 280. Since "we do not determine the right to a speedy trial by the calendar alone," *State v. Wright*, *supra*, we must consider the length of the delay in relation to the three remaining factors. *Barker v. Wingo*, *supra*.

The second factor, the reason for the delay of twenty-two months, is a mixed bag. The grand jury returned the bill of indictment on 10 February 1975 and the case was set for trial on 2 June 1975 but continued on motion of the State for reasons not disclosed. Nothing in the record suggests any purposeful or oppressive delay to this point. Rather, defendant's silence during this period supports our conclusion that he acquiesced in the delay prior to 2 June 1975. However, defense counsel's uncontradicted affidavit tends to show that failure to bring defendant to trial during the next ten months—from June 1975 to April 1976—was due to the wilful neglect of the prosecution and could

have been avoided by reasonable effort. Goaded by Judge McKinnon's order, the prosecution calendared the case for trial on 12 April 1976. Failure to try it at that time is chargeable, in part if not wholly, to defense counsel's unavailability. See Judge McLelland's order and defense counsel's second affidavit. Thereafter, the case was calendared and tried at the 9 August 1976 Session. Nothing in the record will support a finding of purposeful delay by the prosecution during the period from 12 April to 9 August. We must therefore determine whether countervailing factors outweigh the prosecution's purposeful, unexplained delay during the ten months from June 1975 to April 1976 in bringing defendant to trial.

We first note that there are no counterbalancing circumstances arising from waiver by defendant. Nothing in the record suggests waiver during the period of ten months from June 1975 to April 1976. To the contrary, defense counsel's affidavit asserts defendant requested a trial date eight or nine times during that period. The record contains no denial of those allegations. These facts are "entitled to strong evidentiary weight in determining whether defendant is being deprived of the right." *Barker v. Wingo, supra.*

The only counterbalancing factor is the fourth: prejudice to defendant was minimal. Defendant's claim that four of his witnesses became unavailable by reason of the delay is not supported by the record. Edmond Lee Gibson, Charles Daniel Goodwin and Mary Virginia Justice Watson were present at the trial on 9 August 1976 and testified for the State. Anna Wright was absent. We note that in his 22 January 1976 motion to dismiss, defendant did not list Anna Wright as a witness material to his defense. Her name was first included in his February 1976 motions. At the hearing on his motion to dismiss before Judge McLelland, defendant offered evidence tending to show that Anna Wright told Attorney Wade Smith, who originally represented defendant, that she was living with defendant on the day of the shooting; that when Frankie Lee returned to defendant's apartment, "the word was out" that he had a gun; that defendant ordered Lee to leave his apartment by the count of ten and told her to start counting; that while she was counting, Lee "stuck his hands up in his coat" and defendant shot him.

Detective Turnage testified he talked with Anna Wright on 21 October 1974, nine days after the killing, and she stated she was counting as directed by defendant, reached the count of eight or nine, and defendant shot Lee; that defendant then threw the gun on the couch and left; that she never mentioned seeing Lee "stick his hand up in a coat as if to get a gun." Officer Turnage further testified that he went to the scene of the killing immediately after it occurred and found the victim lying on his face in a pool of blood; that Lee did not have a coat on his person at that time and there was no coat in the immediate vicinity of the body. Moreover, Dr. Gordon LeGrand testified that he performed an autopsy on the body of James Franklin Lee on the morning of 13 October 1974 at which time the corpse was "wearing a red turtle neck sweater and tan plaid pants. . . ."

Although credibility and weight of testimony is a matter for the jury, in light of all the evidence it is highly improbable that the testimony of Anna Wright, had she been present, would have affected the result. Yet her testimony, whether true or false, would have required the trial court to submit the issue of self-defense.

**[5]** So it comes to this: Does the prosecution's *wilful* delay for ten months in bringing defendant to trial outweigh minimal prejudice to defendant occasioned by such delay? On the facts and circumstances revealed by this record the answer is yes. Barring circumstances which justify delay, a defendant desiring a speedy trial is constitutionally entitled to it within a reasonable time. Where, as here, defendant carries the burden of proof by offering evidence which tends to show *prima facie* that the delay is due to the wilful neglect of the prosecution, the State should offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing or risk dismissal. The record before us contains *no evidence* designed to explain or justify the ten-month delay from 2 June 1975 to 12 April 1976. Such indifference to the dictates of the law leaves appellate courts with few options. We hold defendant's first assignment of error is meritorious and must therefore be sustained.

**[6]** The other assignment argued in defendant's brief has no merit. G.S. 15-10.2(a) provides in pertinent part that when a detainer requiring a prisoner to answer a criminal charge pending against him in the courts of this State is filed against any

prisoner serving a sentence in this State, such prisoner "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; . . ." Here, defendant admits that he never sent to the district attorney a notice and request for trial "by registered mail" as required by the statute. We hold that he cannot claim the benefits afforded by the statute without complying with its terms. This accords with prior decisions in *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), and *State v. White*, 270 N.C. 78, 153 S.E. 2d 774 (1967).

For the reasons stated we hold that the Court of Appeals erred in sustaining the action of the trial court denying defendant's motion to dismiss for lack of a speedy trial. The decision of the Court of Appeals is therefore reversed and the case remanded to it for further remand to the Superior Court of Wake County for dismissal of the charges in accordance with this opinion.

Reversed and remanded.

Justice MOORE dissenting.

The record before us discloses an unlawful and intentional killing of a human being by an individual who was on parole from a seven to ten year sentence for the unlawful killing of another human being, albeit his conviction in that case was for involuntary manslaughter. Defendant's parole has been revoked and he is now serving the sentence imposed for the first killing. Hence, he has not been deprived of his liberty by reason of the delay in bringing the present case to trial.

As stated in the majority opinion, ". . . deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial. . . ." Furthermore, as stated in the majority opinion, "The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length

of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant."

Defendant first filed a written motion in January 1976 to dismiss the case because of the delay in bringing it to trial. Prior to this motion, defendant's counsel had only made informal, oral inquiries as to when the case would be tried.

On 3 March 1976, McKinnon, J., entered an order denying defendant's motion to dismiss for lack of a speedy trial "without prejudice to the defendant's right to show new circumstances when the case is calendared for trial," and ordered the case calendared for trial on or before the 3 May 1976 session of court.

When the case was called for trial at the 9 August 1976 session, defendant renewed his motion to dismiss. Judge McLelland, in denying this motion, stated:

> "[T]hat trial was calendared for April 12, 1976, but not held and the case not called for trial; that defendant's counsel was unavailable for trial; that during the month of June, Judge McKinnon extended the time specified in his order of March 30 [March 3], 1976, for the trial of the action and the evidence is not sufficient to support a finding by this court as to whether such extension was to a limited time; that the trial was next calendared for this session, August 9, 1976; that all of the witnesses alleged to be material, save Anna Pearl Wright, are available at the session; that Anna Pearl Wright is regarded by defendant as a material and crucial witness and there is no showing that Anna Pearl Wright was not available at the April 12, 1976 Session; that there is no sufficient showing that Anna Pearl Wright is a crucial witness."

Judge McLelland then concluded:

> "WHEREFORE, the court concludes that the delay in calendaring trial from April 12, 1976, until this date, a period of four months, was not a violation of the March 30 [March 3], 1976 order of Judge McKinnon requiring trial by May third; and further that such delay has not been shown to be unreasonable; that possible prejudice to the defendant from the unavailability of the witness, Anna Pearl Wright, has not been shown to be due to the delay in rescheduling trial

following April 12, 1976; that the failure to determine the materiality of the several witnesses mentioned in defendant's motion for a material witness order has not been shown to be due to the failure of the State to act nor to a deliberate effort by the State to harass or prejudice the defendant; that the delay in rescheduling trial after April 12, 1976, until this date is not constitutionally unreasonable and prejudicial to the defendant such as to warrant dismissal of the action."

All of defendant's witnesses, with the exception of Anna Wright, were present and available at trial but defendant elected not to offer testimony. We can only conjecture whether Anna Wright would have been called to testify had she been present.

The first written motion to dismiss for denial of a speedy trial was filed in January 1976. This motion was denied on 3 March 1976, and defendant was tried at the 9 August 1976 session, some seven months after the first written motion was filed, and some five months after that motion was denied. Under these circumstances, I do not believe sufficient prejudice has been shown to justify the release of this twice-convicted killer.

I agree with the majority that defendant is not entitled to any relief under G.S. 15-10.2(a).

I vote to affirm the Court of Appeals.

Chief Justice SHARP joins in this dissent.

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JAMES J. BOOKER AND OREN W. McCLAIN v. KOYT W. EVERHART, KOYT W. EVERHART, SR. AND WIFE, BEATRICE M. EVERHART

No. 56

(Filed 24 January 1978)

**1. Uniform Commercial Code §§ 25, 27 — nonnegotiable promissory note — collection agents not "holders" of note**

A promissory note executed by defendant husband to his estranged wife and guaranteed by his parents was a nonnegotiable note, since the note incorporated a prior deed of separation and property settlement entered into by the husband and wife and thereby rendered the promise to pay the sum certain conditional; therefore, plaintiffs, who had represented the wife in her domestic dispute and to whom the wife had allegedly assigned one-third of the prom-

issory note in payment for their services, could not be "holders" under G.S. 25-3-205 and 206 and thus could not argue that, under G.S. 25-3-301, they had the power to enforce the note as collection agents for the owner. G.S. 25-3-105.

2. **Rules of Civil Procedure § 17; Bills and Notes § 18— promissory note—agents for collection—no real party in interest**

Where defendant husband executed a promissory note to his estranged wife who, in turn, purportedly assigned one-third of the note to plaintiffs and designated them as her agents for collection of the note, plaintiffs could not, as agents for collection, maintain that they were the "real parties in interest" in the case; rather, their status as real parties in interest under G.S. 1-57 and G.S. 1A-1, Rule 17 must be based on their independent interest in one-third of the total debt, but even then they are not the only such parties and so, under G.S. 1A-1, Rule 19 cannot maintain an action solely in their names.

3. **Bills and Notes § 18— assignors of part of promissory note—payee as necessary party to action on note**

Where defendant husband executed a promissory note to his estranged wife, the note was guaranteed by his parents, the wife assigned one-third of the note to plaintiff attorneys and designated them as her agents for collection, and plaintiffs brought this action against the husband and his parents when the husband defaulted on the note, the trial court erred in failing to join the wife as a necessary party, since both the assignors of the partial interest in the debt and defendant debtors had the right to insist that the entire matter be settled at one time—that the cause of action not be split.

4. **Rules of Civil Procedure § 19— absence of necessary parties—no nonsuit**

Absence of necessary parties does not merit a nonsuit; rather, the court should order a continuance so as to provide a reasonable time for them to be brought in and to plead.

5. **Bills and Notes § 20— action on note—evidence as to maker's absence from trial—exclusion error**

In an action to recover on a promissory note, the trial court erred in refusing to allow defendant guarantors to explain to the jury that the defendant maker was out of the country by reason of military service, since absence of defendant maker, without explanation to the jury of the reason therefor, would indicate that he had little or no interest in his own defense or in the defense of his parents, the guarantors.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 33 N.C. App. 1, 234 S.E. 2d 46, affirming directed verdict for the plaintiff, entered by *Rousseau, J.*, at the 26 April 1976 Civil Session of FORSYTH Superior Court.

This is an action by plaintiffs on a note executed by Koyt W. Everhart, Jr. (Koyt, Jr.) to his wife, Jane C. Everhart (Jane), for $150,000, allegedly guaranteed by Koyt, Jr.'s father and mother, Koyt W. Everhart, Sr. and wife, Beatrice M. Everhart.

On 1 May 1972, Koyt, Jr. (an attorney) and his wife Jane separated and entered into a deed of separation and property settlement. Subsequently, a dispute arose involving the custody of a minor child of the marriage, and Jane employed the plaintiffs, James J. Booker and Oren W. McClain, as her attorneys to represent her in the domestic dispute. Jane first met James J. Booker on 3 August 1972. On 30 October 1972, Koyt, Jr., as part of a property settlement, signed a promissory note payable to Jane in the amount of $150,000, payable in stated installments. At the same time Koyt, Jr. and Jane entered into a supplement to the deed of separation and property settlement. Koyt, Jr.'s parents, Koyt W. Everhart, Sr. and wife, Beatrice M. Everhart, signed an instrument guaranteeing payment of the note. On 6 December 1972, Jane signed a document prepared by plaintiffs which purported to assign one-third of the promissory note to plaintiffs in payment of their one-third contingent fee, and which also purported to name plaintiffs Jane's agents for collection of the note. One installment on the note in the amount of $12,500 was paid on 31 December 1972. Plaintiffs retained one-third of this payment, or over $4,000, for themselves and sent the remainder of the payment to Jane. On 8 March 1974, after default, plaintiffs brought this action seeking to recover $137,500, with interest, alleging that they were owners of a one-third interest in the note and were agents for Jane for the collection of the balance.

The case was tried during the 26 April 1976 Session of Forsyth Superior Court. Koyt, Jr. was stationed in the Philippines in the United States Navy and was not present for the trial. At the close of all the evidence, the trial court granted plaintiffs' motion for a directed verdict as to the plaintiffs' claimed one-third portion of the note, and thereafter entered judgment awarding plaintiffs $54,387.64. The court denied plaintiffs' right to recover in behalf of Jane Crater Everhart. Plaintiffs gave notice of appeal to that portion of the judgment denying plaintiffs' right to recover in behalf of Jane but on appeal abandoned their alleged claim to any portion of the note except for their claimed one-third interest. The North Carolina Court of Appeals affirmed the judgment of the trial court granting plaintiffs' motion for directed verdict.

We allowed defendants' petition for discretionary review.

*Womble, Carlyle, Sandridge and Rice by Allan R. Gitter and William C. Raper for defendant appellants.*

*Hudson, Petree, Stockton, Stockton and Robinson by Norwood Robinson and Steven E. Philo for plaintiff appellees.*

MOORE, Justice.

Prior to filing their answer to plaintiffs' complaint, defendants made a motion under Rule 12(b)(7) for dismissal of the action for plaintiffs' failure to join a necessary and indispensable party, *viz.*, Jane C. Everhart, the payee and assignor of the alleged note.

In an order filed May 13, 1974, Judge McConnell ruled, after consideration of the motion, complaint, affidavit of Jane C. Everhart and arguments of counsel, that the motion of defendants should be denied. This constitutes error.

Plaintiffs attached to their complaint two documents, labeled "Exhibit A" and "Exhibit B". Exhibit A reads, in part, as follows:

"October 30, 1972 Winston-Salem
$150,000.00 North Carolina

INSTALLMENT NOTE

FOR VALUE RECEIVED, I, KOYT WOODWORTH EVERHART, JR., do hereby promise to pay to JANE CRATER EVERHART or her order, ONE HUNDRED FIFTY THOUSAND and No/100 --- Dollars ($150,000.00) in lieu of a property settlement supplementing that certain *Deed of Separation and Property Settlement*, dated May 1, 1972, the terms of which are incorporated herein by reference. That, as of the signing of said document, JANE CRATER EVERHART was not aware of the extent of property interests of KOYT WOODWORTH EVERHART, JR. nor was she represented by counsel at said time. That in order to prevent involvement in litigation and dissolution of assets, KOYT WOODWORTH EVERHART, JR. does hereby promise to pay to JANE CRATER EVERHART or her order, the sum of ONE HUNDRED FIFTY THOUSAND and No/100 --- Dollars ($150,000.00); the terms and conditions of said note are as follows . . . ."

Exhibit B, executed December 6, 1972 by Jane C. Everhart, says the following:

"December 6, 1972

FOR Services rendered and for future collection services that might be rendered, the undersigned assigns, transfers and conveys a one-third (1/3) interest *to the undersigned*, endorsed by his parents, in and to a certain note dated October 30, 1972 in the amount of $150,000.00 from Koyt Everhart, Jr., to Booker and McClain Attorneys, a partnership; said partnership being composed of James J. Booker and Oren W. McClain and further authorize all collections to be made through their office at 2510 Wachovia Building, Winston-Salem, N.C. 27101.

s/ JANE C. EVERHART"

It is noted that this assignment purports to assign a one-third interest "to the undersigned", who is Jane C. Everhart; however, we shall treat it as an assignment of one-third interest to plaintiffs.

Plaintiffs argue, in effect, as follows: (1) that the document marked "Exhibit A" is a negotiable instrument meeting the formal requirements of G.S. 25-3-104; (2) that, by Exhibit B, they were assigned a one-third (1/3) interest in the note, and were appointed collection agents for the entire amount of the note; (3) that Exhibit B is a restrictive endorsement of the note to them as collection agents, and that, under G.S. 25-3-205 and 206 they are "holders" of said note; and (4) that under § 25-3-301, "Rights of a holder," they have the right to enforce payment of the note in their own name, without joining the owner of the note, Jane Crater Everhart, as a party.

**[1]** Plaintiffs' argument fails from its outset. They cannot avail themselves of the benefits concerning parties which they read into G.S. 25-3-301, simply because the document labeled "Exhibit A" is not a negotiable instrument within Article 3 of Chapter 25 of the General Statutes.

G.S. 25-3-104, *Form of negotiable instruments*, says in part:

"(1) Any writing to be a negotiable instrument within this article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer."

As stated in the North Carolina Comment to G.S. 25-3-104, ". . . the full tests for determining whether a particular instrument is a negotiable instrument under Article 3 can be determined only by reading G.S. 25-3-104 through 25-3-112 as a unit. . . ."

Under the law of this State prior to the adoption of the Uniform Commercial Code, it was clearly established that a conditional promise or contingent condition contained in the instrument itself had the effect of defeating the negotiability of the instrument. *See Pope v. Righter-Parey Lumber Co.*, 162 N.C. 206, 78 S.E. 65 (1913); *First Nat'l Bank v. Michael*, 96 N.C. 53, 1 S.E. 855 (1887); *Goodloe v. Taylor*, 10 N.C. 458 (1825). This prior law is carried forward in G.S. 25-3-104(1)(b).

G.S. 25-3-105. *When promise or order unconditional*, states in part:

"(2) A promise or order is not unconditional if the instrument

(a) states that it is subject to or governed by any other agreement. . . ."

The official comment to G.S. 25-3-105 says that, as far as negotiability is concerned, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself. When the instrument itself makes express reference to an outside agreement, transaction or document, the effect on the negotiability of the instrument will depend on the nature of the reference. G.S. 25-3-105.

In the present case, the instrument marked Exhibit A says, after the promise to pay Jane Crater Everhart $150,000: ". . . . *in lieu of a property settlement supplementing that certain Deed of Separation and Property Settlement, dated May 1, 1972, the*

*terms of which are incorporated herein by reference . . . .*" (Emphasis added.)

Incorporation by reference has been defined as:

> "The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein." Black's Law Dictionary (Revised 4th Ed.), Incorporation.

To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein. *Railroad Co. v. Cupp*, 8 Ind. App. 388, 35 N.E. 703. *See also* 17 Am. Jur. 2d, Contracts, § 262.

By incorporating into the note in question the Deed of Separation and Property Settlement, the parties made the note "subject to" any and all possible conditions contained in those prior documents. Under G.S. 25-3-105(2)(a), this renders the promise to pay the sum certain conditional. Whether or not the documents incorporated contained any such conditions or contingencies is a matter beside the point. *United States v. Farrington*, 172 F. Supp. 797 (D. C. Mass. 1959). The essential point is that all of the essential terms of the note in question cannot be ascertained from the face of the instrument itself. Because separate documents have been made a part of the note by its express terms, the promise contained therein is conditional, and the note nonnegotiable.

In *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 17 U.C.C. Rep. Ser. 144 (Fla. 1975), the Florida Court held that, under § 3-105(2)(a) of the U.C.C., a promissory note which incorporated by reference the terms of the mortgage securing it did not contain the unconditional promise to pay required by 3-104(1)(b). The note in that case said: "The terms of said mortgage are by this reference made a part hereof." In the course of its opinion that court noted that this is not a mere reference to the mortgage or agreement on which the note is based. ". . . [S]uch reference in itself does not impede the negotiability of the note. There is, however a significant difference in a note stating that it is 'secured by a mortgage' from one which provides, 'the

terms of said mortgage are by this reference made a part hereof.' . . ."

Under G.S. 25-3-105(1)(b) and (c), it is clear that mere reference in a note to the separate agreement or document out of which the note arises does not affect the negotiability of the note. But to go beyond a reference to the separate agreement, by incorporating the terms of that agreement into the note, makes the note "subject to or governed by" that agreement, and thus, under G.S. 25-3-105(2)(a), renders the promise conditional and the note nonnegotiable.

Since the instrument in the present case is nonnegotiable plaintiffs cannot be "holders" under Article 3 of the U.C.C., and thus cannot argue that, under G.S. 25-3-301, they have the power to enforce this note as collection agents for the owner. Plaintiffs, at best, are collection agents for a debt owing to Jane Crater Everhart, and, in addition, possess a possible ownership interest in a portion of the debt stemming from Jane Crater Everhart's purported partial assignment of the debt. The right to receive money due or to become due under an existing contract may be assigned. *Lipe v. Guilford Nat'l Bank*, 236 N.C. 328, 72 S.E. 2d 759; *Wike v. Guaranty Co.*, 229 N.C. 370, 49 S.E. 2d 740. Since plaintiffs are the assignees of a contractual right, the general law concerning parties must be examined to determine who is the real party in interest in this action.

G.S. 1-57 says, in part:

> "Every action must be prosecuted in the name of the real party in interest . . . ."

Chapter 1A, Rule 17 of the Rules of Civil Procedure states, in part:

> "(a) Real party in interest. — Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. . . ."

In *Parnell v. Insurance Co.*, 263 N.C. 445, 139 S.E. 2d 723 (1964), the Court quoted the following from *Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609:

> "A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. . . ."

In *Parnell, supra*, the Court stated the basic doctrine that, ". . . An agent is not the real party in interest and cannot maintain an action. *Morton v. Thornton*, 259 N.C. 697, 700, 131 S.E. 2d 378." And, in *Howard v. Boyce*, 266 N.C. 572, 146 S.E. 2d 828 (1966), the Court said:

> ". . . For nearly a century our statutory law has required every action to be prosecuted in the name of the real party in interest. G.S. 1-57. Since the enactment of that statute it has been consistently held that an agent for another could not maintain an action in his name for the benefit of his principal. (Citations omitted.) . . ."

*See Insurance Co. v. Locker*, 214 N.C. 1, 197 S.E. 555 (1938).

For many years this Court has consistently held that an assignee for purposes of collection is not a "real party in interest." *Morton v. Thornton*, 259 N.C. 697, 131 S.E. 2d 378; *Federal Reserve Bank v. Whitford*, 207 N.C. 267, 176 S.E. 584 (1934); *First Nat'l Bank v. Rochamora*, 193 N.C. 1, 136 S.E. 259 (1927); *Third Nat'l Bank v. Exum*, 163 N.C. 199, 79 S.E. 498 (1913); *Morefield v. Harris*, 126 N.C. 626, 36 S.E. 125 (1900); *Abrams v. Cureton*, 74 N.C. 523 (1876).

In *Morton v. Thornton, supra*, where plaintiffs were agents for collection of commissions owed to nonparties, the Court said:

> ". . . The appointment of an agent does not divest the owner of his property rights. The agent is not the real party in interest and cannot maintain an action. *Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609." 259 N.C. at 700, 131 S.E. 2d at 381.

Cases cited by plaintiffs are not on point. *Willey v. Gatling*, 70 N.C. 410, involved an agency coupled with an interest in a

negotiable note; and, as we have held, *supra*, the law of negotiable instruments is not controlling in this case. *Wynne v. Heck*, 92 N.C. 414, involved the authority of a trustee under an express trust to bring an action on a debt for the beneficiary of the trust. A trustee of an express trust has the capacity to sue as the real party in interest under Rule 17 of the Rules of Civil Procedure (and under section 179 of the Code, at the time Wynne was decided). This express statutory authorization relating to trustees does not apply to agents who, unlike trustees, are not vested with any form of ownership of the claim sued on.

**[2]** Thus, as agents for collection of a debt, plaintiffs cannot maintain that they are the "real parties in interest" in this case. Instead, their status as the real parties in interest under G.S. 1-57 and Rule 17 must be based on their independent interest in one-third of the total debt, as evidenced by Jane Crater Everhart's purported partial assignment to them (Exhibit B, *supra*). Only by virtue of their separate interest in the debt are the plaintiffs "real parties in interest". Even then they are not the only such parties; and under Rule 19 of the Rules of Civil Procedure, and prior case law, they cannot maintain an action solely in their names.

Rule 19 of Chapter 1A, Rules of Civil Procedure, provides in part:

> "(a) . . . those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint. . . ."
>
> (b) *Joinder of parties not united in interest.* — The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action."

These rules make no substantive change in the rules relating to joinder of parties as formerly set out in G.S. 1-70 and G.S. 1-73. Both G.S. 1-70 and G.S. 1-73 were repealed by Session Laws 1967, c. 954, s. 4, effective 1 January 1970. "The new rules of civil procedure make no change in either the categorizing of parties as

necessary, proper and formal, or in the underlying principles upon which the categories have been based." 1 McIntosh, N.C. Practice and Procedure 2d, § 585 (Supp. 1970).

Necessary parties must be joined in an action. Proper parties may be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968).

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Strickland v. Hughes, supra; Manning v. Hart*, 255 N.C. 368, 121 S.E. 2d 721 (1961); *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843 (1952). When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973); *Strickland v. Hughes, supra.*

The law of necessary parties, as applied where, as here, there has been a partial assignment of a single claim, is succinctly stated in 6 Am. Jur. 2d, Assignments, Sec. 133, at 314-315, as follows:

> "Generally under modern statutes or rules of court which authorize an assignee to bring suit in his own name on a claim assigned to him if the assignment is of the entire claim, the assignor is not a necessary party to the suit and need not be joined as a party. . . . But where there has been a partial assignment leaving the assignor owner of a part of the claim, or where different parts of the claim have been assigned to different persons, an assignee, in bringing suit, should join either as plaintiffs or defendants all the parties in interest, so that the entire matter may be settled at one time, and a single decree may determine the duty of the debtor to each claimant, and protect the rights and interests of each party. He should include as parties all assignees or claimants to any part of the fund, as well as the assignor, otherwise, his pleading will be defective for want of parties."

*See Louisville and N.R. Co. v. Mack Mfg. Corp.*, 269 S.W. 2d 707; *Hull v. Townsend*, 186 So. 2d 478; *see also* F. James, Civil Procedure, § 9.5, pp. 389-390 (1965).

In *Underwood v. Otwell*, 269 N.C. 571, 153 S.E. 2d 40 (1967), this Court held that where a bill or note is made payable to several persons, or is endorsed or assigned to several persons, they are joint holders, and must sue jointly as such. *Morton v. Thornton*, 257 N.C. 259, 125 S.E. 2d 464 (1962), holds that where claims for unpaid wages are assigned to joint assignees, all such assignees must be joined as parties. And in *Smith v. Garey*, 22 N.C. 42 (1836), this Court held that a partial assignee of a claim could not enforce his interest without making the assignor a party. *See also Martin v. Hayes*, 44 N.C. 423 (1853); *Knight v. Wilmington & Manchester R. Co.*, 46 N.C. 357 (1854); and *National Surety Co. v. Board of Education of McDowell County*, 15 F. 2d 993 (4th Cir. 1926).

**[3]** There is a single debt in this case, and a single claim. Both the assignor of a partial interest in the debt and defendant-debtors have the right to insist that the entire matter be settled at one time—that the cause of action not be split. *See Louisville and N.R. Co. v. Mack Mfg. Corp., supra.* Defendants, in incurring a single debt, are not required to subject themselves to the possibility of several actions on that debt stemming from its partial assignment. ". . . It is unjust to subject the debtor to a possible horde of claimants, or even to make it necessary for him to defend several suits in case he disputes the validity or the amount of the claim. . . ." 4 Corbin on Contracts, Sec. 889. Furthermore, neither the validity of the assignment, nor the remaining rights and interests of the assignor, Jane Crater Everhart, nor the rights of plaintiffs can be determined or protected unless Jane Crater Everhart is made a party to this suit. Finally, it must be noted here that, although many jurisdictions have held that a contingent fee contract between an attorney and his client in a divorce, alimony or property settlement case is invalid, we do not and cannot reach that question at this time. *See generally* cases cited in 30 A.L.R. 188 and A.L.R. later case service. In the absence of Jane Crater Everhart, the record is not clear as to the nature of the agreement or the nature of the legal services performed in exchange for the contingent fee arrangement. Thus, we hold that the trial court erred in its failure to join Jane Crater Everhart as a necessary party in this lawsuit.

**[4]** It does not follow, however, that the action should be dismissed.

Rule 17(a) of the Rules of Civil Procedure provides:

> ". . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Where, as here, a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court. *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967); *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491. Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E. 2d 74 (1949). *See* 5 Wright and Miller, Federal Practice and Procedure § 1359, pp. 628, 631. And, where a necessary party to an action will not join with the plaintiffs therein, plaintiffs may have him joined as a party defendant. Rule 19, Rules of Civil Procedure; *Owen v. Hines*, 227 N.C. 236, 41 S.E. 2d 739. Jurisdiction over Jane Crater Everhart, now a nonresident, is obtainable under G.S. 1-75.4(5).

**[5]** Since we hold that the trial court erred in failing to join Jane as a necessary party, we do not decide whether it was error for the trial judge to overrule Koyt, Jr.'s motion for a stay under the Soldiers and Sailors Relief Act, 50 U.S.C.A. App. § 501. At time of trial Koyt, Jr. was in the U.S. Navy stationed in the Philippines. He moved for a stay, and in support of his motion filed an affidavit, which was uncontradicted, to the effect that he was a material witness for his own defense and the defense of his parents, but that he could not attend trial for military and financial reasons. At trial the trial judge refused to allow defendants to explain to the jury that Koyt, Jr. was out of the country by reason of military service. This was error. Koyt, Jr. executed the note in question and was the one primarily liable thereon. His absence, without explanation of the reason therefor, would in-

dicate that he had little or no interest in his own defense or in the defense of his parents, the guarantors. This was unfair to the defendants. They should have been allowed to state to the jury that his absence was due, at least in part, to his military service.

For the reasons stated, defendants are entitled to a new trial, with Jane Crater Everhart joined as a necessary party as provided by Rule 19 of the Rules of Civil Procedure.

Other assignments of error are not considered since they may not recur at the next trial.

The decision of the Court of Appeals is reversed. The case is remanded to that court with direction that it remand to the Superior Court of Forsyth County for further proceedings in accordance with this opinion.

Reversed and remanded.

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STATE OF NORTH CAROLINA v. LARRY WATSON

No. 116

(Filed 24 January 1978)

**1. Criminal Law § 66.6— second viewing of lineup—no impermissible suggestiveness**

A lineup was not impermissibly suggestive because a robbery victim, after stepping outside and telling police which person he had selected, was instructed to go back and view the group again and be absolutely sure, and the victim looked at the lineup again and told the police that he was certain that defendant was one of his assailants, since it would appear that the police officers were acting to guard against misidentification rather than seeking to steer the witness toward a particular suspect in the lineup.

**2. Constitutional Law § 43; Criminal Law § 66.5— right to counsel at lineup—no critical stage—waiver**

Defendant was not entitled to be represented by counsel at a lineup since (1) the lineup was not a critical stage of the proceedings because defendant had not been placed under arrest and no formal proceedings had been commenced against him, and (2) defendant expressly waived his right to counsel at the lineup.

**3. Criminal Law § 66.3— detention for lineup—statutory procedures—voluntary lineup participation**

It was unnecessary for the police to follow the procedures provided in G.S. 15A-271 *et seq.* relating to involuntary detention for nontestimonial identification where defendant voluntarily participated in a lineup.

**4. Criminal Law § 66.3— lineup—defendant not taken before magistrate—defendant not under arrest**

A lineup identification was not required to be suppressed under G.S. 15A-974(2) on the ground that defendant was not taken before a neutral judicial official without unnecessary delay as required by G.S. 15A-501 and G.S. 15A-511 where defendant was not under arrest but voluntarily came to the police station and appeared in the lineup.

**5. Criminal Law § 50.1— defendant's commission of robbery—opinion testimony**

In this prosecution for armed robbery, testimony by a witness who had not observed the robbery that he telephoned the police anonymously and told them that defendant and two others had committed the robbery constituted inadmissible opinion evidence since the jury was as well qualified as the witness to draw inferences and conclusions from the facts observed by the witness; however, the admission of such testimony was harmless error in light of the extensive competent evidence of defendant's guilt of the robbery.

**6. Criminal Law § 112.1— instructions on reasonable doubt**

The trial court did not err in omitting the words "to a moral certainty" from its charge on reasonable doubt.

**7. Criminal Law § 117.3— instruction that defendant is interested witness—failure to name State's witness as interested witness**

The trial court did not err in instructing that defendant was an interested witness without also instructing that an officer who testified for the State was an interested witness where the court adequately placed before the jury the factors they should have considered in weighing the credibility of the officer's testimony by instructing the jury that it could find witnesses other than defendant to be interested and by summarizing evidence of the officer's alleged attempts to bribe potential witnesses.

**8. Criminal Law § 113.7— instructions on acting in concert**

The trial court's instructions on acting in concert, when considered as a whole, could not have misled the jury into believing that defendant's mere presence at the scene of a robbery would have been sufficient to render him guilty of the robbery.

**9. Criminal Law § 117.2— interested witnesses—request for further instructions**

Instructions on the credibility of interested witnesses concern a subordinate feature of the case, and a party desiring further elaboration in such instructions must aptly tender a request for further instructions.

**10. Criminal Law § 86.7— consideration of prior convictions—request for instructions**

In the absence of a timely request, the trial court did not err in failing to instruct the jury that evidence of defendant's prior convictions was admitted only for purposes of impeachment.

**11. Criminal Law § 169.2— volunteered testimony—absence of instruction to disregard**

The trial court did not err in failing to instruct the jury to disregard a witness's volunteered statement that one of defendant's alleged accomplices had already been tried since the court's admonishment to the witness not to say "anything about that" sufficiently informed the jury that the statement should not be considered as evidence.

**12. Criminal Law § 101.3— denial of jury view of jail**

The trial court in an armed robbery case did not abuse its discretion in denying the jury's request that it be allowed to view the jail.

**13. Constitutional Law § 79; Robbery § 6— life imprisonment for armed robbery**

A sentence of life imprisonment for armed robbery was within statutory limits and did not constitute cruel and unusual punishment.

DEFENDANT was charged in a bill of indictment, proper in form, with armed robbery. Upon conviction before *Judge Perry Martin*, 30 May 1977 Session, NASH County Superior Court, he was sentenced to life imprisonment.

The State's evidence tended to show the following:

On 3 January 1977 between 9:00 and 9:30 a.m., defendant, in company with two others, robbed the service station of Jessie Howard Johnson in Rocky Mount in Nash County. Johnson was beaten with an iron pipe and stabbed several times in the hip with a butcher knife during the robbery, in which $150.00 in cash was taken.

The evidence for defendant tended to show that:

Defendant was at the home of the Tillery family in Rocky Mount on the date in question between 8:00 a.m. and 9:30 a.m., except for a five-minute interval. The Tillery house was approximately a ten-minute walk from the victim Johnson's service station. In addition, defendant presented a witness who saw four young black males across the street from the service station at about the time of the robbery and later saw these same four running from the area. This witness testified that she could identify

these persons if she saw them again and that defendant was not among them.

Further facts pertinent to the decision are related in the opinion.

*Attorney General Rufus L. Edmisten by Associate Attorney Nonnie F. Midgette for the State.*

*William D. Etheridge and Charles L. Becton for defendant-appellant.*

COPELAND, Justice.

Defendant raises several assignments of error concerning the admission of identification testimony, the instructions of the trial court and other matters. After careful consideration, we have determined that each of these assignments is without merit and should be overruled.

Defendant first contends that the identification testimony of the victim Johnson was improperly admitted because the lineup from which he selected defendant was conducted in an illegal manner. It is asserted that (1) the lineup procedure was impermissibly suggestive and therefore violative of due process; (2) defendant was denied his Sixth Amendment right to counsel at a critical stage of the criminal process; and (3) defendant was improperly detained and compelled to appear in the lineup without a court order, contrary to the provisions of G.S. 15A-271 *et seq.*

When pretrial confrontation procedures are so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, evidence concerning the out-of-court identification is inadmissible; however, where under the totality of the circumstances the identification of the accused was reliable even though the confrontation was suggestive, the actual in-court identification of the defendant is admissible although evidence of the pretrial confrontation is not. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972). Defendant maintains that the trial court erred in admitting evidence of the pretrial lineup because it was suggestive and, further, that the likelihood of misidentification was so great that the in-court identification could have had no independent source and thus was inadmissible.

**[1]** It appears from the record that two lineups were conducted here. The trial court, after a *voir dire* hearing, found as fact that at no time did anyone suggest to the witness whom he should select from either lineup and that during the second lineup the witness picked out defendant immediately. It was further ascertained that the witness was shown two books of photographs, neither of which contained a photograph of defendant, and after looking at both books was unable to identify anyone. As evidence of the suggestive nature of the lineup, defendant relies primarily on the fact that after the witness stepped outside and told the police which person he had selected, he was instructed to go back and view the group again and be absolutely sure. The witness looked at the lineup again and told the police that he was certain that defendant was one of his assailants. Defendant argues that if the witness was positive initially, there was no need to have him reassure the certainty of his identification. We find this argument unpersuasive. It would appear that the police were acting here to guard against misidentification, rather than seeking to steer the witness toward any particular suspect in the lineup. There was competent evidence in the record to support the trial court's findings of fact; therefore, they are conclusive on appeal. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). We find that, based upon our own examination of the record in conjuction with the findings of the trial court, the lineup here was not conducted in a suggestive manner; consequently, the testimony concerning the lineup was not subject to challenge on Due Process grounds.

**[2]** Defendant also maintains that his right to counsel at the pretrial confrontation was denied, requiring the exclusion of testimony concerning his having been identified at the lineup. While a person has a right to the presence of counsel at a pretrial lineup when it is a critical stage of the criminal prosecution, *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967), this right attaches only at or after the initiation of adversary judicial proceedings against him. *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976).

Although defendant argues to the contrary, it appears from the record in the instant case that at the time of the lineup defendant had not been placed under arrest, nor had any formal pro-

ceedings been commenced against him. In addition, the trial court found as a fact that defendant was asked to appear in the lineup and, prior to the confrontation, was advised of his right to have an attorney present, which he waived. This finding of fact is conclusive, since it is supported by competent evidence in the record. *State v. Taylor, supra.* We hold, therefore, that defendant was not entitled to the presence of counsel in the first instance because this lineup was not a critical stage of the proceedings and that any such right defendant arguably may have possessed had been expressly waived.

**[3]** Defendant next contends that he was entitled to the benefit of the procedures outlined in G.S. 15A-271 *et seq.*, including the presence of counsel. It appears from the Official Comment preceding the text of the statute, however, that the thrust of this portion of the Criminal Procedure Act was to provide the State with a valuable new investigative tool to compel the presence of *unwilling* suspects for nontestimonial identification procedures, even though insufficient probable cause existed to permit their arrest. *See*, Comment, 12 Wake Forest L. Rev. 387 (1976).

In examining the record we find that defendant testified on *voir dire* that he voluntarily went to the police department. Additionally, the trial court found on competent evidence that defendant willingly appeared in the lineup. From these facts we conclude that defendant voluntarily participated in the pretrial confrontation; thus, it was unnecessary for the police to utilize the procedures in G.S. 15A-271 *et seq.* allowing involuntary detention for nontestimonial identification. Further, the trial court determined, as noted above, that defendant was informed that he had a right to the presence of an attorney at the lineup and agreed to appear without one.

**[4]** In his final argument concerning the identification procedures here, defendant asserts that he was in fact in custody during the time he was placed in the lineup and thus, under G.S. 15A-501 and G.S. 15A-511, should have been taken before a neutral judicial official without unnecessary delay. Since this was not done, defendant maintains that all identification evidence should have been suppressed under G.S. 15A-974(2). As we determined earlier, however, defendant voluntarily came to the police station and appeared in the lineup; therefore, he was not under arrest and the statutes cited are inapplicable. All defendant's

assignments of error regarding the admission of identification evidence are without merit and overruled.

**[5]** Defendant next assigns as error the admission of testimony from a State's witness who had not observed the robbery to the effect that he had telephoned the police anonymously and told them that defendant and two others had "ripped off Johnson's Service Station." This statement was later repeated in the form of corroborative testimony by two police officers who talked with the informant some time after the telephone call was received. Defendant excepts to the admission of this statement on the grounds that it was an opinion and asserts that, when considered with the corroboration testimony by the officers, it greatly prejudiced defendant because the informant was allegedly a witness of questionable reliability. Prior to relating the content of the telephone call, the informant had testified he overheard defendant, along with Demorris Carter and Percy Ricks, planning the robbery and saw them arming themselves before they left. He further stated that upon their return he overheard them bragging about what they had done to the operator of the service station and saw them divide the money. The informant's conclusion that defendant had robbed the station was apparently based on these observations. Still, "Opinion evidence is generally inadmissible 'whenever the 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.' " *State v. Lindley*, 286 N.C. 255, 257, 210 S.E. 2d 207, 209 (1974).

In the instant case the facts observed by the informant were certainly comprehensible by the jury. Indeed, they had been clearly related to the jury prior to the time the opinion statement was elicited from him. Further, it does not appear that the witness was any better qualified than the jury to draw inferences and conclusions from these facts; thus, the admission of his opinion was error.

Nonetheless, when the exclusion of an erroneous statement would not likely have produced a different result, error in its admission is not sufficient grounds for a new trial. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). The remainder of the State's evidence tended to show that: (1) defendant was positively identified by the victim as one of the three persons who participated

in the robbery; (2) a week before the robbery defendant asked another State's witness where the money at the service station was kept; (3) defendant came to the witness's house the night before the robbery and told her that he was going to get the money at the station; (4) early on the morning of the robbery, defendant returned to the witness's house and got two kerosene cans; (5) the victim was assaulted while filling a kerosene can brought by one of the robbers; (6) defendant was overheard planning the robbery the night before and seen arming himself the next morning with a butcher knife; (7) one of defendant's companions was seen carrying an iron pipe the morning of the robbery; (8) the victim was beaten with an iron pipe and stabbed in the hip with a butcher knife; (9) defendant and two others were overheard after the robbery bragging about what they had done to the station operator and were observed dividing up money. In view of the extensive evidence against defendant, we are convinced that the result would have been the same had the trial court properly excluded the opinion statement by the witness and the accompanying corroborative testimony; consequently, this assignment is overruled.

**[6]** Defendant also assigns as error several portions of the trial court's instructions to the jury. It is first contended that the court erred in failing to adequately define reasonable doubt after it undertook to do so. The charge of the court on this subject reads, in part, as follows:

> "A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane rational doubt based upon good judgment and common sense. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it means that the jury must be fully satisfied or entirely convinced of the truth of the charge against the defendant. It does not mean that you must be satisfied beyond any doubt or all doubt. If after considering, comparing and weighing all the evidence, the minds of the jurors are left in such a condition that they cannot say that they have an abiding faith in the defendant's guilt, then they have a reasonable doubt. Otherwise, you do not have a reasonable doubt.
>
> "A reasonable doubt as that term is employed in the administration of criminal law in North Carolina is an honest,

substantial misgiving, ordinarily generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused."

In the absence of a request, the trial court need not define reasonable doubt. *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975). Once it undertakes to do so, however, the definition should be given in substantial accord with those approved by this court, although no exact formula is required. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). Defendant argues that the trial court should have defined beyond a reasonable doubt as possessing "an abiding faith *to a moral certainty* in the defendant's guilt," citing *State v. Schoolfield*, 184 N.C. 721, 114 S.E. 466 (1922). It is his assertion that by omitting the words "to a moral certainty" from this portion of the charge, the court allowed the jury an opportunity to convict defendant upon a mere general belief in his guilt. After careful consideration, however, we feel that the court's overall definition of reasonable doubt compares favorably with that recently approved in *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976), and that the substance of reasonable doubt was conveyed to the jury. Additionally, the words "to a moral certainty" are synonymous with beyond a reasonable doubt, *Rhinehart v. State*, 175 Ark. 1170, 299 S.W. 755 (1927); thus, they add nothing to the definition of reasonable doubt and indeed one may require as much explanation as the other. *Hopt v. Utah*, 120 U.S. 430, 30 L.Ed. 708, 7 S.Ct. 614 (1887).

The next exception brought forward by defendant concerns the charge of the court on interested witnesses, which reads as follows:

"The defendant is always an interested witness in a criminal case. You may find that a witness in addition to the defendant is also interested in the outcome of this trial. In addition to the defendant in deciding whether or not to believe such a witness, or any other interested witness, you may take their interest into account. If after doing so you believe his or her testimony in whole or in part, you should treat what you believe as you would any other believable evidence that you have heard in the case."

**[7]** Defendant argues that by failing to include two of the State's witnesses by name in this instruction, the court imposed a mandatory standard for consideration of defendant's testimony and a permissive standard for that of the other witnesses. We note at the outset that instructions on the credibility of interested witnesses concern a subordinate feature of the case; thus, the court need not instruct on this subject absent a request. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975). Yet, once the court elects to charge on such a feature, it must do so fully and accurately. *State v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39 (1953). Nonetheless, the trial court may instruct on the defendant's status as an interested witness without being required to give a like instruction, without request, as to possibly interested State's witnesses. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977).

In the case *sub judice*, the court in summarizing the evidence recounted the alleged attempts at bribing potential witnesses by one of the police officers and later instructed the jury that it could find other witnesses in addition to the defendant to be interested. In our judgment this was sufficient to adequately place before the jury the factors they should have considered in weighing the credibility of the officer's testimony and thus was not error. There was no evidence of possible interest in the outcome on the part of any other State's witness; therefore, this portion of the assignment is without merit.

**[8]** Defendant further maintains that the court's instructions on acting in concert could have misled the jury into believing that defendant's mere presence at the scene of the robbery would have been sufficient to render him guilty of the crime charged. This contention is based on language in the charge to the effect that if the jury should find that ". . . the defendant, Mr. Watson, another person or persons acting with him . . ." had committed the robbery, it would be the duty of the jury to return a verdict of guilty.

It is well-settled that mere presence at the scene of a crime is insufficient to make one guilty of the offense. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973). It is equally clear, however, that a charge is to be construed as a whole and if, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception

thereto will not be sustained even though the instruction could have been more aptly worded. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102, 96 S.Ct. 886 (1976).

In the paragraph immediately preceding the portion of the charge noted above, the court instructed the jury that, "[M]ere presence at the scene of a crime is insufficient to convict the defendant but if two or more persons act together with a common purpose to commit robbery with a dangerous weapon, each of them is held responsible for the acts of the others done in the commission of a robbery with a dangerous weapon." This language effectively precluded any possibility of confusion on the part of the jury regarding the effect of mere presence at the crime scene. For the reasons stated above, this assignment concerning the charge of the court is overruled in its entirety.

In his next assignment of error, defendant asserts that the trial court violated G.S. 1-180 in charging the jury by (1) unfairly summarizing the evidence by not pointing out cross-examination of State's witnesses while specifically pointing out testimony of defendant's witnesses on cross-examination; (2) singling out defendant as an interested witness without also indicating that State's witnesses were interested; and (3) referring to evidence of defendant's prior convictions without giving cautionary instructions. We initially note that at the conclusion of its charge the court inquired of counsel for both sides whether they had any additional requested instructions or corrections to the instructions and was informed, after making two corrections in the recapitulation of the evidence, that they did not. It is manifest that G.S. 1-180 requires only a clear instruction on all substantive features of the case, defining and applying the law to the facts and stating the contentions of the parties. *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973). If a defendant wishes fuller instructions on the evidence or his contentions, he must request them at trial or be precluded from assigning error concerning their absence. *State v. Ford*, 266 N.C. 743, 147 S.E. 2d 198 (1966).

**[9]** Regarding the court's interested witness instruction, we reiterate that such an instruction concerns a subordinate feature of the case. *State v. Vick, supra.* On this subject we have earlier held that, "The requirement of G.S. 1-180 that the judge state the evidence is met by presentation of the principal features of the

evidence relied on respectively by the prosecution and defense. A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions." *State v. Guffey*, 265 N.C. 331, 332, 144 S.E. 2d 14, 16 (1965). Since no such request appears from the record before us and we have found defendant's similar earlier exception to be without merit, this portion of the assignment is overruled.

**[10]** The testimony concerning defendant's prior convictions was elicited from him on cross-examination without objection or request for cautionary instructions. Although such evidence is competent only as it relates to a defendant's credibility as a witness and not as substantive evidence, it is incumbent upon a party challenging its use to request a limiting instruction. *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968). Absent such a request, no assignment of error can be predicated on the court's failure to include such an instruction in its charge to the jury. *See, State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). Defendant's assignment of error alleging violations of G.S. 1-180 in the charge of the court is without merit and overruled.

**[11]** During the direct examination of the witness Johnson, the court asked the following question: "Are you talking about the two people that you say were with him?" The witness responded, "One of them I haven't ever been able to identify but the other one has already been tried . . ." The court immediately interjected, "Don't tell me anything about that."

Defendant argues that the court's failure to instruct the jury to disregard the witness's volunteered statement that one of defendant's alleged accomplices had already been tried was prejudicial error. When the court promptly cut off further discussion of this admittedly improper subject, however, it could only have been understood by the jury as an express disapproval of this remark such that it was not to be considered as evidence. *State v. Battle*, 269 N.C. 292, 152 S.E. 2d 191 (1967).

**[12]** After receiving the case, the jury at one point interrupted their deliberations and returned to open court. At this time, the jury foreman requested permission to approach the bench and ask a question. The court instead directed the foreman to ask the question so that the defendant and counsel for both sides could hear it. The foreman then informed the court that the jury had a

question in mind and would like to view the jail. The court asked if that was all the jury wanted, to which the foreman answered yes, and then denied them permission to view the jail, sending them back to resume deliberations. Defendant now argues that the court erred by refusing to answer a question from the jury and by refusing their request to view the jail.

There was nothing in the record to indicate that the jury wished to inquire into anything other than the jury view. Moreover, the determination of whether to grant a jury view is within the discretion of the trial court. *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116 (1971); *State v. Ross*, 273 N.C. 498, 160 S.E. 2d 465 (1968). We find no evidence in the record of an abuse of this discretion; therefore, this contention is without merit.

**[13]** In his final assignment of error, defendant contends that the trial court erred in failing to set aside the sentence of life imprisonment as excessive and so disproportionate as to constitute cruel and unusual punishment. At the time of defendant's conviction, the prescribed punishment for armed robbery under G.S. 14-87(a) was imprisonment for not less than five years nor more than life imprisonment. The punishment provisions of this statute are constitutionally valid. *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977). The actual length of a sentence imposed is at the discretion of a trial judge so long as it is within statutory limits. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). A sentence which does not exceed the maximum authorized by statute is not cruel and unusual in a constitutional sense. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977).

Having examined the assignments of error and found no showing of prejudice to defendant, it is the judgment of this Court that in the trial below there was

No error.

JONAS MELVIN GARDNER v. ROSE D. GARDNER

No. 79

(Filed 24 January 1978)

1. **Divorce and Alimony § 6; Rules of Civil Procedure § 13— wife's action for divorce from bed and board—husband's action for absolute divorce—compulsory counterclaim**

Where the wife filed an action for alimony and divorce from bed and board, claiming that the husband abandoned her, the husband's claim for divorce on the ground of one year's separation could be denominated a compulsory counterclaim, since it arose out of the same transaction or occurrence that formed the basis for the wife's abandonment claim, and the husband's claim had accrued in time for him to have filed it with his answer to his wife's complaint when that answer became due.

2. **Rules of Civil Procedure § 13— applicability to second independent action—effect on second action**

In order to give effect to the purpose of G.S. 1A-1, Rule 13(a) once its applicability to a second independent action has been determined, this second action must on motion be either (1) dismissed with leave to file it in the former case or (2) stayed until the former case has been finally determined.

3. **Divorce and Alimony § 6; Rules of Civil Procedure § 13— counterclaims in divorce actions—Rules of Civil Procedure applicable**

N. C. statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in G.S. 1A-1, Rule 13(a).

4. **Divorce and Alimony § 6; Rules of Civil Procedure § 13— actions between spouses—compulsory counterclaim rule—applicability**

Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under G.S. 1A-1, Rule 13(a) may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action; however, the claim will not be barred by reason of Rule 13(a) if it is filed after final judgment has been entered in the prior action.

WE allowed defendant's petition for discretionary review of the Court of Appeals' order denying her application for a writ of certiorari so that we might review the order of *Hill, J.*, entered 30 July 1976 in the District Court of JOHNSTON County, denying defendant's motion to dismiss or stay this divorce action on the ground of a prior action pending between the parties. This case was argued as No. 37, Spring Term, 1977.

*Freeman & Edwards, by George K. Freeman, Jr., and James A. Vinson III, Attorneys for Defendant Appellant.*

*Mast, Tew, Nall & Moore, P.A., by George B. Mast and W. Richard Moore, Attorneys for Plaintiff Appellee.*

EXUM, Justice.

At the outset we think it important to say that we are not inadvertent to the proposition that the Court of Appeals' denial of defendant's application for a writ of certiorari was a ruling within the discretion of that court. Normally we would not interfere with the exercise of such discretion. We determined to take this case, however, not because we thought the Court of Appeals by denying defendant's application had abused its discretion, but because we desired to address the important and novel questions relating to the applicability of the compulsory counterclaim provisions of Rule 13 of the Rules of Civil Procedure for the guidance of the bench and bar.

This action was brought by plaintiff husband for absolute divorce on the ground of one year's separation. The controversy presented by defendant wife's petition rests upon the effect of a prior action filed by her in Wayne County seeking initially alimony without divorce but later, by amendment to her complaint made after the filing of this Johnston County action, divorce from bed and board.

The sole issue properly presented for our determination is whether this action should have been dismissed or stayed on the ground that Rule 13(a) of the North Carolina Rules of Civil Procedure requires it to have been filed as a compulsory counterclaim to the wife's Wayne County action. We hold that Rule 13(a) does require dismissal or stay of this action.

These parties were married on 11 August 1957. There are no children. On 28 May 1975 the husband moved out of the marital home in Smithfield, Johnston County. On 10 May 1976 the wife went to Goldsboro, Wayne County, where she signed a lease for an apartment, registered to vote, opened a bank account, acquired a telephone listing, signed a contract for electricity, joined a church, ordered a local newspaper, and told friends of her intent to establish a permanent home in Goldsboro. On 11 May 1976 the wife moved from the marital home to an apartment in Goldsboro.

On 12 May 1976 she filed a complaint in the Wayne County District Court in which she prayed for alimony without divorce on the ground, among others, that her husband had abandoned her on 28 May 1975.

At the time this case was argued before us in February, 1977, the wife's Wayne County action had proceeded as follows: On 25 May 1976 the husband moved to remove this action to Johnston County on the ground that neither party was a resident of Wayne County. This motion was denied by the Wayne County District Court, and the husband appealed the ruling to the Court of Appeals. On 16 June 1976 the husband moved to transfer the Wayne County action to Johnston County on *forum non conveniens* grounds pursuant to General Statute 1-83.[1] Also on 16 June 1976 the husband moved for an extension of time to answer. On 26 June 1976 the wife filed an amendment to her complaint by which she struck out her prayer for relief asking for alimony without divorce and substituted in lieu thereof a prayer that she be granted alimony and a divorce from bed and board. The husband had not answered the complaint.[2]

Meanwhile in Johnston County, the husband on 1 June 1976 filed an action for absolute divorce on the ground of one year's separation beginning 28 May 1975. On 29 June 1976 the wife moved in this action that it be dismissed on the ground of a prior action pending in Wayne County or, in the alternative, that it be stayed until the Wayne County action could be determined. This motion was denied. The correctness of this denial is, essentially, the question for review. On 27 August 1976 the wife filed an answer to her husband's action in which she denied the separation and characterized the husband's action on 28 May 1975 as an abandonment. She further filed a counterclaim against the husband seeking alimony without divorce on the same grounds which she had earlier asserted in her Wayne County action.

1. "G.S. 1-83. *Change of Venue.*

. . . .

The court may change the place of trial in the following cases:

. . . .

(2) When the convenience of witnesses and the ends of justice would be promoted by the change."

2. We note that the Court of Appeals in an unpublished opinion filed 7 September 1977, 34 N.C. App. 165, 237 S.E. 2d 357, affirmed the denial of the husband's motion to remove and this action has now proceeded to judgment in favor of the wife entered on 21 October 1977 in Wayne District Court. Defendant has given notice of appeal.

The wife's sole contention is that the husband's action for absolute divorce is a compulsory counterclaim within the meaning of Rule 13(a).[3] As such, she says, it must be filed if at all as a counterclaim in her Wayne County action. The husband, on the other hand, relying on the legislative and judicial history of our divorce laws, features which distinguish matrimonial disputes from other kinds of civil actions, and a policy which favors maintaining within reason the marital relationship, contends that Rule 13(a) should have no application to his action for absolute divorce.

Similar factual circumstances in matrimonial disputes have been the subject of appellate decision in North Carolina, but the doctrine of abatement rather than the compulsory counterclaim rule was the basis for decision in these cases. *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E. 2d 473 (1967); *Beeson v. Beeson*, 246 N.C. 330, 98 S.E. 2d 17 (1957); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796 (1952); *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912); *McLeod v. McLeod*, 1 N.C. App. 396, 161 S.E. 2d 635 (1968).[4]

The wife here, though, taking the position that Rule 7(c) has abolished pleas in abatement and that the substantive law of abatement is thereby rendered useless,[5] has abandoned in her

3. "G.S. 1A-1, Rule 13(a) *Compulsory counterclaims.* — A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule."

4. *Beeson*, *Cameron*, *Cook*, and *McLeod* may all be reconciled. The abatement rule applied in the well-considered *Cameron* decision was that a prior pending action in a matrimonial dispute will abate a subsequent action between the parties only if: (1) the plaintiff in the second action can obtain the same relief by counterclaim in the first action; and (2) a judgment in the first action in favor of the plaintiff therein, under *res judicata* principles, will bar the prosecution of the subsequent action. A majority of this Court in *Cook* and the Court of Appeals in *McLeod*, concluding that there would be no such bar of the second action, found no abatement. *Beeson*, concluding that the subsequent action could not be filed as a counterclaim in the first, found no abatement. There is language in *Fullwood* which seems to run counter to the common rule. The language, however, relies on an abatement rule which had been expressly rejected in *Cameron*. The language, furthermore, was not necessary for decision in that case. These factors weaken it as authority for the proposition it addressed.

5. While the question is not before us, we note that the abolition of the *form* of a plea in abatement by Rule 7(c) may not necessitate the conclusion that the substantive law governing abatement is abrogated. "[U]nder Rule 12(b), every defense, including a defense in the nature of the old plea in abatement, may be raised by responsive pleading." *Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 414, 185 S.E. 2d 727, 729 (1972). A motion to abate has been held equivalent to a motion to dismiss. *Harding v. Harding*, 366 P. 2d 128 (Alaska 1961); *see also* the comment pertinent to Rule 7(c), 1A General Statutes of North Carolina 598 (1969).

brief all reliance on abatement and rests her argument entirely on Rule 13(a).

The question, then, for decision is whether the compulsory counterclaim provisions of Rule 13(a) require a dismissal or stay of the husband's action. The answer depends on the answers we give to several other questions. First, may the husband's action be denominated a compulsory counterclaim, that is, did it arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim" and had it accrued at the time the answer was served?[6] Second, if it may be so denominated does Rule 13(a) require dismissal or stay? Third, does Rule 13(a) so contravene other statutes or public policy that it should be held inapplicable to divorce actions?

**[1]** We are satisfied the husband's claim for divorce may be denominated a compulsory counterclaim. It arises out of the same transaction or occurrence that forms the basis for the wife's abandonment claim. The wife contends the husband abandoned her 28 May 1975. The husband contends his leaving was a separation entitling him to a divorce. Although when this case was argued the husband had not filed an answer, his claim had accrued in time for him to have filed it with his answer when the answer became due.

Once a claim has been denominated a compulsory counterclaim under Rule 13(a), the question what must be done with it if it is filed as a subsequent, independent claim is not answered by the rule itself. Our old counterclaim cases prior to the adoption of Rule 13(a) are of no help. Before the adoption of Rule 13(a) and leaving aside *res judicata* considerations, the concept of a *compulsory* counterclaim was unknown to our civil practice. The questions under the old counterclaim provisions centered around whether the counterclaim was permitted rather than compulsory. See G.S. 1-137 and annots. thereunder (1A General Statutes, Recompiled 1953). If the counterclaim was permitted, the defendant could elect whether to plead it as such or bring an independent action. 1 McIntosh, N.C. Practice & Procedure § 1243, p. 694 (2d Ed. 1956). The purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve "all related claims in one action, thereby avoiding a

6. Other qualifications stated in Rule 13(a) are clearly inapplicable.

wasteful multiplicity of litigation . . . ." Wright and Miller, Federal Practice and Procedure § 1409, p. 37 (1971). *See also id.*, § 1418, p. 103. Federal courts have sometimes dismissed the second claim, *U.S. v. Eastport S.S. Corp.*, 255 F. 2d 795 (2d Cir. 1958); *Jepco Corp. v. Greene*, 171 F. Supp. 66 (D.C.N.Y. 1959); *E. J. Korvette Co. v. Parker Pen Co.*, 17 F.R.D. 267 (D.C.N.Y. 1955); and, in other cases, simply stayed it, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197 (2d Cir. 1970); *Leonard F. Fellman Co. v. Smith-Corona Marchant Inc.*, 27 F.R.D. 263 (D.C. Pa. 1961).

**[2]** We hold, therefore, that in order to give effect to the purpose of Rule 13(a) once its applicability to a second independent action has been determined, this second action must on motion be either (1) dismissed with leave to file it in the former case or (2) stayed until the former case has been finally determined.

Having then determined that the husband's claim for divorce may be denominated a compulsory counterclaim and that if Rule 13(a) is applicable it must be either dismissed or stayed, we turn to whether we should decline to apply Rule 13(a) to an action for divorce because of provisions in other statutes governing these disputes.

**[3]** Rule 1 of the Rules of Civil Procedure provides: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings *of a civil nature* except where a differing procedure is prescribed by statute." (Emphasis supplied.) Certainly divorce actions are "of a civil nature." The question is whether our statutes dealing specifically with divorce actions prescribe a procedure for counterclaims different from that prescribed in Rule 13(a). We conclude they do not.

Our statutes dealing with marital disputes seem to indicate a legislative desire that proceedings in matrimonial disputes shall be conducted as in other civil actions unless there is some express statutory provision otherwise. General Statute 50-8 provides: "In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148." General Statute 50-13.5 provides: "The procedure in actions for custody and support of minor children shall be as in civil actions, except as herein provided" and "[a]n action brought under the provisions of this section may be main-

tained . . . (1) [a]s a civil action." General Statute 50-16.8 provides: "The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section." This last section then provides that actions for alimony may be filed as counterclaims in divorce proceedings and actions for divorce may be filed as counterclaims in alimony without divorce proceedings.

While provisions in General Statute 50-16.8 speak in terms of permissive counterclaims, the provisions are direct descendants of earlier statutes which long predated the adoption of Rule 13(a). These earlier versions of General Statute 50-16.8 were interpreted to preclude counterclaims for alimony in actions for divorce and to require that such claims be brought in separate actions. *Shore v. Shore*, 220 N.C. 802, 18 S.E. 2d 353 (1942); *Silver v. Silver*, 220 N.C. 191, 16 S.E. 2d 834 (1941). General Statute 50-16 was then amended by Chapter 814, 1955 Session Laws, so as to permit the wife to counterclaim for alimony without divorce in her husband's suit for absolute divorce *and* to permit the husband to counterclaim for absolute divorce in an action brought by his wife for alimony without divorce. General Statute 50-16.8 simply continued to permit these kinds of counterclaims in keeping with its earlier version.

These statutes, then, speaking to a court-made rule which precluded certain kinds of counterclaims, made these claims permissive. Rule 13(a), speaking to civil actions generally, made certain of these counterclaims mandatory. There is no conflict between the statutes and Rule 13(a). Rather Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Progressing toward the avoidance of multiplicity of actions and a more efficient use of the time of courts and litigants, the law in this area has steadily evolved from a rule which precluded the counterclaim altogether, to one which permitted it at the election of the pleader, and finally to the present rule which, in certain but not in all instances, requires it to be pleaded, if at all, as a counterclaim.

The last consideration, then, is whether Rule 13(a) if applied to divorce actions contravenes the policy of the law favoring the maintenance of the marital relationship. The argument that it does is based on an effect of Rule 13(a) which we have not as yet addressed. Again the rule itself does not prescribe this effect.

Courts have, however, consistently held that a party who does not plead a compulsory counterclaim is, after determination of the action in which it should have been pleaded, forever barred from bringing a later independent action on that claim. Wright and Miller, *supra*, § 1417, p. 94. The cited text says: "Although this result is well-established by the cases, and a contrary result would destroy the effectiveness of Rule 13(a), it is not clear precisely on what authority it is based." Apparently various doctrines have been invoked to reach this desirable result. According to the cited text these doctrines have been, variously, *res judicata*, waiver, and estoppel. In *Lawhorn v. Atlantic Refining Co.*, 299 F. 2d 353 (5th Cir. 1962), however, the court held that a defendant who successfully moved to dismiss a complaint for failure to state a claim for relief was not thereafter barred from bringing an independent action against the former plaintiff on a claim arising out of the transaction that formed the basis for the former plaintiff's claim. The court said that since the motion was not a pleading, the case had never reached the point at which the compulsory counterclaim rule became operative. It said further, 299 F. 2d at 357:

> "If one hauled into court as a defendant has a claim but the adversary plaintiff has not, the nominal defendant ought to be allowed to name the time and place to assert it. . . . *It is one thing to concentrate related litigation once it is properly precipitated.* It is quite another thing for the rules to compel the institution of litigation." (Emphasis supplied.)

At least one court has applied Rule 13(a) so as to bar an action for absolute divorce on the ground that the action should have been filed as a counterclaim to an earlier *unsuccessful* suit for divorce filed by the other spouse. *Stolar v. Stolar*, 359 A. 2d 597 (D.C. App. 1976).

A contrary result was reached in *Moats v. Moats*, 168 Colo. 120, 450 P. 2d 64 (1969). In that case the wife first filed action for and was awarded a decree of separate maintenance. The husband later filed action for absolute divorce. The wife moved to dismiss the second suit on the ground that Rule 13(a) required it to have been brought, if at all, as a compulsory counterclaim in her earlier completed action. The Colorado court held that the divorce action was not barred. It rested its decision primarily on a Colorado

statute which provided that a decree granting separate maintenance "shall not bar either party from 'subsequently' bringing and maintaining an action for divorce." It added, however, "the policy of the law is to support and maintain the marriage wherever it is reasonable to do so. The husband should not be penalized because he did not ask for a divorce at the first opportunity." 168 Colo. at 125, 450 P. 2d at 66. Furthermore, in *Moats* the husband's divorce action was grounded on mental cruelty which allegedly occurred prior to the decree for separate maintenance granted to the wife. The wife's action for separate maintenance was also grounded on mental cruelty. The Colorado court noted that the doctrine of recrimination no longer applied in Colorado and that since both parties could have been guilty of mental cruelty a decree in favor of the wife was no bar to the husband's divorce action.

In *State ex rel Fawkes v. Bland*, 357 Mo. 634, 210 S.W. 2d 31 (1948), the husband brought suit against the wife for absolute divorce and the wife counterclaimed for separate maintenance and for custody of the child. The question before the court was whether the wife was permitted to file her counterclaim under statutes governing such procedure in Missouri. The trial court held that she was. The Missouri Court of Appeals held that she was not only permitted to file it but was compelled to file it under a compulsory counterclaim provision in a rule relating to civil proceedings generally. The Supreme Court disagreed with the latter conclusion of the Court of Appeals. Noting that Missouri's divorce statutes treated such counterclaims as permissive, it held that the compulsory counterclaim provisions of the Civil Procedure Code would not be construed to make them mandatory. The Court said, 357 Mo. at 645, 210 S.W. 2d at 36:

> "That right is more substantive than procedural; it can hardly be thought that the new Code intended to *compel* the innocent and injured defendant in such a suit to file a cross-action for divorce and seek to sever the marital relation, or else waive the right altogether (on the same grounds)." (Emphasis supplied.)

We recognize and adhere in this state to a policy which within reason favors maintenance of the marriage. This policy militates against the application of any procedural rule which

forces a spouse to file an action for absolute divorce or any action which tends to sever the marital relation before that spouse is really desirous of pursuing such a course.

But giving effect to Rule 13(a) here so as to require dismissal or stay of the husband's suit would not have such an effect. The husband has *already filed* his action. The question is simply whether he can prosecute it as a separate suit in face of the provisions of Rule 13(a). To hold that he cannot does not contravene the policy favoring maintenance of marriages and is in keeping with the salutary procedural principle that litigation once precipitated ought to be concentrated insofar as practicable in one forum.

**[4]** We determine, then, to apply Rule 13(a) to marital disputes as follows: Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13(a), may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. The claim, however, will not be barred *by reason of Rule 13(a)*[7] if it is filed after final judgment has been entered in the prior action. Had the husband here, for example, filed his divorce action after final judgment had been entered in his wife's action, we would follow the rationale and result reached in *Moats v. Moats, supra*; and we would not, for strong reasons of public policy, apply Rule 13(a) so as to bar his action.

We hold, then, for the reasons given, that it was error for the Johnston County District Court to deny the wife's motion to dismiss the husband's action or stay it until her case in Wayne County can be finally determined. The case is therefore remanded to the Court of Appeals in order that it may be further remanded to the Johnston County District Court for further proceedings in conformity with this opinion.

Error and remanded.

7. Other well established doctrines, *e.g.*, *res judicata*, may, of course, operate to bar the subsequent action.

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

AMICARE NURSING INNS v. CHC CORP.

No. 91 PC.

Case below: 34 N.C. App. 310.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

BENTON v. CONSTRUCTION CO.

No. 111 PC.

Case below: 34 N.C. App. 421.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 24 January 1978.

CLINE v. CLINE

No. 112 PC.

No. 47 (Spring Term).

Case below: 34 N.C. App. 495.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 24 January 1978.

DELLINGER v. BELK

No. 104 PC.

Case below: 34 N.C. App. 488.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 24 January 1978.

ELMWOOD v. ELMWOOD

No. 3 PC.

No. 49 (Spring Term).

Case below: 34 N.C. App. 652.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 24 January 1978.

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

GRISSOM v. DEPT. OF REVENUE

No. 105 PC.

Case below: 34 N.C. App. 381.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

PHILLIPS v. PHILLIPS

No. 114 PC.

No. 48 (Spring Term).

Case below: 34 N.C. App. 428.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 24 January 1978.

POOLE v. HANOVER BROOK, INC.

No. 120 PC.

Case below: 34 N.C. App. 550.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. BLAND

No. 92 PC.

Case below: 34 N.C. App. 384.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. CARPENTER

No. 4 PC.

Case below: 34 N.C. App. 742.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

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

STATE v. CARRINGTON

No. 94 PC.

Case below: 34 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. CHAUFFE

No. 98 PC.

Case below: 34 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. COVINGTON

No. 31.

Case below: 34 N.C. App. 457.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. FREEMAN

No. 102 PC.

Case below: 34 N.C. App. 502.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 December 1977.

STATE v. GARNER

No. 116 PC.

Case below: 34 N.C. App. 498.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

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

STATE v. HARRIS

No. 107 PC.

Case below: 34 N.C. App. 491.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1977.

STATE v. JOHNSON

No. 103 PC.

No. 46 (Spring Term).

Case below: 34 N.C. App. 328.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 24 January 1978.

STATE v. LEWIS

No. 7 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. ROBERTS

No. 115 PC.

Case below: 34 N.C. App. 502.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. SAMPSON

No. 84 PC.

Case below: 34 N.C. App. 305.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

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

STATE v. SMALL

No. 1 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1978. Appeal dismissed ex mero motu for lack of substantial constitutional question 11 January 1978.

STATE v. SMITH

No. 2 PC.

Case below: 34 N.C. App. 671.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 January 1978.

STATE v. SUMLER

No. 18 PC.

Case below: 34 N.C. App. 751.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. SUTTON

No. 82 PC.

Case below: 34 N.C. App. 371.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. WALKER

No. 101 PC.

No. 45 (Spring Term).

Case below: 34 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 24 January 1978.

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

STATE v. WALLACE

No. 97 PC.

Case below: 34 N.C. App. 327.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. WATKINS

No. 110 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE v. WHEELER

No. 81 PC.

Case below: 34 N.C. App. 243.

Petition by defendants for discretionary review under G.S. 7A-31 denied 24 January 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

STATE v. WILKINS

No. 108 PC.

Case below: 34 N.C. App. 392.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1977.

STATE v. WILLIAMS

No. 30.

Case below: 34 N.C. App. 502.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1978.

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

STATE v. WILSON

No. 109 PC.

Case below: 34 N.C. App. 474.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 December 1977.

VAUGHN v. COUNTY OF DURHAM

No. 100 PC.

Case below: 34 N.C. App. 416.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 24 January 1978.

STATE OF NORTH CAROLINA v. JOHN CALVIN TATE

No. 97

(Filed 24 January 1978)

1. **Criminal Law § 82.1— attorney-client privilege—fact attorney sent letter to client**

The fact that an attorney did communicate with his client in a certain manner on a certain date is not normally privileged information. Therefore, the trial court properly admitted an attorney's testimony that he had sent a letter to defendant on 22 December 1976.

2. **Criminal Law § 82.1— attorney-client privilege—letter from attorney to client—contents of letter—waiver of privilege**

In a prosecution for murder and two felonious assaults in which the assault victims testified that defendant stated he was going to kill them because he had received a letter from his attorney stating that he would get ten years for shooting into the victims' house on an earlier occasion, and the attorney testified that he sent a letter to defendant three days before the assaults, the trial court properly ruled that if defendant elicited testimony from the attorney that the letter contained no statement that defendant was likely to receive a ten-year sentence for shooting into the victims' apartment, such action would constitute a waiver of the attorney-client privilege with respect to the entire contents of the letter.

3. **Constitutional Law § 30; Bills of Discovery § 6— summary denial of discovery motion at trial—harmless error**

In this prosecution for murder and two felonious assaults, the trial court erred in summarily denying defendant's motion that the district attorney be required to disclose a statement given to police officers by a witness who testified at the trial that she saw defendant knocking on the door of the victims' apartment between 9 and 10 a.m. on the day of the crimes; however, such error was harmless beyond a reasonable doubt where defense counsel's cross-examination of the witness established that she was uncertain of the time she saw defendant knocking on the door of the victims' apartment; uncontradicted testimony of the two assault victims indicated that defendant was the person who went on a rampage in their apartment on the day in question; and another witness testified he saw defendant leaving the victims' apartment shortly before police officers arrived there.

4. **Criminal Law § 34.7— evidence of another crime—relevance to show intent**

In this prosecution for murder and two felonious assaults, testimony by one assault victim that on an earlier occasion defendant came to her house with a pistol, forced her to have sexual relations with him and threatened to kill her if she called the police was relevant as tending to prove defendant's intent at the time he assaulted the victim, and such evidence was not inadmissible because it also tended to show that defendant committed a separate and independent crime.

**5. Criminal Law § 73.1— admission of hearsay—harmless error**

In this prosecution for murder and two felonious assaults, a newspaper boy's testimony that he saw defendant leave the victims' apartment at 10 a.m. was inadmissible hearsay where the witness testified that he knew the hour at which he had seen defendant only because his supervisor had driven by and told him the time; however, the admission of the newspaper boy's testimony concerning the time could not have prejudiced defendant where other witnesses, including the two assault victims, placed defendant at the victims' apartment at the time in question.

**6. Criminal Law § 99.2— court's private conversation with jurors—waiver of objection**

While the trial judge's private conversations with jurors who asked or started to ask questions addressed to the court were ill-advised and are disapproved, defendant waived objection to such procedure by failing to object thereto or to request disclosure of the substance of the conversations.

**7. Homicide § 24.1— instructions—presumption of malice**

In a homicide prosecution, the trial court's instructions on the mandatory presumption of malice were proper and constitutional where there was no evidence that the killing was committed in self-defense or in the heat of passion arising on sudden provocation.

**8. Criminal Law § 99.2— court's statement to prospective juror—no expression of opinion**

In this prosecution for murder and two felonious assaults wherein there was evidence tending to show that two of the victims were assaulted by defendant for the purpose of killing them so that they could not testify against him for shooting into their home, the trial court's statement to a prospective juror that "in many cases witnesses are eliminated, or—for reasons that they are witnesses" did not convey to the jury any opinion concerning defendant's guilt or the sufficiency of proof of any fact and did not constitute an expression of opinion in violation of G.S. 1-180.

Justice EXUM dissenting.

DEFENDANT appeals from judgments of *Grist, J.*, at the 23 May 1977 Session, MECKLENBURG Superior Court.

Defendant was tried upon bills of indictment charging him with the first degree murder of Tamara L. Robinson and with two counts of assault with a deadly weapon with intent to kill inflicting serious injury on Margaret Royster Robinson and Malinda Ann Robinson.

The State's evidence tends to show that on the morning of 25 December 1976, between the hours of 9 and 10, defendant knocked on the door of the Robinson family's apartment in

Charlotte. The door was answered by Mrs. Margaret Robinson. Margaret Robinson and defendant knew one another and had previously lived together but were not living together at this time. Mrs. Robinson had sworn out a warrant against defendant for shooting into her apartment the previous September, and that case was still pending.

When Mrs. Robinson answered the door, defendant inquired concerning the whereabouts of a mutual acquaintance, then turned and departed. Mrs. Robinson went upstairs to make up her bed and check on her granddaughter. A few moments later she turned to find defendant standing behind her. He attemped to choke her with a rope and she passed out. She regained consciousness briefly as defendant was cutting her on her neck, then again passed out.

Malinda Ann Robinson, the daughter of Margaret Robinson and the mother of Tamara, had spent Christmas Eve at a friend's house. She returned to the family's apartment on Christmas morning and knocked on the door until it was opened by defendant. Going upstairs, she saw her mother lying on the floor and was then attacked by defendant who attempted to choke her with his hands and with a broomstick. She passed out but awakened as defendant was cutting her on the face and neck with a razor blade box cutter. Defendant ceased cutting her and Malinda passed out again. Before passing out, however, she heard her daughter scream. Sometime later Malinda awakened and telephoned her boyfriend. When officers arrived at approximately 11 a.m. they found three-year-old Tamara with a cord around her neck. She had been strangled to death. Defendant was seen leaving the Robinsons' apartment about twenty to thirty minutes before the officers arrived.

Defendant did not testify but offered evidence tending to show that Margaret and Malinda Robinson were the beneficiaries of insurance policies totaling approximately $3,000 on the life of Tamara. Defendant also presented evidence tending to show that the doors to the Robinsons' apartment were equipped with properly functioning locks and, when locked, could not be opened without a key.

Other evidence necessary to an understanding of the case on appeal will be discussed in the opinion. A motion to bypass the Court of Appeals was allowed as to the assault convictions.

Defendant was convicted of second degree murder of Tamara Robinson and sentenced to life imprisonment. He was also convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury and sentenced to imprisonment for twenty years on each assault. Defendant appeals from the judgments, assigning errors noted in the opinion.

*Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State of North Carolina.*

*Michael S. Scofield, Public Defender, and Grant Smithson, Assistant Public Defender, for the defendant appellant.*

HUSKINS, Justice.

Defendant's first two assignments of error concern evidentiary rulings of the trial court relating to a communication between defendant and the attorney who represented him in connection with another criminal charge. These assignments require further examination of the evidence adduced at trial.

**[1]** State's witness Margaret Ann Robinson testified that during the course of his assault on her defendant stated: "I got a letter from my lawyer saying that I was going to make ten years for shooting in your house. . . . You are not going to live to testify." State's witness Malinda Ann Robinson testified: "[Defendant] said he was going to kill all of us because he got a paper from his lawyer saying he was going to make ten years for shooting in our house." Attorney Tate Sterrett was then called as a witness for the State and testified that he represented defendant in connection with a charge of shooting into an occupied dwelling. Sterrett was then asked: "Did you have an occasion to communicate with the defendant by letter on December 22nd of 1976?" Over defendant's objection the witness was directed to respond and his answer was in the affirmative. No further questions were asked. The trial court's ruling admitting this testimony constitutes defendant's first assignment of error.

It is well established that the substance of communications between attorney and client is privileged under proper circumstances. *See generally* 1 Stansbury's North Carolina Evidence § 62 (Brandis rev. 1973); McCormick on Evidence §§ 87-95 (2nd ed. 1972). Not all facts pertaining to the lawyer-client relationship are privileged, however. "[T]he authorities are clear that the privilege

extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client." *Colton v. United States*, 306 F. 2d 633, 637 (2nd Cir. 1962). We are of the opinion that the fact that an attorney did communicate with his client in a certain manner on a certain date is likewise not normally privileged information. "It is the substance of the [attorney-client] communication which is protected, however, not the fact that there have been communications." *United States v. Kendrick*, 331 F. 2d 110, 113 (4th Cir. 1964). *Accord, State v. Manning*, 162 Conn. 112, 291 A. 2d 750 (1971). We hold that the trial court properly admitted Attorney Sterrett's testimony that he had sent a letter to defendant on 22 December 1976. Defendant's first assignment of error is overruled.

**[2]** Following Attorney Sterrett's testimony that he had written a letter to John Calvin Tate, defense counsel sought to cross-examine Sterrett concerning the letter's contents. Sterrett testified in the absence of the jury that the letter he had written to defendant contained no statement that Tate was likely to receive a ten-year sentence for shooting into the Robinson apartment. Judge Grist ruled that if such testimony were elicited in the presence of the jury by defendant's questioning, such action would constitute a waiver of the attorney-client privilege with respect to the entire contents of the letter. This ruling constitutes defendant's second assignment of error.

It is well settled that the privilege afforded a confidential communication between attorney and client may be waived by the client when he offers testimony concerning the substance of the communication. *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540 (1956); *State v. Artis*, 227 N.C. 371, 42 S.E. 2d 409 (1947); *Jones v. Marble Co.*, 137 N.C. 237, 49 S.E. 94 (1904); McCormick on Evidence § 93 (2nd ed. 1972); 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961). Defendant contends, however, that questions concerning what statements a confidential communication does *not* contain should not constitute a waiver of the attorney-client privilege with respect to the entire communication.

We are of the opinion that the trial court's ruling was correct. The letter itself is the best evidence of what it *does* and *does not* contain. Even if the letter contained no statement that defendant was likely to receive a ten-year sentence for shooting into the Robinson residence, it may have contained other statements of similar import. The privilege which preserves the confidentiality of the letter is deemed to be waived if Sterrett's testimony concerning the letter's contents is put into evidence before the jury. *Hayes v. Ricard, supra.* Defendant's second assignment of error is overruled.

**[3]** Defendant's third assignment of error relates to the failure of the trial court to order the district attorney to disclose a statement by State's witness Mary Harrell given prior to trial.

Mrs. Harrell testified at trial that defendant spent Christmas Eve at her family's home and that she saw defendant knocking on the door to Mrs. Robinson's apartment on Christmas morning between 9 and 10 a.m. On cross-examination defense counsel established that Mrs. Harrell had previously given a statement to police officers in connection with their investigation of the murder of Tamara Robinson. Defendant then moved that he be allowed to inspect this prior statement, and the motion was denied. No *in camera* inspection of the witness' prior statement was conducted, and no findings of fact were made respecting the court's refusal to permit defendant to inspect the prior statement of Mary Harrell.

The trial court's denial of defendant's motion was error. This question is thoroughly discussed in *State v. Hardy,* 293 N.C. 105, 235 S.E. 2d 828 (1977):

> "[W]e 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, competent 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 ap-

proved 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 v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963)] and [*United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976)] 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." 293 N.C. at 127-28, 235 S.E. 2d at 842.

In our opinion, however, the trial court's error was harmless beyond a reasonable doubt. Defense counsel's cross-examination of Mary Harrell established that she was uncertain of the time at which she saw defendant knocking on the door of the Robinson family's apartment. Even if her pretrial statement to police officers would have enabled counsel to completely destroy Mrs. Harrell's credibility, the uncontradicted testimony of Margaret and Malinda Ann Robinson indicates defendant was the person who went on a rampage in their home on Christmas morning. Moreover, State's witness Michael Walker, a local newspaper boy, testified that he saw defendant leaving the Robinsons' apartment on Christmas morning about twenty to thirty minutes before police officers arrived. The officers first arrived at the Robinson apartment at about 11 a.m. according to the testimony of Officer J. C. Boatman. We are satisfied beyond a reasonable doubt that the error of the trial court in summarily denying defendant's motion had no impact on the jury's verdict and did not contribute to defendant's conviction. *See 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).

**[4]** In response to questions propounded by the district attorney, Mrs. Margaret Robinson testified that at one time between summer and Christmas of 1976 defendant had come to her house

armed with a pistol, forced her to have sexual relations with him, and threatened to kill her if she called the police. Motion to strike this testimony was overruled. Defendant grounds his fourth assignment on this ruling.

It is a well settled rule of evidence in this jurisdiction that proof of crimes other than those for which defendant is being tried is generally inadmissible. This rule, however, is subject to a number of exceptions. The rule itself and the numerous exceptions thereto are discussed and documented by Justice Ervin in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The second exception noted in *McClain* is pertinent here:

> "2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." (Citations omitted.) 240 N.C. at 175, 81 S.E. 2d at 366.

*Stansbury* formulates the rule thusly:

> "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's North Carolina Evidence § 91 (Brandis rev. 1973).

One of the crimes for which defendant was being tried—assault on Mrs. Margaret Robinson with a deadly weapon with intent to kill inflicting serious bodily injury—requires proof of a specific intent or mental state. Evidence tending to show that defendant had threatened to kill Mrs. Margaret Robinson if she reported his criminal conduct to the police is relevant as tending to prove defendant's intent at the time he assaulted her. *See, e.g., State v. Heard*, 262 N.C. 599, 138 S.E. 2d 243 (1964). In our opinion evidence both of the threat itself and of the context in which it was made is relevant and admissible here. Such evidence is not rendered inadmissible because it also tends to show that defendant has committed a separate and independent crime. Accordingly, defendant's fourth assignment of error is overruled.

**[5]** Michael D. Walker, a local newspaper boy, testified that he saw defendant leave the Robinson apartment at about 10 a.m. on Christmas morning. On cross-examination Walker said he knew the hour at which he had seen defendant leave the Robinson home only because his supervisor had driven by and told him the time. Defendant moved to strike Walker's testimony with regard to the time he saw defendant leave the Robinson apartment because it was based totally on the hearsay statement of Walker's supervisor. Denial of defendant's motion constitutes his fifth assignment of error.

Walker's testimony concerning the time of day at which he had seen defendant is indeed hearsay, for "its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness. . . ." *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); 1 Stansbury's North Carolina Evidence § 138 (Brandis rev. 1973). In our view, however, the admission of Walker's testimony concerning the time could not have prejudiced defendant. Mary Harrell testified that she observed defendant knocking on Mrs. Robinson's door between 9 and 10 a.m. Mrs. Margaret Robinson testified that defendant knocked on her door between 9:30 and 10:00 a.m. and assaulted her shortly thereafter. Malinda Robinson testified that she arrived at her family's apartment at approximately 10:35 a.m. and was admitted by defendant after knocking for approximately twenty minutes. Charlotte Police Officer J. C. Boatman testified that it was about 11 a.m. when he drove to Mrs. Robinson's apartment in response to a call, and defendant was not there when Officer Boatman arrived. Michael Walker testified that he saw police officers arrive at the Robinson apartment "about twenty or thirty minutes after I saw John Tate leave the [Robinsons' apartment]."

Michael Walker's testimony that it was about 10 when he saw defendant leave the Robinson apartment was, in our opinion, entirely harmless and resulted in no prejudice to defendant. Accordingly, defendant's fifth assignment of error is overruled.

**[6]** On two occasions during defendant's trial jurors asked, or started to ask, questions addressed to the court. In each case Judge Grist directed the juror to approach the bench and a private discussion between judge and juror ensued. By his sixth assignment of error defendant contends that such procedure was impermissible, requiring a new trial.

We are of the opinion that the trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response should be made in the presence of counsel. The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver. *See, e.g., State v. Hartsfield,* 188 N.C. 357, 124 S.E. 629 (1924). *See also State v. Tolley,* 290 N.C. 349, 226 S.E. 2d 353 (1976); *State v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621 (1945). Defendant's sixth assignment of error is, therefore, overruled.

**[7]** Defendant's seventh assignment of error relates to a portion of the trial court's charge pertaining to murder. It is contended that the trial court erred by instructing the jury as follows: "Malice is implied in law *if no other evidence is presented* and when the State has satisfied the jury from the evidence beyond a reasonable doubt that the defendant, by means of a deadly weapon, intentionally inflicted injuries upon the deceased which proximately caused death." (Emphasis added.) At another point in the court's charge, the jury was instructed that under the circumstances described above "the law raises [the] presumption . . . that the killing was with malice."

*Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), explicitly permits the use of mandatory presumptions under certain circumstances: "Many states do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element . . . beyond a reasonable doubt. . . . Nothing in this opinion is intended to affect that requirement." *Mullaney, supra,* n. 28. This Court has repeatedly held that mandatory presumptions concerning the existence of malice and unlawfulness are proper and constitutional *so long as there is no evidence that the killing was committed in the heat of passion arising on sudden provocation or in self-defense. State v. Biggs,* 292 N.C. 328, 233 S.E. 2d 512 (1977); *State v. McCall,* 289 N.C. 512, 223 S.E. 2d 303 (1976); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575, *reversed on other grounds,* --- U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977); *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975). Where, as in this case, there is no evidence that the killing was committed in self-defense or in heat of passion arising on sudden

provocation, the instruction given by Judge Grist is correct. Defendant's seventh assignment of error is overruled.

**[8]** By his eighth and final assignment of error defendant contends that the trial court violated G.S. 1-180 in the course of its examination of a prospective juror.

The record shows that one prospective juror expressed reservations about her willingness to vote for conviction of a defendant if his guilt was shown only by circumstantial evidence. At defense counsel's request, Judge Grist questioned the juror regarding her willingness to consider circumstantial evidence. Following the juror's further expression of doubt as to whether she could vote to convict a defendant based on circumstantial evidence, the following transpired:

> "COURT: You understand that crimes in many instances are committed in secret, don't you?
>
> JUROR: Yes, sir.
>
> COURT: And that in many instances witnesses are eliminated, or—for reasons that they are witnesses. You know that. And that it's necessary in many instances through the proper use of circumstantial evidence to submit a case to the jury whether they find the defendant guilty or not guilty, based on all the evidence, including circumstantial evidence. Understand that?
>
> JUROR: Yes, sir."

The particular juror to whom these remarks were addressed was challenged for cause by the State and the challenge was allowed. Defendant contends, however, that the trial court's statement "in many cases witnesses are eliminated, or—for reasons that they are witnesses" constitutes an expression of opinion prohibited by G.S. 1-180. We think not. Admittedly, the evidence at defendant's trial tended to show that Margaret and Malinda Robinson were assaulted by defendant for the purpose of killing them so they could not testify against him for shooting into their home. Nonetheless, we are of the opinion that Judge Grist's statement quoted above did not convey to the jury any opinion concerning defendant's guilt or the sufficiency of proof of any fact. "[T]he test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge *expressed partiality or in-*

*timated an opinion as to a witness' credibility or as to any fact to be determined by the jury.*" *State v. Staley*, 292 N.C. 160, 165, 232 S.E. 2d 680, 684 (1977) (Emphasis added). Judge Grist's remarks do not constitute prejudicial error warranting a new trial.

Having considered all assignments raised by defendant's able brief, we think defendant had a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

Justice EXUM dissenting.

I think it was error to admit the witness Sterrett's statement that he communicated with defendant without also permitting Sterrett to explain that he did not advise defendant of the possibility of receiving a ten-year sentence.

This is a close case. The evidence is not overwhelming against defendant. For this reason I cannot subscribe to the majority's conclusion that other errors, which the majority concedes were committed at trial, were harmless.

I vote for a new trial.

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ROBERT F. WATERS v. QUALIFIED PERSONNEL, INC.

Nos. 40 and 73

(Filed 24 January 1978)

**1. Appeal and Error § 5.1— no right of appeal—dismissal of appeal ex mero motu**

If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves.

**2. Appeal and Error § 6.2— appeal from interlocutory orders**

No appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before final judgment. G.S. 1-277; G.S. 7A-27.

**3. Appeal and Error § 6.2— setting aside summary judgment on procedural ground—order not immediately appealable**

An order setting aside without prejudice a summary judgment on the ground of procedural irregularity—failure to comply with the notice requirement of G.S. 1A-1, Rule 56(c)—is an interlocutory order which is not immediately appealable.

CASE No. 40 is before us on plaintiff's petition for discretionary review filed pursuant to General Statute 7A-31. Case No. 73 comes by way of writ of certiorari, which we issued pursuant to plaintiff's petition. In No. 40 plaintiff seeks review of a decision of the Court of Appeals, 32 N.C. App. 548, 233 S.E. 2d 76 (1977), which, on defendant's appeal, reversed an order entered by *Judge James M. Long* on 24 May 1976 in GUILFORD Superior Court setting aside a summary judgment for defendant entered in the same court by *Judge John D. McConnell* on 8 March 1976. In No. 73 plaintiff asks us to review the Court of Appeals' denial of plaintiff's petition for writ of certiorari by which (his time for appeal having expired) he sought review in that Court of the summary judgment entered by Judge McConnell. We consolidated both cases for argument and decision.

*Smith, Patterson, Follin, Curtis & James by J. David James, Attorneys for plaintiff appellant.*

*Jordan, Wright, Nichols, Caffrey & Hill by William L. Stocks and R. Thompson Wright, Attorneys for defendant appellee.*

EXUM, Justice.

**[1]** The threshold question in Case No. 40, although not argued by either party, is whether an appeal lies from Judge Long's order. If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal[1] even though the question of appealability has not been raised by the parties themselves. *Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632 (1959); *Rogers v. Brantley*, 244 N.C. 744, 94 S.E. 2d 896 (1956); *Morse v. Curtis*, 6 N.C. App. 620, 170 S.E. 2d 491 (1969). Concluding that Judge Long's order is not appealable, we hold that the Court of

1. Unless, in the case of this Court, we elect to consider the matter in the exercise of our general supervisory powers granted by N.C. Const., Art. IV, § 12(1) and G.S. 7A-32(b). *See Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974).

Appeals erred by entertaining and not dismissing on its own motion the purported appeal from the order.[2] Concluding further that we improvidently issued our writ of certiorari in Case No. 73, we set aside the writ and deny plaintiff's petition therefor.

The facts are these: On 12 March 1975 plaintiff filed in Guilford Superior Court a complaint, signed by Attorney Lawrence Egerton, Jr., in which he claimed a balance due him of $23,160 with interest on a promissory note executed by defendant. He also claimed defendant corporation was insolvent or in danger of becoming insolvent so that the interests of general creditors would be served by the appointment of a receiver. A purported copy of the note, signed by J. Leon Turner individually and for defendant Qualified Personnel, Inc., was attached to the complaint as Exhibit "A". Plaintiff sought recovery of the amount due on the note and an order directing defendant to show cause why a receiver should not be appointed. Defendant answered denying these allegations and averring by way of defense that the alleged note was neither a corporate obligation nor supported by consideration.

On 5 June 1975 plaintiff moved in a writing signed by Mr. Egerton for summary judgment pursuant to Rule 56. On 10 June 1975 Judge Robert A. Collier, Jr., ordered, over plaintiff's objection, that plaintiff's deposition be taken before the court heard plaintiff's motion for summary judgment. Plaintiff appeared for his deposition on 26 June represented by attorney Kent Lively, who was not a member of Mr. Egerton's firm. Mr. Lively instructed plaintiff not to answer certain questions, and on 6 August 1975 defendant moved for the imposition of Rule 37 sanctions. Some time thereafter plaintiff requested that this motion for sanctions be set for hearing at the 8 March 1976 Session of Guilford Superior Court. For several months no further action was taken by either party.

On 24 February 1976 defendant moved for summary judgment. Defendant's counsel served this motion on plaintiff by mailing a copy to Mr. Egerton on 25 February 1976. On 3 March 1976 defendant filed in support of the motion an affidavit of Lacy M. Henry to the effect that the by-laws of Qualified Personnel, Inc.,

2. It is clear the Court of Appeals purported to entertain this case only as an appeal of right and not pursuant to the issuance of any prerogative writ permitted by G.S. 7A-32(c).

required a resolution of the board of directors for the issuance of any evidence of indebtedness and that the note sued on by plaintiff had not been authorized by such resolution. A copy of defendant corporation's by-laws was attached to this affidavit as Exhibit "A". Copies of the affidavit and exhibit were served by mailing them to Mr. Egerton on 3 March 1976.

As originally requested by plaintiff following defendant's motion for Rule 37 sanctions, a hearing had been calendared for the 8 March 1976 Session of Guilford Superior Court. At Judge McConnell's calendar call on 8 March Mr. Lively answered for plaintiff and Mr. William L. Stocks for defendant. Judge McConnell announced that "the case" would be heard later that morning. At 11:43 a.m. on 8 March Mr. Lively filed with the court a reply to defendant's motion for summary judgment, which was signed by Mr. Egerton as "Attorney for Plaintiff." A reply to defendant's Rule 37 motion, signed by Mr. Egerton, was also filed at some time on 8 March.

Although defendant had filed no notice of hearing on its motion for summary judgment, Judge McConnell proceeded to hear this motion at approximately 11:45 a.m. on 8 March. Mr. Lively argued the motion for plaintiff and Mr. Stocks for defendant. Mr. Lively raised no question and made no objection concerning whether plaintiff had received adequate notice of hearing on defendant's summary judgment motion. At the conclusion of the hearing Judge McConnell granted defendant's motion. Summary judgment for defendant was signed and entered at 4:00 p.m. on 8 March.

On 11 March 1976 plaintiff moved to set aside the judgment on the grounds (1) that he was not served with defendant's summary judgment motion at least ten days before the time fixed for hearing as required by Rule 56(c) and (2) that the hearing on 8 March had been calendared for the purpose of considering defendant's motion for Rule 37 sanctions and not its motion for summary judgment. Plaintiff's motion was signed by Robert S. Hodgman of the firm of Egerton & Hodgman.

Plaintiff's motion to set aside the judgment came on for hearing on 11 March 1976 before Judge McConnell with attorneys James B. Rivenbark and Mr. Lively appearing for plaintiff. At this hearing a question, quite a natural one in view of the pro-

ceedings just related, arose as to who was in fact plaintiff's attorney of record. Mr. Egerton was not present at this hearing and could not be reached. Following the hearing Judge McConnell found facts and entered the following order on 12 March 1976:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

"(1) This case shall be calendared as the first case on the motion portion of the calendar for the March 29, 1976 Civil Session of Superior Court of Guilford County.

"(2) In the event that James B. Rivenbark, Kent Lively and Lawrence Egerton all appear in Court on March 29, 1976 at 10:00 A.M. such hearing as may be appropriate to resolve the question of who is counsel of record for the plaintiff shall be held and such further hearing as may be appropriate may be held on the plaintiff's motion to set aside the judgment.

"(3) Upon the failure of James B. Rivenbark, Kent Lively or Lawrence Egerton to appear before the Court at 10:00 A.M. on March 29, 1976, the plaintiff's motion to set aside the judgment which was entered on March 8, 1976, shall be denied pursuant to this order and without the necessity of further hearing."

The matter was continued by consent until the 17 May 1976 Session when it came on for hearing before Judge Long. Although he heard no evidence, Judge Long made findings of fact substantially as stated above and entered the following order on 24 May 1976:

"THAT UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

"1. That the undersigned by the order of Judge John D. McConnell dated March 11, 1976, has jurisdiction to hear this matter.

"2. That through and including March 8, 1976, the attorney of record for the plaintiff was Lawrence Egerton, Jr.

"3. That the defendant's Motion for Summary Judgment filed and mailed on February 25, 1976 to the attorney of record for the plaintiff, Lawrence Egerton, Jr., by the defendant's attorney, and the affidavit of Lacy M. Henry in

support thereof filed on March 3, 1976 and mailed to the attorney of record for the plaintiff, Lawrence Egerton, Jr., on March 3, 1976, could not have been heard until March 16, 1976 under the provisions of Rule 6 and 56 of the North Carolina Rules of Civil Procedure.

"4. That the plaintiff's attorney of record, Lawrence Egerton, Jr., was not present in Court on March 8, 1976; therefore, there could have been no waiver of notice of hearing of the defendant's Motion for Summary Judgment.

"5. That the Court should not have heard the defendant's Motion for Summary Judgment on March 8, 1976, and the Judgment granting the defendant's Motion for Summary Judgment should be set aside without prejudice to the parties.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the Judgment of the Court by the Honorable John D. McConnell dated March 8, 1976 granting the defendant's Motion for Summary Judgment is set aside and void ab initio without prejudice to the parties to have said matter heard as by law provided, and the Court, pursuant to the responsibility of the Court to see that justice is done, in its discretion, also sets aside the Order of the Honorable John D. McConnell dated March 8, 1976."

From this order defendant attempted to appeal to the Court of Appeals. That court, treating the matter as having been appealed to it as a matter of right, proceeded to consider defendant's attacks on Judge Long's order. In this we think the court erred. We also think there was error in the Court of Appeals' characterization of Judge Long's order as one which, in effect, overruled a decision made by Judge McConnell.

Defendant offered in the Court of Appeals several arguments attacking Judge Long's order of 24 May 1976. Primarily it contended that the order purported to correct errors of law in Judge McConnell's prior rulings and thus violated the rule that one superior court judge cannot modify or vacate for legal error an order or judgment entered by another superior court judge. Defendant also argued that the grounds stated by Judge Long are not sufficient to set aside judgment under Rule 59(e) or Rule 60(b) of the Rules of Civil Procedure. Finally, defendant contended that

the appearance and argument of Attorney Kent Lively at the hearing on defendant's summary judgment motion constituted a waiver of the Rule 56(c) requirement that such a motion must be served at least ten days before hearing, and that Judge Long erred in concluding that there was no waiver because counsel of record was not present at the hearing.

In reversing Judge Long's order of 24 May 1976, the Court of Appeals reasoned that Judge Long had erroneously applied the provisions of Rule 60(b) as grounds for setting aside the summary judgment. The opinion also alludes to the established rule that one superior court judge cannot correct another judge's legal error and states that "plaintiff's only remedy from Judge McConnell's entry of summary judgment was by appeal." The Court of Appeals expressed no view on the waiver question or on the merits of the summary judgment order.

We believe that defendant's arguments and the opinion of the Court of Appeals reflect a misunderstanding of Judge Long's order. Judge Long did not rule on any question of law previously determined by Judge McConnell. In his order of 12 March 1976 Judge McConnell made no affirmative ruling on plaintiff's motion to set aside the judgment. He merely continued the hearing until all attorneys could be present to resolve the counsel of record question. Judge Long's order of 24 May 1976 was the first and only ruling at the trial level on plaintiff's previously undetermined motion. Judge Long did not purport to consider whether defendant was entitled to summary judgment as a matter of law. He merely noted the failure to comply with the notice requirement of Rule 56(c),[3] found that plaintiff had not waived the requirement, and set aside Judge McConnell's summary judgment order, *without prejudice to the parties, to rehear and redetermine defendant's motion for summary judgment at the trial level.* While Judge Long's order includes certain findings and conclusions as to procedural irregularity, Judge Long did not improperly assume the role of an appellate court vis-a-vis Judge McConnell.

Defendant urges this Court to consider several questions going to the legal correctness of Judge Long's order. These questions include whether the failure to comply with Rule 56(c)

3. Noncompliance with Rule 56(c) was conceded by defendant on oral argument before us.

warrants setting aside a summary judgment on the grounds provided in Rule 59(e) or Rule 60(b); whether the appearance and argument by Attorney Lively constitute waiver of the Rule 56(c) notice requirement as a matter of law; and whether continuance of the hearing on the motion to set aside the summary judgment, so that the motion eventually came before a second superior court judge, precludes the determination of the motion and leaves the opposing party without relief in the trial court. The Court of Appeals directed its opinion toward whether Judge Long committed legal error. For reasons hereinafter stated we believe these questions are presented prematurely and that the Court of Appeals should have dismissed this purported appeal.

**[2]** General Statutes 1-277[4] and 7A-27[5] in effect provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E. 2d 178, 181 (1974); *accord, Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). An order is interlocutory "if it does not determine the issues but directs some further proceeding preliminary to final decree." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961). The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for

4. "§ 1-277. *Appeal from superior or district court judge.* – (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

5. "§ 7A-27. *Appeals of right from the courts of the trial divisions.*

. . . .

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals."

determination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E. 2d 669, 671 (1951).

Clearly Judge Long's order was interlocutory. It contemplated further proceedings on the summary judgment question at the trial level. Neither, we are satisfied, did the order deprive defendant of any substantial right which might be lost by a refusal to review this order before some final judgment at trial was entered.

**[3]** Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. While our research has disclosed no North Carolina decision on the appealability of an order setting aside without prejudice a summary judgment on the grounds of procedural irregularity, both reason and analagous cases persuade us that such an order is not immediately appealable.

Defendant's rights here are fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment in the case ultimately go against it. All defendant suffers by its inability to appeal Judge Long's order is the necessity of rehearing its motion. The avoidance of such a rehearing is not a "substantial right" entitling defendant to an immediate appeal. Neither, for that matter, is the avoidance of trial which defendant might have to undergo should its motion and plaintiff's motion for summary judgment (which is still pending) both be denied.

Practically all courts which have considered the question, including our Court of Appeals, have held that the *denial* of a motion for summary judgment is not appealable. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970); *see also Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973); Annot., 15 A.L.R. 3d 899 (1967). In *GMC Trucks v. Smith*, 249 N.C. 764, 107 S.E. 2d 746 (1959) this Court held that an order setting aside a judgment of nonsuit was equivalent to the denial of a motion for nonsuit and not appealable. Other representative cases holding interlocutory orders not appealable are: *Consumers Power v. Power Co., supra*, 285 N.C. 434, 206 S.E. 2d 178 (1974) (denial of defend-

ant's motion to dismiss for lack of a justiciable controversy); *Barrier v. Randolph*, 260 N.C. 741, 133 S.E. 2d 655 (1963) (denial of motion for judgment on the pleadings); *Atkins v. Doub*, 260 N.C. 678, 133 S.E. 2d 456 (1963) (order setting aside verdict and denying motion for nonsuit); *Fryar v. Gauldin*, 259 N.C. 391, 130 S.E. 2d 689 (1963) (order of continuance); *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879 (1957) (order reversing clerk's entry of voluntary nonsuit); *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E. 2d 381 (1939) (denial of defendant's motion to dismiss on ground action was barred by statute of limitations); *Acoustical Co. v. Cisne and Associates*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975) (order setting aside an entry of default); *see also* 2 McIntosh, North Carolina Practice and Procedure § 1782, n. 44 (1970 Pocket Part); *but see Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976) and *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976) in which we held an order dismissing a claim for punitive damages prior to trial was immediately appealable.

The order setting aside summary judgment for defendant is tantamount to an order denying, for the time being at least, defendant's motion for such a judgment. *See GMC Trucks v. Smith, supra.* Leaving aside the obvious point that defendant may ultimately prevail at the rehearing of its summary judgment motion or at trial, there is good reason for withholding an appeal from a denial of summary relief at trial. It is that the trial court and the parties will be given an opportunity to develop more fully the facts in this dispute and to put the merits of the claim in bolder relief than they now are. Even if defendant should ultimately lose at trial, an appeal at that point would give the reviewing court a more complete picture, factually and legally, of the entire controversy between the parties. While we express no opinion on the merits, a fuller development of the facts in this case, whether on the respective motions for summary judgment now pending or at trial and regardless of which side prevails, may well render moot or at least shed more light than we now have in this record on the technical niceties involved in Judge Long's interlocutory order.

We recognize that we could, in the exercise of our supervisory powers, elect to consider the appeal in Case No. 40 on its merits. *Consumers Power v. Power Co., supra.* We decline to do

so, however, just as we declined under similar circumstances in *GMC Trucks v. Smith, supra.*

The Court of Appeals therefore erred in Case No. 40 by not dismissing the appeal sua sponte. In Case No. 73 we improvidently issued our writ of certiorari. Plaintiff's petition therefore should have been denied. The decision of the Court of Appeals is, therefore, reversed and Case No. 40 is remanded to it with instructions that it enter an order dismissing the appeal.

In Case No. 40 — Reversed and remanded.

In Case No. 73 — Petition for certiorari denied.

STATE OF NORTH CAROLINA v. DIXON LOCKLEAR

No. 111

(Filed 24 January 1978)

1. **Criminal Law § 138.6— sentencing of defendant—basis**

The record does not support the conclusion of the Court of Appeals that the trial judge improperly relied, either partially or solely, on "unsolicited whispered representations" or "rank hearsay" in sentencing defendant.

2. **Criminal Law § 102.5— cross-examination of witness—district attorney's comment on veracity—defendant prejudiced**

The district attorney's remarks to a witness during cross-examination that "you are lying through your teeth and you know you are playing with a perjury count" were grossly improper and should have been suppressed by the court *ex mero motu.*

3. **Constitutional Law § 32— right of defendant to fair trial**

Every person charged with a crime has an absolute right to a fair trial, that is, a trial before an impartial judge and an unprejudiced jury, and it is the duty of both the court and the prosecuting attorney to see that this right is sustained.

4. **Criminal Law § 102— prosecuting attorney—proper conduct**

Prosecuting attorneys owe honesty and fervor to the State and fairness to the defendant in the performance of their duties.

5. **Criminal Law § 102— conduct of counsel—expression of beliefs not based on evidence—impropriety**

Language may be used consistent with the facts in evidence to present each side of the case, but counsel may not, by argument or cross-examination,

place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence.

6. **Criminal Law § 102.5— attorney's comment on witness's veracity—impropriety**
It is improper for a lawyer to assert his opinion that a witness is lying.

Justice EXUM concurring.

APPEAL by the State from decision of the Court of Appeals, 34 N.C. App. 37, 237 S.E. 2d 289 (1977), vacating judgments of *Canaday, J.*, 19 October 1976 Criminal Session, ROBESON Superior Court, and remanding for resentencing. We allowed defendant's petition for discretionary review of other portions of the decision of the Court of Appeals upholding his conviction.

Defendant was tried upon a bill of indictment charging him with felonious possession of 24.1 grams of marijuana with intent to sell and deliver, and with sale and delivery of the same 24.1 grams of marijuana. A jury returned verdicts of guilty on both charges, and defendant was sentenced to consecutive five-year terms of imprisonment.

The State's evidence consists principally of the testimony of Max Boliek, an agent of the North Carolina Board of Alcoholic Control temporarily assigned to the Robeson County Sheriff's Department as an undercover agent for the purpose of seeking out and purchasing illicit drugs.

Agent Boliek testified that on 22 April 1976 he went to the residence of Clarence Leonard and asked about purchasing some marijuana. According to Boliek, Leonard responded that he had no marijuana but knew someone named Dixon who did. Boliek and Leonard drove to defendant's home. Boliek gave Leonard twenty dollars, and Leonard walked around to the back of defendant's residence while Boliek remained in the car. Several minutes later Leonard and defendant walked back to Boliek's car. Leonard was carrying a bag of marijuana which he handed to Boliek. Boliek inspected the marijuana and complained about its apparent quality. At this time, Boliek testified, the defendant took the bag of marijuana, examined it, and said: "Hey, man, you don't have to take it, but—you don't have to buy it if you don't want it. There's no trash in that pot. It's just like all the other I got and I haven't had any complaint."

The State also offered expert testimony that the bag sold to Agent Boliek contained 24.1 grams of plant material, approximately 80 percent of which was marijuana.

Defendant offered the testimony of Clarence Leonard. Leonard stated he had the marijuana concealed in his sock at the time he and Boliek began their drive to defendant's residence. Leonard also testified that Boliek and defendant did not converse with one another and that defendant did not take the bag of marijuana from Boliek, examine it, or otherwise handle it.

Defendant Dixon Locklear testified that Clarence Leonard came to his house on 22 April 1976; that Leonard stated he wanted to sell some marijuana to Boliek but did not want to consummate the sale at his own residence; that he observed Leonard take the bag of marijuana from his sock while both of them were behind defendant's residence and out of Boliek's presence; and that he did not take the marijuana from Boliek, examine it, or make any statement concerning its quality.

Other matters necessary to an understanding of the questions discussed will be narrated in the opinion.

*Rufus L. Edmisten, Attorney General; Jane Rankin Thompson, Associate Attorney, for the State of North Carolina.*

*James D. Little, attorney for defendant.*

HUSKINS, Justice.

**[1]** After verdict and before sentencing, the State examined a deputy sheriff who testified, over defendant's objection, that an unnamed reliable informant had told the witness he had purchased marijuana from defendant on many occasions and that defendant was "doing between $500 and $1,000 worth of grass a week." Following pre-sentencing statements by defense counsel and the district attorney, the trial court said:

> "I cannot conclude that this is an appropriate case for probation. And it does seem to me that the testimony of Leonard lacks plausibility. It's just not plausible to me that he would sell a quantity of marijuana at no profit. It just lacked plausibility. He may be telling the entire truth, but it didn't strike me as so, and there is some indication of some collusion for the purpose of this trial."

The court then found that defendant would not benefit from sentencing as a committed youthful offender under G.S. 148-49.4 (repealed effective 1 October 1977 and replaced by G.S. 148-49.14) and imposed consecutive five-year prison terms.

On appeal, the Court of Appeals apparently concluded that the sentences were based solely on "unsolicited whispered representations" or "rank hearsay" and, for that reason, vacated the sentences and remanded the cause for resentencing. The State appealed from that holding and we allowed defendant's petition for discretionary review of his assignments based on alleged errors in the trial. We first consider and dispose of the State's appeal.

We hold that the record does not support the conclusion that Judge Canaday improperly relied, either partially or solely, on "unsolicited whispered representations" or "rank hearsay" in sentencing defendant. The fallacies and inconsistencies of the decision of the Court of Appeals on that point are accurately depicted by Judge Morris in her dissenting opinion and need not be repeated here. It suffices to say that trial judges have a broad discretion, and properly so, in making a judgment as to proper punishment. They must not be hampered in the performance of that duty by unwise restrictive procedures. The following excerpt from *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962), is controlling:

> "In our opinion it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. He should not be put in a defensive position and be required to sustain and justify the sentences he imposes, and be subject to examination as to what he has heard and considered in arriving at an appropriate judgment. He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Pre-sentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, cir-

cumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."

*Compare State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967), where the trial judge by his own pronouncement clearly demonstrated that he imposed sentence for a cause not embraced within the indictment.

The decision of the Court of Appeals vacating and remanding the cause for resentencing is reversed.

We now turn to the issues raised by defendant's assignments of error.

Defense witness Clarence Leonard testified that the marijuana which Agent Boliek purchased did not come from defendant. Rather, he said that he himself had purchased the marijuana the preceding day at a pool hall, and that it was he who sold the drug to Boliek. The following exchange then took place during Leonard's cross-examination by District Attorney Britt:

"Q. Give me the names of a few that were in the pool room when you made this purchase.

Sir?

A. I don't know. I just know them by the nicknames.

Q. Give me the nicknames, then.

Sir? Give me the nicknames. Who are they?

Clarence, you are lying through your teeth and you know you are playing with a perjury count; don't you?

A. I ain't lying.

Q. What?

A. I ain't lying.

Q. Who did you buy it from, then?

A. I don't know them by name.

Q. Give me their nicknames.

A. I don't know the dude I bought it from nickname either.

Q. What did he look like?

A. He was about six feet tall.

Q. Now, think fast, Leonard. Think up a good story while you are up there.

MR. SMITH: Object. Move to strike the Solicitor's comments.

THE COURT: Yes. Motion allowed. Ladies and Gentlemen, disregard the last statement of the District Attorney. Don't consider that."

**[2]** Defendant contends the district attorney's assertion that "you are lying through your teeth and you know you are playing with a perjury count" constitutes an absue of privilege and is so highly prejudicial that a new trial is required. The State contends defendant failed to interpose timely objection and is therefore deemed to have waived it.

The quoted remarks of the district attorney were grossly improper and calculated to prejudice the jury. Counsel for the defendant should have objected as soon as the improper comments were uttered. This was not done, and such a failure is ordinarily held to constitute a waiver. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Edwards*, 274 N.C. 431, 163 S.E. 2d 767 (1968); *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968). Even so, where, as here, the impropriety is gross "it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*. *State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954)." *State v. Monk*, 286 N.C. 509, 516, 212 S.E. 2d 125, 131 (1975). *Accord, State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967).

Disciplinary Rule 7-106 of the North Carolina State Bar Code of Professional Responsibility, 283 N.C. 783 at 837 (1973), provides in pertinent part as follows:

"DR 7-106 Trial Conduct.

* * * *

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * * *

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) *Assert his personal opinion* as to the justness of a cause, *as to the credibility of a witness*, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." (Emphasis added)

The Disciplinary Rules embodied in the Code of Professional Responsibility set forth the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action and are binding on all lawyers practicing law within the State, including prosecuting attorneys. "Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." 283 N.C. at 785.

The American Bar Association's suggested Standards Relating to the Prosecution Function are specifically addressed to the conduct of prosecuting attorneys in the performance of their duties. Section 5.8(b) of these suggested standards provides: "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and Defense Function* 126 (Approved Draft 1971).

Many decisions of this Court have spelled out in meticulous detail what is permitted and what is prohibited by way of examination, cross-examination and argument in the trial of cases. *E.g.*, *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572, *vacated on other grounds*, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *State v. Conner*, 244 N.C. 109, 92 S.E. 2d 668 (1956); *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). We are not

disposed to write another treatise on the subject. The following basic concepts expressed in these decisions must be observed in the courts of this State:

**[3]** 1. Every person charged with a crime has an absolute right to a fair trial. This means that "he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment. [Citations omitted] It is the duty of both the court and the prosecuting attorney to see that this right is sustained. [Citations omitted] To these ends there are rules of practice and decorum with which all counsel involved in the trial of criminal cases must abide." *State v. Britt, supra* at 710, 220 S.E. 2d at 290.

**[4]** 2. Prosecuting attorneys owe honesty and fervor to the State and fairness to the defendant in the performance of their duties. *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *Berger v. United States*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). They should prosecute the State's case with earnestness and vigor and use every *legitimate* means to bring about a just conviction. They should not be so restricted as to discourage a vigorous presentation of the State's case to the jury. *State v. Westbrook*, supra.

**[5]** 3. Language may be used *consistent with the facts in evidence* to present each side of the case, *State v. Monk, supra*, but counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Noell*, supra; *State v. Phillips*, supra; *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953). A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. *State v. Britt, supra; State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971); *State v. Phillips, supra*; Disciplinary Rule 7-106(C), North Carolina State Bar Code of Professional Responsibility, 283 N.C. 783, 837 (1973).

**[6]** 4. It is improper for a lawyer to assert his opinion that a witness is lying. "He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Miller*, 271 N.C. 646, 659, 157 S.E. 2d 335, 345 (1967). *Accord, State v. Thompson*, 278 N.C. 277, 179 S.E. 2d 315 (1971). *Compare, State v. Noell*, supra.

[2] Application of these principles to the present case compels the conclusion that the district attorney's remarks were grossly improper and should have been suppressed by the court *ex mero motu*. Whether the court is obliged to act immediately when the impropriety occurs or wait and correct the transgression in its charge to the jury is ordinarily left to the discretion of the judge. Yet, even absent an objection, "it may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privilege, to the manifest prejudice of the opposite party, it is the *duty* of the judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial." *Jenkins v. Ore Co.*, 65 N.C. 563, 564-65 (1871). *Accord, State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967); *Massey v. Alston*, 173 N.C. 215, 91 S.E. 964 (1917); *State v. Davenport*, 156 N.C. 597, 72 S.E. 7 (1911).

It is fair to say that improper suggestions, insinuations and assertions of personal knowledge by the prosecuting attorney ordinarily "carry much weight against the accused when they should properly carry none." *Berger v. United States, supra. Accord, State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). Consequently, the prosecutor may not determine matters of credibility and announce the result in open court—that is the jury's prerogative. The district attorney's private opinion that defendant's witness Leonard was lying "was a step out of bounds." *State v. Thompson*, 278 N.C. 277, 179 S.E. 2d 315 (1971). In the present case this flagrant disregard of well-defined rules resulted in manifest prejudice to defendant and consequently a new trial is required.

It is the responsibility of the trial judge to maintain a courtroom atmosphere and decorum appropriate to judicial proceedings. He should intervene, on his own motion if necessary, in cases of flagrant and prejudicial misconduct of counsel. If counsel's misconduct is in wilful violation of the court's rulings and instructions, exercise of the contempt powers may be appropriate. See G.S. 5-1 and 5-8(1). All lawyers are officers of the court and subject to its lawful orders as well as to the provisions of the North Carolina State Bar Code of Professional Responsibility.

We deem it unnecessary to discuss the remaining assignments of error since the matters giving rise to them may not recur on retrial.

On State's Appeal — Reversed.

On Defendant's Appeal — New trial.

Justice EXUM concurring.

I recognize that part of conventional judicial wisdom is the notion that trial judges ought to have the broadest possible discretion in sentencing a convicted criminal defendant and that this notion is presently embodied in our case law and statutes on the subject. *See, e.g., State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962), relied on by the majority; *see also, generally*, General Statutes, Chapter 14. I do not agree with the majority, however, that this is a "proper" notion, and I would not sustain the result here on the basis of it.

Practically unbridled sentencing discretion in the hands of judges has resulted in grossly unequal treatment by judges of defendants convicted of the same crime. *See* M. Frankel, *Criminal Sentences, Law Without Order* (Hill and Wang, 1972); L. Orland and H. Tyler, *Justice in Sentencing* (Foundation Press 1974); *Struggle For Justice*, (a report on Crime and Punishment in America Prepared for the American Friends Service Committee, Hill and Wang, 1971); J. Exum, "Criminal Sentencing—A New Approach," 27 Bar Notes 111 (Spring 1976). The time has come for the legislature to change our present approach to criminal sentencing. I do not suggest that all judicial discretion in this process be eliminated. By appropriate legislation, however, it should be greatly narrowed and more carefully channeled.[1]

Even under the present approach to criminal sentencing, the crucial question in this case is not whether the trial judge improperly relied on inadmissible hearsay, but whether, as the Court of Appeals put it, the sentencing hearing was "fair and just [and provided the defendant] with full opportunity to controvert hearsay and other representations in aggravation of punishment." The Court of Appeals concluded defendant was not accorded such an opportunity. I disagree. The adverse information, although admittedly hearsay and obviously considered by the trial judge,[2]

1. One approach to accomplishing this was suggested in my *Bar Notes* article last cited in the text.

2. To say that he did not consider it on this record is simply, as any trial judge knows, to shut one's eyes to the realities of the sentencing process as it is now conducted.

was brought out in open court in the presence of defendant and his counsel. Defendant had the opportunity to refute it by testifying himself, offering other witnesses or, if necessary, asking for a recess or continuance to enable him to develop an appropriate refutation. He did none of these but stood mute on the question. He did not, therefore, take advantage of the opportunities he had at the hearing. His failures in this regard do not render the hearing itself unfair or unjust. The sentence imposed, while far longer and harsher than is normally imposed under such circumstances, must, under our present sentencing procedures, be allowed to stand.

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STATE OF NORTH CAROLINA v. MICHAEL ALLEN LESTER

No. 76

(Filed 24 January 1978)

1. **Criminal Law § 21.1— probable cause hearing—when required**

G.S. 15A-606(a) requires a probable cause hearing only in those situations in which no indictment has been returned by a grand jury.

2. **Criminal Law § 21.1— preliminary hearing—no constitutional requirement**

Neither the Constitution of the U.S. nor that of N.C. requires a preliminary hearing as a necessary step in the prosecution of a defendant.

3. **Criminal Law § 21.1— preliminary hearing—failure to hold—no violation of equal protection**

Defendant's contention that equal protection is violated where a state affords preliminary hearings to some criminal defendants but not others is without merit, since the discretion given to the district attorney in such matters bears a rational relationship to a legitimate governmental objective, i.e., the more efficient administration of criminal justice, and it is therefore not subject to constitutional challenge.

4. **Criminal Law § 104— motion for nonsuit—consideration of evidence**

Defendant's contention that the trial court erred in denying his motion for nonsuit because the only State's witness to connect him with the crime was inherently incredible is without merit, since the court, in ruling on a motion for nonsuit, does not pass upon the credibility of the witnesses for the prosecution, but instead considers the testimony favorable to the State, takes it as true, and determines its legal sufficiency to sustain the allegations of the indictment.

**5. Homicide § 16— victim's apprehension of death—no specific finding—dying declarations admissible**

In a prosecution for first degree murder where the trial court made no specific finding that the victim knew there was no hope of her recovery, there was nevertheless no error in admitting the victim's dying declarations since the circumstances, including the severity of her wounds, her loss of blood, intense pain, directions to tell her parents she loved them, and repeated expressions of fear of death, indicated that the victim knew that she had no hope of recovery.

**6. Homicide § 16.1— dying declarations—assailants not identified—statements not opinions—evidence of separate offense**

Dying declarations of a homicide victim that she had been raped and stabbed by two white boys with long hair were not inadmissible on the grounds that they failed to identify the victim's assailants, the statements that she had been raped and stabbed were opinion rather than fact, and statements that she had been raped were evidence of a separate offense with which defendant was not charged.

**7. Homicide § 20.1— photographs of victim—admissibility to illustrate testimony**

In a first degree murder prosecution defendant's contention that his stipulation that death was caused by stab wounds should have precluded the admission of three photographs of deceased is without merit, since the photographs were admissible to illustrate testimony describing the manner of the killing, and that testimony was admissible to show premeditation and deliberation.

**8. Criminal Law § 87— immunity granted to witness—sufficiency of notice to defendant**

Defendant's contention that the testimony of a witness should have been excluded because defendant was not afforded full and sufficient notice of the terms of the arrangement between the witness and the State by which it was agreed that the witness would not be prosecuted for his part in the purported crime is without merit, since a letter from the district attorney to defense counsel gave defendant sufficient notice, and defense counsel, when asked by the court if he was surprised by the witness's testimony and desired a recess, requested no recess and took no exception on the basis of failure to grant a sufficient recess. G.S. 15A-1054(c).

**9. Criminal Law §§ 87, 117.3— immunity granted to witness—jury informed of grant**

No prejudicial error arose from the failure of the trial court to instruct the jury concerning the grant of immunity to a witness prior to commencement of his testimony, since the jury was made aware of the grant of immunity during jury selection; the jury was fully instructed by the court as to the arrangement between the State and the witness before completion of his testimony; and the court also instructed on the arrangement during its final charge to the jury.

**10. Criminal Law § 89.5— corroborating testimony—slight variances**

The trial court did not err in allowing the testimony of a corroborating witness, though there were slight variances between his testimony and that of the principal witness, since the testimony substantially corroborated the principal witness as to the crime charged.

ON an indictment proper in form, defendant was charged with and convicted of first degree murder. Appeal was taken pursuant to G.S. 7A-27(a) from judgment of *Kivett, J.*, 8 April 1977 Session, GUILFORD County Superior Court, imposing sentence of life imprisonment to commence at the expiration of other prior sentences.[1]

The State's evidence tended to show the following:

The victim, Pamela Elizabeth Hyatt, age 15, was found on Bunch Road in rural Guilford County near Greensboro on 17 March 1974 at about 10:00 p.m. Shortly after being discovered, Pamela was picked up by area residents and taken to a nearby hospital, where she was treated. During the course of her transportation to and treatment at the hospital, Pamela made several statements to the effect that she had been raped and stabbed by two white boys with long hair. The victim subsequently died about an hour and one-half after reaching the hospital. An autopsy was performed on the body and a vaginal smear taken which revealed the presence of spermatozoa.

The principal State's witness, Robert Winston May, an accomplice, testified that:

He and defendant picked up the victim, who was hitchhiking, and drove around with her while she voluntarily performed various sex acts with them. They finally arrived at a point on Bunch Road where Pamela was later found. At this point, the victim and defendant left the car. As the witness drove off to turn the car around, defendant and the victim walked away from the road. Upon his return, the witness picked up defendant carrying what appeared to be a knife wrapped in a cloth. Defendant was asked what happened and responded that he had stabbed the girl.

An SBI agent, a deputy sheriff, and May's brother gave testimony which tended to corroborate that of the principal

1. One of these convictions was previously before us in *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976), in which we found no error.

witness. In addition, SBI Agent Hunt testified that the spot May indicated as the one at which he dropped defendant and the victim was the very location where the victim was found.

Defendant offered no evidence.

Additional facts relevant to the decision are related in the opinion.

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

*Walter E. Clark, Jr., for defendant-appellant.*

COPELAND, Justice.

Defendant brings forward seven assignments of error. For reasons hereinafter discussed, we find each of these assignments to be without merit; therefore, defendant's conviction must be affirmed.

**[1]** Defendant first contends that the trial court erred in denying his motion for a probable cause hearing in District Court, which was made one month after return of the bill of indictment. It is well-settled in this state that, at common law, a defendant could be tried on a bill of indictment without the necessity of a probable cause hearing. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975). Defendant argues, however, that under authority of G.S. 15A-606(a), "The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing." From this, he maintains, arises a requirement that a probable cause hearing be held as a matter of course, regardless of whether an indictment has been returned.

This argument ignores the purpose of such hearings, known prior to enactment of Chapter 15A as preliminary hearings, which is simply to determine whether sufficient probable cause exists to bind the case over to Superior Court and seek an indictment in order to place the defendant on trial. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972). Moreover, the discharge of a defendant after a preliminary hearing for lack of probable cause does not bar a later indictment, *State v. Cradle, supra.* Thus, a probable cause

hearing is unnecessary after the grand jury finds an indictment. *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972).

While defendant impliedly contends that G.S. 15A-606(a) changes all this, it must be remembered that statutes in derogation of the common law must be strictly construed. *State v. Vaughan*, 268 N.C. 105, 150 S.E. 2d 31 (1966). Indeed, the Official Comment to G.S. 15A-611 indicates that proceedings begun by indictment were once included in subsection (d) of that section as being among those in which no probable cause hearing could be held. An amendment in a legislative committee deleted mention of indictments, however, and sought to restrict the power of district attorneys to bypass probable cause hearings. Subsequently, this latter restriction was itself deleted and, although no mention of indictments was restored to subsection (d), it was the conclusion of the drafters of the Comment that, "In view of the preexisting jurisdictional law and the fairly clear legislative intent . . . it seems certain that no probable-cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment." We find the logic of this Comment persuasive and therefore hold that G.S. 15A-606(a) requires a probable cause hearing only in those situations in which no indictment has been returned by a grand jury.

**[2]** Defendant also asserts that refusal of a probable cause hearing in this case resulted in a denial of due process and equal protection under the Fourteenth Amendment. This court has previously held, however, that neither the Constitution of the United States nor that of North Carolina requires a preliminary hearing as a necessary step in the prosecution of a defendant. *State v. Foster, supra.* While the Fourth Amendment requires a timely determination of probable cause for significant pretrial restraint, it is not necessary that such a determination be reached by a procedure including all the trappings of a full adversary hearing. *Gerstein v. Pugh*, 420 U.S. 103, 43 L.Ed. 2d 54, 95 S.Ct. 854 (1975). In the instant case, the finding of probable cause by the grand jury clearly satisfied the requirement of determination by a neutral judicial official, outlined in *Gerstein v. Pugh, supra.*

**[3]** Defendant's contention that equal protection is violated where, as here, a state affords preliminary hearings to some criminal defendants but not others is likewise without merit. As we have already indicated, a defendant has no fundamental in-

terest in having an adversary probable cause hearing. There are many situations in which a district attorney may deem it advisable to initiate criminal proceedings by indictment, e.g., where there is no fear of flight by a defendant, or where there exists a need for confidentiality to avoid needless harm to the reputation of a prospective accused. In such instances, a prosecutor may elect to eschew the needless waste of judicial and prosecutorial resources which an unnecessary probable cause hearing would engender. Since the availability of this discretion to a district attorney bears a rational relationship to a legitimate governmental objective, i.e., the more efficient administration of criminal justice, it is not subject to constitutional challenge. *Johnson v. Louisiana*, 406 U.S. 356, 32 L.Ed. 2d 152, 92 S.Ct. 1620 (1972).

**[4]** Defendant's second assignment of error challenges the denial of his motion for nonsuit. It is his contention that the testimony of May, the only State's witness to connect defendant with the crime, was inherently incredible because he was serving a life sentence for murder; had been convicted of numerous other offenses; had made no statement about the matter for two and one-half years; had at one point repudiated his statement in this case; had been under indictment in other cases, all but one of which were later dismissed; had received immunity for his part in this case and his testimony contradicted other evidence presented by the State.

Defendant argues that under *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), nonsuit must be granted when the only testimony implicating defendant is inherently incredible; however, that case involved evidence which was physically impossible and contrary to the laws of nature. The factors relied on by defendant, while tending to impeach the credibility of the witness, do not expose it as physically impossible. "In ruling on [a motion for nonsuit], the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false and what it proves if it be true are matters for the jury." *State v. Bowman*, 232 N.C. 374, 376, 61 S.E. 2d 107, 109 (1950). The unsupported testimony of an accomplice, if believed, is suffi-

cient to support a conviction. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964). Further, the granting of immunity to a witness goes only to his credibility and not to his competency. *State v. Johnson*, 220 N.C. 252, 17 S.E. 2d 7 (1941). This assignment is overruled.

**[5]** Defendant contends in his third assignment of error that the statements by the victim before her death that she had been raped and stabbed by two rednecks or white boys with long hair were not properly admissible as dying declarations. He argues that the circumstances here do not satisfy G.S. 8-51.1, which renders dying declarations of a deceased admissible when they were voluntarily made at a time when the deceased was "conscious of approaching death and believed there was no hope of recovery."

Formerly dying declarations were admissible only in homicide prosecutions and wrongful death actions. 1 Stansbury's N.C. Evidence, (Brandis Rev. 1973), § 146. The overall effect of G.S. 8-51.1 was to liberalize this exception to the hearsay rule by expanding the admissibility of such statements to all civil and criminal trials. This statute results in more restrictive use of dying declarations in homicide and wrongful death cases, however, since the court must find, in addition to an apprehension of death with death in fact ensuing, that the deceased believed there was no hope of recovery. Nevertheless, "It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied." *State v. Bowden*, 290 N.C. 702, 712, 228 S.E. 2d 414, 421 (1976).

In the instant case, while the trial court found that the victim was in actual danger of death at the time the statements were made and fully apprehended such danger, there was no specific finding that she believed there was no hope of recovery. Still, we conclude from the surrounding circumstances and the nature of the victim's wounds that she was aware that she had no hope of recovery. She had been stabbed once in the chest, with a laceration of the heart and a stab wound to the lung, and once in the abdomen, penetrating the intestine and right kidney. She was in a great deal of pain and asked the people who took her to the hospital to tell her parents that she loved them. The victim lost a

great deal of blood on the way to the hospital and by the time she arrived was unable to sit up or walk. Witnesses testified that during the trip to the hospital the victim said she had been raped and stabbed by two rednecks. Upon her arrival at the hospital, tests revealed that the victim had no blood pressure. She told nurses attending to her that she had been raped and stabbed by two white boys with long hair. She repeatedly asked if she was going to die, saying that she was too young to die.

Considering the severity of her wounds, her loss of blood, intense pain, directions to tell her parents she loved them, and repeated expressions of fear of death, we conclude that the victim knew she had no realistic hope of recovery; therefore, the admission of her declarations was not error.

**[6]** Defendant further maintains that these statements were inadmissible because (1) the declarations did not identify her assailants, (2) statements that she had been "raped and stabbed" were opinion rather than fact and (3) statements that she had been "raped" were evidence of a separate offense with which defendant was not charged.

Defendant's contention that the declarations must identify the deceased's assailants is based on one asserted rationale for admission of dying declarations, the prevention of secret homicides. In view of the statutory extension of admissibility of dying declarations to all civil and criminal actions, however, "Admissibility seems no longer to be confined to situations in which the declarant's death is in issue, but rather extends to any situation in which the cause or circumstances of the declarant's death may be relevant to any issue in litigation. The rationale of the statute clearly rests upon a belief in the general trustworthiness of dying declarations, rather than upon the necessity for bringing to justice the perpetrators of secret homicides." 1 Stansbury's N.C. Evidence, (Brandis Rev. 1973), § 146, p. 151 (1976 Supp.). Additionally, under the old rationale the statements would be admissible since any evidence tending to describe or identify a victim's assailants would further the purpose of capture and conviction of those guilty of secret homicides.

Regarding defendant's exception to these declarations as opinion rather than fact, "It is usually said that the declaration must be a statement of fact and not opinion, but this seems to

mean only that the declarant must have had personal knowledge of the declared facts, and not that the opinion rule in all its severity is applicable. The declaration will not be excluded because it . . . is expressed in a verbal 'shorthand' which would not be permitted of a witness on the stand." *Id.*, § 146, p. 491. These statements, under the exigencies of the situation, could hardly have been expressed more concisely or factually.

Defendant's argument that portions of the victim's statements were evidence of a separate offense and therefore inadmissible is also without merit. The two crimes here were parts of the same transaction and so closely connected in time and circumstance that one could not be fully shown without tending to prove the other; consequently, the victim's declarations that she had been "raped" as well as stabbed were fully competent and admissible. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence reversed*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971); *State v. Morrow*, 262 N.C. 592, 138 S.E. 2d 245 (1964).

**[7]** By his fourth assignment of error, defendant asserts that his stipulation that death was caused by stab wounds should have precluded the admission of three photographs of the deceased and that the only purpose for the use of the photographs was to inflame the jury. Nonetheless, "This argument misses the point that in a first degree murder case premeditation and deliberation may be proved circumstantially by showing the use of grossly excessive force, or by proof of the brutal manner of the killing. A mere stipulation as to the cause of death may not necessarily convey to the jury full information as to the actual manner of killing. In such a case it is legitimate and often necessary to use testimony describing in detail the manner of killing, and photographs, properly authenticated, may be offered to illustrate this testimony." *State v. Patterson*, 288 N.C. 553, 570-571, 220 S.E. 2d 600, 613 (1975) (citations omitted), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3211 (1976). *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), and other cases present an exception, in cases of excessive use, to the general rule of admissibility of even gory and gruesome photographs. We find, however, no such excessive use of photographs in the record before us and therefore overrule this assignment of error.

**[8]** The fifth assignment of error raised by defendant challenges the admission of the testimony of Robert Winston May on

grounds that defendant allegedly had not been afforded full and sufficient notice of the terms of the arrangement between the witness and the State by which it was agreed that the witness would not be prosecuted for his part in the purported crime. G.S. 15A-1054(c) requires written notice fully disclosing to a defendant the terms of any arrangement between a witness and the State in which the State agrees not to prosecute the witness or seeks sentence reductions for the witness in exchange for his truthful testimony in a criminal proceeding. Such notice is to be provided the defendant a reasonable time prior to any proceeding in which the witness is expected to testify.

The trial court found that defendant had been advised, both orally and in writing, that the witness, in exchange for his truthful testimony, would not be prosecuted in connection with any of the facts or circumstances arising out of the alleged murder or rape of the victim. Upon our reading of the record, we conclude that the letter from the district attorney to defense counsel substantially complies with the requirements of the statute; thus, the trial court's finding is supported by competent evidence and must be affirmed. Moreover, the remedy for failure to comply with the statute is the granting of a recess upon motion by the defendant, rather than suppression of the testimony. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976). In the case *sub judice*, the trial court directly inquired of defense counsel whether he was surprised by this testimony and desired a recess. None was requested, nor was any exception taken on the basis of failure to grant a sufficient recess; thus, we find no merit in this contention and it is overruled.

**[9]** Defendant next assigns as error the failure of the trial court to instruct the jury concerning the grant of immunity to the witness Robert Winston May prior to the commencement of his testimony. The record discloses, however, that the jury had been made aware of the grant of immunity during the jury selection. Further, the jury was fully instructed by the court as to the arrangement between the State and the witness before the completion of his testimony. The court also instructed on the arrangement during its final charge to the jury. We conclude from these circumstances that no prejudicial error arose from the failure of the trial court to instruct on the immunity grant prior to the

testimony of the witness, *cf., State v. Cousins, supra;* consequently this assignment is overruled.

**[10]** In his seventh and final assignment of error, defendant contends that the testimony of the brother of the State's principal witness was inadmissible because it failed to corroborate that of Robert Winston May. The corroborating witness testified that the principal witness told him that defendant and he raped the victim and defendant stabbed her. Defendant maintains that this testimony should have been excluded because it did not in fact corroborate that of Robert Winston May, since he had testified that the victim willingly submitted to defendant's and his sexual advances.

Slight variances in corroborating testimony do not render such testimony inadmissible, since it is for the jury to determine whether the testimony of one witness in fact corroborates that of another. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961). Upon objection by defendant, the trial court properly instructed the jury concerning corroborating testimony. The statement objected to substantially corroborated the principal witness as to the crime of murder. While portions of the corroborative testimony may have been arguably incompetent, defendant objected to the testimony as a whole without specifying the offensive portions. Objections to testimony *en masse* ordinarily will not be sustained if any portion is competent, it being the duty of the objecting party to point out the objectionable matter. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). This assignment, too, is without merit and overruled.

We have carefully reviewed all defendant's assignments of error and in the verdict and judgment find

No error.

STATE OF NORTH CAROLINA v. WILLIAM BLANE HENSLEY

No. 28

(Filed 24 January 1978)

1. **Criminal Law § 87.2— leading questions**

The trial court in a rape case did not err in permitting the district attorney to ask leading questions of the twelve-year-old victim who was not familiar with many of the terms used in the questions and of a female witness who could not read and write and did not know her own age.

2. **Criminal Law § 52— expert testimony—opinion based on testimony of other witnesses—hypothetical questions**

Where an expert bases his opinion on facts not within his personal knowledge, such facts should first be testified to by other witnesses and then incorporated, expressly or by reference, in a hypothetical question addressed to the expert. And where an expert witness has personal knowledge of some of the facts of the case, he may base his opinion partly on his personal knowledge or observation of the facts, and partly on the factual evidence of other witnesses hypothetically presented to him.

3. **Criminal Law § 52— medical expert—penetration of rape victim—insufficient foundation—harmless error**

Although a medical expert's opinion testimony that an alleged rape victim had been penetrated by a male organ which deposited sperm in the vagina was technically improper because the State failed to lay a proper foundation for the opinion by including in its hypothetical an assumption that the jury should believe the testimony of another expert, upon which the opinion was partially based, that he took the vaginal smear from the victim, the admission of such opinion testimony was not prejudicial error in view of the abundant amount of other competent evidence of penetration.

4. **Criminal Law § 105— failure to move for nonsuit—appellate review of sufficiency of evidence**

The appellate court will review the sufficiency of the evidence to sustain the verdict even though defendant failed to make motions for nonsuit or directed verdict at the close of the State's evidence and at the conclusion of all the evidence. G.S. 15-173.1.

5. **Rape § 5— sufficiency of evidence of penetration**

The State's evidence was sufficient for the jury in a prosecution for rape where it tended to show that defendant took indecent liberties with the twelve-year-old victim by threatening her with a knife, the victim testified that while she was on her back she felt defendant's penis inside her body, an eyewitness testified that defendant had intercourse with the victim while the victim was lying on her back, and a medical expert testified that the victim had a tear in the hymenal ring and that a vaginal smear of the victim showed the presence of active sperm, notwithstanding the testimony of the victim and the eyewitness was at times inconclusive and to some extent conflicting.

**6. Rape § 6— failure to define "sexual intercourse"**

The trial court in a rape case did not err in failing to define the term "sexual intercourse" in the absence of a request by defendant for further elaboration on that term.

**7. Constitutional Law § 48— right to effective assistance of counsel**

The right to assistance of counsel guaranteed by the Sixth Amendment of the U.S. Constitution (made applicable to the states by the Fourteenth Amendment) and by Sections 19 and 23 of Article I of the N.C. Constitution includes the right to have the effective assistance of counsel.

**8. Constitutional Law § 48— effective assistance of counsel**

There are no set rules to determine whether a defendant has been deprived effective assistance of counsel; rather, each case must be approached upon an *ad hoc* basis, viewing circumstances as a whole in order to determine this question.

**9. Constitutional Law § 48— defendant not denied effective assistance of counsel**

Defendant was not denied the effective assistance of counsel in his trial for rape because of the failure of his trial counsel to make additional objections or to make motions for judgment of nonsuit or other formal motions where (1) the appellate court reviewed evidence which present counsel contends should have been the subject of objection and found no prejudicial error in the admission of such evidence even if objection had been made at the proper time, (2) the motions, if made, would have been properly denied, and (3) the record shows that defendant's trial counsel conducted extensive cross-examination of the State's witnesses, entered numerous objections to evidence offered by the State, and presented direct evidence on behalf of defendant in the form of testimony by defendant and his mother.

**10. 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 where the Court allowed defendant's petition for certiorari 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.

APPEAL by defendant from *Thornburg, J.*, at the 8 November 1976 Session of BURKE Superior Court.

Defendant was tried and convicted of first degree rape of Betty Philbeck and was sentenced to life imprisonment.

The State introduced evidence tending to show that the defendant, William Blane Hensley, a forty-two-year-old man, was living with Lois Lowery in a trailer in Drexel. Betty Philbeck, a twelve-year-old girl and the alleged victim of the rape, was stay-

ing with defendant and Lois during the week of 30 July 1976. The three were in the habit of sleeping together. On the evening of 30 July, Betty, Lois and defendant went to bed together. Betty testified that the defendant had a pocket knife, that he threatened her and Lois with the knife, and that he then proceeded to take indecent liberties with her; that he stuck his penis and his finger in her anus and vagina; and that while doing so he continued to threaten the two females with his knife, stating that he would cut them if they did not lie still. Betty stated that defendant put his penis into her vagina. Lois testified that Betty was on her back, and that defendant was lying on top of Betty and had his penis in her. Similar types of conduct continued throughout most of the night.

Dr. A. W. Hamer checked Betty on the evening of 30 July. He found her hymen slightly ruptured. Dr. John C. Reece examined a vaginal smear taken from Betty by Dr. Hamer. He testified that he found several inactive sperm in the smear and that in his opinion she had been penetrated by a male organ and sperm was so deposited in her vagina.

Defendant's testimony tended to show that he drank some sixteen beers on the evening of 29 July, and that he passed out on the bed. Defendant testified that he did not remember anything until he awoke the next morning. When he awoke Betty and Lois were still in the bed with him. Later, when he got up, everything appeared to be normal. Defendant's mother testified that in August 1976 Lois Lowery told her that defendant did not touch Betty at any time.

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

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

*C. Scott Whisnant for defendant appellant.*

MOORE, Justice.

**[1]** Defendant's first assignment of error is directed to two allegedly leading questions directed to Betty, the prosecuting witness, and to two such questions directed to the witness, Lois Lowery.

We see no merit in this assignment.

The trial court has discretionary authority to permit leading questions in proper instances, and absent a showing of prejudice the discretionary action of the trial court will not be disturbed. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1976); *State v. Willis*, 281 N.C. 558, 189 S.E. 2d 190 (1972); *State v. Pearson*, 258 N.C. 188, 128 S.E. 2d 251 (1962). If the testimony is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained. *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Young, supra.*

In *State v. Pearson, supra,* a case in which defendant was charged with carnally knowing and abusing a child over 12 years and under 16 years of age, Justice Parker (later Chief Justice) stated:

> "Generally, leading questions are permissible to arrive at facts when modesty or delicacy prevents full answers to general interrogatories. Hence, because of the delicate nature of the subject of inquiry, many courts have recognized and held that rape and carnal abuse cases, and other cases involving inquiry into delicate subjects of a sexual nature, constitute an exception to the general rule against leading questions, and that in such cases the permitting of leading questions of the prosecutrix, particularly if she is of tender years, is a matter within the sound discretion of the trial judge. [Citations omitted.]"

In view of the fact that Betty was a child twelve years of age and was not familiar with many of the terms used in the examination, and that Lois was an ignorant woman who could not read or write and did not know her own age, the trial court correctly allowed the questions here involved. No abuse of discretion is shown and this assignment of error is overruled.

Dr. Hamer, who examined the prosecuting witness, testified in detail concerning his examination and his extraction of the vaginal smear from her. This smear, taken from the prosecuting witness, was examined by Dr. Reece, who testified that an examination of the vaginal smear revealed that sperm were present, and that the sperm were fresh and active at the time they were taken out of the victim's vagina. The following then occurred:

"Q. Dr. Reece, based on your examination and analysis of the slide, what does that indicate to you with regard to what happened to Betty Philbeck?

A. In my opinion based on the information that I had available to me and that I have heard in Court and on my findings, that this individual, Betty Philbeck, had been penetrated by a male organ producing and depositing sperm within the vagina."

Defendant contends that the court erred in failing to strike the answer of Dr. Reece. In support of this contention defendant cites *State v. David*, 222 N.C. 242, 22 S.E. 2d 633 (1942). In that case the doctor who testified based his opinion upon the findings of the physician who had testified earlier; his opinion was not based upon his own findings. There we stated: ". . . it is uniformly held that the opinion of one expert based upon that of another is incompetent and inadmissible as evidence." *See also Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964).

**[2]** The rule in *State v. David, supra,* is not, however, applicable in the present case. This is not an instance where one expert bases his opinion on the opinion of another expert. Rather it is a situation where one expert bases his opinion in part on facts testified to by another witness, *i.e.*, Dr. Hamer's testimony that the smear was taken from the victim's vagina. Where an expert bases his opinion on facts not within his personal knowledge, such facts should first be testified to by other witnesses and then incorporated, expressly or by reference, in a hypothetical question addressed to the expert. Stansbury, North Carolina Evidence, Sec. 136 (Brandis Rev. 1973); *Taylor v. Boger*, 289 N.C. 560, 223 S.E. 2d 350. Where, as here, an expert witness has personal knowledge of some of the facts of the case, he may base his opinion partly on his personal knowledge or observation of the facts and partly on the factual evidence of other witnesses hypothetically presented to him. *State v. David, supra; Taylor v. Boger, supra.*

The fact upon which Dr. Reece partially based his opinion had been testified to by another witness, Dr. Hamer, and Dr. Reece was present in the courtroom and heard such testimony. The jury also had the opportunity to assess the credibility of the testimony of Dr. Hamer that he had taken this smear from the vagina of Betty Philbeck, a fact which was actually not in dispute.

Dr. Reece also testified that the smear examined by him was listed in the laboratory as having been taken from Betty Philbeck. Finally, there was abundant evidence in the case showing penetration, in addition to the testimony given by Dr. Reece.

In the present case, the witness's answer would have been proper had the prosecutor only added to his question the phrase, "Assuming that the jury should believe Dr. Hamer's testimony that the vaginal smear was taken from the person of Betty Philbeck . . ." or some other such form of the hypothetical. *Cf.* Stansbury, North Carolina Evidence, Sec. 137 (Brandis Rev. 1973); *State v. Griffin*, 288 N.C. 437, 219 S.E. 2d 48 (1975); *State v. Keene*, 100 N.C. 509, 6 S.E. 91 (1888). Aside from this fact, it is clear that Dr. Reece's opinion was based on his personal observation of the smear and his knowledge as an expert.

In *State v. Temple*, 269 N.C. 57, 152 S.E. 2d 206 (1966), a similar question arose. There, the medical expert, Dr. Satterfield, was asked if he had an opinion satisfactory to himself, based on his examination of the prosecuting witness and the information he had, as to whether the prosecuting witness's female organ was penetrated, and, if so, by what was it penetrated. Dr. Satterfield replied in substance that in his opinion from the laboratory findings her female organ was penetrated full depth by a man's male organ. The defendant in that case contended that the testimony of the expert was incompetent because he was permitted to give his opinion based not only upon his personal examination of the victim, but also upon "the information he had", and that this would permit the expert to rely upon rumor, defendant's purported confession and other things. Answering this contention, we said:

> "Even if we concede that the challenged evidence of Dr. Satterfield was incompetent [Citations omitted], we think, and so hold, that its admission in evidence was not prejudicial, and that it is likely a different result would not have been reached if this challenged evidence had been excluded. . . ."

Noting the abundant amount of other competent evidence showing penetration, the Court further held that the admission of incompetent evidence will not be held prejudicial when its import is abundantly established by competent testimony.

**[3]** In the case at bar, although Dr. Reece's testimony was technically improper in that the State failed to lay a proper foundation for his opinion, we hold that defendant has failed to show any prejudice and to show that the jury would likely have reached a different result had this evidence been excluded. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976); *State v. Temple*, *supra*. This assignment is overruled.

**[4]** Next, defendant contends that the trial court erred in failing to direct a verdict for defendant at the close of the State's evidence or at the close of all the evidence. Under G.S. 15-173.1, "the sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." Hence, we review the sufficiency of the evidence in this case to sustain the verdict, even though defendant failed to make motions for nonsuit or directed verdict at the close of the State's evidence and at the conclusion of all the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973).

A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. McKinney*, *supra; State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Only evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are for the jury and do not warrant nonsuit. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

**[5]** Betty Philbeck testified that while she was on her back she felt defendant's penis inside her body, and Lois Lowery testified that defendant had intercourse with Betty while Betty was on her back. Dr. Hamer testified Betty had a tear in the hymenal ring, and an examination of the vaginal smear taken from the prosecuting witness showed active sperm in the vagina. This was clearly sufficient to carry the case to the jury regardless of the fact that at times the testimony of the prosecuting witness and of Lois Lowery was inconclusive and to some extent conflicting. Any

discrepancy or conflict was for the jury to resolve. This assignment of error is overruled.

**[6]** Defendant admits that the trial court correctly charged the jury concerning the elements constituting the crime of rape, but contends that the court erred in failing to define the term "sexual intercourse". In *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), the trial judge charged the jury: "For you to find defendant guilty of rape, the State must satisfy you from the evidence and beyond a reasonable doubt of three things. First, that the defendant, Ernest John Vinson had sexual intercourse with the alleged victim, Norma Coleen Ferguson. . . ." Defendant in that case assigned as error the trial court's failure to define the term "sexual intercourse". Justice Huskins, speaking for the Court, said:

> "'. . . There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male.' [Citations omitted.] In this respect the law does not require any particular phraseology in stating that the defendant had carnal knowledge of the complaining witness. [Citation omitted.] Accordingly, in *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950), this Court held that testimony of a complaining witness that defendant had 'intercourse' with her was sufficient to warrant a finding by the jury that there was penetration of her private parts. [Citation omitted.] It necessarily follows that the term 'sexual intercourse' encompasses actual penetration. [Citations omitted.]"

Justice Huskins then concluded:

> "We are of the opinion that the instructions sufficiently relate the law of rape to the evidence presented . . . . [T]he term 'sexual intercourse' conveyed the idea of completed intercourse, including actual penetration, and the jury must have so understood." 287 N.C. at 341-42, 215 S.E. 2d at 71-72.

If the defendant desired further elaboration on the term "sexual intercourse" he should have so requested at the time. This assignment of error is overruled.

Mr. Harold Robinson, attorney, was appointed to represent defendant at trial, and after verdict, to perfect defendant's ap-

peal. Mr. Robinson failed to perfect the appeal and on 29 March 1977 the assistant district attorney filed a motion to dismiss the appeal. Thereafter, Judge Snepp entered an order relieving Robinson as attorney for defendant and appointed present counsel, C. Scott Whisnant, to prosecute the appeal. Defendant now contends that he was denied his constitutional right to effective assistance of counsel during the trial.

**[7]** The right to assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution (made applicable to the States by the Fourteenth Amendment, *Avery v. Alabama*, 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321), and by Sections 19 and 23 of Article I of the North Carolina Constitution. This right is not intended to be simply an empty formality but is intended to guarantee effective assistance of counsel. *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974); *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158. Usually, the question of alleged failure of counsel to render effective representation arises on post conviction proceedings. However, the question can be considered on direct appeal. *State v. Sneed, supra.*

**[8]** There are no set rules to determine whether a defendant has been deprived effective assistance of counsel; rather each case must be approached upon an *ad hoc* basis, viewing circumstances as a whole in order to determine this question. Justice Branch in *State v. Sneed, supra*, stated:

> ". . . A review of these decisions indicates the general rule to be that the 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. [Citations omitted.]
>
> "Consistent with the above stated general rule, it has been held that the question of Constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation. [Citations omitted.] Neither does the Sixth Amendment guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. [Citations omitted.] Nevertheless, counsel cannot assume the

role of *amicus curiae*, *Ellis v. United States*, 356 U.S. 674, 2 L.Ed. 2d 1060, but must function in the active role of an advocate. *Entsminger v. Iowa*, 386 U.S. 748, 18 L.Ed. 2d 501. Nor can counsel be hobbled by divided loyalties. [Citations omitted.]"

**[9]** In present case, Mr. Robinson was appointed counsel for defendant on 2 August 1976. The case was called for trial on 9 November 1976. There is nothing in the record to indicate Mr. Robinson failed to confer with his client or that defendant was dissatisfied with his attorney prior to or during the course of the trial. Defendant's counsel now, however, alleges that defendant was deprived of his effective assistance of counsel for the following reasons:

"1. The record itself is devoid of objections except in a very limited capacity.

2. There were no objections made to obvious leading questions to witnesses even though testimony elicited on direct examination tended to refute the need for those leading questions.

3. There was no motion made to quash nor was there a motion made for a directed verdict at the end of the State's evidence nor at the end of all of the evidence.

4. There was no objection made after the Jury returned its verdict to set aside the verdict or for arrest of judgment."

Present counsel has inserted in the record objections to testimony which he would have made at trial. We have carefully considered each of these objections as if objections had been made at the proper time.

The indictment was proper, so a motion to quash would have been useless. Under G.S. 15-173.1 we have reviewed the sufficiency of the evidence to go to the jury as if motions for judgment as of nonsuit had been made. Here there was ample evidence to go to the jury and to support the verdict. A motion to set aside the verdict as being contrary to 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. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Massey*, 273 N.C. 721, 161 S.E. 2d 103 (1968). No abuse of discretion is

shown. A motion in arrest of judgment is one made after verdict and is based upon the insufficiency of the indictment or some other fatal defect appearing upon the face of the record. *State v. Armstrong, supra; State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664, (1972). No such defect appears in this case. We fail to see, therefore, how defendant was prejudiced by failure of trial counsel to make additional objections, or to make motions for judgment as of nonsuit or other formal motions.

The record does disclose, moreover, that defendant's trial counsel conducted extensive cross-examinations of the State's witnesses, entered numerous objections to evidence offered by the State, and presented direct evidence on behalf of defendant in the form of defendant's own testimony and that of his mother.

In *United States v. Handy*, 203 F. 2d 407 (3rd Cir. 1953), the Court stated that in the absence of such gross incompetence or faithlessness of counsel as to make it apparent to the trial judge and call for action by him, it would be destructive of the relationship of counsel and client to permit the trial judge to dictate to counsel his trial strategy in defending his client's interest or to permit the defendant, after conviction, to question that strategy and in effect put counsel on trial with respect to it.

In present case, the able and experienced trial judge who was present and who observed the conduct of the trial counsel did not at any time during the trial intimate that the counsel for defendant had in any manner neglected to represent his client to the best of his ability. To the contrary, after the trial was concluded, the trial judge appointed the trial attorney to perfect defendant's appeal, thereby ruling in effect that Mr. Robinson had, to that point, performed his duties faithfully and competently. Nothing in the record indicates any divided loyalty on the part of trial counsel, or any lack of skill or diligence in investigating the case or presenting the defenses available to defendant.

We hold, therefore, that under the facts of this case the defendant, William Blane Hensley, was not denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the Constitution of North Carolina.

**[10]** Finally, defendant contends that he should be granted a new trial because his trial counsel failed to perfect his appeal.

This contention is without merit. As soon as this failure was discovered Judge Snepp appointed the present able counsel to perfect the appeal. We allowed certiorari so that the appeal could be docketed and the case brought before us for review. We have reviewed this 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. Thus defendant has in no way been prejudiced. *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977). 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 verdict and judgment must, therefore, be upheld.

No error.

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STATE OF NORTH CAROLINA v. JOE EDWARD HAMPTON, JR.

No. 121

(Filed 24 January 1978)

1. **Criminal Law § 73.2— what witness told police—testimony not hearsay**

In this homicide prosecution, a witness's testimony as to what he had told police officers when they first questioned him was not inadmissible as hearsay where the testimony was not offered to prove the truth of the declarant's statement but to explain his action in originally making a false statement to the police.

2. **Criminal Law § 126.4— refusal to accept verdict**

In a criminal case it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict.

3. **Criminal Law § 124.2— interpretation of verdict**

A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence and the instructions of the court, and in making such interpretation, nonessential words which do not cast doubt upon the character of the verdict may be treated as surplusage.

4. **Criminal Law §§ 124.2, 126.2— verdict of "guilty as charged in the first degree"—clerk's polling of jury**

The trial court in a homicide case did not err in accepting a verdict of "guilty as charged in the first degree" since it is clear that the jury intended to find defendant guilty of murder in the first degree when the indictment,

evidence and charge are reasonably considered in connection with the verdict returned. Nor did the clerk dictate or suggest what the jury's verdict should be when, in polling the jury, the clerk asked the jurors whether they had returned a verdict of guilty of murder in the first degree and whether they still assented thereto.

**5. Criminal Law § 126.1— polling of jury—assent by nodding head**

There is no merit in defendant's contention that the verdict was not unanimous because two of the jurors merely nodded their heads in response to the inquiry of the clerk during the polling of the jury.

**6. Criminal Law § 86.5— cross-examination of defendant—prior bad conduct**

The trial court in a homicide case did not abuse its discretion in permitting the district attorney to ask defendant on cross-examination whether he had stolen an automobile, had broken into a school and stolen food therefrom, had stolen $250 worth of beer from a business, and had assaulted a certain person with a stick where nothing in the record indicates that the questions were asked in bad faith.

**7. Homicide § 30.2— first degree murder case—failure to submit manslaughter**

The trial court in this first degree murder case did not err in failing to instruct the jury on the lesser included offense of voluntary manslaughter where the State's evidence tended to show that deceased withdrew from an assault on defendant's companion when defendant struck deceased one blow with an automobile jack, deceased threatened to get the police and defendant resumed the assault on him by felling him with the jack and striking deceased about the head and face with the jack as deceased lay in a gully, and defendant verbally indicated an intent to kill deceased while striking him with the jack, and where defendant's evidence was to the effect that he never assaulted the deceased in any manner but that his companion was the killer.

**8. Homicide § 25.2— first degree murder—failure to include premeditation and deliberation in one portion of the charge**

In this prosecution for first degree murder, the trial court did not err in failing to include premeditation and deliberation in a portion of the charge in which the court instructed that the State had to prove beyond a reasonable doubt that defendant "intentionally and with malice" beat deceased with an automobile jack where a contextual reading of the charge shows that the trial judge chose to array his instructions so that each element of first degree murder, including the elements of premeditation and deliberation, would be separately defined and explained, the questioned portion of the charge was part of the court's charge on the element of malice, and the court gave a clear and concise definition of the crime of murder in the first degree which contained each previously defined and explained element.

APPEAL by defendant from *Canaday, J.*, at the June, 1977, Criminal Session of WARREN Superior Court.

Defendant was charged in a bill of indictment with the first degree murder of Cleveland Alonzo Wilson. Defendant entered a plea of not guilty.

Will McClean Davis, the State's principal witness, testified to the effect that on the night of 21 January 1977, he met defendant and Cleveland Wilson at the Starlight Palace, a nightspot in Warren County. Defendant told the witness that he wanted Wilson to drive them to Richmond but had never discussed it with Wilson. At defendant's request, he told Wilson that some girls would meet them at a nearby road and sometime after midnight they drove to a wooded area in Wilson's car where they drank wine and smoked marijuana. After a while, Wilson accused Davis of lying about the girls and ordered him out of the car. He started to walk away, but Wilson jumped on him and knocked him to the ground. Davis then testified:

> . . . While he was on top of me Joe hit him with a jack. I am talking about a piece of iron used for lifting a car so you can change a tire.
>
> After Joe Hampton hit Cleveland Wilson with the jack Cleveland got up off of me. Cleveland said he was going to get me and Joe, said he was going to get the cops. That is when Joe hit him again with the same piece of iron. After he hit him several times then he took and put him in the car. I don't know exactly how many times he hit him. I was standing on the outside of the car.
>
> I said to Joe Hampton "Let's put him in the car and turn him loose in Richmond." Joe said we had started and we had to finish it. He was hitting him towards the head. Cleveland Wilson was laying on the ground in a gutter like, a gully. I couldn't tell whether his face was up, but he was laying in gully and I saw Joe Hampton hitting him about the head.

After robbing Wilson's body, they placed it in the trunk of the automobile and drove to Lake Gaston where they threw the body into the lake. The two men then proceeded to Richmond, Virginia, where they remained until 22 January. On 23 January, defendant called Davis and told him that he had been questioned by the police concerning Wilson's disappearance and directed him to tell the police that Wilson had carried them to the Greystone Club on 21 January, and they had not seen him since. Davis com-

plied with these instructions and on the following night told defendant that he had done so. On 24 January, Davis was arrested and at that time he told the police that defendant had killed Wilson in nearby Sherwood Forest. He agreed to testify against defendant in exchange for a reduction of the first degree murder charge to voluntary manslaughter and a commitment that he would receive a sentence of twenty years.

The State offered the testimony of police officers with regard to their visits to the alleged scene of the crime and concerning the recovery of Wilson's body from Lake Gaston on 27 February 1977.

Dr. Page Hudson, the Medical Examiner for the State of North Carolina, stated that in his opinion Wilson's death was caused by a beating about the head and face.

The State also offered expert testimony tending to show that the deceased's blood type was AB, EAP, Group B, a rare blood type which normally occurs in only two or three percent of the population. The same type blood was found on the bumper jack allegedly used in the killing and on a leather jacket found near the scene where the killing supposedly took place. There was further testimony by a fingerprint expert that defendant's fingerprints matched latent prints of right and left palmprints which were taken from the trunk area of the automobile belonging to deceased.

Defendant testified in his own behalf and stated that he, Davis, and Wilson left the Starlight Palace and went to the Greystone Restaurant located near Henderson where Davis and Wilson left him. Sometime later, Davis returned to the Greystone Restaurant and told defendant that he and Wilson had engaged in a fight and that he had killed Wilson. He accompanied Davis to Gaston Lake where Davis threw the body into the lake. They then drove to Richmond in deceased's automobile.

The jury returned a verdict of "guilty as charged in the first degree." The trial judge imposed a sentence of life imprisonment.

*Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State.*

*Frank Banzet for defendant appellant.*

BRANCH, Justice.

[1] Defendant contends that the trial judge committed prejudicial error by permitting the witness Davis to testify as to what he told the police. The witness was asked, "What did you tell the officers?" He replied, "I told them what Joe had told me to tell them, that Cleveland Wilson had took us to Greystone and left us." Defendant contends that this is hearsay evidence. We disagree.

In 1 Stansbury's North Carolina Evidence, Section 138, pp. 459-460 (Brandis Rev. 1973), it is stated:

> . . . [W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay.

The challenged evidence was not offered to prove the truth of the declarant's statement but to explain his action in originally making a false statement to the police.

We also note that just prior to the time this evidence was elicited, the witness had testified without objection that defendant ". . . told me to tell them [the officers] that Cleveland took me and him to Greystone and put us off and we ain't seen him since. . . ." It is well established in this jurisdiction that when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976); *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973).

[4] Defendant argues that the trial judge erred in accepting the verdict.

The record discloses the following proceedings when the jury returned its verdict:

> THE COURT: Ladies and gentlemen, have you reached a verdict in the case of State versus Joe Edward Hampton, Jr.?
>
> FOREMAN: Yes, sir.
>
> THE COURT: All right. Take the verdict, Madam Clerk.

MADAM CLERK: Mr. Foreman and members of the jury, how say you: Is the defendant guilty of murder of the first degree, the offense with which he stands charged, or is he guilty of murder in the second degree, or is he not guilty?

FOREMAN: We reached a verdict he was guilty as charged in the first degree.

MADAM CLERK: Is this your verdict, so say you all?

FOREMAN: All of us.

MR. FRANK BANZET: Your Honor, I would like to have the jury polled.

THE COURT: All right. Poll the jury.

MADAM CLERK: John T. Allen.

JUROR ALLEN: Yes, ma'am.

MADAM CLERK: You as foreman has [sic] returned for your verdict that the defendant is guilty of murder in the first degree. Is this your verdict?

JUROR ALLEN: Yes, ma'am.

MADAM CLERK: And do you still assent thereto?

JUROR ALLEN: Yes, ma'am.

All the remaining jurors verbally answered the same questions in the affirmative except for jurors Austin and Boyd who nodded their heads when the two questions were directed to them.

Defendant first avers that the verdict was not responsive to the indictment, and, therefore, the court should have refused to accept it and should have directed the jury to reach a proper verdict.

**[2, 3]** A verdict is a substantial right and is not complete until accepted by the court. *State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651 (1966). The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. *Davis v. State*, 273 N.C. 533, 160 S.E. 2d 697 (1968). In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and

bring in a proper verdict. Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded. A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court. *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968); *State v. Thompson*, 257 N.C. 452, 126 S.E. 2d 58 (1962), *cert. denied*, 371 U.S. 921 (1962). In making such interpretation, non-essential words which do not cast doubt upon the character of the verdict may be treated as mere surplusage. *State v. Perry*, 225 N.C. 174, 33 S.E. 2d 869 (1945).

**[4]** Here, in his final mandate to the jury and throughout the charge, the trial judge made it clear that the jury might find defendant guilty of murder in the first degree as charged in the bill of indictment, guilty of the lesser included offense of murder in the second degree, or not guilty. The only possible verdict submitted which contained the language "in the first degree" was the crime charged in the bill of indictment, to-wit: murder in the first degree. When the indictment, the evidence and the charge are reasonably considered in connection with the verdict returned, it is clear that the jury intended to find, and did find, defendant guilty of murder in the first degree. Nevertheless, defendant contends that the clerk coerced a verdict by the language used during the polling of the jury. A contention similar to this was made in the case of *Davis v. State*, supra, and in rejecting this contention the Court reasoned that the record did not disclose that the clerk dictated or suggested what the verdict should be but merely addressed an inquiry to the jury. So it was here.

**[5]** Finally, by this assignment of error, defendant contends that the verdict was not unanimous because two of the jurors merely nodded their heads in response to the inquiry of the clerk.

In *State v. Sears*, 235 N.C. 623, 70 S.E. 2d 907 (1952), and in *State v. Wilson*, 218 N.C. 556, 11 S.E. 2d 567 (1940), this Court found it to be unobjectionable when the jurors nodded their assent to questions concerning their verdict. However, defendant points to the fact that instant case differs substantially from *Sears* and *Wilson* because this record does not disclose that the two jurors nodded in *assent*. He argues that the word "nod" encompasses an involuntary motion caused by drowsiness. This

argument is without merit. It would strain one's credulity to believe that jurors who, under the supervision of the trial judge, were in the process of being individually questioned as to their vote and continued assent to a verdict of guilty of first degree murder would be "napping." The existence of two dozing jurors at this crucial point in the proceedings is refuted by the very fact that able defense counsel, the district attorney, and the trial judge failed to take note of their condition and demand clear, verbal replies to the questions posed by the clerk.

For reasons stated, this assignment of error is overruled.

**[6]** We next turn to defendant's contention that the trial judge erred by permitting the district attorney to question him concerning prior unrelated acts. On cross examination by the district attorney, defendant was asked whether he had stolen a 1972 Chevrolet automobile, whether he had broken into a school and stolen food therefrom, whether he had stolen $250.00 worth of beer from the Starlight Palace, and whether he had assaulted Carlton Smith with a stick. Defendant's reply to each of these questions was in the negative with the exception of his admission that he assaulted Smith.

In *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), Chief Justice Bobbitt, speaking for the Court, stated: "It is permissible, for the purposes of impeachment, to cross examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct [citations omitted]. Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not here undertake to mark the limits of such cross examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." [Emphasis in the original.] *Accord, State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Griffin*, 201 N.C. 541, 160 S.E. 826 (1931); *State v. Colson*, 194 N.C. 206, 139 S.E. 230 (1927).

We find nothing in this record which indicates that the questions were asked in bad faith or that the trial judge abused his discretion in permitting such examination of defendant. We, therefore, hold that the trial judge did not commit prejudicial error in these rulings.

[7] Defendant next assigns as error the failure of the trial judge to instruct the jury on the lesser included offense of voluntary manslaughter.

Unquestionably, a defendant is entitled to have all permissible verdicts arising on the evidence submitted to the jury under proper instructions, and the trial judge must submit the question of a defendant's guilt of a lesser included offense when there is evidence of guilt of such crime of lesser degree. The presence of evidence from which the jury could find that such included crime of lesser degree was committed is the determinative factor. "Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 160, 84 S.E. 2d 545, 547 (1954). *See also, State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958). Thus, when there is no evidence to show the commission of such crime of lesser degree, the court should not charge on the lesser included offense. *State v. Harrington*, 286 N.C. 327, 210 S.E. 2d 424 (1974); *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973); *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955).

Voluntary manslaughter (a lesser included offense of first degree murder) is the unlawful killing of a human being without malice, expressed or implied, and without premeditation or deliberation. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Street*, 241 N.C. 689, 86 S.E. 2d 277 (1955). One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter. *State v. Wynn, supra; State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968).

> "Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *S. v. Banks*, 143 N.C. 652. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon. *S. v. Lane*, 166 N.C. 333."

*State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), *overruled on other grounds; State v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337 (1965).

In instant case, the State's evidence discloses that after defendant struck deceased one blow with the jack, Wilson withdrew from the assault on Davis. Nevertheless, when deceased threatened to "get the cops," defendant resumed his assault upon the victim by felling him with the jack and continuing his assault by striking deceased about the head and face with the jack as deceased lay prone in a gully. As defendant continued to inflict the head wounds which proved to be mortal, he verbally indicated an intent to kill deceased. The State's evidence was sufficient to raise reasonable inferences of an unlawful killing with malice, perpetrated after premeditation and deliberation. Defendant's evidence was to the effect that he never assaulted deceased in any manner and that, in fact, the witness Davis was the killer. This evidence did not tend to dispel malice but only tended to support the possible verdict of not guilty. We, therefore, hold that there was no evidence to support the lesser included offense of manslaughter and that the trial judge correctly submitted as possible verdicts: guilty of murder in the first degree, guilty of murder in the second degree, and not guilty. We further note that even had there been evidence of the lesser included offense of manslaughter, the court's failure to submit this lesser included offense would not have amounted to prejudicial error since the jury returned a valid verdict of guilty of murder in the first degree under proper instructions which also included a proper charge on the lesser included offense of second degree murder. *See, State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

For reasons stated, this assignment of error is overruled.

**[8]** Defendant's assignment of error number 4 is as follows:

> Did the trial court err in omitting from the jury charge the "with deliberation and premeditation" elements of the crime of murder in the first degree?

In the initial portion of his instructions on murder in the first degree, the trial judge charged:

Now, murder in the first degree is defined as the unlawful killing of a human being with malice and with premeditation and deliberation.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Now, in order to warrant the conviction of the defendant of the crime of murder in the first degree, the State must satisfy you from the evidence beyond a reasonable doubt that the defendant intentionally and with malice beat the decedent Cleveland Alonzo Wilson about his head and face with an automobile jack.

The court then defined malice and continued seriately to give, define, and explain the additional elements of the crime including intent to kill, malice, proximate cause, premeditation and deliberation. After each element of the crime had been defined and explained, the court in its mandate to the jury on first degree murder charged:

So I instruct you ladies and gentlemen with respect to the crime of murder in the first degree that if the State has satisfied you from the evidence beyond a reasonable doubt, the burden being upon the State so to do, that on or about the 22nd day of January, 1977, the defendant Joe Edward Hampton, Jr. intentionally beat Cleveland Wilson about his face and head with an automobile jack thereby proximately causing the death of Cleveland Wilson, and that the defendant Joe Edward Hampton, Jr. intended to kill the said Cleveland Wilson, and that he, the defendant Hampton, acted with malice, and that he acted after premeditation and deliberation, it would be your duty if the State has so satisfied you in each of these respects to return a verdict of guilty of murder in the first degree.

The rules that there are no stereotyped forms of instructions and that a charge must be considered contextually as a whole are now so firmly established that citation of authority is not required. Here a contextual reading of the charge clearly shows that the trial judge chose to array his instructions so that each element of the crime of first degree murder would be separately

defined and explained. He then gave a clear and concise definition of the crime of murder in the first degree which contained each previously defined and explained element. We, therefore, disagree with defendant's contention that the first above-quoted portion of the charge was incorrect. It was a proper part of a contextually correct charge. The trial judge's instructions as a whole presented the law of the case in such a manner that there is no reasonable ground to believe that the jury was misled or misinformed by his instructions.

In the trial below, we find

No error.

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STATE OF NORTH CAROLINA v. LEONARD GREEN MARTIN

No. 96

(Filed 24 January 1978)

1. **Criminal Law § 169— answers to questions not in record—failure to show prejudice**

Defendant failed to show prejudicial error in the trial court's rulings limiting defendant's cross-examination of two State's witnesses where the record does not show what answers the witnesses would have made had the objections to the questions not been sustained.

2. **Criminal Law § 169— answers to questions not in record—failure to show prejudice**

Where the record failed to show what the sheriff would have answered had he been permitted to testify concerning his knowledge of the reputation of a State's witness, the record failed to show prejudicial error; furthermore, since the State's witness had already testified as to his criminal record and had testified that he participated in the crime for which defendant was on trial, the testimony of the sheriff would not have added substantially to the jury's ability to evaluate the credibility of the witness.

3. **Criminal Law § 102.3— district attorney's statements—impropriety cured by trial court**

Where the district attorney asked defendant on cross-examination, "What kind of business were you in, other than robbing and killing people?" the error was cured by the trial court's sustaining of defendant's objection and instruction to the jury to disregard the district attorney's statement. Defendant also failed to show prejudice resulting from statements by the district attorney concerning defendant's sales of liquor and the absence of an alibi witness.

4. **Criminal Law § 102.1— jury argument about jail—testimony about prison camp—variation not prejudicial**

The variation between the term "jail" used by the district attorney in his argument to the jury which referred to testimony of an SBI agent and the term "prison camp" used by the agent in his testimony was trivial and did not justify any correction of the district attorney's argument by the trial judge.

5. **Criminal Law § 102.3— arrangement between witness and State—improper jury argument—correction by court**

The district attorney's jury argument concerning promises which the State made in exchange for pretrial statements from two witnesses was not prejudicial to defendant, since the court, upon defendant's objection to the argument, instructed the jury that "his testimony was that he had been made some concession to testify, and the jury can remember the evidence as it came from the mouths of the witnesses and not from the lawyers."

6. **Criminal Law § 102.9— defendant as interested witness—district attorney's jury argument proper**

The district attorney's argument to the jury concerning the testimony of defendant as an interested witness was not prejudicial to defendant, since the defendant in a criminal action is an interested witness, and the court may properly instruct the jury that the testimony of an interested witness should be scrutinized in the light of that interest, but if believed, should be given the same weight as any other evidence found believable by the jury.

7. **Criminal Law § 102.10— jury argument—defendant called a professional criminal—characterization supported by evidence**

In a prosecution for murder committed during the perpetration of an armed robbery, the private prosecutor's explanation that there were no fingerprints in the victim's home because defendant and his accomplices were professional criminals and wore gloves was not prejudicial to defendant since the evidence supported such a characterization of defendant.

APPEAL by defendant from *Collier, J.*, at the 8 November 1976 Session of ALEXANDER.

Upon separate indictments, each proper in form, the defendant was convicted of murder in the first degree and of armed robbery. He was sentenced to imprisonment for life for the murder and judgment on the charge of armed robbery was arrested, that offense being merged into the charge of murder so as to make it murder in the first degree.

On the morning of 14 December 1974, the body of Clyde Pennel was found lying on the floor of his home. It was stipulated that the proximate cause of his death was a gunshot wound in the left abdomen and that there were other gunshot wounds in the

head. The telephone had been torn from the wall and, thereby, disconnected. Mr. Pennel had a 20-gauge shotgun in his home. A window in the back of the house was raised and one of the panes had been broken out. A five-foot step ladder was immediately beneath this window. No billfold was found upon the body of Mr. Pennel. He was wearing a sweater, but no overcoat. No fingerprints were found in the house except those of the deceased and one of his relatives.

Howard Anders, an inmate of the Virginia State Prison, testified as a witness for the State to the following effect: He has not yet entered a plea in connection with the robbery and murder of Mr. Pennel, but has been promised by the State that he will "get 15 years to run concurrently" with sentences previously imposed. In December 1974, the defendant and Anders discussed picking up "a little safe or strongbox." On the evening of 13 December 1974, the defendant invited Anders to "make a trip with him" and suggested that Anders bring his rifle, which Anders did. They first drove to the house of Eudene Pruitt, who joined the venture and drove them to the Pennel home where Anders and the defendant got out, Pruitt remaining in the car and driving up and down the road waiting for them. They found a window they could raise and, using a stepladder located by Anders, the defendant went into the house. Observing a car approaching, Anders called to the defendant to get out for someone was coming. The defendant instructed him "just to watch." Anders then left and went down into a field to wait for the defendant. He heard two shots which he thought came from the house. In a short while the defendant joined Anders, they left and Pruitt picked them up in the car. The defendant was then carrying a shotgun which he did not have when he went into the house. Going back to Pruitt's home, they divided between them in equal shares $3,300 found in a billfold and threw the shotgun into the river. The defendant told Anders that no one had been hurt and that "the man would be all right."

Eudene Pruitt testified as a witness for the State to the following effect: he is now a prisoner at the Central Prison in Raleigh and is serving 7 to 10 years for breaking and entering. He has reached an agreement with the District Attorney that any additional sentence he receives as a result of the murder and robbery of Mr. Pennel will run concurrently with the sentence he is

now serving. On the occasion of the murder and robbery of Mr. Pennel, the defendant and Anders came to Pruitt's home in North Wilkesboro about dusk. He joined them in their venture. He observed that they had "a long gun and a pistol." Pruitt drove the car. He had information that Mr. Pennel carried money on him and that the three of them were "going to get it." They arrived at the Pennel home after dark. Pruitt let the defendant and Anders out of the car and drove away with the understanding that he would be back for them and pick them up. When they got out of the car the defendant and Anders each had a gun, neither of which was a shotgun. When Pruitt returned and picked them up, they did have a shotgun and said that they had to shoot Mr. Pennel, the defendant saying Anders shot first and then the defendant shot. They told Pruitt they were in the house when Mr. Pennel came home, opened the door and took a step or two inside, whereupon they shot him. They told him they had taken the billfold from Mr. Pennel and gave Pruitt $1,130 therefrom, keeping $1,100 each. Leaving the Pennel home, they stopped at the bridge over the river at North Wilkesboro, went under the bridge and threw the shotgun and billfold into the river. They then separated.

Anders and Pruitt each gave a statement to Richard Lester, an agent of the North Carolina State Bureau of Investigation, he interviewing them in prison. The statements were introduced in evidence without objection for the purpose of corroborating the testimony of Anders and Pruitt. The statements are substantially corroborative of such testimony. Pruitt's statement, which was given first, was not shown to Anders prior to Anders' own statement to Agent Lester. In Anders' statement he said that both he and the defendant were wearing gloves when they went to the Pennel house.

The defendant testified in his own behalf denying that he participated in the murder and robbery of Mr. Pennel and asserting an alibi. He called no other witness in support of the alibi. On cross-examination he acknowledged that he had been convicted nine times for violating the Federal liquor laws and once for the possession and sale of a stolen automobile.

*Rufus L. Edmisten, Attorney General, by Donald W. Grimes, Associate Attorney, for the State.*

*C. H. Kutteh II for Defendant.*

LAKE, Justice.

The defendant was represented at trial by an attorney of the State of Georgia, selected and employed by the defendant, who was assisted by North Carolina counsel, also selected and employed by the defendant. On appeal he was represented by a different counsel, court-appointed.

In his case on appeal, the defendant makes five assignments of error. Assignment of Error Number Two is to the trial court's denial of his motions for a directed verdict, or a dismissal as of nonsuit, at the end of the State's evidence and again at the end of all the evidence. This assignment was not brought forward into the brief and is, therefore, deemed abandoned. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 671, 741. In this, defendant's counsel was well advised for the evidence, taken in the light most favorable to the State, as it must be upon such a motion, is clearly sufficient to carry the case to the jury both upon the charge of murder and upon the charge of armed robbery.

**[1]** Assignment of Error Number One is that the court erred by limiting the scope of the defendant's cross-examination of the State's witnesses Allen and Anders. As to all of the exceptions upon which this assignment is based, it is sufficient to note that the record does not show what answer the witness would have made had the objection to the question not been sustained. Consequently, it cannot be determined that the ruling, even if error, was prejudicial. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Kirby*, 276 N.C. 123, 133, 171 S.E. 2d 416 (1970).

The question directed to the witness Allen was whether the fact that there was no overcoat on the body of the deceased would indicate to the witness that the deceased had probably been at home for some period of time prior to the shooting. This was a matter as to which the jury was as well qualified to make an interpretation as was the witness. Consequently, there was no error in sustaining the objection.

The questions directed to the witness Anders were merely argumentative and were not designed to elicit information not already in evidence. Both with reference to the allowance of extended cross-examination for the purpose of impeachment and with reference to the curtailment thereof, this Court has frequently said, "The limits of legitimate cross-examination are

largely within the discretion of the trial judge and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. Chance*, 279 N.C. 643, 652, 185 S.E. 2d 227 (1971), death sentence vacated, 408 U.S. 940, 33 L.Ed. 2d 764, 92 S.Ct. 2878 (1972); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725 (1947).

We find no merit in the defendant's Assignment of Error Number One.

**[2]** The defendant's Assignment of Error Number Three is that he called as his witness the Sheriff of Alexander County, who, after testifying that he did not know the State's witness Eudene Pruitt, personally, was asked, "Do you know his reputation?" To this question, the State's objection was sustained. Here, again, the record does not show what the witness would have answered had he been permitted to answer the question. Consequently, the record does not show prejudicial error. Furthermore, the State's witness Pruitt had already testified that he was, at that time, serving a prison sentence of 7 to 10 years for the crime of breaking and entering and had further testified that he was one of the participants in the robbery-murder for which the defendant was then on trial. Under these circumstances, it is inconceivable that the testimony of the sheriff as to the witness' reputation would have added substantially to the jury's ability to evaluate the credibility of Pruitt. We find no merit in this assignment of error.

**[3]** The defendant's Assignment of Error Number Four is directed to certain questions and statements by the District Attorney during the cross-examination and the redirect examination of the defendant when testifying as a witness in his own behalf. On cross-examination the defendant was asked, "Now on December 13, 1974, what kind of business were you in, other than robbing and killing people?" The question was obviously improper and the trial court promptly sustained the defendant's objection and instructed the jury, "Members of the jury, do not consider that statement of the District Attorney." This ruling of the trial judge corrected the error of the District Attorney. Thereupon, the District Attorney restated his question in a proper form, "What kind of business were you in?" The witness replied, "At that time I was in the business of trading cars and selling a little whiskey, mostly white whiskey."

On redirect examination the defendant's counsel asked, "What is your occupation?" The witness replied, "Dealing in used cars." Thereupon, the District Attorney objected and moved to strike, saying, "He sells liquor too." The record does not show any ruling of the court upon the District Attorney's objection and motion, nor does it show any objection or motion or comment by the defendant's counsel with reference to this remark of the District Attorney. The witness continued his response as follows: "Business has mostly been in used cars. Oh, I've sold some whiskey, yes, sir, and I've made it too. My entire record is liquor violations except for this possession of stolen car and maybe a traffic ticket." The record further shows that in his argument to the jury the defendant's trial counsel said: "All I've got is the truth that comes from that stand. And the truth is Peewee Martin [the defendant] is a bootlegger. *** Been a race car driver and bootlegger. Run over the mountains of Virginia, and the revenuers chasing him. Made a good living bootlegging."

Finally, in connection with this assignment of error, the defendant, having asserted as his alibi that he spent the night on which the offense occurred with his girl friend in a motel in Martinsville, Virginia, was apparently asked on cross-examination to explain why his girl friend was not present to testify in corroboration of his alibi. He said, "My girl friend is not here today because I've been locked up about nine months and she started going with somebody else and is planning on getting married and her boyfriend didn't want her to come." Thereupon, the District Attorney asked, "Didn't want her to come down here and tell a fib for you, did he?" At this point the record shows an objection was interposed but does not show any ruling by the trial judge. The witness answered, "She could have told the truth." We are unable to perceive how the defendant was prejudiced by this question in view of the response to the District Attorney's question.

We find no merit in the defendant's Assignment of Error Number Four.

The defendant's Assignment of Error Number Five relates to statements made by the privately employed prosecutor and by the District Attorney in their respective arguments to the jury.

With reference to the defendant's Exceptions 13 and 14, which are directed to portions of the argument of the privately employed prosecutor, and his Exceptions 16, 17, 19, 21A, 21B, 22, 23 and 24, which are directed to portions of the argument of the District Attorney, the record discloses no objection made at the time of the argument. "An objection to argument comes too late after the verdict." *State v. Noell*, 284 N.C. 670, 698, 202 S.E. 2d 750 (1974), death sentence vacated, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976); *State v. Williams*, 276 N.C. 703, 712, 174 S.E. 2d 503 (1970), death sentence vacated, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971).

**[4]** Defendant's Exception 15 is directed to the District Attorney's statement in his argument that S.B.I. Agent Lester and Pruitt's attorney went up to the jail to get Pruitt's statement. Defendant's counsel objected on the ground that this was not in evidence. The testimony of Agent Lester was that he went with Pruitt's court-appointed counsel "to the North Carolina Department of Corrections in Avery County," *i.e.*, to the prison camp in Avery County, to interview Pruitt and obtain his statement. The variation between the term "jail," used by the District Attorney, and the term "prison camp" is trivial and did not justify any correction of the District Attorney's argument by the trial judge.

**[5]** Defendant's Exception 18 relates to the District Attorney's comments in his argument concerning the statements given to Agent Lester by Anders and Pruitt. The District Attorney said, "The defendant over here can say, well look, the State has promised all this, which it has not." The context indicates the District Attorney's remark related to Agent Lester's testimony that he promised Anders nothing in order to obtain his pretrial statement. Thereupon, defendant's counsel objected, saying, "He testified on that stand he [Anders] made a deal for fifteen years and it's in the record." The court said: "His testimony was that he had been made some concession to testify, and the jury can remember the evidence as it came from the mouths of the witnesses and not from the lawyers." The court's statement in response to this objection by the defendant was sufficient to correct and remove any prejudice to the defendant which might have resulted from this remark of the District Attorney.

**[6]** Defendant's Exception 20 is to this statement by the District Attorney in his argument: "You got to decide that once that man

[the defendant] stands up there whether or not he is an interested witness. The judge will charge you to that, and in this State it means this; you closely scrutinize what he says to see whether or not he's telling you the truth because the law recognizes that a man in his situation is interested in your verdict. He is interested in the outcome." At this point defendant's counsel objected and the objection was overruled. In this there was no error. The defendant in a criminal action is an interested witness. The court may properly instruct the jury that the testimony of an interested witness should be scrutinized in the light of that interest, but if believed should be given the same weight as any other evidence found believable by the jury. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Green*, 187 N.C. 466, 122 S.E. 178 (1924). The charge of the court to the jury is not set forth in the record. It is presumed to have been complete and free from error.

Although the record shows no objection prior to the verdict to the other portions of the arguments for the State to which the defendant now excepts, we have, nevertheless, reviewed them because of the serious nature of the offense charged and the sentence imposed. We find in these no basis for granting the defendant a new trial.

**[7]** In his argument, the private prosecutor explained the absence of the defendant's fingerprints in the Pennel residence by saying: "They were professional criminals. They wore gloves. That would keep the fingerprints away." The statement of Anders to Agent Lester, introduced in evidence without objection, indicated he and the defendant wore gloves. The characterization of the three participants as professional criminals is fully supported by their own testimony. Pruitt came to the witness stand from prison where he is serving a 7 to 10 year sentence for a different breaking and entering. Anders came from the Virginia State Prison, the nature of his crime against the state not being shown in the record. The defendant testified that he met Anders while both were serving sentences in the Federal Penitentiary in Atlanta, and that he, the defendant, had been convicted numerous times for violation of liquor laws, and his own counsel, in argument, labeled him a successful bootlegger. Uncomplimentary characterizations of criminal defendants in arguments for the prosecution which are supported by the

evidence at the trial are not grounds for new trial. *State v. Frazier*, 280 N.C. 181, 201, 185 S.E. 2d 652 (1972), death sentence vacated, 409 U.S. 1004, 34 L.Ed. 2d 295, 93 S.Ct. 453 (1972); *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E. 2d 572 (1971), death sentence vacated, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972). *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949).

It would serve no useful purpose to discuss in detail the other portions of the arguments for the State to which the defendant excepts but to which he interposed no objection prior to verdict. We have carefully examined them and find no departure from the limits of legitimate argument in the trial of a criminal charge of the nature here involved. The defendant's Assignment of Error Number Five is without merit.

No error.

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BIG BEAR OF NORTH CAROLINA, INC.; BELK-BECK CO.; COLONIAL STORES, INC.; K & W CAFETERIA, INC.; ROSE'S STORES, INC.; WINN-DIXIE FOOD STORES, INC.; WAGNER TIRE SERVICE, INC. AND S. S. KRESGE CO. v. THE CITY OF HIGH POINT, NORTH CAROLINA

No. 99

(Filed 24 January 1978)

**1. Municipal Corporations § 37.1— fee for garbage collection—no coercion—no recovery of fees paid**

Fees charged for trash collection services were validly imposed by defendant city, and plaintiffs failed to show that the payments were made under such coercion as to render them involuntary where the city ordinance provided for discontinuance of trash collection upon nonpayment of fees; the city's control of trash collection and removal did not preclude individuals or private contractors from engaging in the same activity; there was no evidence that plaintiffs ever attempted to remove their own garbage or that any attempt was made to arrange with private firms to remove plaintiffs' garbage; there was no showing that plaintiffs ever requested the city not to service their dumpster boxes; and plaintiffs, by continuing to accept the trash collection service and by paying for it only under protest after service was discontinued, indicated that they desired the city's collection services.

**2. Municipal Corporations § 37.1— garbage collection—voluntary service by municipality—fee collection proper**

A municipality may provide the service of collecting and removing garbage as an exercise of police powers delegated to it, but a municipality is

under no compulsion to provide such service. Further, a municipality which does provide garbage collection services may impose a charge reasonably commensurate with the cost of this service upon the householder or building occupant, and, under proper classification, the rates charged need not be uniform and a business may be charged at a rate different from individuals.

ON certiorari to review decision of the Court of Appeals, 33 N.C. App. 563, which reversed the judgment of *Rousseau, J.*, dismissing plaintiffs' actions at the 25 October 1976 Regular Civil Session of the GUILFORD Superior Court, High Point Division.

This is a class action brought pursuant to G.S. 1A-1, Rule 23(a), seeking recovery of monies paid by plaintiffs to the City of High Point for garbage collecting services performed by the city. Prior to 21 January 1971, the city without charge collected garbage from dumpsters, large metal receptacles, furnished by plaintiffs. An ordinance, effective 21 January 1971, was enacted by the city which required plaintiffs and others to pay a service charge of $4.00 each time the dumpster box was serviced. The ordinance, Section 10-6 of the High Point Code of Ordinances, in pertinent part, provided:

(a) The director of public works is authorized to determine the type, size, number and location of containers for the collection of garbage, trash, waste or other refuse and the failure to comply with the director of public works instructions as to same shall result in discontinuance of garbage, waste or trash collection service.

(b) All persons, firms or corporations, except single family residences, apartments, and public schools, desiring or required by the director of public works to have dumpster boxes shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly and failure to pay the bill within ten (10) days shall result in a discontinuance of service.

Pursuant to this ordinance, the director of public works directed that all persons, firms and corporations which generated more than 180 gallons of solid waste a week should provide themselves with dumpsters. Plaintiffs came within this regulation so that failure to provide the dumpsters or pay the service fee would result in loss of garbage removal service by the city. Plaintiffs refused to pay the service charge, and the city discontinued

service on 7 August 1971 and on 9 August plaintiffs, under protest, paid all past due fees. The city thereupon resumed collection of their garbage. Plaintiffs continued to pay the required fees for the collection service under protest.

On 19 January 1972, plaintiffs filed suit seeking to have Section 10-6 of the High Point Code of Ordinances declared unconstitutional and seeking recovery of sums paid pursuant to that ordinance. Judge Barbee sitting without a jury heard this cause and entered judgment on 24 November 1975 declaring Section 10-6(a) unconstitutional. The judgment also declared unconstitutional that portion of Section 10-6(b) of the ordinance which read "or required by the director of public works." The judgment severed the issue of damages for further trial and declared the issue of constitutionality of the ordinance to be a final judgment subject to review by appeal. There was no appeal from this judgment.

Prior to 21 January 1971 and to the date that this action was instituted, there was also in effect an ordinance which provided that only persons under the direction of the superintendent of the division of sanitation could remove garbage set out for collection except by the written consent of the superintendent of the sanitation division. That ordinance is not under attack by plaintiffs.

The question of damages came on to be heard before Rousseau, J., sitting without a jury, on 25 October 1976. After considering the stipulated facts, exhibits, and other evidence, Judge Rousseau found facts, entered conclusions of law, and dismissed the action. We quote pertinent portions of his judgment:

FINDINGS OF FACT

1. Prior to January 21, 1971, the Plaintiffs voluntarily purchased and provided "dumpster boxes," which the City of High Point serviced free of charge.

EXCEPTION NO. 1

2. That on January 21, 1971, the Defendant adopted an ordinance amending Chapter 10, Article I, Section 10-6 of the Code of Ordinances of the City of High Point, revised 1957, and that portion of the ordinance not invalidated by the prior judgment entered November 24, 1975, reads as follows:

(b) All persons, firms or corporations, except single family residences, apartments, and public schools, desiring to have dumpster boxes shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly and failure to pay the bill within ten (10) days shall result in a discontinuance of service.

3. The fees paid by the Plaintiffs are reasonable.

EXCEPTION NO. 2

4. Plaintiffs desired the dumpster service by the City of High Point.

EXCEPTION NO. 3

CONCLUSIONS OF LAW

1. The following provisions of subsection (b) of said ordinance are separable from the invalid provisions of said ordinance, do not constitute an invalid delegation of legislative authority, do not improperly discriminate between classes and are not arbitrary or unreasonable:

(b) All persons, firms or corporations, except single family residences, apartments, and public schools, desiring to have dumpster boxes shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly and failure to pay the bill within ten (10) days shall result in a discontinuance of service.

2. Payments by Plaintiffs to Defendant of dumpster box service charges under the amended ordinance (Chapter 10, Article I, Section 10-6(b)) were valid.

EXCEPTION NO. 4

3. Plaintiffs have failed to establish that they were *required* under the invalid provision of the ordinance to have dumpster boxes.

EXCEPTION NO. 5

4. Plaintiffs have not shown that they ever requested the City not to service their boxes which they could have done under Chapter 10, Article I, Section 10-2 of the Code of Ordinances of the City of High Point.

The plaintiffs appealed.

The Court of Appeals, holding that the payments made by plaintiffs to the city were involuntary, reversed the trial judge and remanded to the Superior Court of Guilford County for entry of judgment in favor of plaintiffs. We allowed defendant city's petition for discretionary review on 12 September 1977.

*Byerly and Byerly, by W. B. Byerly, Jr., for plaintiff appellants.*

*Knox Walker for defendant appellee.*

BRANCH, Justice.

**[1]** Plaintiffs contend that the payments to the city for garbage collection service were made as a result of coercion, on the part of the city, which rendered the payments involuntary. Plaintiffs rely upon the following language from 66 Am. Jur. 2d, *Restitution*, Section 98, page 1039:

> A rule that has been frequently applied is that to constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, for which the latter has *no other means of immediate relief than by making the payment.* [Emphasis ours.]

Plaintiffs further rely upon *Chicago v. Insurance Co.*, 218 Ill. 40, 75 N.E. 803, and *Brewing Ass'n. v. St. Louis*, 140 Mo. 419, 37 S.W. 525, to support their position that threatened discontinuance of trash collection is coercion sufficient to render the subsequent payment of fees involuntary and subject to recovery.

In *Chicago v. Insurance Co., supra*, the City of Chicago threatened to discontinue water service to all of plaintiff's properties unless it paid outstanding water bills incurred by previous owners. The insurance company paid the bills and then instituted suit to recover the sums paid. In holding for plaintiffs, the Illinois court reasoned that such payments had in fact been coerced because the city had the only source of water and plaintiff was thereby faced with a choice of paying for services which it had

not received or of foregoing the use of valuable business properties because of the lack of water service.

The Supreme Court of Missouri faced a somewhat different problem in *Brewing Ass'n. v. St. Louis, supra.* There the city had established different billing rates for its water service, and plaintiffs sought recovery of the difference between the higher rate it had paid and what it would have paid under the lower rate. The court found the rate differentiation to be reasonable and denied recovery. However, the court noted that if the differentiation had been unreasonable or arbitrary, coercion would have resulted because the city system was the only source of water and nonpayment would have resulted in a discontinuance of water service which would have completely shut down plaintiff's brewing operations.

These cases are distinguishable from instant case in that the services there involved were indispensable to the business efforts of the respective plaintiffs, and it was established that the city controlled the only source from which such services could be obtained. While not a crucial distinction, we note that trash removal is not as acute or as indispensable to a business operation as is the furnishing of water or electricity. The more important distinction to be drawn is that in each of the cited cases, the city controlled the *only* source of water and the plaintiffs had "no other means of immediate relief than by making the payment." 66 Am. Jur. 2d, *Restitution*, Section 98, page 1039. Such a situation is not present in instant case.

Section 10-2 of the High Point Code of Ordinances provides:

> No persons, other than those under the direction of the superintendent of the division of sanitation, shall haul or remove any garbage or other refuse set out for collection as in this chapter provided, except by written consent of the superintendent of the sanitary division.

The language of this section of the Code makes it clear that the city's control of trash collection and removal does not preclude individuals or private contractors from engaging in the same activity.

There is nothing in the record before us which indicates that plaintiffs ever attempted to obtain permission to remove their

own garbage or that any attempt was made to arrange with private firms to remove plaintiffs' garbage. Neither is there any indication that these courses of action have been foreclosed. In this regard, Judge Rousseau found that plaintiffs failed to show that they ever requested the city not to service their dumpster boxes. The Court of Appeals disposed of this conclusion with the following language:

> The court's Conclusion No. 4 that plaintiffs failed to show that they requested the City not to service the boxes, as plaintiffs could have done under another section of the ordinance, misses the point. While the record is silent here, it can be presumed that plaintiffs could have hauled away their own trash, or contracted with someone else to haul it away. However, if it was coercion for the City to force plaintiffs to pay the City fees under color of an unconstitutional ordinance, then it also would be coercion for the City, by discontinuing service, or threatening to discontinue service, to force plaintiffs to pay the extra cost to a private contractor, or increase their own cost, when but for the unconstitutional ordinance the City would have performed the service at no extra cost to plaintiffs.

**[2]** The Court of Appeals seems to proceed under the assumption that the city is required to furnish this service to its inhabitants and to do so without charge. We find nothing in the statutes or case law which supports such an assumption. A municipality may provide the service of collecting and removing garbage as an exercise of police powers delegated to it, but a municipality is under no compulsion to provide such service. Further, a municipality which does provide garbage collection services may impose a charge reasonably commensurate with the cost of this service upon the householder or building occupant. Under proper classification, the rates charged need not be uniform and a business may be charged at a rate different from individuals. Finally, a municipality need not provide such services to one who refuses to pay the charge imposed and may discontinue this service in the event of non-payment. *Brewing Ass'n. v. St. Louis*, *supra*; McQuillin, 7 Municipal Corporation, Section 24.250; 56 Am. Jur. 2d, *Municipal Corporations, Etc.*, Section 456, pages 506-507, and Section 461, page 512. *See also*, G.S. 160A-311 and G.S. 160A-312.

**[1]** Plaintiffs contend, however, that their use of dumpster boxes, for which the challenged fee was imposed, was "required" by the terms of a public works regulation authorized by the partially invalid ordinance.

As a result of Judge Barbee's unappealed judgment declaring portions of Section 10-6 of the High Point Code of Ordinances unconstitutional, the remaining valid part of that section now provides:

> (b) All persons firms or corporations, except single family residences, apartments, and public schools, *desiring to have dumpster boxes* shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly and failure to pay the bill within ten (10) days shall result in a discontinuance of service . . . . [Emphasis ours.]

The Court of Appeals held that the record evidence does not support Judge Rousseau's fourth finding of fact to the effect that plaintiffs "desired the dumpster service by the City of High Point." In so holding, that court seems to rely heavily on the requirement imposed by the regulation of the director of public works that plaintiffs use dumpster boxes. It must be borne in mind that plaintiffs do not seek to recover damages growing out of the purchase or maintenance of the dumpster boxes; neither have they shown that their use of dumpster boxes was the result of coercion on the part of the city. Plaintiffs seek merely to recover fees paid to the city for services rendered by it.

Even prior to the enactment of the challenged ordinance, plaintiffs were required by the city to maintain these receptacles in order to obtain trash removal services and plaintiffs complied without complaint. There would appear to be no reason to comply with such a requirement unless plaintiffs desired the service. Further, plaintiffs' actions in continuing to accept the service and refusing to pay the fees imposed and their final decision to pay under protest when the service was discontinued dispel any notion that the service was not desired. It seems clear that plaintiffs desired the service but did not desire to pay for it.

There was ample evidence to support the trial judge's findings, and these findings of fact are conclusive. *Highway Commis-*

*sion v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772. These findings in turn support the trial judge's conclusions and ruling.

We, therefore, hold that the fees charged for trash collection services were validly imposed by the City of High Point and that plaintiffs have failed to show that the payments were made under such coercion as to render them involuntary.

The decision of the Court of Appeals is

Reversed.

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STATE OF NORTH CAROLINA v. LEWIS ALEXANDER GARRISON

No. 70

(Filed 24 January 1978)

1. **Criminal Law § 75.8— Miranda warnings—resumption of interrogation—repetition of warnings not required**

It was not necessary for an officer again to give the *Miranda* warnings to defendant before questioning defendant in the bay area of the sheriff's office while on the way to the interrogation room, and statements made by defendant in the bay area did not taint defendant's subsequent written confession made in the interrogation room after the *Miranda* warnings were repeated to him, where the *Miranda* warnings had been given to defendant by the officer at the home of defendant's mother-in-law less than one hour and 15 minutes before defendant made the statements in the bay area, all interrogations were conducted by or in the presence of the same officer, the resulting statements were not fundamentally contradictory, during all the questioning defendant was calm and in full possession of all his faculties, defendant could read and write, and defendant was experienced in dealing with law enforcement officers.

2. **Criminal Law § 86.1— impeachment of defendant—prior convictions or conduct**

On cross-examination, for the purpose of impeachment, the district attorney may question a defendant who elects to testify in his own behalf with reference to specific acts of criminal and degrading conduct, provided the questions are based on information and asked in good faith.

3. **Criminal Law § 86.3— denial of conviction or conduct—further cross-examination—sifting the witness**

While the State is bound by a witness's denial of a conviction or of specific degrading conduct to the extent that it cannot be contradicted by other evidence, such denial does not per se preclude further cross-examination with reference to these matters, but it is for the trial judge to say how far the

State may go in "sifting" the witness who denies the commission of the acts about which he is cross-examined.

4. **Criminal Law § 86.3— denial of criminal conduct—further cross-examination—motion for mistrial**

In a burglary prosecution in which defendant denied on cross-examination that he had broken into an automobile and stolen a CB radio, the trial court did not err in the denial of defendant's motion for mistrial when the district attorney then asked defendant whether he had told officers where he had sold the radio and the court sustained defendant's objection to the question, since the record is devoid of any suggestion that the district attorney's questions were asked in bad faith, and *prima facie* the cross-examination was proper.

5. **Burglary and Unlawful Breakings § 7— burglary—time of intrusion into house—no conflict in evidence—submission of felonious breaking or entering not required**

In this first degree burglary prosecution, there was no conflict in the evidence with reference to the time of defendant's intrusion into the victim's house which required the submission of nonburglarious or felonious breaking or entering, all of the evidence having tended to show that defendant entered the house during the nighttime.

APPEAL by defendant under G.S. 7A-27(a) from *Donald L. Smith, S. J.*, 28 March 1977 Criminal Session of UNION.

Defendant was tried upon an indictment which charged that on 1 March 1977, in the nighttime between the hours of 9:00 and 10:00 p.m., with the intent to commit the felony of larceny therein, he did feloniously and burglariously break and enter the dwelling of Zeb W. Griffin, which was then occupied by Mrs. Zeb Griffin. The State's evidence tended to show:

On the night of 1 March 1977 Mrs. Zeb W. Griffin, who was then alone in her home in Union County, retired between 9:00 and 9:30 p.m. Before retiring she had ascertained that all doors were locked and the windows, none of which were broken, were closed. Later, when she was awakened by the sound of someone walking around in the house, she assumed that her husband, who had been in Charlotte that day, had returned home. She got up and went out into the hall. There she saw a tall, thin black man wearing a two-toned toboggan and shaded glasses; she had never seen this individual before. They looked at each other, and he darted into the other bedroom. She ran back into her room and pulled the sewing machine across the door. Sometime later, having heard no further noises, she peered out her door and saw the man's head "sticking out the other bedroom door." Upon seeing her he shut

the door. Soon thereafter she heard the telephone ring in the kitchen. Then she heard the intruder run by the hall door and leave the house by the back way.

After the man had left the house Mrs. Griffin answered the telephone. A voice, which "sounded like a colored person," asked to speak to Toby. She responded "that Toby didn't live there and they had the wrong number." She then called her son. Upon her son's arrival he called the sheriff's office and Deputy Sheriff Cook came to the Griffin residence.

After hearing Mrs. Griffin's account of the events summarized above, he inspected the premises. He found that a back window had been broken out and the metal frame "tore up pretty good." A heavy flat file with a wooden handle on the end, which he found on the windowsill, had apparently been used to knock out the window.

Mrs. Griffin testified that after the break-in several items were missing from the dresser in "the other bedroom": a change purse containing more than $16.00, a flashlight, her rings, and two watches. Later in the evening Deputy Sheriff Cook returned to the Griffin home with Mrs. Griffin's rings and the two watches.

After conducting a *voir dire*, the court found facts and permitted Officer Cook to give the testimony summarized below. His testimony before the jury included the substance of his testimony on *voir dire.*

Cook had known defendant prior to 1 March 1977. On that day he first saw defendant about 10:30 or 11:00 p.m. at the home of defendant's mother-in-law, Mrs. Duncan. Defendant appeared normal in all respects and he talked coherently and intelligently. At Cook's request defendant accompanied him outside. At this time defendant was not under arrest, and before asking him any questions, Cook orally advised him of his constitutional rights. Thereafter defendant agreed to talk to him and said "he didn't want a lawyer because he hadn't done anything." Cook then questioned him about "this crime which had occurred" at the Griffin residence. In response to questions as to his whereabouts that night defendant told Cook he had been down to the phone booth at Yank's Grill, a place within two blocks of the Griffin home. Cook then talked further with Mrs. Duncan. Thereafter he told defendant that he would like to talk to him at the sheriff's office,

and defendant said he was willing to go. At the sheriff's office Deputy Sheriff Cook awaited the arrival of Sheriff Fowler. About 11:45 p.m., in the presence of Sheriff Fowler, Cook again warned defendant of his rights. This time he gave defendant a copy of the *Miranda* warning which defendant followed as Cook read it aloud to him. Defendant then said he understood his rights and that he desired to answer the officer's questions. He signed the warning and waiver of rights (State's Exhibit 3).

After defendant and Cook had talked 15 or 20 minutes defendant made a statement which Cook reduced to writing. Cook testified, "I would ask him and he would tell me and I would write it down." The entire interrogation lasted about one hour. At no time was defendant threatened; nor was he offered any reward or hope of reward to induce a statement. He answered questions and never indicated any desire to end the interrogation. After writing the statement (State's Exhibit 4) Cook read it back to defendant, who then read it himself. He pronounced it correct and signed it. The statement is summarized below. After acknowledging that he was not under the influence of alcohol or drugs; that he made "this statement freely and willingly without any threats or promises from anyone," and that he had been "advised of his rights," defendant stated:

About 9:00 p.m. on 1 March 1977 he went to the back of the Griffin home. He found he could get into the house and he entered. Inside, he used the phone to call his sister's home and leave word for her to call him at the Griffin's number. When she called a short time later, Mrs. Griffin got up, answered the phone, and told his sister she must have the wrong number. At this time defendant was in the next bedroom looking out the door. When Mrs. Griffin saw him he shut the door and held it until she went back into her bedroom. He then left the house, taking with him from the bedroom a change purse, a flashlight, two rings and two ladies' watches. He returned to Mrs. Duncan's home, about half of a mile from the Griffin residence, arriving about 10:30 p.m.

Cook testified that defendant at first had told him "he had lost the stuff out of his pocket when he was running back home." However, he later told Cook "that he had dropped the flashlight and the merchandise in a box there in his wife's bedroom at his mother-in-law's house."

Defendant's evidence consisted of his own testimony and that of his wife.

Defendant testified on *voir dire* that he had an eleventh grade education and could read and write; that in March 1977 he was 22 years old; and that on the night of 1 March 1977 Officer Cook came to his mother-in-law's home, which was about a mile or a mile and a half from the Griffin residence. Cook asked him to go downtown with him, and he went. At the sheriff's office Cook advised him of his rights for the first time. On previous occasions defendant had "been advised of those same rights by other officers," and he knew Officer Cook was then questioning him "about a crime that had been committed." He told Cook he was not going to answer anythig until he got a lawyer, but they had a little argument and he "went ahead and gave it to him." The officer wrote out the statement (State's Exhibit 4), read it aloud to him and he signed it. He also read it after he signed it. Nobody hit him but he was scared. He had not been drinking, taking pills, or smoking marijuana. On *voir dire*, defendant said, "It was about thirty minutes since I had been in Mr. and Mrs. Griffin's house that the officers came to my mother-in-law's and wanted to talk to me. . . . I was under arrest after the interview."

Defendant's testimony before the jury, summarized except when quoted, tended to show:

On the night of 1 March 1977 his wife was having labor pains and he thought it was time for her to go to the hospital. He left his mother-in-law's home about 7:00 or 7:30 p.m. and went to Yank's Grill "to make a phone call for his wife." At the grill he discovered that he did not have the 20 cents required to make a call. Unable to find anybody there to take his wife to the doctor, defendant knocked on the door of the Griffin house, the only house in which he saw a light. When no one answered his knock he decided nobody was at home. He then entered through a broken window and called his sister's home on a phone he found in the kitchen. His sister was out; so he gave her daughter the Griffin's number and told her to have his sister call him upon her return. For about 20 minutes thereafter he walked around in the house. Then the telephone rang, but before he could answer it Mrs. Griffin came out of her room. When she saw defendant she ran back into her room, and he ran into the other one. Thinking that she might be going for a gun, he decided he "wasn't going to

stick around to talk to her" about why he was there but that he "was going on back to his mother-in-law's house to see how [his] wife was doing." Accordingly, he left by the back door after having been in the house a total of approximately thirty minutes. Mrs. Duncan lived about a half a mile or a mile from the Griffin house. Defendant had been home about 20-25 minutes when the officers came and took him to the Sheriff's Department. The only statement he made to Officer Cook was that he went into the Griffin house to make an emergency phone call because his wife was sick and having labor pains.

On cross-examination defendant testified that when he climbed in the window of the Griffin house he "believed there was somebody in there"; that he had previously been tried and convicted of first-degree burglary, larceny, automobile larceny, and damaging personal property. He said he had signed State's Exhibit 4 because he "felt like signing it." He admitted he had told the officers he took two watches and two rings from the Griffin house but said he did so only "to get the officers off his back"; that all he took from the house was one flashlight.

Defendant's wife, whom he called as a witness, testified that he left home about 7:15 p.m. and returned about 10:30 p.m.; that on the night of 1 March 1977 she was not feeling well but she was not having any labor pains; that she did not go into labor that night, and that she was still carrying the child at the time of the trial.

The court charged the jury that, upon the evidence adduced, it might return one of three possible verdicts: guilty of burglary in the first degree, guilty of nonfelonious breaking or entering, or not guilty. The jury found defendant guilty of burglary in the first degree and, under G.S. 14-52 (N.C. Gen. Stats., 1975 Cum. Supp. to Vol. 1B), the court imposed the mandatory sentence of imprisonment for life in the State's prison.

Other facts pertinent to the assignments of error will be included in the opinion.

*Attorney General Rufus L. Edmisten and Charles J. Murray, Assistant Attorney General for the State.*

*Joe P. McCollum, Jr., for defendant appellant.*

SHARP, Chief Justice.

**[1]** Defendant brings forward three assignments of error. The first is that the court erred in admitting into evidence defendant's "alleged confession."

Upon defendant's objection to the admission in evidence of "any statement of the defendant," Judge Smith conducted a *voir dire* to determine the circumstances under which any statements by defendant were made. After hearing the testimony of both Officer Cook and defendant, Judge Smith found the circumstances to have been as testified to by Cook. In addition, he found that on the night in question defendant was not under the influence of alcohol or drugs and that he was fully able to read and write.

Based on the foregoing findings the judge held that defendant had "freely, intelligently, voluntarily and understandingly" twice waived his right to counsel—verbally at the home of Mrs. Duncan and in writing at approximately 11:45 p.m. at the sheriff's office. Judge Smith thereafter found that neither waiver was the result of any promise of reward, pressure, threat or coercion and that both waivers were constitutionally obtained and valid in all respects. He therefore adjudged "that any statement made by defendant on the night of March 1st, 1977, or the early morning of March 2nd, 1977," would be admitted in evidence "if the same is otherwise admissible."

Defendant excepted to this order but thereafter made no objection to the admission of any statement, oral or written, which defendant had made.

Cook's testimony, heretofore detailed in our preliminary statement of facts, was that on the night in question he first confronted defendant at Mrs. Duncan's home about 10:30 or 11:00 p.m. Before asking defendant any questions relating to the intrusion which had occurred earlier at the Griffin residence, Cook orally gave defendant the *Miranda* warning, and defendant orally waived both his right to counsel and his right to remain silent. Cook testified that after defendant told him "he had been down to the phone booth there at Yank's Grill, which is close to Mrs. Griffin," he requested defendant to accompany him to the sheriff's office. Defendant agreed to go and got dressed for that purpose.

It is not clear from the record whether Cook continued to interrogate defendant as he drove him to the sheriff's office.

However, Cook testified that as they entered "the bay" and were approaching "the interrogation part of the office," he asked defendant "about some stuff that was gone out of Mrs. Griffin's home." Defendant responded by telling him that he had taken some articles, including a change purse, but that he had lost them out of his pocket running home, stating approximately where he thought he had lost them.

At about 11:45 p.m. Cook, in the interrogation room in the presence of Sheriff Fowler, again warned defendant of his constitutional rights, and this time defendant executed a written waiver of his right to counsel and right to remain silent. Deputy Cook and Sheriff Fowler then talked to him approximately an hour, and thereafter defendant signed the statement introduced in evidence as State's Exhibit 4.

The court's findings, made at the conclusion of the *voir dire*, are clearly supported by plenary evidence. They are, therefore, conclusive on appeal. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Indeed, the findings are largely supported by defendant's own testimony. Although defendant made the general statement that he was "scared," he makes no contention that he was under the influence of drugs or alcohol; that he was threatened, coerced, promised leniency; or that he did not understand his rights. Moreover, he admitted that on previous occasions other officers had explained them to him, and that he signed Exhibit 4 because he "felt like signing it."

Appellant's contention, as stated in his brief, is "that the interrogation stopped at the mother-in-law's house and resumed in the bay of the office of the sheriff. That when the defendant made the statement in the bay 'that he had been in Mrs. Griffin's,' he was being interrogated by Sergeant Cook for the second time and had not been given his Miranda warnings. Therefore, the appellant argues that the written confession later given was tainted and should not have been allowed in evidence." This contention has no merit. As the court found, Officer Cook had fully warned defendant of all his constitutional rights before he interrogated him at the home of his mother-in-law and the circumstances did not require a repetition of the warnings. *See State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975).

The "bay" interrogation occurred less than one hour and 15 minutes after the initial warning had been given. All interrogations throughout were conducted either by or in the presence of the same officer, Deputy Cook. Furthermore, the resulting statements, although dissimilar, were not fundamentally contradictory. Finally, during all the questioning, defendant was calm and in full possession of all his faculties; he could read and write; and he was experienced in dealing with law enforcement officers. By his own statement, he never drank alcoholic beverages and he was not under the influence of drugs. Applying to this situation the guidelines laid down in *State v. McZorn*, *supra*, Sheriff Cook's failure to repeat the *Miranda* warnings as he and defendant walked through the bay to the interrogation room at the sheriff's office did not render defendant's statements inadmissible. From the four corners of this record it is clear that all of defendant's statements were voluntarily and understandingly made after he had been fully and fairly warned of all of his constitutional rights.

**[4]** Defendant's second contention is that the trial court erred in disallowing his motion for a mistrial based upon the following occurrence:

On the cross-examination of defendant, after he had denied that on 21 February 1977 he had broken into an automobile belonging to Mr. Brooks and taken a CB radio, the district attorney said, "I'll ask you if you didn't tell the officers where you sold the radio?" Defendant's objection to the question was sustained and he did not answer the inquiry. Defendant moved for a mistrial, and the court correctly denied the motion.

**[2, 3]** On cross-examination, for the purpose of impeachment, the district attorney may question a defendant who elects to testify in his own behalf with reference to specific acts of criminal and degrading conduct, provided the questions are based on information and asked in good faith. *State v. Broom*, 222 N.C. 324, 22 S.E. 2d 926 (1942). Such cross-examination is not limited to conduct for which defendant has been convicted but encompasses any act of the witness which tends to impeach his character. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). "The rule is necessary to enable the State to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony." *State v. Foster*, 284 N.C. 259, 275, 200 S.E. 2d 782, 794 (1973). It is for the

trial judge to say how far the State may go "in sifting" the witness who denies the commission of the acts about which he is cross-examined. The scope of such cross-examination is subject to his discretion. *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971). Of course, as in the case of other collateral facts, the State is bound by the witness's answers to the extent that they cannot be contradicted by other evidence. *State v. Broom, supra;* 1 Stansbury's North Carolina Evidence, § 111 (Brandis rev. 1973). Nevertheless, a witness's denial of a conviction or of specific degrading conduct does not per se preclude further cross-examination with reference to these matters. *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]** The court in its discretion did not require defendant to answer the question whether he had told the officers where he sold the radio. The cross-examination was halted as soon as defendant had denied that he had broken into Mr. Brook's automobile and that he had taken therefrom a CB radio. Obviously, the district attorney's questions implied that he had information contrary to defendant's denials, but it is equally clear that the record is devoid of any suggestion that the questions were asked in bad faith. Prima facie, the cross-examination was proper. Certainly, on this record, it would be absurd to say that the district attorney's question, to which the court sustained defendant's objection, affected the outcome of the trial. Defendant's second assignment of error is overruled.

**[5]** Finally, defendant contends that because of conflicting evidence as to whether defendant's unauthorized entry into the Griffin residence was during the nighttime "the trial judge should have instructed the jury that they could return a verdict of felonious breaking and entering." This contention is futile for it is based upon a false premise.

It is quite true that to warrant a conviction of burglary the State must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with the intent to commit a felony therein. "The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v. Frank*, 284 N.C. 137, 145, 200 S.E. 2d 169, 175 (1973). However, the record contains no

evidence tending to show that defendant entered the Griffin house during the daytime.

The evidence for the State tended to show that defendant entered the Griffin dwelling after 9:00 p.m. Defendant's wife testified that he left Mrs. Duncan's home, where they were then living, at 7:15 p.m. and did not return until about 10:30 p.m. Defendant himself testified that he left his mother-in-law's home about 7:00 or 7:30 p.m.; that the Duncan home was from half a mile to a mile and a half from the Griffin house; that before going to the Griffin home he went to Yank's Grill, where he attempted unsuccessfully to make a phone call and to find somebody to take his wife to the doctor; that from there he went to the Griffin home and entered it because it was the only house in which he saw a light. Moreover, in the written statement which defendant signed he stated that he entered the Griffin home at "about 9:00 p.m." Further, we take judicial notice that in Union County on 1 March 1977 the sun set at 6:10 p.m. and that it was nighttime before 7:00 p.m. *See* the schedule for "Sunrise and Sunset" computed by the Nautical Almanac Office, United States Naval Observatory.

Thus, there existed no conflict in the evidence with reference to the time of defendant's intrusion into the Griffin house which required the submission of an issue of nonburglarious or felonious breaking or entering. *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). Here we note that, based on defendant's statement that he entered the Griffin home solely for the purpose of using the telephone, the court submitted the issue of defendant's guilt of nonfelonious breaking or entering. Notwithstanding, on the clear, strong, and convincing evidence the jury found defendant guilty of burglary in the first degree. In his trial, we find

No Error.

STATE OF NORTH CAROLINA v. GEORGE EUGENE SCHULTZ

No. 120

(Filed 24 January 1978)

1. **Criminal Law § 111.1— three charges of larceny—guilty of all if guilty of one—instructions**

In this trial upon three indictments charging defendant with the felonious larceny of bronze urns and vases from cemeteries, the charge of the court, when considered as a whole, could not have led the jury to believe that it could return a verdict of guilty in all three cases if satisfied, in any one of them, of the defendant's guilt beyond a reasonable doubt, although in one portion of the charge the court did not state with clarity that the three separate cases must be determined separately by the jury.

2. **Larceny § 7.3— ownership of stolen property—no fatal variance**

There was no fatal variance between indictments charging the larceny of the urns or vases of a cemetery corporation and proof that the urns or vases were not owned by the cemetery corporation but were the property of persons who had purchased from it the burial lots, grave markers, and urns or vases, and that the cemetery corporation had only the custody of them, since it is sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian.

3. **Larceny § 2— cemetery urns and vases—indictments for larceny—insufficiency for convictions under statutes**

Indictments charging defendant with the felonious larceny of bronze urns and vases from cemeteries would not sustain a conviction of the defendant under either G.S. 14-80 or G.S. 14-148 since they do not allege certain essential elements of the statutory offenses.

4. **Larceny § 2— statute prohibiting theft of cemetery monument—inapplicability to urns and vases**

A brass urn or vase which fits into a receptacle in a grave marker and is easily separated therefrom is not a "monument . . . erected for the purpose of designating the spot where any dead body is interred" within the meaning of G.S. 14-148, and its unlawful removal would not constitute a violation of that statute. Thus, the enactment of G.S. 14-148 does not show a legislative intent to remove the theft of such urn or vase from the scope of common law larceny.

5. **Larceny § 2— cemetery urns and vases—subject of common law larceny**

Bronze urns or vases which were fastened to grave markers by a slight twist so as to make grooves and projections upon the urns or vases fit into prepared slots in a receptacle on the markers and which were easily separated from the markers did not become a part of the markers so as to make them real property or chattels real but remained personal property which was the subject of common law larceny.

State v. Schultz

APPEAL by the defendant from the Court of Appeals, which found no error on the defendant's appeal to it from *Howell, J.*, at the 29 November 1976 Session of BUNCOMBE, *Clark, J.*, dissenting. The decision of the Court of Appeals is reported in 34 N.C. App. 120, 237 S.E. 2d 349.

By three separate indictments, each proper in form, the defendant was charged with: (1) The felonious larceny of 70 bronze urns, the personal property of Mountain View Memorial Park, Inc., having a value of $3,500; (2) the felonious larceny of 55 bronze vases, the personal property of Mountain View Memorial Park, Inc., having the value of $2,750; and (3) the felonious larceny of 280 urns, the personal property of Ashlawn Gardens of Memories, Inc., having a value of $14,000. The three cases were consolidated for trial and the defendant was found guilty upon all three charges. He was sentenced to imprisonment to five years in each case, the sentences to run consecutively.

The defendant's two assignments of error are: (1) The denial of his motions for judgment of nonsuit; and (2) a portion of the court's charge to the jury which he contends would permit the jury to return a verdict of guilty in all three cases if satisfied, in any one of them, of the defendant's guilt beyond a reasonable doubt.

The evidence of the State was to the following effect:

Mountain View Memorial Park and Ashlawn Garden of Memories own and operate cemeteries in the vicinity of Asheville. The corporations sell cemetery lots and memorials, including granite and marble tombstones and flat, bronze grave markers. They also sell to the purchasers of the lots and markers bronze urns or vases. These and the markers are sold together "as a package deal." Thereafter, the purchaser, not the cemetery corporation, owns them, the cemetery corporation being the custodian or caretaker thereof. The respective urns or vases are containers for flowers and like decorations placed upon the graves. They are so designed and manufactured as to fit into receptacles in the bronze grave markers. To prevent overturning, by wind or accident, they and the receptacles in the grave markers are grooved or slightly slotted so that, when in place, they may be turned slightly and held in an upright position by the interaction of such slots and projections. They are removable by a simple reverse twist and lifting.

On the night of 5 June 1976, 55 such urns or vases were removed, without permission, from the Mountain View Memorial Park, these having a fair market value of $2,800. On 29 June 1976, 83 such urns or vases were removed, without permission, from the Mountain View Memorial Park, these having a fair market value of $4,300. On or about 27 September 1976, 391 such urns or vases were removed, without permission, from the Ashlawn Garden of Memories, these having a fair market value of between $16,000 and $20,000.

On the nights upon which these urns or vases were so taken from the cemeteries, the defendant and his companions went to the cemeteries in his automobile and, in short periods of time, removed the urns or vases, placed them in the trunk of the defendant's automobile and carried them away, their purpose being to "make some easy money." On the following day, in each instance, the defendant carried the urns or vases to different dealers in scrap metal and sold them, dividing the proceeds with his associates. When the thefts were discovered and reported in the newspaper, the purchasing dealers notified the police and turned over to them the articles so purchased by them from the defendant and his associates.

The basis for the defendant's motion for judgment of nonsuit is his contention that the urns or vases, when in place upon the grave markers, were not personal property and, therefore, were not subject to common law larceny, the offense charged in the respective indictments.

*Rufus L. Edmisten, Attorney General, by Patricia B. Hodulik, Associate Attorney, for the State.*

*Max O. Cogburn, Jr., for the Defendant.*

LAKE, Justice.

**[1]** The defendant's assignment of error directed to the charge of the court is without merit. Standing alone, the paragraph to which he excepts is not a model of clarity and, perhaps, the jury might have concluded therefrom that if it found, from the evidence and beyond a reasonable doubt, that on either of the times in question the defendant, acting alone or with his alleged associates, took and carried away the property of the cemetery

without authority and with the requisite intent, and such property was worth more than $200.00, it should return a verdict of guilty of felonious larceny in all three cases. However, portions of a charge to the jury must be read contextually. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Lee*, 277 N.C. 205, 214, 176 S.E. 2d 765 (1970).

The entire charge was relatively short. Immediately after the paragraph to which the defendant excepts, the court said:

> "Now in this case you may return one of two verdicts in each case. You may return a verdict of guilty of felonious larceny or not guilty with respect to each of the three cases, which, as I told you earlier, you will consider as separate and distinct cases."

At the outset of the charge, the court said:

> "Now, ladies and gentlemen of the jury, each bill of indictment charges a separate and distinct offense. You must decide upon each bill of indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other bill of indictment. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each charge must be stated in a separate verdict."

In at least two other portions of this brief charge, the court clearly stated that the State must prove beyond a reasonable doubt the elements of felonious larceny "in each case" and that the jury must consider the evidence of the defendant's possession of the stolen urns or vases, soon after they were stolen and under circumstances such as to make it unlikely that he obtained possession of them honestly, in deciding whether or not the defendant is "guilty of larceny in any of these cases."

The defendant is correct in saying that when, in his charge to the jury, the trial judge makes conflicting statements of law, one correct and the other incorrect, a new trial must be granted since the jury cannot be expected to know which of the two conflicting instructions is correct and it cannot be determined which of the instructions it followed. *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976). This well established rule has no application to this case, however, since here the complaint is not of two inconsistent

statements of the law but is simply that in one portion of the charge the court did not state with clarity that the three separate cases must be determined separately by the jury. That confusion, assuming it to exist, was completely clarified in the other portions of the charge. We agree with the majority of the Court of Appeals that it is inconceivable that the jury was confused as to the necessity for its separate consideration and determination of the three charges against the defendant in this case.

**[2]** The defendant's motion for judgment of nonsuit should have been granted if, as he contends, the evidence is not sufficient to support a verdict of guilty of the offense charged in the indictment. *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149 (1940). Each of the indictments upon which he was tried charges him with common law larceny of the "personal property" of the cemetery corporation. The evidence was that the urns or vases, taken by the defendant, were not owned by the cemetery corporation but were the property of the persons who had purchased from it the burial lots, the grave markers and the urns or vases, the cemetery corporation having only the custody of them.

"If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed." *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). Accord: *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972); *State v. Thompson*, 280 N.C. 202, 216, 185 S.E. 2d 666 (1972); *State v. Brown*, 263 N.C. 786, 140 S.E. 2d 413 (1965); *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946). It is, however, sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian. *State v. Hauser*, 183 N.C. 769, 111 S.E. 349 (1922); *State v. Allen*, 103 N.C. 433, 9 S.E. 626 (1889).

Thus, in respect to the ownership of the property taken by the defendant, there was no fatal variance between the indictment and the proof. The defendant does not contend to the contrary. His contention is that the urns or vases were so attached to the realty as to make them part thereof, or chattels real, and, therefore, not a subject of common law larceny and that this variance between the indictments and the proof is fatal.

In *State v. Jackson*, supra, this Court, speaking through Justice Barnhill, later Chief Justice, said:

"Larceny at common law was confined to 'goods and chattels'; it did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof. *S. v. Burrows*, 33 N.C. 477; 36 C.J., 736, sec. 6. It, as a common law offense, is concerned with personal property only, and its nature has not been altered by the statutes making it larceny to steal things affixed to realty and severed therefrom by the thief. 36 C.J., 736, sec. 6. Therefore, it was not larceny at common law, to steal anything adhering to the soil. *S. v. Burrows*, supra; 17 R.C.L. 33." 218 N.C. at 375.

In the Jackson case, the defendant was indicted for common law larceny of a tombstone. The evidence was that, without the knowledge or consent of the widow of the deceased, whose grave was marked by the tombstone, the defendant went to the cemetery lot and removed the tombstone therefrom, it having been erected at the grave. Holding that there was a fatal variance between the proof and the indictment, this Court said:

"The thought underlying the erection of a tombstone or marker at the grave of a deceased person is that of permanency. Its purpose is to designate the spot where the deceased was buried, to perpetuate his name and to record biographical data as to birth, death, etc. When so erected it becomes a chattel real and is not the subject of the common law crime of larceny." 218 N.C. at 375.

The Court in the Jackson case held that the motion for judgment of nonsuit should have been allowed with leave to the State to send to the grand jury another bill charging the defendant with violation of G.S. 14-80 or G.S. 14-148. G.S. 14-80 provides:

"If any person, not being the present owner or bona fide claimant thereof, shall wilfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood *or other kind of property whatsoever*, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor." (Emphasis added.)

G.S. 14-148 provides:

> "If any person shall unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, * * * he shall be guilty of a misdemeanor."

**[3]** Indictments in the present case would not sustain a conviction of the defendant under either of these two statutes since they do not allege certain essential elements of the statutory offenses. Consequently, the defendant's motion for judgment of nonsuit should have been allowed if the urns or vases taken and carried away by him were chattels real or, otherwise, part of the real property.

**[4]** In our opinion, a brass urn or vase, of the type here involved, is not a "monument * * * erected for the purpose of designating the spot where any dead body is interred" and therefore, its removal, under the circumstances of this case, would not constitute a violation of G.S. 14-148. That statute deals with the removal of a monument in its entirety, not with the defacing thereof or the removal of a part thereof, if such urn be deemed a part of the marker upon which it rests. Thus, the enactment of G.S. 14-148 does not show a legislative intent to remove the theft of such urn or vase from the scope of common law larceny.

**[5]** It seems clear that the bronze grave markers, upon which the urns or vases here in question rested at the time of the removal by the defendant, were so affixed to the soil as to make them parts of the realty and not subject to common law larceny. While the evidence in the present case is to the effect that such urns or vases are, habitually, sold to the owner of the cemetery lot at the same time as the grave marker, as part of a "package deal," and although they are fastened to the marker by a slight twist so as to make grooves and projections upon the urn or vase fit into prepared slots in the receptacle which is part of the marker, the urn or vase, itself, is not a part of such marker. The marker serves its contemplated purpose whether or not the urn or vase is so affixed. The urn or vase serves its contemplated purpose as a container for flowers or other decorations, whether or not it is so affixed to the marker. The sole purpose of the attachment to the marker appears to be to prevent a casual overturning

of the urn or vase by wind or accident. The evidence makes it quite clear that on their several visits to the respective cemeteries, the defendant and his associates removed, within a short space of time, large numbers of these urns or vases. Thus, it is clear that they were quite easily separated from the grave markers. Obviously, when originally put in place, the owner contemplated their remaining so in place. Nevertheless, under all the circumstances, we are constrained to hold that the urns or vases did not become so attached to the grave markers, upon which they rested, as to make them integral parts of such markers and, therefore, real property or chattels real. We think they are clearly distinguishable from the tombstone involved in *State v. Jackson, supra,* it having been erected at the grave, presumably in the customary manner of a burying of the base thereof in the soil so that the soil, itself, held the stone erect.

We hold, therefore, that the urns or vases, alleged in the indictment and shown by the evidence to have been taken and carried away by the defendant, were personal property at the time of such taking and, therefore, the motion for judgment of nonsuit was properly denied.

No error.

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STATE OF NORTH CAROLINA v. GREGORY LAMAR JOHNSON

No. 107

(Filed 24 January 1978)

1. **Criminal Law § 73.4— *spontaneous utterance*—admissibility**

In a prosecution for first degree murder, the trial court did not err in admitting into evidence deceased's spontaneous statement to a witness who questioned him that he had been shot by "Greg," since only thirty-five seconds elapsed between the witness's hearing of the shots and deceased's statement; deceased's wounds were severe and he rapidly lost consciousness; and the witness's questioning of deceased as to who shot him did not negate the spontaneity of deceased's statement.

2. **Homicide § 15— hearsay statement attributed to three-year-old child—admission harmless error**

Error in admitting a hearsay statement attributed to a three-year-old child identifying defendant as deceased's assailant was not prejudicial in light of other evidence which tended to show that defendant and deceased had

fought on two or three occasions, including the night before the shooting; the deceased, in his last conscious moment, identified "Greg" as his assailant; shortly after the incident, defendant telephoned deceased's girl friend and asked if he had hurt the three-year-old child in question; during this phone conversation, defendant said that he did not care if deceased died because he had plenty of alibis; and defendant left town three or four days after the shooting and had to be extradited from New York over three years later.

3. **Homicide § 21.5— first degree murder—intentional use of deadly weapon—sufficiency of evidence**

In a prosecution for first degree murder where the evidence tended to show that only three shots were fired, three wounds were found in deceased's body, and the third shot was fired after the deceased had backed away from the car carrying defendant, put down the child he was holding, and turned to walk away, there was ample evidence from which the jury could conclude that the use of the deadly weapon was intentional.

4. **Homicide § 21.5— first degree murder—premeditation and deliberation—sufficiency of evidence**

Evidence was sufficient to permit the jury to infer that defendant, after premeditation and deliberation, formed a fixed purpose to kill the deceased and subsequently carried out that purpose where the evidence tended to show that, while defendant and deceased had fought the night before, at the time of the shooting deceased was standing in a place where he had a right to be and offered no provocation for defendant's acts; defendant later said that he did not care if deceased died because he had plenty of alibis; although the deceased had not been felled, he was shot once by defendant after he had retreated from the side of defendant's car and apparently was trying to walk away; and deceased was shot twice while he was defenseless, holding a small child in his arms.

5. **Criminal Law § 112.4— circumstantial evidence—charge on degree of proof**

A general and correct charge as to the intensity or quantum of proof when the State relies wholly or partly on circumstantial evidence is adequate unless the defendant tenders request for a charge on the intensity of proof required for such evidence.

DEFENDANT appeals from a conviction of first degree murder and sentence of life imprisonment, *Howell, J.*, 9 May 1977 Session, MECKLENBURG Superior Court.

The evidence for the State tended to show that:

On 8 July 1973, the deceased, William Mobley, left the apartment of his girlfriend, Teresa Hall, in Charlotte sometime after 8:00 p.m. on his way to catch a bus. As he walked down the sidewalk, he picked up JoAnn Smith, three-year-old daughter of Teresa's aunt, and carried her to a vending truck which sold can-

dy in the nearby parking lot. A car pulled around the truck and stopped. As the deceased left the truck, someone called him to the car and, still carrying the child, he went over and leaned into it. At this point he was shot twice, whereupon he backed away from the car, let the child down and apparently started back toward the apartment. He was then shot again.

Jerome Smith, Teresa's cousin, heard the shots and went to aid the deceased, reaching him within seconds after the shooting. The deceased pulled up his shirt, showed Jerome a bullet wound in his chest and asked for help. Jerome asked Mobley who shot him and he replied "Greg" and collapsed. Police and an ambulance were summoned and Mobley was taken to a hospital where he was pronounced dead at 9:00 p.m.

Soon after the shooting defendant telephoned Teresa Hall's apartment and talked with Jerome Smith while Teresa listened on an extension. During this conversation defendant asked if the child was hurt and said he did not care if Mobley died because he had plenty of alibis. Defendant left Charlotte shortly after this incident. He was subsequently extradited from New York in late 1976.

Teresa Hall had at one time lived with defendant, but their relationship had terminated the month before the shooting. Mobley and defendant had fought two or three times, once on the night just prior to the killing.

Defendant's evidence tended to show that he was elsewhere at the time the deceased was shot.

Other facts pertinent to the decision are discussed in the opinion.

*Attorney General Rufus L. Edmisten by Associate Attorney J. Chris Prather for the State.*

*William F. Burns, Jr., for defendant-appellant.*

COPELAND, Justice.

Defendant presents seven assignments of error, only four of which are discussed below. It is our conclusion that all these assignments are without merit.

**[1]** Defendant argues that the trial court erred in admitting into evidence the deceased's hearsay statement to the witness Jerome Smith that he had been shot by "Greg." Statements are admissible as spontaneous utterances, however, when made by a participant or bystander in response to a startling or unusual incident, without opportunity to reflect or fabricate. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976). "[S]uch statements derive their reliability from their spontaneity when (1) there has been no sufficient opportunity to plan false or misleading statements, (2) they are impressions of immediate events and (3) they are uttered while the mind is under the influence of the activity of the surroundings." *State v. Deck*, 285 N.C. 209, 214, 203 S.E. 2d 830, 833-834 (1974).

In the instant case, only thirty-five seconds passed between the witness Smith's hearing of the shots and the deceased's statement that "Greg" had shot him. Defendant maintains that this was sufficient time for fabrication and that the deceased's statement was not spontaneous because it was made in response to the question "Who shot you?" asked by the witness Smith. There was evidence, however, that the deceased (1) began to stagger almost immediately after being shot and was completely unable to walk within thirty seconds; (2) raised his shirt and exhibited his chest wound to Smith; and (3) lost consciousness within one minute and died within one-half hour of the shooting. In addition, an autopsy revealed that the gunshot wound in Mobley's chest passed through the lower part of his left lung and the pericardical sac around his heart. The severity of the deceased's wounds and his rapidly diminishing state of consciousness lead us to conclude that any inference of fabrication which might have arisen from the minimal time lapse between the shots and the statement by the deceased was refuted. Further, the element of spontaneity is not negated merely because a bystander's question intervened between the startling incident and the utterance. *See, State v. Deck, supra.* This assignment is without merit and overruled.

**[2]** We next consider defendant's contention that the trial court committed reversible error in admitting certain hearsay statements attributed to JoAnn Smith, the three-year-old child Mobley was carrying at the time he was shot. Defendant called as a witness a police officer who had prepared a preliminary report of the shooting at the scene. On cross-examination by the State,

the officer testified that the name Gregory Johnson appeared in the report on the line marked "Identify Suspects and Charge." The witness was then asked who told him the suspect's name, to which he was allowed to answer, over objection, "JoAnn Smith told me that Greg hurt William." We agree that this statement was hearsay; however, we do not feel that it was sufficiently prejudicial to warrant a new trial. Although defendant arguably opened the door to this later testimony by inquiring on direct examination into the origin of other information in the report, it is unnecessary to resolve this question. In order to merit an award of a new trial, an appellant must show error so substantial that a different result likely would have ensued in its absence. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969).

In the case under consideration, there was evidence which tended to show that: (1) defendant and the deceased had fought on two or three occasions, including the night before the shooting; (2) the deceased, in his last conscious moment, identified "Greg" as his assailant; (3) shortly after the incident, defendant telephoned Teresa Hall's apartment and asked if he had hurt JoAnn Smith; (4) during this telephone conversation, defendant said that he did not care if Mobley died because he had plenty of alibis; (5) defendant left Charlotte three or four days after the shooting and had to be extradited from New York over three years later. The challenged evidence consists merely of a hearsay statement attributed to a three-year-old child. In view of the quality and quantity of the other evidence against defendant, we are convinced that the result would have been the same had the statement been excluded; therefore, we find that this error was harmless and the assignment is overruled.

Defendant next assigns as error the denial of his motion for nonsuit, asserting that the State failed to put forth sufficient evidence from which the jury could find malice or premeditation and deliberation. When ruling upon a motion for judgment of nonsuit, the court must consider the evidence in the light most favorable to the State, resolving all conflicts in favor of the State and giving it the benefit of all inferences reasonably to be drawn in its favor. *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977). Further, when the State satisfies the jury beyond a reasonable doubt that the defendant intentionally assaulted the

deceased with a deadly weapon proximately causing his death, the law raises the presumption that the killing was unlawful and done with malice. *State v. Jackson*, 284 N.C. 383, 200 S.E. 2d 596 (1973); *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955).

**[3]** Defendant argues that there was insufficient evidence in the record from which the jury could find *intentional* use of the deadly weapon. Yet, the State's evidence, taken as true, would tend to show that only three shots were fired and that three wounds were found in the deceased's body. Moreover, the third shot was fired after the deceased had backed away from the car, put down the child he was holding, and turned to walk away. The accuracy with which the shots were fired and the shooting of the victim as he retreated supplied ample evidence from which the jury could conclude that the use of the deadly weapon was intentional.

**[4]** It is also asserted that insufficient proof of premeditation and deliberation was adduced to permit the submission of the first degree murder charge to the jury. Since it is not ordinarily possible to prove premeditation and deliberation by direct evidence, circumstantial evidence may be used to establish these elements of first degree murder. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). "Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) Want of provocation on the part of the deceased; (2) the conduct of defendant before and after the killing; (3) the dealing of lethal blows after deceased has been felled and rendered helpless; (4) the vicious and brutal manner of the killing; (5) the number of shots fired." *State v. Davis*, 289 N.C. 500, 510, 223 S.E. 2d 296, 302-303, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 47 (1976) (citations omitted).

The evidence in the instant case, viewed in the light most favorable to the State, tends to show that: (1) while defendant and the deceased had fought the night before, at the time of the shooting Mobley was standing in a place where he had a right to be and offered no provocation for defendant's acts; (2) defendant later said that he did not care if Mobley died because he had plenty of alibis; (3) although the deceased had not been felled, he was shot once by defendant after he had retreated from the side of the car and apparently was trying to walk away; and (4) Mobley was shot twice while he was defenseless, holding a small child in his arms. It is our conclusion that this evidence was sufficient to

permit the jury to reasonably infer that defendant, after premeditation and deliberation, formed a fixed purpose to kill the deceased and subsequently carried out that purpose. For the above reasons, this assignment of error also is overruled.

**[5]** Defendant further assigns as error the failure of the trial court to specially instruct the jury on the quantum of proof to be used in reviewing circumstantial evidence. Although defendant tendered no request for special instructions on circumstantial evidence, he argues that the court should be required to give such an instruction absent a request in cases in which the State relies totally on circumstantial evidence. We have recently held, however, that "A general and correct charge as to the intensity or quantum of proof when the State relies wholly or partly on circumstantial evidence is adequate unless the defendant tenders request for a charge on the intensity of proof required for such evidence." *State v. Beach*, 283 N.C. 261, 272, 196 S.E. 2d 214, 221-222 (1973). The trial court here gave a proper charge on the general burden of proof in criminal cases; therefore, this assignment is without merit.

The remainder of defendant's assignments of error require no discussion. We have examined them and found them to be without merit; thus, they are overruled.

After consideration of defendant's assignments of error, we conclude that he has had a fair trial and in the verdict and judgment find

No error.

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STATE OF NORTH CAROLINA v. JOHN C. DENNY III

No. 105

(Filed 24 January 1978)

**1. Jury § 6.3— prospective jurors—question as to state of mind improper**

The trial court did not err in refusing to permit defense counsel to ask prospective jurors if they would "be willing to be tried by one in your present state of mind if you were on trial in this case."

2. **Criminal Law § 85.1— character of defendant—manner of introduction improper**

Where defendant called a witness who had known him for six to eight months and asked him to describe defendant's behavior and to give his impression of defendant, and defendant also called an employee at the jail in which defendant had been incarcerated for 100 days and asked him how defendant conducted himself while in custody, the trial court properly sustained objections to the questions, since the manner in which defendant attempted to elicit character testimony from his witnesses was improper.

3. **Criminal Law § 101.2— newspaper article about defendant—jury examined en masse—discretionary matter**

It was within the trial court's discretion to examine the jury *en masse* rather than individually to determine whether the jurors had read, or had been improperly influenced by, a newspaper article concerning defendant which was published during trial.

DEFENDANT appeals from judgments of *McLelland, J.*, entered at the 20 June 1977 Session, LEE Superior Court.

Upon indictments, proper in form, defendant was convicted of (1) the crime against nature and (2) first degree rape of Mrs. Gloria Thomas on 9 March 1977 in Lee County. He was sentenced to ten years for the crime against nature and life imprisonment for the rape, to run consecutively.

Mrs. Gloria Thomas testified that defendant came to the yard outside her home about 1:30 p.m. the afternoon of 9 March 1977, ostensibly to interview her in connection with an assignment for a political science course. After asking several questions and ascertaining that her husband was not at home, defendant displayed a knife and ordered Mrs. Thomas into her house. He permitted her to put her two young children to bed for their afternoon nap, then ordered her to disrobe. Threatening harm to her children if she did not comply with his demands, he forced her to engage in intercourse and to perform an oral sex act upon him. Then, after receiving her assurances that she would not report his actions to anyone, he departed. In addition to identifying defendant as her assailant, Mrs. Thomas identified articles of clothing taken from defendant's residence as clothing worn by the assailant and identified a car belonging to defendant as the same or similar to the car in which her assailant had driven to her home.

The State also offered the testimony of Officer Billy Bryant of the Lee County Sheriff's Department and Dr. James C. Little,

Jr., a Lee County physician. Officer Bryant related the substance of a statement given by Mrs. Thomas immediately after she was raped. This statement substantially corroborates her testimony at trial. Dr. Little testified that he examined Mrs. Thomas on 9 March 1977, and his examination revealed the presence of sperm in her vagina.

The defendant did not testify but presented evidence vaguely tending to show that he was at a local Army recruitment office for fifteen to twenty-five minutes sometime between 12 noon and 3:30 on the date Mrs. Thomas allegedly was raped. Defendant attempted to introduce testimony relating to his general behavior and demeanor, but such testimony was excluded by the court upon objection.

*Rufus L. Edmisten, Attorney General; David S. Crump, Assistant Attorney General, for the State.*

*Harry E. Wilson, attorney for defendant appellant.*

HUSKINS, Justice.

**[1]** By his first assignment of error defendant contends the trial court erred by refusing to permit him to ask the following questions of prospective jurors:

> "MR. WILSON [defense attorney]: Would you be willing to be tried by one in your present state of mind if you were on trial in this case?
>
> THE COURT: That question is improper. You may not ask it.
>
> MR. WILSON: Searching your mind as you would want the mind of a juror to be searched if you were on trial in this case, can you think of any reason why you would not want a juror with your present state of mind to hear this case?
>
> THE COURT: I am not going to allow you to put the jury on trial. Do not ask that question. Not in any form."

G.S. 9-15(a) secures to litigants the right "to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror . . ." This Court has repeatedly held, however, that the manner and extent of the inquiry is a matter committed largely to the discretion of the trial judge and

is subject to his close supervision. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745, *cert. denied sub nom. Holloman v. North Carolina*, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973). Moreover, such discretion is properly exercised when the trial court prohibits ambiguous or confusing hypothetical questions. "On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed." *State v. Vinson*, supra at 336, 215 S.E. 2d at 68. We are of the opinion that the trial court's refusal to permit defense counsel to ask prospective jurors the questions set forth above was a proper exercise of its discretion. Accordingly, defendant's first assignment of error is overruled.

**[2]** Defendant called as witnesses Mr. Leroy Oldham, who had known defendant for six to eight months, and Mr. Watson Kelly, an employee at the jail in which defendant had been incarcerated for approximately 100 days. Mr. Oldham was asked to "describe Mr. Denny's behavior" and to give his "impression" of defendant; Mr. Watson was asked "how the defendant . . . conducted himself" while in custody and whether he had ever observed defendant "become angry." Neither witness had indicated any familiarity with defendant's reputation. Defendant contends that by sustaining objections to these questions the trial court improperly excluded evidence pertaining to defendant's character. This constitutes his second assignment of error.

A criminal defendant, if he so elects, may always offer evidence of his good character as *substantive evidence* on the issue of his guilt or innocence. *State v. Davis*, 231 N.C. 664, 58 S.E. 2d 355 (1950); *State v. Moore*, 185 N.C. 637, 116 S.E. 161 (1923); *State v. Hice*, 117 N.C. 782, 23 S.E. 357 (1895). *See generally* 1 Stansbury, North Carolina Evidence § 104 (Brandis rev. 1973); McCormick, Evidence § 191 (2nd ed. 1972). It is well settled, however, that in this jurisdiction a defendant's character is proved by testimony concerning "his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion. [Moreover], the testifying witness must have sufficient contact with that community or society to

qualify him as knowing the general reputation of the person sought to be attacked or supported." *State v. McEachern*, 283 N.C. 57, 67, 194 S.E. 2d 787, 793-94 (1973). A witness's personal opinion concerning another person's character is inadmissible. *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); 1 Stansbury, North Carolina Evidence § 110 (Brandis rev. 1973). Nor may witnesses be questioned on direct examination concerning specific acts indicative of character. *Johnson v. Massengill, supra*; 1 Stansbury, supra at §§ 110, 111. *See State v. O'Neal*, 187 N.C. 22, 120 S.E. 817 (1924). *See also State v. Bush*, 289 N.C. 159 at 169, 221 S.E. 2d 333 at 339-40 (1976), and cases there cited. Further, before a witness may testify concerning a person's character he must qualify himself by affirmatively indicating that he is familiar with that person's general reputation. *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), and cases cited therein. "The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is." *State v. Hicks*, 200 N.C. 539, 540-41, 157 S.E. 851, 852 (1931). *Accord, State v. Stegmann, supra.*

Application of the foregoing principles to the present case leads us to conclude that the manner in which defendant attempted to elicit character testimony from Messrs. Oldham and Kelly was improper and objections thereto were properly sustained. Accordingly, defendant's second assignment of error is overruled.

**[3]** Defendant's third assignment of error relates to the manner in which the trial court attempted to determine whether jurors had read a newspaper article which appeared during the course of the trial. The record discloses that a story in the 21 June 1977 *News and Observer* circulated in Harnett and Lee Counties commented on defendant's trial and disclosed that defendant had recently been paroled from a prison term imposed for a previous conviction of rape. The trial court questioned the jury *en masse* and inquired whether any juror had read an article concerning

the trial in the *News and Observer*. The trial court further asked whether any juror was aware of the existence of the newspaper article concerning defendant. No juror responded and the trial was allowed to proceed. Defendant contends that the trial court erred by failing to require each juror to respond individually and audibly to the question whether he or she had read the newspaper article concerning defendant.

The procedure chosen by the trial court to determine whether the jurors had read, or had been improperly influenced by, the newspaper article concerning defendant constituted a proper exercise of the court's discretion. *See State v. McVay* and *State v. Simmons*, 279 N.C. 428, 183 S.E. 2d 652 (1971). No abuse of discretion is shown. Defendant's third assignment of error is overruled.

By his fourth and final assignment of error defendant contends the trial court erred in denying his motion to dismiss for insufficient evidence. Mrs. Gloria Thomas positively identified defendant as the person who raped her. Her evidence alone is sufficient to carry the case to the jury. *See, e.g., State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973); *State v. Hanes*, 268 N.C. 335, 150 S.E. 2d 489 (1966). *Compare State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967).

Defendant having failed to show prejudicial error, the verdicts and judgments must be upheld.

No error.

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STATE OF NORTH CAROLINA v. MORGAN JESSIE LEE

No. 118

(Filed 24 January 1978)

**Homicide § 21.4— defendant as perpetrator—insufficiency of evidence**

Defendant's motion for nonsuit should have been allowed in a murder prosecution where the evidence established a murder and showed that defendant had the opportunity, means and perhaps the mental state to have committed the murder, but there was no showing that defendant actually shot the victim.

APPEAL by the State from the decision of the Court of Appeals, reported in 34 N.C. App. 106, 237 S.E. 2d 315 (1977), reversing the judgment of *Webb, J.*, 31 January 1977 Regular Session of SAMPSON Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the murder of Brenda Thornton Jones. The jury returned a verdict of second degree murder and defendant was sentenced to thirty years imprisonment.

The Court of Appeals reversed, and the State appealed as of right by reason of the dissent of one member of the hearing panel. G.S. 7A-30(2).

*Attorney General Rufus L. Edmisten and Assistant Attorney General James Peeler Smith for the State, appellant.*

*Holland, Poole & Newman by R. Maurice Holland for defendant appellee.*

MOORE, Justice.

The question presented by this appeal is whether the Court of Appeals erred in reversing the trial court on the ground that defendant's motion for judgment as of nonsuit should have been granted. We hold that it did not.

The State's evidence tends to show the following:

On Saturday evening, 28 August 1976, the body of Brenda Thornton Jones was discovered several miles from defendant's home in a clearing in the woods some 150 yards from N.C. Highway 242 in rural Sampson County. She had two small bullet holes in the left side of her neck. Prior to her death the defendant and the deceased had been living together in a trailer located at Dreamland Trailer Park on Murchison Road in Fayetteville.

On Saturday evening about 8:00 p.m., just before the body was discovered, John Hayes, Chief of Police of Newton Grove, went to defendant's father's home, located three miles south of Newton Grove just off U.S. Highway 13. When the officer arrived, the defendant was standing in the yard of his father's home, and was acting quite nervously. Defendant told the officer that he had been shot by a man unknown to the defendant. Chief Hayes called the rescue squad, and defendant was carried to the hospital for

treatment of a wound to his side. On inquiry Chief Hayes learned from Jessie Lee, defendant's father, that defendant had been shot by Jessie Lee himself during a scuffle with the defendant. Chief Hayes then obtained a .25-caliber automatic pistol from Peggy, defendant's sister. At trial Officer Hayes testified that as a result of their investigation the officers went a few miles over on Highway 242 near Tower's Gas Company. There Bruce Warren was standing by the road and directed them to the body of the victim, Brenda Jones, lying some 150 yards from the highway. At least two other men were at the scene when the officers arrived.

Detective Gene Faircloth arrived at the scene soon thereafter. He searched the area around the body, and found no evidence of any sort. He then went to the hospital in order to question the defendant. On being asked where Brenda Jones was, defendant told the officer that he did not know, that he had not seen her since 7:30 that morning (Saturday, August the 28th), and that she had left without telling the defendant where she was going. Detective Faircloth further testified: "When I asked him about Brenda, he denied knowing anything, sort of smiled and said, well, you read my rights and everything, didn't you."

Willie Phillips and Helen Robinson, neighbors of the deceased, testified that the deceased had been beaten by defendant on two separate occasions within the two weeks prior to her death. Before Brenda's death defendant told Phillips that he had beaten Brenda because she told the defendant that she and Phillips were having an affair. Phillips said that a few days prior to the discovery of Brenda's body he had seen the defendant in possession of a .25-caliber automatic similar to that pistol marked State's Exhibit 1. On Friday night prior to the discovery of the body, Phillips heard two shots fired outside his trailer. Helen Robinson testified that on Thursday or Friday morning, August 26th or 27th, she had a conversation with the defendant wherein he told her that he was going to kill Brenda Jones.

Two lead fragments were taken from the body of Brenda Jones, but were "unsuitable for identifying the weapon from which they may have been fired." The .25-caliber pistol which defendant's sister gave to Officer Hayes but which was not identified as belonging to defendant, and a fired cartridge casing, the origin of which was never established at trial, were introduced

into evidence. It was not shown that the cartridge casing was fired from the pistol introduced at trial.

Jessie Lee, father of the defendant, testified that his son came to his home during the early evening of Saturday, 28 August. Defendant had a pistol with him at this time. Jessie Lee and defendant had an argument, and during a scuffle defendant was shot in the side. Both defendant's father and his sister, Annie Royal, testified that defendant did not mention Brenda Jones that evening.

Defendant offered no evidence.

On a motion for nonsuit in a criminal case the evidence must 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. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). If 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, 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). However, in order to prove that defendant committed the crime and thus withstand the motion for nonsuit, there must be substantial evidence of all material elements of the crime. *State v. Furr, supra; State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949). Evidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand nonsuit. *State v. Furr, supra; State v. Evans, supra; State v. Palmer, supra. Cf. State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976).

In a murder case, to overcome a motion for nonsuit and justify a conviction of the defendant, the State must offer evidence from which it can be reasonably inferred (1) that deceased died by virtue of a criminal act, and (2) that the act was committed by the defendant. *State v. Furr, supra; State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971); *State v. Palmer, supra.* The State has presented sufficient evidence to establish the first of these requirements, but it has failed to present enough evidence to support the second—that is, that Brenda Jones was murdered by the defendant.

The State's evidence shows that defendant probably beat the victim on two occasions just before her death, and it further shows that defendant threatened to kill the victim a day or two before her death. The State argues that this evidence is sufficient to permit the inference that the defendant bore malice toward Brenda Jones. Assuming that this evidence is sufficient to establish the *mens rea* in this case, the State's case still must fail since it has not offered substantial evidence which shows that defendant committed the act of murder. The criminal act cannot be inferred from evidence of state of mind alone. *Cf. State v. Furr, supra; State v. Palmer, supra.*

The State's evidence in this case establishes a murder; and considered in the light most favorable to the State, shows that the defendant had the opportunity, means and perhaps the mental state to have committed this murder. Such facts, taken in the strongest view adverse to defendant, ". . . excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. . . ." *State v. Goodson*, 107 N.C. 798, 12 S.E. 329 (1890). *See State v. Jones, supra.*

The evidence in the case at bar shows a brutal murder and raises a strong suspicion of defendant's guilt, but we are constrained to hold that the State failed to offer substantial evidence that the defendant was the one who shot Brenda Jones. Therefore, defendant's motion for nonsuit should have been allowed, and the Court of Appeals did not err in reversing the trial court's denial of defendant's motion for judgment as of nonsuit.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. PADEN H. COLE, JR., TOM T. COLE, JACK BARTLETT, CHARLES BARTLETT, HAROLD G. BARTLETT AND DANIEL K. WRIGHT

No. 43

(Filed 24 January 1978)

1. **Indictment and Warrant § 7— presentment defined**

A presentment does not institute a criminal proceeding but is only a device whereby the grand jury brings to the attention of the district attorney *subject matter* which requires investigation by the district attorney and the submission of a properly drawn indictment to the grand jury when the facts so warrant.

2. **Indictment and Warrant § 7; Criminal Law § 16.1— misdemeanor charge initiated by presentment—original jurisdiction of superior court**

A charge in indictments for the misdemeanor of possessing a dead game animal, a bear, which was taken in closed season in Tyrrell County in violation of G.S. 113-103 was initiated by presentment although the presentment charged the different offense of violating the N. C. Game Laws by "taking and possessing a bear in Tyrrell County during closed season," since the language in the presentment and that contained in the indictments dealt with the same subject matter. Therefore, the superior court had original jurisdiction of the misdemeanor charge under the statute giving it jurisdiction to try a misdemeanor when the charge is initiated by presentment, G.S. 7A-271.

3. **Animals § 7— possessing dead bear in Tyrrell County on 16 November 1974—no charge of crime**

Indictments charging defendants with possessing on 16 November 1974 a dead game animal, a bear, which was taken during closed season in Tyrrell County in violation of Chapter 103 of the 1973 Session Laws and G.S. 113-103 do not charge a crime since Chapter 103 does not prohibit the possession of a dead bear but only the taking or hunting of a bear in Tyrrell County between 9 June 1973 and 9 June 1975, possession of a dead bear on November 16 is not a violation of G.S. 113-103 because the statute fixes the "open season" on bear as October 1 to January 1 of each year, and the two statutes cannot be combined so as to create a new crime.

ON certiorari to review the decision of the Court of Appeals reported in 33 N.C. App. 48, 234 S.E. 2d 191, which vacated the judgment of *Webb, J.*, entered at the 28 June 1976 Session of MARTIN County Superior Court.

Defendants were tried originally in Tyrrell County District Court under warrants which charged that:

> . . . on or about the 16th day of November, 1974, the defendant(s) named above did unlawfully, wilfully, and (sic)

(1) hunt bear in the county of Tyrrell at a prohibited time, to wit: between the dates of June 9, 1973 and June 9, 1975, to wit: on the 16th day of November 1974.

(2) have in his possession a wild animal, to wit: a bear, knowing the same to have been taken during the closed season.

The offense charged here was committed against the peace and dignity of the State and in violation of law North Carolina 1973 Session Law Chapter 103, House Bill 398 and G.S. 113-103 and 113-104.

These cases came on to be heard before Judge Hallett S. Ward in the Tyrrell County District Court who found defendants not guilty on the first count, guilty on the second count and thereupon entered the following judgment:

JUDGMENT: It is ordered that Defendant: pay the costs of court, not violate any laws of Article 7, Chapter 113 GS of NC for 1 year, pay to CSC $100.00 for use of Wildlife Resources Commission—Fish & Game Div.

This the 18 day of Dec., 1974.

Defendants appealed to superior court where they moved to dismiss on the ground that the second count in the warrants did not charge a crime. Judge Rouse allowed the motions on the 15th day of September 1975. On the same day, new warrants were issued charging that defendants ". . . did unlawfully possess a dead game animal, a bear, which was taken during closed season in Tyrrell County, said season being closed by Chapter 103, House Bill 398 of the 1973 Session Laws of North Carolina . . . and in violation of G.S. 113-103." Judge Charles H. Manning, Chief District Court Judge, dismissed the charges with prejudice. On 20 April 1975 the Tyrrell County Grand Jury by presentment charged that on 16 November 1974 defendants "violated the game laws of the State of North Carolina by taking and possessing a bear in Tyrrell County during closed season, contrary to Chapter 103 of the 1973 North Carolina Session Laws and G.S. 113." On the same day, indictments were returned against defendants charging that each of them on 16 November 1974 in Tyrrell County did unlawfully and wilfully "possess a dead game animal, a bear, which was taken during closed season in Tyrrell County, said season being closed by Chapter 103, House Bill 398 of the

1973 Session Laws of the North Carolina General Assembly and protected by the laws of North Carolina pursuant to G.S. 113-102(2) because said season was closed and done in violation of G.S. 113-103."

On 21 April 1976, defendants appeared in superior court and moved to dismiss on the ground, among others, that the superior court was without jurisdiction, the original jurisdiction of the cases being in the district court. Judge Webb ordered that Judge Manning's order dismissing the new warrants be reversed and that the cases be returned to the District Court of Tyrrell County for trial. Nevertheless, on motion of the State, agreed to by defendants, the cases were transferred to Martin County Superior Court for trial. The jury found defendants guilty as charged in the bills of indictment and defendants appealed.

The Court of Appeals held that the superior court had no original jurisdiction to try these cases and remanded them to Martin County Superior Court with direction that they be returned to the District Court in Tyrrell County for disposition. We allowed the State's petition for discretionary review on 13 June 1977.

*Rufus L. Edmisten, Attorney General, by George W. Lennon, Associate Attorney, for the State.*

*Wilkinson and Vosburgh by John A. Wilkinson for defendant appellants.*

BRANCH, Justice.

The threshold question presented by this appeal is whether the Court of Appeals erred in holding that the Superior Court of Martin County did not have original jurisdiction to try defendants on the *misdemeanor* charges of possessing a dead game animal, a bear, which was taken during closed season in Tyrrell County in violation of G.S. 113-103 and Chapter 103 of the 1973 Session Laws.

The district court division has exclusive original jurisdiction of criminal actions below the grade of felony, G.S. 7A-272, unless otherwise provided by G.S. 7A-271. One of the provisions of G.S. 7A-271 is that the superior court has jurisdiction to try a misdemeanor when the charge is initiated by presentment. The State

contends that the misdemeanor charges here involved were initiated by presentment. In reaching a contrary conclusion, the Court of Appeals noted that the presentment in instant case alleged that defendants violated the North Carolina Game Laws "by taking and possessing a bear in Tyrrell County during closed season contrary to Chapter 103 of the 1973 North Carolina Session Laws and G.S. 113" and that the bills of indictment under which defendants were tried charged that defendants violated the North Carolina laws by "possessing a dead game animal in violation of G.S. 113-103." The Court of Appeals held that the offense charged in the presentment was different than that charged in the indictments and reasoned that these cases had not been initiated by presentment within the exception contained in subsection (2) of G.S. 7A-271(a) so as to confer original jurisdiction upon the Martin County Superior Court.

In the landmark decision of *State v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283, Justice Ervin speaking for the Court reviewed the history and law of the modes of prosecution from the date of the Constitutional Convention in Halifax in 1776 to the date of that opinion in November, 1958. Prior to 1797, an accused could be tried upon an indictment or a presentment. The history of the changes in the modes of prosecution, the reasons therefor, and the effects of such changes are found in the following quote from *Thomas*:

> The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute, which has been retained to this day in slightly changed phraseology, and which now appears in this provision of the General Statutes: "No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law." G.S. 15-137. Since the adoption of the Act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. *S. v. Cain*, 8 N.C. 352; 42 C.J.S., Indictments and Information, section 7.

> The reasons which motivated the General Assembly to abolish the practice of trying criminal cases upon presentments were summarized in this fashion in *S. v. Guilford*, supra: "Prior to the Act of 1797, it was found that the presentments made by the grand juries were frequently so informal that a trial could not be had upon them, and very frequently the presentment would set out a matter which was not a criminal offense; so that sometimes the citizen was arrested and greatly oppressed when he had committed no violation of the public law, and oftentimes he was put to the trouble and expense of a trial, when, if the public law had been violated, the charge was made without the averments necessary to insure certainty in judicial proceedings, and it was necessary to enter a nol. pros. and send a bill of indictment. To remedy these evils, the Act of 1797 was passed, but it made no change in the distinction between an indictment and a presentment."

G.S. 15-137 was repealed by Session Law 1973, C. 1286, s. 26, effective July 1, 1975, and Chapter 15A of the General Statutes was enacted by the same General Assembly, effective, in pertinent part July 1, 1975. G.S. 15A-641(c) provides:

> A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district solicitor is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

The above-quoted portion of G.S. 15A does not change the law as stated in *State v. Thomas*, supra, but only codifies and clarifies that holding.

**[1, 2]** A presentment then does not institute a criminal proceeding but is only a device whereby the grand jury brings to the attention of the district attorney *subject matter* which requires investigation by the district attorney and the submission of a properly drawn indictment by him to the grand jury when the

facts so warrant. In instant case, the language of the presentment and that contained in the bills of indictment dealt with the same factual subject matter and the charges contained in the bills of indictment were in fact initiated by presentment. The Court of Appeals, therefore, erred by holding that the Martin County Superior Court was without original jurisdiction since the charges were *initiated* by presentment.

**[3]** Having held that the Martin County Superior Court had original jurisdiction to try the cases before us, we now turn to the question of whether the bills of indictment, in fact, charge a crime.

Chapter 103 of the 1973 Session Laws of North Carolina (hereinafter referred to as Chapter 103) provides:

> Section 1. It shall be unlawful for any person to take or hunt bear in the county of Tyrrell at any time during the next two years.
>
> Sec. 2. Violation of this act shall be a misdemeanor punishable by fine or imprisonment at the discretion of the court.
>
> Sec. 3. This act shall be in full force and effect on and after June 9, 1973.
>
> In the General Assembly read three times and ratified, this the 26th day of March, 1973.

G.S. 113-103 provides in part:

> Unlawful possession—The possession, transportation purchase or sale of any dead game animals, dead game birds, or parts thereof during the closed season in North Carolina . . . shall be unlawful . . . .

Obviously, Chapter 103 does not make mere possession of a dead bear a crime. Since G.S. 113-100 fixes the "open season" on bear as October 1 to January 1 of each year, it is equally clear that possession of a dead bear on November 16 is not a violation of G.S. 113-103. It is the State's contention, however, that these two statutes combine to make possession of a dead bear taken in Tyrrell County at any time between 9 June 1973 and 9 June 1975 a misdemeanor.

It is well established that in order for a defendant to be punished for criminal conduct, his actions must fall plainly within the prohibition of the statute which defines the crime. *Donnelley v. U.S.*, 276 U.S. 505; *U.S. v. Bathgate*, 246 U.S. 220. In instant case, defendants' possession of a dead bear was not a violation of Chapter 103 or G.S. 113-103. Statutes which define criminal conduct may not be extended by mere intendment. 1 Wharton's Criminal Procedure, Section 19. To allow prosecution of defendants upon the indictments as drawn would be to grant to grand juries and to prosecutors legislative power to combine separate and independent statutes so as to create a new crime. See, e.g., *U.S. v. Grocery Co.*, 255 U.S. 81; *State v. Hart*, 200 Kan. 153, 434 P. 2d 999.

Examination of the plain and unambiguous language of the two legislative acts discloses that each is a separate and independent statute, requiring proof of different elements, affecting different territories and containing its own respective penalty provisions. Neither refers to the other expressly or by implication so as to make the acts interdependent.

We, therefore, hold that the indictments charging defendants with possessing a dead game animal, a bear, which was taken during closed season in Tyrrell County in violation of Chapter 103 of the 1973 Session Laws and G.S. 113-103 do not charge a crime. Ordinarily, a defect in a bill of indictment may be taken advantage of only by a motion to quash. *State v. Lucas*, 244 N.C. 53, 92 S.E. 2d 401. However, where the indictment does not charge a crime, this Court may, *ex mero motu*, quash the indictment and vacate any judgment rendered thereupon. *State v. Walker*, 249 N.C. 35, 105 S.E. 2d 101; *State v. Stonestreet*, 243 N.C. 28, 89 S.E. 2d 734.

For reasons stated, the decision of the Court of Appeals is reversed, the bills of indictment are quashed, and the verdicts rendered and the judgments imposed thereon are vacated. This cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Martin County for action consistent with this opinion and for dismissal of the charges.

Reversed—bills of indictment quashed—judgments vacated and actions dismissed.

STATE OF NORTH CAROLINA v. JOHN ROGER WALTERS

No. 69

(Filed 24 January 1978)

1. **Criminal Law § 102.12— right to inform jury of punishment for offense**

G.S. 84-14 secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried, and counsel may exercise this right by reading the punishment provisions of the statute to the jury.

2. **Criminal Law § 102.12— denial of right to inform jury of punishment for offenses— prejudicial error**

The trial court in a second degree murder case erred in denying defense counsel the right to inform the jury of the punishment prescribed by law for second degree murder, voluntary manslaughter and involuntary manslaughter, and the denial of the right to inform the jury of the punishment provisions of G.S. 14-18 for voluntary and involuntary manslaughter was prejudicial to defendant where the jury convicted defendant of voluntary manslaughter, the evidence of defendant's guilt was not overwhelming and there was significant evidence to the contrary, and counsel could not document the seriousness of voluntary manslaughter as compared to involuntary manslaughter and was thus hampered in shaping his argument to persuade the jury, if he could, that defendant should be acquitted on the ground of self-defense or, at most, convicted only of involuntary manslaughter.

THE State of North Carolina appeals from decision of the Court of Appeals, 33 N.C. App. 521, 235 S.E. 2d 906 (1977), awarding defendant a new trial.

Defendant was tried at the 6 September 1976 Session, Robeson Superior Court, before *Canaday, J.*, upon a bill of indictment charging him with the murder of Walter Carson Cox. The district attorney announced upon the call of the case that he would not seek a verdict greater than second degree murder.

The State's evidence tends to show that in the early morning hours of Saturday, 28 February 1976, Walter Carson Cox was shot five times and died as the result of hemorrhage secondary to the gunshot wounds. Defendant was seen hurrying from the scene to a telephone booth and was overheard phoning the police. During this telephone call defendant was heard to state that he had shot Cox and that Cox was badly hurt. After defendant finished his phone call, he stated, "if the sonofabitch ain't dead, he ought to be."

The State's evidence further tends to show that defendant made a statement to police officers in which he admitted shooting Cox, but stated that the shooting occurred in the following manner: Cox and defendant were friends and had been sitting together in a car. Cox got out of the car and departed, then returned with a shotgun which he pointed through the window and into the car where defendant was sitting. Cox again departed, then returned, pointed the shotgun in the car window again and threatened defendant. Defendant then pushed the shotgun away, took his pistol and shot Cox.

Defendant testified and offered evidence tending, in substance, to show that Cox, Esther Bell and defendant had been riding together in defendant's car. Cox had been drinking, apparently heavily. At approximately 1 a.m. the three of them were sitting in defendant's car parked in a lot by a Robeson County grocery store. Cox departed amicably and attempted to start his car parked nearby. The car failed to start. Cox then walked toward his home, located a short distance away, and returned ten minutes later carrying a shotgun. He walked to defendant's car, placed the shotgun barrel at defendant's left temple and stated he was going to scatter defendant's brains. Miss Bell fell to the floorboard of the car, crying, and pleaded with Cox to leave. Defendant asked Cox to leave. Cox then walked to his car and got in it, but immediately got out and returned to defendant's car. He again placed the shotgun barrel through the open window and at defendant's left temple and again stated he was going to scatter defendant's brains. Defendant grabbed the shotgun with his left hand and pushed its barrel out of the car window and up in the air. Simultaneously, defendant reached with his right hand for a .25 caliber semi-automatic pistol which he kept in the car console, aimed it at Cox and fired approximately five shots in quick succession. When Cox "let go" of the shotgun, defendant ceased firing. Defendant then got out of his car and hurried to a nearby telephone booth where he telephoned the police and requested that they send an ambulance.

Defendant also offered evidence tending to show that Cox had a reputation as a dangerous and violent man. Defendant denied making any statement in which he said that Cox was a "sonofabitch" or "ought to be dead."

In rebuttal the State presented evidence that spent .25 caliber cartridges had been found a considerable distance from defendant's car. The State argued that this evidence, the angle of the bullet wounds in Cox's body and the location of puddles of Cox's blood tended to show that Cox had not been shot while defendant was seated in his car attempting to defend himself.

The jury found defendant guilty of voluntary manslaughter and he was sentenced to ten to fifteen years imprisonment. Defendant appealed to the Court of Appeals which, with Judge Britt dissenting, ordered a new trial. The State appealed to this Court pursuant to G.S. 7A-30(2).

*Rufus L. Edmisten, Attorney General; Norma S. Harrell, Associate Attorney, for the State of North Carolina.*

*E. M. Britt of Britt and Britt, for defendant appellee.*

HUSKINS, Justice.

At the close of all the evidence defendant moved that he be permitted to read to the jury G.S. 14-17 and G.S. 14-18, including the statutory provisions pertaining to punishment for first and second degree murder and manslaughter. This motion was denied "with respect to any reading of the punishment provisions." Defendant assigned this denial as error, and the Court of Appeals awarded him a new trial on that basis. The State's appeal challenges the correctness of that decision.

**[1]** G.S. 84-14 provides, in part: "In jury trials the whole case as well of law as of fact may be argued to the jury." This statute secures to counsel the right to *inform* the jury of the punishment prescribed for the offense for which defendant is being tried. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). *Accord, State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Counsel may exercise this right by reading the punishment provisions of the statute to the jury, though he "may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the [prescribed punishment]." *State v. Britt, supra* at 273, 204 S.E. 2d at 829. "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." *Id.*

**[2]** Thus the trial court erred in denying defense counsel the right to inform the jury of the punishment prescribed by law for second degree murder, voluntary manslaughter and involuntary manslaughter. We must now decide whether the error was prejudicial.

Mere technical error does not entitle defendant to a new trial. *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). The burden is on the appellant to show prejudicial error amounting to the denial of some substantial right. *Kennedy v. James*, 252 N.C. 434, 113 S.E. 2d 889 (1960). *Accord, State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967); *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960). For reasons which follow we think he has carried the burden.

We said in *State v. McMorris*, *supra*, that it is permissible for a criminal defendant "to inform the jury of the statutory punishment provided for the crime for which he is being tried. In serious felony cases, at least, such information serves the salutary purpose of impressing upon the jury the gravity of its duty. It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration. . . . Denial of permission to counsel to so inform the jury was an unwarranted and prejudicial restriction on defendant's right to argue fully the 'whole case' as permitted by General Statute 84-14." 290 N.C. at 288, 225 S.E. 2d at 554-55.

A careful review of the record on appeal leads us to the conclusion that denial of defendant's right to inform the jury of the punishment provisions of G.S. 14-18 for voluntary and involuntary manslaughter was prejudicial and may not be regarded as harmless. "Whether an error is to be considered prejudicial or harmless must be determined in the context of the entire record." *State v. Lewis*, 274 N.C. 438, 452, 164 S.E. 2d 177, 186 (1968). The record discloses, among other things, that Carson Cox was drinking, hostile, and had twice pointed a cocked, loaded shotgun at defendant's left temple and threatened to "scatter his brains"; that when thus assaulted the second time defendant grabbed the

shotgun barrel with his left hand, pushed it up and out of the car window, and shot Cox with a pistol held in defendant's right hand while Cox was trying to force the shotgun downward and "get it back in the window" on defendant. It was the jury's duty to weigh defendant's conduct in this factual context.

In cases where evidence of a defendant's guilt is overwhelming and the error complained of is insignificant by comparison, we have held, and rightly so, that such insignificant error could not have contributed to the conviction and was therefore harmless. *See, e.g., State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970).

Here, the evidence of guilt is not overwhelming; there is significant evidence to the contrary. Counsel was not permitted to read the punishment provisions of G.S. 14-18 to the jury and could not document the seriousness of voluntary manslaughter as compared to involuntary manslaughter. Nor could he portray the gravity of the jury's duty by informing it that voluntary manslaughter might involve imprisonment for twenty years whereas involuntary manslaughter was only punishable by a fine or imprisonment (not exceeding ten years), or both. Counsel was thus hampered in shaping his argument to persuade the jury, if he could, that defendant should be acquitted on the ground of self-defense or, at most, convicted of involuntary manslaughter only. This error constituted a substantial restriction on defendant's right to argue to the jury the whole case—the law as well as the facts, G.S. 84-14. Such an improper restriction must be regarded as material and prejudicial on the facts of this case. Accordingly, the decision of the Court of Appeals awarding defendant a new trial is

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES HEWITT

No. 108

(Filed 24 January 1978)

**Weapons and Firearms— shooting into occupied dwelling—insufficiency of evidence**

The State's evidence was insufficient to be submitted to the jury in a prosecution for discharging a firearm into an occupied dwelling where it tended to show only that the occupants of a mobile home heard the sound of a car slowing down and then eight to ten shots or sounds like firecrackers; the occupants observed two holes in the side of the mobile home; the owner of the mobile home testified that to his knowledge the holes were not there before he heard the eight to ten shots; a .22 caliber cartridge hull was found about 50 or 60 feet from the mobile home; the .22 caliber cartridge hull was fired from a pistol found behind the sofa in defendant's home; six other empty .22 caliber hulls were later found on or near the pavement approximately 75 to 100 feet from the mobile home; and the area surrounding the mobile home was often used for hunting.

ON the state's appeal pursuant to G.S. 7A-30 from the decision of the Court of Appeals, *Clark, J.*, dissenting, reported in 34 N.C. App. 109, 237 S.E. 2d 311 (1977), reversing judgment of *Barbee, J.*, at the 31 January 1977 Criminal Session of UNION County Superior Court.

*Rufus L. Edmisten, Attorney General, by Mary I. Murrill, Associate Attorney, and William W. Melvin, Deputy Attorney General, for the State.*

*Bailey, Brackett & Brackett, P.A. by Martin L. Brackett, Jr., and Terry D. Brown, Attorneys for defendant appellee.*

EXUM, Justice.

The sole question presented is whether the Court of Appeals erred in reversing the judgment of the trial court on the ground that defendant's motion for judgment as of nonsuit should have been granted. We hold that it did not.

Defendant was tried on a bill of indictment charging that on or about 1 November 1976 he "unlawfully and wilfully did feloniously and wantonly discharge a firearm, to wit: a .22 caliber pistol, into the home of Larry W. Rowell, located at Matthews,

North Carolina, while the said home was then and there actually occupied," in violation of G.S. 14-34.1.

The state's evidence tends to show that on 1 November 1976 Morris Rowell was visiting his cousin Larry Rowell at the latter's mobile home, which is located on a rural paved road in Union County. The area surrounding the mobile home is wooded and often used for hunting. Morris Rowell admitted having heard shots fired in the vicinity on previous occasions, and 1 November 1976 fell during dove hunting season.

Around 8:30 p.m. that evening, Morris and Larry Rowell heard the sound of a car slowing down and then "eight to ten shots or sounds like firecrackers which occurred in rapid succession." Although they never actually saw the car, they went outside and attempted to give chase. After returning and calling the sheriff's department, they discovered two holes in the outside wall of the trailer near the kitchen window. Larry Rowell stated that to his knowledge the holes were not there before the night of 1 November 1976. Deputy Sheriff Jerry Moore subsequently examined the two holes and observed in one of the holes an "object that appeared to be lead, approximately 3/4 of an inch" into the hole.

Deputies Moore and Reavis then conducted a search of the roadside area at "a spot approximately where Mr. Rowell said he heard a vehicle stop." About 50 or 60 feet from the mobile home they found a .22 caliber cartridge hull, which appeared to Deputy Moore to be fresh because there was no sign of any corrosion or residue. However, he admitted that the hull "could have been lying there a couple of days."

Around 10:30 or 10:45 p.m. the same evening, Lieutenant Kenneth Boshnyak and three deputies from the Union County Sheriff's Department arrived at defendant's home with a warrant for his arrest. They found him sitting on a living room sofa, served him with the warrant, and took him to the patrol car. Defendant consented orally and his wife consented in writing to a search of their home. The search disclosed a loaded .22 caliber pistol on the floor behind the sofa where defendant had been sitting. Defendant also had several .22 caliber bullets in his pocket.

The following afternoon Deputy Sheriffs Myers, Smith and Reavis went to Larry Rowell's mobile home and made a further

search of the area. They found six empty .22 caliber hulls on or near the pavement approximately 75 to 100 feet from the mobile home.

Eric Johnson of the Charlotte-Mecklenburg Crime Laboratory testified for the state as an expert in firearms identification. In his opinion the .22 caliber cartridge hull found the night of 1 November was fired from the pistol which the deputies had found behind the sofa in defendant's home. He did not offer an opinion as to the six hulls which were found on the afternoon of 2 November.

Both Morris and Larry Rowell testified that they did not know defendant and knew of no reason he would have to harm them.

Defendant offered no evidence.

The jury returned a verdict of guilty as charged in the indictment, and thereupon Judge Barbee sentenced defendant to eight years imprisonment.

The Court of Appeals reversed for error in the trial court's denial of defendant's motion for judgment as of nonsuit. In an opinion by Hedrick, J., Vaughn, J., concurring, the evidence was held insufficient to connect defendant with the commission of the offense. Judge Clark dissented, stating his belief that the totality of the circumstances permitted the inference that defendant committed the crime charged.

We agree with the holding of the Court of Appeals. The legal principles controlling defendant's motion for judgment as of nonsuit were stated by Justice Lake in *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 681-82 (1967):

> "The question for the Court is whether, when all of the evidence is so considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment, or warrant if it be a case tried upon a warrant, has been committed and that the defendant committed it. *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772. If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. *State v. Guffey*, 252

N.C. 60, 112 S.E. 2d 734. This is true even though the suspicion so aroused by the evidence is strong. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340."

Even if one assumes that the evidence here is sufficient to support a finding that the offense charged was in fact committed, we believe it raises no more than a suspicion or conjecture as to the identity of defendant as the perpetrator. The only evidence that might connect defendant with any shots fired into the mobile home is Larry Rowell's statement, "To my knowledge the holes were not in my trailer before I heard the eight to ten shots." This somewhat ambiguous declaration, without any further showing that the holes in the trailer wall resulted from shots fired the evening of 1 November 1976, falls short of substantial evidence that defendant fired into the mobile home, especially as the surrounding area was commonly used for hunting.

The state relies on *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977), and *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974). No useful purpose would be served by a detailed comparison of the state's evidence in those cases with the evidence in the record before us. Suffice it to say that this case presents nothing like the overwhelming circumstantial evidence which implicated the defendant in *Irick*, and that the Court in *Poole* held the evidence insufficient to withstand the defendant's motion for judgment as of nonsuit. We believe the evidence here is even less sufficient than that which was held insubstantial in *Poole*.

We hold that the state's evidence creates only a suspicion that defendant committed the crime with which he was charged. The trial court's denial of defendant's motion for judgment as of nonsuit was correctly held to be error, and the judgment of the Court of Appeals is therefore

Affirmed.

STATE OF NORTH CAROLINA v. RALPH POLK HILL, JR.

No. 124

(Filed 7 February 1978)

1. **Criminal Law §§ 75.3, 75.8— indication of wish to remain silent—admissibility of subsequent confession—confrontation of victims in hospital—no compulsion**

The fact that on three occasions between 7:30 and 9:00 a.m. on the day of defendant's arrest he indicated a desire to remain silent did not render his subsequent confession that he committed two felonious assaults inadmissible where, on the three occasions between 7:30 and 9:00 a.m., his right to cut off questioning was scrupulously honored in that, once he expressed his wish to remain silent, he was asked no further questions by the officers who had asked whether he wanted to make a statement, and it was not until four hours later, after defendant had been identified by the assault victims, that defendant volunteered his confession to the assaults and was again read his rights before interrogation resumed. Furthermore, the fact that defendant volunteered a confession only after having confronted the assault victims in a hospital did not amount to a "subtle compulsion" of defendant to waive his Fifth Amendment rights where defendant requested to go to the hospital to see the victims after having expressed disbelief that they were still alive.

2. **Criminal Law § 75.7— incriminating statements—absence of interrogation**

Defendant's incriminating statement to the sheriff that he had passed through the locale of the murder of a service station attendant was not rendered inadmissible by the fact that defendant had earlier exercised his right to remain silent when questioned about two felonious assaults in another county where the statement was not made during interrogation within the purview of *Miranda*, but rather was made during a casual conversation between the sheriff and defendant. Even if the sheriff's conversation with defendant constituted an in-custody interrogation, defendant's statement was still admissible where defendant was re-advised of his rights and waived his rights concerning interrogation about the felonious assaults just prior to his conversation with the sheriff, and the waiver applied to statements relevant to the murder because defendant was advised that "anything" he said could be used against him in a court of law.

3. **Criminal Law § 75.4— request for counsel—subsequent waiver—admissibility of confession**

Even if defendant requested counsel when first advised of his rights, this would not make his subsequent statements inadmissible since defendant initiated the subsequent conversation with officers himself, was once again fully informed of his rights, and expressly waived the right to have counsel present.

4. **Criminal Law § 76.5— motion to suppress confession—entry of supplemental findings**

The trial court did not err in entering supplemental findings of fact and conclusions of law concerning defendant's motion to suppress in-custody statements during the same term of court as the hearing on the motion and

the original order, since both the supplemental and original orders held that the statements were admissible, and since the orders of the court were *in fieri* until the expiration of the term and the judge had the discretion to make such changes and modifications in them as he deemed wise and appropriate for the administration of justice.

**5. Criminal Law § 60.4— fingerprint—non-expert testimony—absence of prejudice**

Defendant was not prejudiced by the admission of testimony by an officer who was not an expert concerning a fingerprint taken from a cash register and identifying the print as belonging to deceased since the testimony was beneficial to defendant by establishing that his fingerprints were not found on the cash register.

**6. Constitutional Law § 30— discovery order—refusal to strike evidence not disclosed**

In this prosecution for the murder of a service station attendant, the trial court did not abuse its discretion in refusing to strike testimony by a witness that, when defendant forced his way into a trailer occupied by the witness and her sister, defendant told the witness that he had shot a seventeen-year-old boy that same morning, although the State did not disclose defendant's statement pursuant to a pretrial discovery order, where (1) defendant failed to object to the testimony when it was first offered but moved to strike it only after the witness and her sister had been cross-examined about the statement, and (2) defendant failed to indicate surprise and move for alternate sanctions under G.S. 15A-910.

**7. Constitutional Law § 30— failure to comply with discovery order—exclusion of evidence—discretion of court**

The exclusion of evidence for the reason that the party offering it has failed to comply with the statutes granting the right of discovery, or with an order issued pursuant thereto, rests in the discretion of the trial court.

**8. Criminal Law § 34.5; Homicide § 15— murder case—stipulation as to assault on other persons—physical condition of assault victims**

In this prosecution for the first degree murder of a service station attendant in which the State and defense counsel entered into a stipulation as to the facts relating to defendant's assault with a pistol on two other persons in another county on the same morning as the homicide, defendant was not prejudiced by an officer's testimony concerning the physical condition of the assault victims when he questioned them in the hospital where (1) the officer's testimony was far less explicit than the stipulation itself, and (2) additional testimony concerning the physical condition of the assault victims was admitted without objection.

**9. Criminal Law § 57— expert in firearms—positive rather than opinion testimony**

In this homicide prosecution, defendant was not prejudiced by the testimony of an expert in firearms identification that each gun leaves its individual characteristics peculiar to that weapon only, although the jury should

have been informed that the testimony was only the opinion of the witness based on his personal observations.

**10. Searches and Seizures § 1— evidence obtained by warrantless search—absence of pretrial motion to suppress**

The trial court in a homicide case did not err in failing to conduct a hearing on defendant's motion to suppress a lay-away card in defendant's name for a .22 caliber pistol which was obtained by a warrantless search where the district attorney gave defense counsel notice that he intended to introduce this evidence more than 20 working days before trial, and defendant made no motion to suppress the evidence within 10 working days after receipt of the notice as required by G.S. 15A-975(b) although he had a reasonable opportunity to do so. Furthermore, defendant was not prejudiced by the admission of the lay-away card where other evidence, including a gun registration found in defendant's billfold, clearly showed that defendant owned the .22 caliber pistol.

**11. Homicide § 21.5— premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation to go to the jury on the question of defendant's guilt of first degree murder of a service station attendant where the evidence tended to show that deceased died as a result of five gunshot wounds inflicted in his head, neck and back by defendant; the location of the wounds indicates that deceased was shot from behind; the number of shots indicates excessive force and the dealing of lethal blows after the victim was felled; the fact that no weapon was found near deceased indicates that deceased was unarmed and did nothing to provoke the attack; and defendant's statement at another location shortly after deceased was shot that he had killed a seventeen-year-old boy, followed by his action in shooting two other persons in the back of the head after forcing them to lie on their stomachs, indicates a *modus operandi* and a complete lack of remorse for the shooting of the deceased.

**12. Homicide § 25.2— premeditation and deliberation—circumstantial evidence—instructions—no expression of opinion**

The trial court's instruction that premeditation and deliberation may be proven by proof of circumstances from which they can be inferred, "such as the brutal or vicious circumstances of the killing, if any, infliction of lethal wounds after the victim is felled or helpless, if that be the case," did not constitute an expression of opinion that these circumstances were present because of the court's failure to include other circumstances which could be considered, since the use of the words "if any" and "if that be the case" indicates otherwise, and since the charge as given was supported by the evidence in the case.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from *Smith (Donald L.), S.J.*, 23 May 1977 Session of DUPLIN Superior Court.

Defendant was tried and convicted of the first degree murder of Herman W. Rofe and was sentenced to life imprisonment.

The State offered evidence which tends to show the following: In the early morning of 27 July 1976 the dead body of Herman Rofe, an eighteen-year-old service station attendant, was discovered at the Tar Heel Exxon station on U.S. Highway 24 in Swansboro, Onslow County. At 3:00 a.m. on that morning, John Little, a customer, stopped at the twenty-four hour station in order to purchase cigarettes. He noticed that the interior lights of the establishment were out, the cash register drawer open, and no attendant in sight. He informed the owner and the Onslow County Sheriff's Department. The owner of the station, Donald Wallace, arrived and turned on the inside lights. In the third service bay of the station the body of Herman Rofe was discovered lying face down with five bullet wounds in his back, the back of his neck and head.

When the station owner left the attendant in charge of the station at 7:00 p.m. on the evening of 26 July, the cash register contained some $150 in cash. After the crime some change (it was not determined how much), credit card slips and checks were discovered in the register. Some $109 in cash was found in a paper bag on a shelf beneath the register. The owner's pistol also was found under a shelf near the cash register and apparently had not been fired.

Debbie Barker was at the station with the deceased attendant from 11:00 p.m., 26 July, until 1:30 a.m. on 27 July. A neighbor, Alton Brown, at about 2:30 a.m., "heard a bang, bang, bang, bang sound at the station but paid it no attention." He saw the lights in the station go off and observed a small compact car drive away.

On that same morning, at 6:00 a.m., the defendant broke into the mobile home of Dorothy Speller and her sister, Shirley Freeman, on Highway 17 in Bertie County, near Windsor, North Carolina, some 115 miles from the Exxon service station in Swansboro. The defendant demanded money from the two women, and when they told him they had but $2.35 he ordered them to lie on the floor on their stomachs. He then shot Shirley Freeman twice in the back of the head, and Dorothy Speller once in the head and once in the chest. Both women were hospitalized. Defendant was arrested for this unrelated offense at 7:30 a.m. that same morning in Beaufort County. At the time, he was driving a brown Ford Pinto. He was picked up by the Bertie County

sheriff and transported from Beaufort County to Bertie County. During the midmorning of 27 July defendant was taken to the hospital where the two girls had been admitted, and they identified him as their assailant. Thereafter, defendant told the police that he had traveled from Jacksonville the evening before, and had followed Highway 24 through Swansboro, and crossed over to Highway 17. At the time he was questioned, the Bertie County officers knew nothing of the homicide in Onslow County.

Defendant subsequently pled guilty to two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury on the persons of Ms. Freeman and Ms. Speller.

On 28 July 1976 defendant was charged with the murder of Herman Rofe in Onslow County. On 16 November 1976, on motion of defendant, this case was transferred to Duplin County for trial.

The pathologist who performed the autopsy on Rofe extracted five lead bullets from his body. These bullets were examined by an S.B.I. firearms expert and compared with the bullets taken from the persons of Ms. Freeman and Ms. Speller. The bullets found in Rofe were fired from the same pistol as those found in Ms. Freeman and Ms. Speller.

On 28 August 1976, one month after defendant's arrest for the assault on Ms. Freeman and Ms. Speller, Ms. Freeman, after learning that defendant was charged with the shooting of Rofe, told police that before defendant shot her he told her to be quiet because he had already killed a seventeen-year-old boy that morning and he would not mind killing her.

Other facts pertinent to decision are set out in the opinion.

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

*William J. Morgan for defendant appellant.*

MOORE, Justice.

Under his first assignment of error the defendant contends that the trial court erred in admitting evidence of defendant's confession to having committed the assaults on Dorothy Speller and Shirley Freeman in Bertie County, and evidence of defendant's statement to Sheriff Daniels that he (defendant) had trav-

eled from Jacksonville, North Carolina, via Route 24 through Swansboro, the locale of the murder for which defendant was tried in present case. Prior to trial counsel for defendant filed a motion to suppress any and all evidence of purported statements made by defendant. A pretrial hearing on said motion was held before Webb, J., at the 16 May 1977 Session of Onslow Superior Court. At the conclusion of the hearing Judge Webb found facts, entered conclusions of law, and ruled that the statements made by defendant were admissible into evidence.

On 19 May 1977, Judge Webb filed a supplementary order to his initial order, and therein made more extensive findings of fact. The judge found: that the defendant had been advised of his Miranda rights on three separate occasions on the morning of 27 July, and on all three occasions the defendant stated that he had not done anything and did not have anything to say to the officers; that upon being told that the two women were going to live the defendant stated that he wanted to go to the hospital and see the girls because he did not believe they were alive; that after having seen the girls and on leaving the hospital the defendant freely volunteered the statement that he was the man who had assaulted the women and that he was ready to make a statement; that Sheriff Daniels reminded defendant of his rights a fourth time and defendant stated that he did not want a lawyer present; that defendant was taken back to the Bertie County jail for interrogation by Agent Godley; that, while waiting for the agent, Sheriff Daniels and defendant engaged in casual conversation not connected with the Bertie County case, and that at this time, in response to the sheriff's question, defendant told the sheriff that he had traveled to Windsor that morning on Highway 24 through Swansboro; that Sheriff Daniels knew nothing of the murder of Herman Rofe in Swansboro at the time he asked defendant this question; that defendant was advised of his rights a fifth time by Agent Godley, and that defendant voluntarily waived them and stated he wished to make a statement without a lawyer; that defendant was later advised of his rights a sixth time by Deputy Cherry, and that he voluntarily waived these rights and confessed to the Bertie County crime to Deputy Cherry.

These findings of fact by the trial court are conclusive on appeal in that they are supported by competent evidence in the record. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975);

*State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971). Based on these facts, the judge correctly ruled that defendant's constitutional rights were not violated; "that he freely, understandingly, and voluntarily waived these rights and that the statement made by the defendant to Sheriff Daniels between 11:00 a.m. and 12:00 noon regarding coming through Swansboro; that the statement made to S.B.I. Agent Godley and Sheriff Daniels at approximately 1:00 p.m., and that the statement made to Deputy Sheriff Cherry at approximately 3:00 p.m. are admissible in evidence at the defendant's trial."

**[1]** Defendant argues, however, that his statements to officers should have been suppressed and bases this contention on the fact that on the morning of his arrest, between 7:30 a.m. and 9:00 a.m., he was advised of his rights on three separate occasions by three different officers, and on each occasion he exercised his Fifth Amendment right to remain silent. Defendant contends that his right to silence was infringed upon when he was taken to the hospital and forced to confront Ms. Freeman and Ms. Speller, that this amounts to "subtle compulsion," and that any and all subsequent statements made by him, and especially his alleged statement concerning his trip through Swansboro, were involuntarily made and in violation of his Fifth Amendment rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. Defendant argues that *Miranda* requires that once an accused has indicated his desire to remain silent, not only must officers cease the immediate interrogation, but also officers cannot approach defendant at some later time, as in the present case, and begin anew their interrogation.

Our Court, in *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976), stated:

> ". . . The Miranda rule that in-custody interrogation of a defendant must cease when the defendant indicates he wishes to remain silent, or wishes to consult counsel, or both, does not bar a subsequent statement by a defendant who, after having been fully advised of his constitutional rights, freely and voluntarily waives his right to remain silent and his right to counsel and invites the officer to resume talks with him. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975); *State v. Jones*, 278 N.C. 88, 178 S.E. 2d

820 (1971); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968)."

Such an interpretation of *Miranda v. Arizona, supra*, was approved by the United States Supreme Court in *Michigan v. Mosley*, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975). There the Court held that the Miranda requirement, that police interrogation must cease when the person in custody indicates that he wishes to remain silent, does not create a *per se* proscription of indefinite duration upon any further questioning by any police officer at any time or place on any subject; nor does it impose a blanket prohibition against the taking or the admission in evidence of voluntary statements; nor, on the other hand, does it permit a resumption of interrogation after a momentary cessation. Instead, ". . . the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.' "

In present case, defendant's own evidence does not support his contention that officers continued to interrogate him after he exercised his right to remain silent. On the three occasions between 7:30 a.m. and 9:00 a.m. his "right to cut off questioning" was "scrupulously honored" in that, once he expressed his wish to remain silent, he was asked no further questions by the officers who had asked whether he wanted to make a statement. In fact, it was not until four hours later, after defendant had been identified by the victims of his assault, that defendant volunteered his confession to that crime, and was once again read his rights before interrogation resumed. And, the fact that defendant volunteered a confession to this offense only after having confronted the victims of that crime in the hospital does not amount to a "subtle compulsion" of the defendant to waive his Fifth Amendment rights, for the trial court found that defendant *requested* to go to the hospital to see the victims of that crime after having expressed disbelief that they were still alive.

**[2]** As for defendant's incriminating statement to Sheriff Daniels that he had traveled to Windsor via Route 24 through Swansboro, this statement was not made during an "interrogation" under *Miranda*, but rather was made during the course of a casual conversation between the sheriff and defendant while awaiting the arrival of the S.B.I. agent who was to interrogate defendant

regarding the Bertie County offense. At the time defendant made this statement, neither Sheriff Daniels nor anyone else suspected defendant of the murder of Herman Rofe. And even if, for the sake of argument, we do consider Sheriff Daniels' conversation with defendant to be an "in-custody interrogation," such an admission is still admissible. The record clearly shows that the defendant was re-advised of his Miranda rights, and that he waived these rights just prior to his conversation with Sheriff Daniels. Although this was a waiver of rights concerning interrogation for the Bertie County crime, defendant was advised that *anything* he said could be used against him in a court of law.

Therefore, we hold that the lower court did not err in ruling that defendant's confession to the Bertie County offense, and his admission to having traveled through Swansboro on his way to Bertie County, were admissible into evidence.

**[3]** Under this same assignment of error defendant argues a violation of his Sixth Amendment right to counsel. At the hearing of the motion to suppress, defendant stated that he twice asked for a lawyer on the morning of 27 July. The State's evidence was, however, to the contrary. Based on this evidence the trial court found that, on being asked whether he wished to make a statement on the morning of 27 July, defendant had simply stated that he had not done anything and did not have anything to say. The court further found that the defendant expressly waived his right to counsel on the afternoon of 27 July, when he finally chose to make a statement. There being competent evidence in the record to support the judge's findings of fact and rulings of waiver and admissibility, such findings and rulings are conclusive on appeal. *State v. Jones*, 278 N.C. 88, 178 S.E. 2d 820 (1971); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968).

Even if we assume that the defendant did request counsel when first advised of his rights, this does not make his subsequent statements inadmissible since the defendant initiated the subsequent conversation with officers himself, was once again fully informed of his rights, and expressly waived the right to have counsel present. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Jones*, *supra*.

This assignment is overruled.

**[4]** Under his second assignment of error, defendant contends that the trial court committed error in issuing and entering supplemental findings of fact and conclusions of law concerning defendant's motion to suppress evidence of his statements to officers. The pretrial hearing on defendant's motion to suppress was held on 16 May 1976 in Onslow County. At the conclusion of the hearing Judge Webb denied defendant's motion, and made findings of fact and entered conclusions of law to the effect that defendant's statements to officers were freely and voluntarily made after defendant had waived his right to have counsel present. Thereafter, on 19 May 1976, during the same term of court, Judge Webb entered additional findings of fact and conclusions of law with regard to this hearing. This second set of findings was not filed in Onslow County where the case arose, but rather was filed in Duplin County where the case had been removed for trial. Neither defendant nor his attorney was served with copies of these supplemental findings, and defendant argues that the supplemental order did not come to his attention until preparation of the record on appeal. Defendant contends that such a supplemental order is improper, and that the State should be bound by the original findings by the judge.

Since the supplemental findings consist mainly of a more extensive finding of facts, and contain the same order as that contained in the initial order of 16 May, which held that evidence of defendant's statements was admissible, we do not see how the defendant has been prejudiced by Judge Webb's supplemental findings. In any case, until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice. *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936). *See also* 8 Strong, N.C. Index 3d, Judgments § 6. This assignment is overruled.

**[5]** Under his third assignment of error defendant argues that the trial court erred in failing to strike the opinion evidence of Officer Don Hunnings concerning a fingerprint taken from the cash register and identified by Hunnings as belonging to Herman Rofe, the deceased. Defendant argues that, because the State failed to qualify the witness as an expert in fingerprint identification, and because the witness himself testified that he did not consider

himself an expert, the evidence is incompetent opinion evidence, and is therefore prejudicial to defendant. Suffice it to say that defendant could not have been prejudiced by this testimony. The evidence, if anything, would be beneficial to the defendant, for it establishes that his fingerprints were not found on the cash register.

**[6]** Shirley Freeman testified for the State that when defendant forced his way into the house trailer where she and her sister lived, he told her that he had shot a seventeen-year-old boy that same morning. Defendant argues that the trial court committed prejudicial error in denying defendant's motion to strike this testimony. He bases his contention on the State's failure to disclose this statement by defendant to the defendant prior to trial pursuant to his motion and an order for discovery under G.S. 15A-903. The State did not discover the existence of this evidence until mid-April 1976, just before trial and some six months after defendant's motion for voluntary discovery. Defendant contends that, under G.S. 15A-907, the State was under a continuing duty to disclose this evidence, and its failure to do so, coupled with the trial court's failure to strike the evidence at trial, resulted in prejudicial error to the defendant.

It must first be noted that defendant failed to object to this testimony when it was first offered. Only after Ms. Freeman had been cross-examined concerning the statement, and Ms. Speller had been recalled and cross-examined concerning whether she heard defendant make the statement, did the defendant move to strike the earlier testimony by Ms. Freeman concerning defendant's statement to her. The motion to strike was denied, and thereafter additional testimony concerning this statement was introduced without objection. It is well settled that an objection to the offer of evidence must be made in apt time, that is, as soon as the opponent has the opportunity to learn that the evidence is objectionable; and unless prompt objection is made, the opponent will be held to have waived it. *State v. Edwards*, 274 N.C. 431, 163 S.E. 2d 767 (1968). Furthermore, when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975).

**[7]** Additionally, exclusion of evidence is but one of several remedies provided by G.S. 15A-910. As this Court has held, the exclusion of evidence for the reason that the party offering it has failed to comply with the discovery statutes granting the right of discovery, or with an order issued pursuant thereto, rests in the discretion of the trial court. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977); *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975). The exercise of that discretion, absent abuse, is not reviewable on appeal. *State v. Thomas, supra; State v. Carter, supra.*

**[6]** No abuse of discretion has been shown in this case. There is no evidence of bad faith on the part of the State; and, considering defendant's failure to object, his searching cross-examination of the witness, and his failure to indicate surprise and move for alternate sanctions under G.S. 15A-910, we hold that the trial judge was within his discretion in denying defendant's motion to strike this evidence. This assignment is overruled.

**[8]** At trial the district attorney and defense attorney entered into a stipulation concerning the facts of the assault in Bertie County. The stipulation was entered to facilitate the trial, to limit the evidence of the Bertie County offense to the issue of the identity of defendant as perpetrator of the present crime, and to mitigate prejudice to defendant. Later in the trial S.B.I. Agent Godley was permitted to testify, over objection, concerning the physical condition of Shirley Freeman and Dorothy Speller when he questioned them in the hospital. Defendant objects that the allowance of this testimony was inflammatory and prejudicial to defendant, and that the State entered a stipulation with defendant in order to avoid the prejudicial effects of such testimony on the jury.

In the contested testimony Agent Godley simply stated that Ms. Freeman "was sedated, with bandages around her neck and face," and that "it was extremely difficult to talk with her." This testimony regarding her physical condition is far less explicit than the language of the stipulation itself, which stated that Freeman was shot twice in the back of the head, and Speller, once in the back of the head and once in the chest. Furthermore, additional testimony concerning the physical condition of the two women following the assault was admitted without objection. In

view of this, we do not see how defendant could have been prejudiced by the testimony in question.

**[9]** Frederick M. Hurst, a special and senior technical agent for the State Bureau of Investigation, after stating his training and experience, was found, without objection, to be an expert in the field of firearms identification. During the course of Mr. Hurst's examination by the district attorney, he was asked: "Would any two separate weapons leave identical characteristics on the bullet that passes through its barrel." Defendant objected, and his objection was overruled. The witness answered: "Individual characteristics, no, sir. Each gun would leave their individual characteristics which would be common to that weapon and that weapon only." Defendant assigns the overruling of his objection as error, contending that the trial court committed prejudicial error in allowing opinion testimony by an expert concerning a subject not proper for opinion testimony.

The testimony objected to is a statement of general opinion by an expert witness, and it is based on his general knowledge of his discipline. Such general opinions of fact are a proper subject for expert testimony so long as they are relevant and tend to lay the foundation for, explicate or justify that expert's opinion regarding the particular facts of the case. 1 Stansbury, N.C. Evidence § 135 (Brandis rev. 1973), says: "The requirement that expert opinion be based on facts personally known or hypothetically presented has been applied also to the witness's *general* knowledge which is an essential element of his qualification as an expert. . . ." The witness testified that he had undergone extensive training in firearms identification and ballistics, and had made "between thirty and forty thousand examinations and comparisons and possibly as high as fifty or sixty thousand." Based on his personal observation this witness could have testified that in his opinion each gun leaves its individual characteristics peculiar to that weapon and that weapon only. Such testimony would be a statement of his opinion, and the jury could only have considered it as such. "Some positive statements can, in the nature of things, be only expressions of opinion." *Teague v. Power Co.*, 258 N.C. 759, 129 S.E. 2d 507 (1963). The failure of the witness to inform the jury that the contested testimony was his opinion could not have been prejudicial to the defendant, especially in view of the fact that the witness testified,

without objection, that the bullets taken from Rofe's body were fired from the same gun that fired the bullets removed from Dorothy Speller and Shirley Freeman. This assignment is overruled.

**[10]** Defendant next assigns as prejudicial error the failure of the trial court to grant a hearing on defendant's motion to suppress evidence obtained by a search without a search warrant, and its failure to suppress such evidence.

The evidence in question consisted of a gun box in which was found a lay-away card in defendant's name, bearing a serial number for a .22-caliber pistol, and two .22-caliber cartridges. On 5 October 1976 the district attorney gave defendant's counsel notice that he intended to introduce this evidence which was obtained as a result of a search without a warrant. Additionally, on 19 October 1976, in response to defendant's request for voluntary discovery, defendant's counsel was personally served with an answer, describing the evidence in detail and stating that the State intended to offer it into evidence.

G.S. 15A-975(a) provides that a motion to suppress evidence must be made prior to trial unless the defendant did not have a reasonable opportunity to make the motion prior to trial. G.S. 15A-976(b) provides that if the State gives notice not later than twenty working days before trial of its intention to use evidence, and if the evidence, as in this case, is of the type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence *only if its motion is made not later than ten working days following receipt of the notice from the State.* Defendant's counsel did not comply with this statute in filing his motion to suppress. The motion was filed just prior to the jury selection in this case.

The trial judge found "that the defendant was in Onslow County Jail, [and] had ample opportunity to confer with Mr. Morgan [defendant's counsel] from October 17, the date of the service of the answer to Mr. Morgan's request for voluntary discovery, until the 15th day of November, that being approximately four weeks." Thereupon, the trial court ordered "that the motion to suppress and the request for voir dire is denied for failure to comply with G.S. 15A-975 and for the reason this court finds in its conclusion that the defendant had reasonable opportunity to move to suppress the evidence which is the subject of

this motion prior to November the 13, 1976." We think this ruling is correct.

We further fail to perceive how defendant could be prejudiced by the court's failure to suppress this evidence. Sheriff Daniels had previously testified without objection that Trooper Dudley, who arrested defendant, gave him a billfold and a box of .22 cartridges which he found in defendant's car. The billfold was taken from defendant. "There was a gun registration in the billfold and it identifies Ralph P. Hill of North Las Vegas, Nevada as registering a RGIND caliber .22 pistol number L552912. It is signed by Ralph P. Hill, Jr. and by Charles G. Darwin, Chief of Police. The wallet also contained a North Carolina driver's license for Ralph Polk Hill, Jr. and the address was in Jacksonville, North Carolina." This evidence clearly shows that the defendant was the owner of the pistol in question. The evidence which defendant sought to suppress, consisting of a box and a lay-away slip for the same pistol, was simply cumulative, and added nothing to the probative value of the evidence introduced without objection by defendant. Furthermore, it is a well recognized rule in this jurisdiction that the admission of testimony over objection is ordinarily harmless error when testimony of the same import has previously been admitted without objection or is thereafter introduced without objection. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971); 1 Stansbury, N.C. Evidence § 30 (Brandis rev. 1973). Hence, the error, if any, in overruling defendant's motion to suppress this evidence was harmless. This assignment is overruled.

**[11]** Defendant next assigns as error the failure of the trial judge to sustain his motion to dismiss on the charge of first degree murder at the close of the State's evidence and at the close of all the evidence. The trial judge submitted the case to the jury on the charge of murder, with malice, after premeditation and deliberation, rather than murder committed in the perpetration of a robbery. Defendant contends, however, that there was not sufficient evidence of premeditation and deliberation to go to the jury on the question of first degree murder, and that his motion therefore should have been allowed.

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.

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. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Perry*, *supra*.

When there is a motion for judgment as of 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).

In present case, Dr. Walter D. Gable, a medical doctor specializing in the field of pathology, performed an autopsy upon deceased. Dr. Gable testified that deceased died as the result of five gunshot wounds in the head, neck and back. There was an entrance wound in the back of the head, an entrance wound on the right side of the back of the head, two entrance wounds in the neck and an entrance wound in the back with an exit in the chest. The location of the wounds indicates that deceased was shot from behind. The number of shots indicates excessive force and the dealing of lethal blows after the victim had been felled. The fact that no weapon was found near deceased indicates that deceased

was unarmed and did nothing to provoke the attack. Defendant's statement shortly thereafter that he had just killed a seventeen-year-old boy, followed by his action in shooting Shirley Freeman and Dorothy Mae Speller in the back of the head after forcing them to lie on their stomachs, indicates a deliberate *modus operandi* and a complete lack of remorse for the shooting of the deceased.

In our opinion, when taken in the light most favorable to the State, this evidence was sufficient to permit the jury to reasonably infer that defendant, with malice, after premeditation and deliberation, formed a fixed purpose to kill Rofe, and thereafter accomplished that purpose. We hold, therefore, that the State's evidence was sufficient to be submitted to the jury on the charge of first degree murder. *See State v. Perry, supra; State v. Faust, supra.*

**[12]** The trial judge charged the jury: "Now neither premeditation or deliberation are usually susceptible of direct proof. They may be proven by proof of circumstances [from] which they can be inferred such as the brutal or vicious circumstances of the killing, if any, infliction of lethal wounds after the victim is felled or is helpless, if that be the case." Defendant insists that, by mentioning only two circumstances which should be considered in inferring premeditation and deliberation, the trial judge expressed an opinion that these circumstances were present, and that the judge thereby expressed an opinion as to the facts in violation of G.S. 1-180 (repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978). The use of the words "if any," and "if that be the case," indicates otherwise. Defendant further insists that the trial judge should have instructed the jury that they might consider all of the circumstances as set out in *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E. 2d 80, 88 (1975). There the Court said: ". . . Among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased had been felled. . . ." However, in *State v. Buchanan, supra*, we also said that " '[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence.' " And, as stated by Justice

Branch in *State v. Cameron*, 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973), ". . . The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence. [Citations omitted.]"

In the case at bar there was evidence from which the jury could find that defendant did kill the deceased in a brutal and vicious manner by shooting him five times in the back of his head, back and neck, and that some of the shots were fired after deceased was felled or helpless. Therefore, the charge as given was supported by the evidence and was not an expression of opinion by the trial judge. Moreover, it was in substantial accord with the quoted statement from *State v. Buchanan, supra.* Hence, this assignment is overruled.

Finally, defendant contends that the trial court erred in refusing to set aside the verdict of the jury as being contrary to the greater weight of the evidence. This motion is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of abuse of discretion. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); 4 Strong, N.C. Index 3d, Criminal Law § 132, p. 681. No abuse of discretion appears in this case. Hence, this assignment is overruled.

We have carefully examined the entire record and conclude that defendant has had a fair trial, free from prejudicial error. The trial, verdict, and judgment must therefore be upheld.

No error.

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STATE OF NORTH CAROLINA v. JAMES SANDERS

No. 110

(Filed 7 February 1978)

**Constitutional Law § 40— appearance at arraignment without counsel—duty of trial court**

Where defendant appeared at arraignment upon the charge for which he was tried without counsel, the trial court was required, pursuant to G.S. 15A-942, to inform defendant of his right to counsel, to give defendant an op-

portunity to exercise that right, and to take action necessary to effectuate that right, including making an inquiry into defendant's indigency irrespective of any request by defendant. For failure of the trial judge to determine indigency and appoint counsel to represent defendant if indigent, the judgment must be vacated and a new trial ordered.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals which found no error in his trial before *Cowper, J.*, at the 19 October 1976 Session of the Superior Court of NASH. The opinion, written by Chief Judge Brock, with Judge Hedrick concurring and Judge Martin dissenting, is reported in 34 N.C. App. 59, 237 S.E. 2d 475 (1977).

Stated chronologically, events pertinent to this appeal are the following:

On 21 April 1976 defendant was arrested upon charges that he had committed the felonies of housebreaking with the intent to commit larceny, and larceny, violations of N.C. Gen. Stats. §§ 14-54(a) and 14-72 (1969). After having been charged in a magistrate's order under G.S. 15A-511 and later released upon a secured bond of $500, defendant made his initial appearance before Chief District Court Judge Carlton on April 23rd as required by G.S. 15A-601. Judge Carlton, *inter alia*, advised him of his right to counsel, and defendant stated that he would employ his own attorney. On June 29th, however, defendant filed a request for court-appointed counsel accompanied by an affidavit of indigency in which he averred that his weekly salary was $100; that he and his wife jointly owned a home in Spring Hope where their two children lived with them; that he owned a 1969 Plymouth automobile; and that he owed $728. On this showing District Court Judge Matthews adjudged defendant not indigent and denied his request for the appointment of counsel.

After a probable cause hearing on 6 July 1976 at which he was not represented by counsel, defendant was bound over to the Superior Court under his same bond. On August 9th the grand jury returned the first indictment against defendant. In two counts it charged that on "__ January 1976": (1) defendant broke and entered the dwelling of Billy Winstead with the intent to commit therein the felony of larceny; and (2) after having unlawfully broken into the Winstead dwelling, defendant

feloniously took and carried away therefrom a Zenith TV having a value of $300.

On August 10th defendant again filed an affidavit of indigency. This time he asserted that he had been "laid off" his job and was unemployed; that he was making payments of $40 per month on his automobile; and that he owed $500-$600 in monthly payments on the house he owned jointly with his wife. On August 10th Judge Smith refused defendant's request for counsel on the ground that he was not indigent.

On 27 September 1976 defendant's case was calendared for trial as "76-Cr-4964, Receiving stolen goods." Defendant came into court "in his own proper person" and entered a plea of not guilty. A jury was selected and impaneled, but before the introduction of any evidence the court declared a mistrial on its own motion. (Presumably the court took this action because the two-count indictment contained no charge of receiving stolen goods, a violation of G.S. 14-71, the crime for which the district attorney intended to try defendant.)

On September 27th the grand jury returned the second indictment against defendant. The first two counts in the second indictment were identical with those of the first indictment. A third count, however, charged that *Billy Winstead* had feloniously received his own Zenith TV of the value of $300, knowing at the time that the TV had been feloniously taken and carried away from his own home pursuant to an unlawful breaking and entering for that purpose. On September 28th another jury was impaneled to try defendant. This time (presumably after reading the indictment) the court of its own motion again declared a mistrial and quashed the bill of indictment before the introduction of any evidence.

On 18 October 1976 the grand jury returned a third bill of indictment. The first two counts in this indictment were duplicates of the prior indictments. In this third indictment, however, the third count charged that on "the __ day of January 1976" defendant feloniously received one Zenith TV of the value of $300, the property of Billy Winstead, knowing it to have been feloniously stolen from Winstead's residence pursuant to a felonious entering for that purpose.

On the same day the third indictment was returned defendant was arraigned and tried upon the charge of feloniously receiving stolen goods. At the time of his arraignment defendant appeared without counsel and, "in his own proper person," entered a plea of not guilty. At that time Judge Cowper did not inform defendant of his right to counsel or make any inquiry as to why he had no lawyer. Upon the trial both the State and defendant offered evidence.

Evidence for the State tended to show:

Billy Winstead rented a house in rural Nash County in which he kept a Zenith color TV of the value of $300. In January 1976 he left this house closed and locked. Upon his return he found a window open and the TV gone. He reported the theft to the sheriff. Thereafter Deputy Sheriff Reams obtained the TV from Keith Clark and took it to the sheriff's office, where Winstead later identified it as the one which had been taken from his house.

Keith Clark, who was "charged in this matter" and had "entered a plea of guilty," gave testimony for the State which, except when quoted, is summarized below. He said he had not been promised anything for his testimony and had "in no way been forced to testify."

Clark testified that in January 1976 he knew the contents of the Winstead house. Upon encountering defendant on the street in Spring Hope, Clark had asked him if he wanted to buy a color TV for $125. Defendant said he did and told Clark to deliver it at defendant's house in 15 minutes. Clark and one John Batchelor went immediately to the Winstead house, entered through the front door, which they found ajar, and removed the TV. About 40 minutes after having left defendant in Spring Hope they were at defendant's home with the TV. When defendant arrived about 15 minutes later they took the TV into his garage. Defendant tested the television, and then paid Clark $125. Thereafter defendant asked Clark where the TV came from and Clark replied that "it came out of a poker house and [he] didn't think anybody would find out about it." Clark and Batchelor then left and thereafter Clark gave Batchelor $50 of the $125 he had received from defendant. Several weeks later Clark told Deputy Sheriff Reams where the TV was and then took him to defendant's home "to recover the goods."

Deputy Sheriff Reams, as a witness for the State, testified in substance as follows.

In April 1976 his investigation of Winstead's stolen TV led him to Keith Clark, whom he had "picked up in reference to several breaking and enterings." Clark admitted that he and Batchelor had broken into the Winstead house sometime in January, removed the television, and sold it to defendant for $125. After interrogating Clark, Reams took him to defendant's home. Defendant gave them permission to enter and Clark identified the television, which was in a den-kitchen area. Reams took the television to the sheriff's office where Mr. Winstead identified it. "Clark told me," Reams said, "that James Sanders knew the television set was stolen because he told him that he stole it."

At no time during the trial did defendant ever make an objection.

Defendant testified in his own behalf as follows: "I saw Keith Clark in town that morning and he asked me did I want a color TV and I told him yes. When he brought the TV there I asked him how much he wanted for it and he said $125.00. And he said, 'You ain't got nothing to worry about, the TV ain't hot.' Then he brought the TV in the house and I gave him $125.00. And when they come that night to pick up the TV, I told them I didn't know it was stolen, and they said, 'Yes, you do,' and they brought me down here and put me in jail without bond. That is all I've got to say."

On cross-examination, in brief summary, defendant said: He had "never been convicted of anything." He had known Clark all his life. True, he "thought $125.00 was a mighty good price for a working TV color set," but "Clark said he was about to lose his car." Defendant explained that he had kept the TV in his house for two or three months, and he would not have done so had he known it was stolen. Finally, he insisted that Clark did not tell him either that the TV "didn't come out of somebody's house" or that "it came out of a poker house."

John Batchelor, whom defendant called as a witness, testified upon direct examination by defendant as follows:

"It is true that when Keith and I brought the TV to your house that Keith said it 'won't hot.'

"Court: I take it you went there with Clark, is that right?

"Yes, sir.

"Q. What did Clark tell this defendant?

"A. He told him where it come from and told him it won't hot, you know, and he went on and got it then.

"Q. He told him where it came from?

"A. Yes, sir."

On cross-examination by the district attorney, Batchelor said, "All I heard Keith say was that it won't hot. That conversation took place uptown." He also said that he too was charged in this case; that after Clark talked with defendant on the street in Spring Hope he went with Clark to the Winstead house; that Clark went through the window and opened the door; that he then went in and rolled the TV out the door, and that he and Clark then took the TV to Sander's home. There he spent his time in the pasture examining a calf and so he did not know what defendant paid Clark for the TV, but that Clark only gave him $25.

At the conclusion of the evidence arguments to the jury were waived. The judge submitted the case to the jury solely on the issue of defendant's guilt of "nonfelonious receiving of stolen goods." Upon the "verdict that the defendant is guilty of nonfelonious receiving of stolen goods," the court sentenced defendant to a term of two years and he appealed.

*Attorney General Rufus L. Edmisten and Special Deputy Attorney General Myron C. Banks for the State.*

*Moore, Diedrick & Whitaker for defendant appellant.*

SHARP, Chief Justice.

Defendant's assignment of error No. 6 raises the question which is decisive of this appeal: Does the trial judge's failure to comply with the requirements of N.C. Gen. Stats. § 15A-942 (1975) entitle defendant to a new trial? This section provides:

"If the defendant appears at the arraignment without counsel, the court *must* inform the defendant of his right to counsel, *must* accord the defendant opportunity to exercise that

right, and *must* take any action necessary to effectuate the right." (Emphasis added.)

Defendant stressfully contends that the court's failure to comply with this statute denied him his constitutional right to the assistance of counsel for his defense and effectively deprived him of a fair trial. He asserts that had he not been indigent he would have employed counsel as he had originally told Judge Carlton he would do. Further, had he known he could have had his indigency redetermined by the court at any stage of the proceeding as provided by G.S. 7A-450(c) he would have attempted to have done so at his arraignment.

For the reasons hereinafter stated we hold that the court's failure to obey the mandates of G.S. 15A-942 at the time defendant was arraigned upon the charge for which he was tried does entitle defendant to a new trial.

At the time defendant was arrested in April and first indicted in August, the State had no evidence whatever that defendant had committed either the crime of breaking and entering with the intent to commit larceny or the crime of larceny; yet he was charged with both these crimes. Further, notwithstanding that the State's evidence disproved defendant's guilt of these charges, both were again included in the second and third indictments the district attorney sent to the grand jury. It was not until 18 October 1976, the day the district attorney sent the third bill, that defendant finally was charged with the crime of receiving stolen goods. Thus, defendant was first charged with the crime for which he was convicted on the same day he was arraigned and tried. Although the record discloses that on three occasions defendant appeared *pro se* and entered a plea of not guilty each time, it fails to show that the trial judge ever advised him of his right to counsel or inquired as to why he was appearing without counsel as required by G.S. 15A-942.

The State in its brief specifically recognizes "that a defendant is entitled to counsel through each critical stage, including arraignment and trial; that the question of indigency may be determined or redetermined by the court at any stage; that if the defendant appears at arraignment without counsel, the Court must give him the opportunity to exercise that right and take any action necessary to effectuate that right; and that a defendant

may not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived. G.S. 7A-451(b); G.S. 7A-450(c); G.S. 15A-942; G.S. 15A-1012(a)."

After recognizing the foregoing rights which the State accords every citizen, counsel for the State makes two contentions: He asserts (1) that the court's "failure to observe any of these niceties" did not prejudice defendant; and (2) that since defendant had twice been found not to be indigent, when he appeared at trial without counsel he had made a conscious choice "to tough it out" by representing himself. With reference to contention (1) at this point it suffices to say that in our view defendant was prejudiced by the court's failure to observe these constitutional and statutory "niceties." We interpret State's contention (2) as an argument that when defendant failed to file a third affidavit of indigency and petition for counsel when the third indictment was returned against him, he chose to proceed *pro se* and thus waived his right to the appointment of counsel. We find no merit in this contention. Defendant, a layman, who had twice been denied the appointment of counsel, no doubt thought that a third application would be futile. He could not be expected to know that the question of his indigency could be redetermined at the time of his arraignment on the day his case was called for trial upon an indictment returned that same day. More decisive, however, is the fact that the statute made it the duty of the trial judge, *when defendant appeared at the arraignment without counsel,* to inquire into his indigency irrespective of any request by defendant.

The State, however, declares its "more important" contention to be that the record "affirmatively discloses that defendant was not indigent at the time of the trial." This claim is based solely on the fact that defendant is represented by counsel on this appeal and is presently at liberty (so the State asserts in its brief) under a bond for which a premium was paid.

This contention will not withstand scrutiny. That defendant is now represented by counsel and is out under a premium-paid bond discloses only that a nonindigent has expended money in defendant's behalf. It is not proof that defendant himself was not indigent on October 18th. Likewise, the two orders of June 29th and August 10th adjudging defendant nonindigent are not proof of his status on October 18th. Defendant's two affidavits on these

dates, however, do disclose that his financial condition had changed drastically between June 29th and August 10th. In the interim he had lost his job and was unemployed; he had mortgaged his automobile; and his house payments were in arrears. The State even concedes that whether counsel should have been appointed for defendant on August 10th was "perhaps debatable."

On this appeal, however, we do not debate the August order denying defendant's request for the assignment of counsel. The question is whether defendant was indigent on 18 October 1976, the day he was arraigned and tried without counsel. Now, however, this question cannot be answered because the trial judge then failed to make the inquiries directed by G.S. 15A-942.

In *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1968), the defendant was convicted of a general misdemeanor and the judge imposed an active prison sentence of 18 months. In the Recorder's Court and in the Appellate Division defendant was represented by counsel, but he was without counsel at the time he was tried by a jury in the Superior Court. On appeal he contended (1) that he was denied his constitutional right to the assistance of counsel because the trial judge did not advise him that if he could not afford an attorney the court would appoint one for him, and (2) that the court erred in proceeding to trial without a specific finding that defendant was not an indigent or that he had knowingly and understandingly waived his right to counsel.

At the time *Morris* was decided the applicable statute, G.S. 15-4.1 (1965) (enacted as a result of the decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) and repealed by 1969 N.C. Sess. Laws, c. 1013, s. 12), provided: "When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant. . . ."

In 1968, however, decisions of the Supreme Court had extended the constitutional right to counsel to all defendants charged with "serious misdemeanors." As a result, in *Morris*, this Court defined a serious misdemeanor as one for which the authorized punishment exceeded six months, and extended the requirements of G.S. 14-4.1 to serious misdemeanors. Thus, that

statute was interpreted as requiring the judge of the superior court (1) to advise any defendant who was without counsel and charged with a felony or serious misdemeanor that he was entitled to counsel, (2) to ascertain whether the defendant was indigent and unable to employ counsel, and (3) to appoint counsel for an indigent defendant unless he had intelligently and understandingly waived his right to counsel. These requirements are essentially those of G.S. 15A-942, and the decision in *Morris* dictates the decision in this case.

Speaking for the Court in *Morris*, Justice Huskins said: "[D]efendant was represented by privately employed counsel in the Recorder's Court of Thomasville and on appeal to the Court of Appeals and to this Court. Yet in the trial of his case before a jury in the superior court he had no counsel. Was he able to employ counsel? Was he indigent? Did he request appointment of counsel? Did he waive the right to counsel? The record is silent. Waiver of counsel may not be presumed from a silent record.

. . .

"For failure of the trial judge to determine indigency and appoint counsel to represent defendant if indigent, the judgment must be vacated and a new trial ordered. At the next trial if defendant is not represented by privately employed counsel, the presiding judge shall (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. These findings and determinations should appear of record." *Id.* at 59-60, 165 S.E. 2d at 251-52. This must also be our judgment in the instant case.

Finally, we are impelled to say that prejudice which defendant suffered throughout his trial from lack of counsel is obvious from the record. While defendant was able to give a forthright version of his side of the story when his time came, he was unequal to the task of cross-examining Clark, the confessed housebreaker and thief who had sold him the television and who was testifying for the State prior to being sentenced. *A fortiori*, defendant was unable to cope with the trial judge's questioning of defense witness Batchelor, Clark's confederate who was also awaiting sentencing.

As set out in the preliminary statement of facts, on direct examination in response to a question from defendant, Batchelor

said, "It is true that when Keith [Clark] and I brought the TV to your house that Keith said it 'won't hot.' " Then in response to Judge Cowper's question, "What did Clark tell this defendant?" Batchelor said he had heard Clark tell defendant "where it [the TV] come from and told him it won't hot." The judge then said, "He told him where it came from?" and Batchelor replied, "Yes, sir." We have no doubt that this exchange between the judge and the witness left the jury with the impression that defendant's own witness was saying that he had heard Clark tell defendant that the TV came from Winstead's home. Yet this was not what the witness said; and we note further that Clark himself testified that he had told defendant the TV came from a "poker house" and that on cross-examination Batchelor said that all he had heard Clark say "was that it won't hot" and Clark had said that "uptown." We apprehend that Batchelor's response to the judge, added to Officer Ream's incompetent hearsay testimony that Clark told him defendant "knew the television set was stolen because he told him that he stole it," sealed defendant's fate.

As heretofore noted, defendant interposed no objection during his entire trial and, at the end, he waived the right to argue his case to the jury—an opportunity which any trial lawyer would have seized to stress the several points which might have been made in favor of defendant who, according to the evidence, had no prior criminal record.

Defendant's conviction is set aside, and the case will be remanded to the superior court for a new trial in accordance with this opinion.

New trial.

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STATE OF NORTH CAROLINA v. GREGORY JAMES TAYLOR

No. 67

(Filed 7 February 1978)

**1. Homicide § 20.1— photograph of deceased—admissibility to illustrate testimony**

The trial court in a murder prosecution properly allowed into evidence a photograph which illustrated the testimony of a witness concerning the appearance of deceased after she had been shot.

**2. Criminal Law § 101.2— defendant's prior conviction— evidence improperly placed before jury—jury not examined by court—no error**

Where a carton containing evidence introduced at defendant's previous trial rested on the clerk's table twelve to fourteen feet from the nearest juror, and the carton had printed on its side "State v. Taylor—Murder—Guilty—Death—9-17-75—75-CR-5186," the trial court did not err in failing to examine the jury to determine if they had read the writing on the box and been influenced thereby, since there was no showing of deliberate prosecutory misconduct; it was highly unlikely that any juror could have read the writing on the carton from the jury box; most, if not all of the jurors already knew about defendant's previous conviction, having read about it in the newspaper; and the trial court concluded that inquiry of the jury would in all probability create a high likelihood of prejudice.

**3. Homicide § 21.5— murder during attempted robbery—first degree murder—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for murder committed during the perpetration of an attempted robbery where such evidence consisted of testimony by an eyewitness that he saw defendant shoot deceased; there was evidence corroborating the eyewitness's account; and defendant made a statement to police officers to the effect that he shot deceased accidentally during the course of an attempted robbery.

APPEAL by defendant from *Howell, J.*, 28 February 1977, Schedule B Session of MECKLENBURG Superior Court.

Defendant was arrested in January of 1975 upon a warrant charging him with the first degree murder of Betty Moore. After a court-ordered period of observation at Dorothea Dix Hospital, he was declared competent to stand trial, and the Mecklenburg County Grand Jury indicted defendant for the first degree murder of Betty Moore. At trial, defendant entered pleas of not guilty and not guilty by reason of insanity. The jury found defendant guilty as charged and a death sentence, mandatory at that time, was imposed. This Court found error in the failure of the trial judge to give requested instructions pertaining to commitment procedures applicable to a defendant who has been acquitted by reason of mental illness and awarded defendant a new trial. *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976).

Upon arraignment at the second trial, defendant again entered pleas of not guilty and not guilty by reason of insanity. The State's evidence, which was substantially the same as that offered at the first trial, tended to show that Betty Moore died as a result of shotgun wounds inflicted by defendant during an attempted robbery of her husband's store.

Defendant offered evidence tending to show lack of mental capacity. Members of his family described instances of irrational behavior by defendant and recited a history of his hospitalization and treatment for mental disorders. Defendant also offered expert testimony which tended to show that defendant suffered from paranoid schizophrenia.

On rebuttal, the State offered expert opinion testimony to the effect that at the time of the crime, defendant knew the difference between right and wrong and knew the nature and consequences of his behavior. Evidence of inculpatory statements made by defendant to police officers was also admitted on rebuttal.

We do not deem it necessary to here fully recite the facts because of their striking similarity to those fully set out in the first case which is reported in 290 N.C. 220. Such additional facts as are necessary for decision of this appeal will be hereinafter set forth.

The trial judge submitted the case to the jury on the theory of felony murder, and the jury returned a verdict of guilty of first degree murder. Defendant was sentenced to life imprisonment.

*Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.*

*Paul L. Whitfield for defendant appellant.*

BRANCH, Justice.

**[1]** Defendant first assigns as error the ruling of the trial judge admitting into evidence State's Exhibit 1, a photograph of deceased at the scene of her death. Defendant contends that this photograph illustrated no relevant testimony, had no probative value, and its introduction served no purpose other than to inflame and prejudice the jury.

It is well established in this jurisdiction that photographs may be used to illustrate relevant and competent testimony and the fact that the photograph may be gory or gruesome does not necessarily render it inadmissible. *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948). The record discloses that after the witness Moore had described the sequence of events leading to his wife's death, he testified

that State's Exhibit 1 fairly represented his wife's appearance after she had been shot. The trial judge admitted this photograph over defendant's objection and at that time instructed the jury that the photograph was admitted for the limited, sole purpose of illustrating the testimony of the witness Moore, if the jury should find that the photograph did illustrate his testimony. He specifically told the jury that they should not consider the photograph for any other purpose.

In order to prove a charge in a criminal case, the State must prove (1) that the act was done and (2) that it was done by the person charged. Thus, before there can be a lawful conviction of a crime, the *corpus delicti*, that is that the crime charged has been committed by someone, must be proved by the State. *State v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762 (1944). Defendant's plea of not guilty places the burden of proving every element of the crime charged, including the establishment of the *corpus delicti* upon the State. *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958). As long as a defendant stands on his plea of not guilty, the State may choose the method by which it will carry this burden subject to the enforcement of the rules of evidence by the trial judge. *State v. Cutshall*, supra.

The single photograph here challenged was relevant and competent for use in illustrating the testimony of the witness Moore bearing upon *corpus delicti*. *State v. Gardner, supra; State v. Miller*, 219 N.C. 514, 14 S.E. 2d 522 (1941). We also note that the photograph was not excessively gory as was the case in *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), *overruled on other grounds*, *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975), neither did the State make excessive use of the photograph as in *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). The photograph was illustrative of a material part of the State's case, did not violate established rules of evidence, and was admitted under proper instructions. We, therefore, hold that the trial judge did not commit error by admitting State's Exhibit 1 into evidence.

**[2]** Defendant next contends that the trial judge committed prejudicial error by failing to properly ascertain whether any of the jurors had seen allegedly prejudicial language printed on the side of a carton containing evidence introduced at defendant's previous trial.

During the noon recess on the second day of trial, defense counsel brought to the court's attention a white cardboard carton which had been resting on the clerk's table twelve to fourteen feet from the nearest juror. On the side of the box were the words "State v. Taylor — Murder — Guilty — Death — 9-17-75 — 75-CR-5186." These words were written in ballpoint pen or pencil. The record does not disclose the size of the lettering. Defendant moved for a mistrial and the trial judge thereupon conducted a *voir dire* hearing which included an examination of the prosecuting attorney and the clerk of court. In addition, the trial judge had defense counsel place the box in the position that it rested on the clerk's table when it was exposed to the jury's view. The judge then took the seat in the jury box which was nearest to the box and attempted to read the words written on the box and could only read the word "State." It was disclosed in the *voir dire* hearing that the 13th juror, Ms. Chandler, walked near the box when she approached the clerk to inquire about using a telephone.

At the conclusion of the *voir dire* hearing, the trial judge found facts and *inter alia* concluded:

> Therefore, the Court concludes that it is highly unlikely, if not impossible, that any juror could have ascertained, read or maintained the words or the language on the box;
>
> That it is highly unlikely that Ms. Chandler, the 13th juror in this case, lingered or stayed in the area of the bar or bench long enough to read the words imprinted on the box;
>
> That there is no likelihood that any event regarding the utilization of this box or its display or location during the trial, at this point, has prejudiced the defendant;
>
> That the Court is of the opinion that to inquire of the jury about whether they have in fact observed this box would in all probability create a higher likelihood of prejudice.

Based on these findings and conclusions, the trial judge denied defendant's motion for a mistrial.

Where a defendant's conviction is set aside or a new trial granted for error in the trial, it is error to permit evidence of this erroneous or void conviction to be introduced in any manner at a

subsequent trial for the same offense. *Loper v. Beto*, 405 U.S. 473 (1972); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Alford*, 274 N.C. 125, 161 S.E. 2d 575 (1968). This is particularly so when such evidence results from deliberate prosecutory misconduct. *State v. Solomon*, 93 Utah 70, 71 P. 2d 104 (1937).

In instant case, there is no evidence of deliberate prosecutory misconduct. Neither is there a clear showing that improper evidence was actually communicated to the jury. We are of the opinion that, under ordinary circumstances, it would have been the better practice for the trial judge to have inquired of the jurors if they had read the writing on the box and, in the event of an affirmative answer, to determine whether this information would affect such jurors' ability to return a fair and impartial verdict. However, the record before us contains the following statement made by Judge Howell at the conclusion of the *voir dire* hearing:

> I'd also like the record to show at this point that in accordance with the District Attorney or the defense counsel's statement, that this matter is being tried for the second time. There was a previous conviction. That certain members of the jury, in voir dire, indicated that they had heard or read about the matter in the paper; that the previous conviction was reversed and a new trial was ordered, all of which was reported in the local newspapers.

It becomes apparent that some of the jury panel, and probably all of them, were aware of the previous erroneous conviction. There is no indication in the record that defendant objected to or challenged the qualification of these jurors. We are of the opinion that the trial judge's conclusion that inquiry of the jury would in all probability create a high likelihood of prejudice is strengthened by his knowledge that members of the jury were already aware of defendant's prior conviction. Further reference to this matter by the trial judge would obviously emphasize its importance in the minds of the jurors.

Under the circumstances of this case, we are unable to say that prejudicial error resulted from the trial judge's failure to examine the jury concerning the writing on the box.

By his assignments of error 3, 4 and 5, defendant contends that the trial judge erred (1) in finding that defendant's in-custody

statements were voluntary, (2) in allowing the State to introduce these statements on rebuttal, and (3) in admitting the expert opinion of Dr. Groce in response to the district attorney's hypothetical question. These assignments of error were made and rejected in the first appeal of this case upon nearly identical factual bases. Defendant advances no new arguments to support these assignments of error, and we adhere to our original reasoning and rulings. We deem it unnecessary to here repeat our reasoning which is fully set forth in *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976).

**[3]** Defendant next assigns as error the denial of his motion to dismiss.

The State offered the eye witness testimony of M. L. Moore to the effect that he saw defendant at the check-out corner of his store with a gun pointed at his wife Betty Moore. He asked defendant what he wanted, and defendant turned the shotgun toward him and told him not to do anything foolish. Defendant then turned the shotgun back to Mrs. Moore and the gun discharged. Defendant and his companion fled. In court, Mr. Moore unequivocally identified defendant as the man who wielded the shotgun in his store even though he testified that on that occasion defendant wore a wig. The State also offered into evidence a statement made by defendant to police officers to the effect that he went to the store for the purpose of committing a robbery and that he shot Mrs. Moore accidentally during the course of the attempted robbery. The State offered other evidence that tended to corroborate Mr. Moore's testimony.

When considered in the light most favorable to the State and taking the State's evidence to be true, we are of the opinion that the evidence here presented was sufficient to furnish a reasonable basis for the jury to find that defendant shot and killed Betty Moore during the course of an attempted armed robbery. Such findings would be tantamount to findings that the crime charged in the bill of indictment, first degree murder, was committed and defendant was one of the perpetrators of that crime. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1968). We, therefore, hold that there was ample evidence to repel defendant's motion to dismiss.

Defendant's remaining assignments of error are that the trial judge erred by denying his motion to set aside the verdict and by denying his motion for a new trial. These motions are addressed to the sound discretion of the trial judge. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). In view of our ruling on the preceding assignments of error, we find no basis whatever to support a finding that the trial judge abused his discretion in denying these motions.

We have carefully reviewed this entire record and find no prejudicial error.

No error.

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STATE OF NORTH CAROLINA v. SAMMY LEE MOSER

No. 114

(Filed 7 February 1978)

**1. Homicide § 21.7— second degree murder—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that defendant and the female victim occupied an apartment together; defendant was seen on the street beating the victim with a belt at 8:15 p.m.; at approximately 4:15 the following morning, a woman in defendant's apartment was heard crying for help for about 15 minutes; defendant went to the lobby of the apartment building at 5:00 a.m. and stayed there until 9:15; defendant told an officer that he had found "his wife" in the apartment and she would not respond to his calling her name; when the officer accompanied defendant to the apartment, defendant produced the key and there was no sign of forced entry; the victim's body was found in the bedroom with a hole in her right shoulder, a wound over her left eye and multiple abrasions and lacerations about the upper part of her body; a "completely mutilated" slat bottomed chair was found in the apartment; bloodstained clothing belonging to defendant was found in the apartment; and according to expert medical testimony, the victim "died of a beating."

**2. Homicide § 21.1— identification of body—sufficiency of evidence**

In this prosecution for the murder of "Evelyn Jennings," there is no merit in defendant's contention that his motion for nonsuit should have been allowed because there was no evidence that the body found in defendant's apartment was the same body upon which the State's Medical Examiner performed an autopsy where it was not controverted that the body found in defendant's apartment was the body of Evelyn Jennings; the Medical Examiner testified that he examined "the body of Evelyn Jennings although at the time I understood the last name to be Moser"; and the Medical Examiner's confusion

about the victim's last name was caused by the fact that defendant and the victim lived together and he referred to her as his wife although they were not actually married.

APPEAL by defendant from *Wood, J.*, 20 June 1977 Criminal Session of UNION Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first degree murder of Evelyn Jennings. Upon call of the case for trial, the district attorney announced that the State would seek a verdict of second degree murder or any lesser included offense. The jury returned a verdict of murder in the second degree, and the trial judge imposed a sentence of life imprisonment.

*Rufus L. Edmisten, Attorney General, by Charles J. Murray, Assistant Attorney General, for the State.*

*Joe P. McCollum, Jr., for the appellant.*

BRANCH, Justice.

The single question for decision is whether the trial judge erred by denying defendant's motion for judgment as of nonsuit.

The often stated rules governing the sufficiency of the evidence to withstand a motion for judgment as of nonsuit are concisely stated in *State v. Price*, 280 N.C. 154, 157, 184 S.E. 2d 866, 868 (1971), as follows:

> In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608; *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44. Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion. *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789; *State v. Vincent*, supra. The question for the court is whether, when the evidence is so considered, there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the

perpetrator, or one of the perpetrators, of it. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679.

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth, *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951), and, as in other cases, when the sufficiency of circumstantial evidence to take the case to the jury is challenged, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

**[1]** In instant case, the State's evidence tended to show that defendant and Evelyn Jennings (Evelyn) lived together at Monroe Rooms and Apartments in Monroe, North Carolina. About 8:00 p.m. on March 19, 1977, defendant and Evelyn left the apartments together. Defendant was carrying a belt in his hand. About 8:30 p.m. a witness heard a woman screaming and shortly thereafter observed defendant standing over a woman who was lying in the street. Defendant was beating the screaming woman with a belt, and the woman was heard to say, "I won't do it again" or "I won't see her again." Shortly after this assault, defendant and Evelyn returned to the apartments. Evelyn's left eye was bloodshot, she was crying, and "was walking bent over." About ten minutes after his return, defendant approached Amelia Wilson in the lobby of the apartments and said, "You saw me beating her with this." He at that time displayed a leather belt which was about two inches wide.

At approximately 4:15 a.m. on 20 March 1977, a woman in the apartment which defendant occupied with Evelyn was heard crying and saying, "Help me," for a period of about fifteen minutes. About 5:00 a.m. on the 20th of March, 1977, defendant came down the steps to the lobby of the apartments and remained there until about 9:15 a.m. when he left. He returned in about twenty minutes with Captain Helms of the Monroe Police Department.

Captain Helms testified that he first saw defendant at the Police Department, and defendant told him that he had found his wife in Apartment 14 of the apartments and that she would not respond to his calling her name. Officer Helms accompanied defendant to the apartment and found the door to defendant's rooms locked. There was no sign of forced entry. Defendant produced

and gave to him a key which opened the door. Upon entering the apartment, he observed "a straight back wood slat bottomed chair completely mutilated and bursted all over the floor." He then proceeded to the bedroom where he observed a black woman lying partly on the bed and partly on the floor. She was nude from the waist up and that portion of her body was covered with blood. There was a hole in her right shoulder, a wound over her left eye and multiple abrasions and lacerations about the upper part of her body. Officer Helms stated, "She was dead. She was cold." With defendant's permission, he searched and found a blood spattered long sleeved green shirt, a blood stained blue jacket, and a blood stained corduroy jacket. Defendant admitted that the blue coat was his. There was expert testimony to the effect that the victim's blood type was O and that the blood stains found on the black jacket and the green shirt were type O. Dr. Page Hudson, the State's Medical Examiner, testified that in his opinion Evelyn Jennings "died of a beating."

**[2]** In the case *sub judice*, there was substantial evidence to permit the jury to draw reasonable inferences that defendant unlawfully and with malice killed Evelyn Jennings on the morning of 20 March 1977. However, defendant further contends that his motion for judgment of nonsuit should have been allowed because there was no evidence that the body found in the apartments was the same body upon which Dr. Page Hudson performed the autopsy. This contention is without merit. Initially, it is not controverted that the body found in the apartment was the body of Evelyn Jennings. Dr. Hudson, without objection, testified: "On March 21, 1977, in the morning I had an occasion to examine the body of Evelyn Jennings although at that time I understood the last name to be Moser." The record shows that defendant and Evelyn lived together in the same apartment, and defendant referred to her as his wife. This in all probability explains Dr. Hudson's initial misapprehension concerning the name of the victim.

We hold that the trial judge correctly denied defendant's motion for judgment as of nonsuit.

No error.

BILLY HAROLD THOMPSON, EMPLOYEE v. FRANK IX & SONS EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 46

(Filed 7 February 1978)

**Master and Servant § 74— workmen's compensation—permanent partial disability of hand—award for disfigurement of forearm**

An employee who had received compensation for the permanent partial disability of his left hand was entitled to additional compensation for disfigurement because of surgical scars on his left forearm above the wrist. G.S. 97-31.

APPEAL by defendants (employer and insurance carrier) from the decision of the Court of Appeals affirming the award of compensation for disfigurement made to plaintiff (employee) by the North Carolina Industrial Commission. The opinion, written by *Morris, J.*, with *Arnold, J.*, concurring, and *Hedrick, J.*, dissenting, is reported in 33 N.C. App. 350, 235 S.E. 2d 250 (1977).

*Morgan, Byerly, Post, Herring & Keziah for plaintiff appellee.*

*Brinkley, Walser, McGirt & Miller for defendant appellants.*

*PER CURIAM.* This appeal comes to us under N.C. Gen. Stats. § 7A-30(2) (1969) because of the dissent of Judge Hedrick.

In their brief filed in this Court defendants succinctly state the question for review as follows:

"Where an employee suffers a fracture of his wrist and as a result of the surgical reduction of the fracture he sustains scars of the forearm, is he entitled to be paid compensation for permanent partial disability and in addition for disfigurement under G.S. 97-31?"

The facts in this case are fully set out and discussed in the opinion of the Court of Appeals. The following brief summary will suffice for the purpose of this appeal:

Plaintiff was injured in an accident arising out of and in the course of his employment by defendant Frank Ix & Sons. After maximum healing had occurred plaintiff was left with permanent disfiguring scars on his left arm and a permanent partial limitation of motion in his wrist. Thereafter the parties stipulated that

plaintiff had suffered a "25% loss of use of left hand" and that he should be paid $80.00 a week for 50 weeks for this disability. The North Carolina Industrial Commission approved their agreement on 22 January 1976.

Subsequently plaintiff filed with the Commission a claim for compensation for the disfiguring surgical scars on his forearm. Defendants resisted payment on the ground that the arm and hand together constitute one member of the body. They contend that plaintiff, having received compensation for permanent partial loss of use of the hand, is precluded by § 97-31(22) of the North Carolina Workmen's Compensation Act (N.C. Gen. Stats., ch. 97 (1972)) from recovering compensation for disfigurement of the arm. Deputy Commissioner Denson, who heard the claim, concluded that the "arm is a different 'member' of the body under the provisions of G.S. 97-31" and awarded plaintiff $750.00 for disfigurement. The full Commission affirmed and adopted this award as its own. Defendants appealed and the Court of Appeals affirmed the Commission.

In a well reasoned opinion by Judge Morris, the Court of Appeals held that the scars on plaintiff's forearm did not constitute disfigurement to the hand; that the parties' settlement of 22 January 1976 related only to the partial loss of use of plaintiff's hand; and that he was, therefore, entitled to additional compensation for the disfigurement of his arm.

For the reasons set out in Judge Morris' opinion we hold that the Court of Appeals has correctly applied the law to the facts of this case. We therefore affirm the decision of the Court of Appeals.

Affirmed.

STATE OF NORTH CAROLINA, EX REL COMMISSIONER OF INSURANCE v. MOTORS INSURANCE CORPORATION AND CIM INSURANCE CORPORATION

No. 78

(Filed 7 February 1978)

**Appeal and Error § 9; Insurance § 79.1— appeal from collision insurance order— mootness**

An appeal from a 1975 order of the Commissioner of Insurance revising automobile collision insurance rates is dismissed as moot where the order never became effective because of pending appeals; the order was vacated by the Supreme Court; new statutes regulating automobile insurance rate making were enacted in 1977; and the Commissioner of Insurance has entered a comprehensive order approving new automobile liability and collision rates in a new proceeding under the 1977 statutes.

ON defendants' petition for further review of an unpublished decision of the North Carolina Court of Appeals filed 18 August 1976. This case was argued as No. 12, Spring Term 1977.

*Hunter & Wharton, by John V. Hunter III, Attorneys for Plaintiff Appellee.*

*Smith, Anderson, Blount & Mitchell, by H. A. Mitchell, Jr., and M. E. Weddington, Attorneys for Defendant Appellants.*

*PER CURIAM.* Defendants were in 1975 writers of automobile physical damage insurance but not automobile liability insurance; consequently they were members of the North Carolina Fire Insurance Rating Bureau (hereinafter "Rating Bureau") but not the North Carolina Automobile Rate Administrative Office (hereinafter "Rate Office") as these organizations then existed. Compare Art. 13, Ch. 58, with Art. 25, Ch. 58, in bound Vol. 2B of the General Statutes. On 26 August 1975 the Insurance Commissioner entered two orders purporting to revise, respectively, automobile liability and automobile physical damage insurance rates pursuant to Ch. 666, 1975 Session Laws, codified as General Statutes 58-30.3 and 58-30.4 (hereinafter House Bill 28). The proceedings leading to and the orders themselves are fully discussed in *Comr. of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977), *rehearing denied* 24 January 1978.

On defendants' appeal to the Court of Appeals they challenged the Commissioner's order in these 1975 proceedings

dealing with automobile physical damage insurance (hereinafter "Collision Insurance Order") on the ground that House Bill 28 and consequently the Collision Insurance Order had no application to them; and if they did have, House Bill 28 was unconstitutional as applied and the Collision Insurance Order a nullity vis-a-vis these defendants. Their position was that, as members only of the Rating Bureau, they had neither notice nor opportunity to be heard in the proceedings leading to the challenged order. The Court of Appeals remanded the matter to the Commissioner for further proceedings.

The Collision Insurance Order, because of pending appeals therefrom, has never become operative. In the case last cited we determined to vacate this order. Additionally, as we pointed out in that case, the 1977 General Assembly enacted new and comprehensive legislation for the purpose of regulating insurance rate making. Enacted as Ch. 828, 1977 Session Laws, and codified in General Statutes, Ch. 58, 1977 Cum. Supp., this legislation repealed Article 13 and Article 25 of Chapter 58 as they then existed, abolished both the Rating Bureau and the Rate Office as they then existed, transferred their functions to a new organization denominated the "North Carolina Rate Bureau," amended House Bill 28 as it was enacted in 1975, and established, generally, new insurance rate making procedures. New procedures involving both automobile liability and automobile collision insurance have already taken place under these new statutes and the Insurance Commissioner on 10 November 1977 entered a comprehensive order approving new liability and collision rates. *See Comr. of Insurance v. Automobile Rate Office, supra; Comr. of Insurance v. Automobile Rate Office*, No. 88, Fall Term 1978, filed 24 January 1977, 294 N.C. 60, 241 S.E. 2d 324 (1978).

Under these circumstances the questions raised on this appeal are now moot and the appeal should be dismissed. The opinion of the Court of Appeals is vacated. *Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976).

Appeal dismissed. Court of Appeals' decision vacated.

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

STATE v. BARUS

No. 5 PC.

Case below: 34 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. BLACK

No. 6 PC.

Case below: 34 N.C. App. 606.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. CAMERON

No. 10 PC.

Case below: 34 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. HOLLAND

No. 118 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. HUNTLEY

No. 17 PC.

Case below: 34 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

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

STATE v. MOODY

No. 9 PC.

Case below: 34 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. RICKS

No. 121 PC.

Case below: 34 N.C. App. 734.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 February 1978.

STATE v. TRUESDALE

No. 21 PC.

Case below: 34 N.C. App. 579.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

UPCHURCH v. UPCHURCH

No. 119 PC.

Case below: 34 N.C. App. 658.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978.

UTILITIES COMM. v. TANK LINES and
UTILITIES COMM. v. TRANSPORT CO.

No. 13 PC.

Case below: 34 N.C. App. 543.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 February 1978. Motion of Protestant-Intervenors to dismiss appeal for lack of substantial constitutional question allowed 7 February 1978.

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

## NORTH CAROLINA

AT

## RALEIGH

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SPRING TERM 1978

STATE OF NORTH CAROLINA v. BOBBY LEE SMITH

No. 70

(Filed 7 March 1978)

1. **Constitutional Law § 77; Criminal Law § 75.4— defendant in custody—waiver of right to remain silent—necessity for presence of counsel**

Defendant's contention that, at the time he made an admission, he was represented by counsel and his attorney's presence was therefore a prerequisite to a valid waiver of his rights to remain silent and to have counsel present during any custodial interrogation is without merit, since (1) on the day defendant made his statement, he was neither charged with the offense in question nor represented by counsel in this case, and (2) even had an attorney "entered the proceeding" on defendant's behalf on or before the date of the confession, which no attorney had done, defendant would have retained his right to waive counsel, the presence of the defendant's attorney not being required for waiver of counsel in this State.

2. **Criminal Law § 75.4— defendant in custody—confession—necessity for presence of counsel**

The rule that a defendant in custody who is represented by counsel may not waive his constitutional rights in counsel's absence is not the law in this State; rather, the rule in N. C. is that in determining the admissibility of a confession by a suspect in custody, the crucial question is whether the statement was freely and understandingly made after defendant had been fully advised of his constitutional rights and had specifically waived his right to remain silent and to have counsel present.

**3. Criminal Law § 74.1— repudiation of confession—exclusion proper**

Defendant's contention that his repudiation of his statement two hours after he gave it to police was such an integral part of the original statement as to require the admission of the repudiation along with the confession is without merit.

**4. Criminal Law § 102.3— objection to jury argument—time for making**

Ordinarily, objection to an improper argument by State's counsel must be made before the verdict so that the trial judge may be given a chance to stop the argument and instruct the jury to disregard the prejudicial material.

**5. Criminal Law § 102.2— jury argument—control within discretion of trial court**

The argument of counsel must be left largely to the control and discretion of the presiding judge; however, an exception to this rule is recognized in capital cases so that an appellate court may review the prosecution's argument in spite of counsel's laxity, but, even so, the impropriety of the argument must be gross indeed in order for the appellate court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

**6. Criminal Law § 102.8— incriminating testimony—failure of defendant to rebut—jury argument not comment on defendant's failure to testify**

The district attorney's jury argument which questioned defendant's failure to get back on the stand and deny incriminating evidence did not amount to a comment on defendant's failure to testify in violation of G.S. 8-54, since a defendant who testifies is subject to impeachment by the questions and arguments of opposing counsel, and these arguments may include comments on the defendant's failure to explain or deny incriminating evidence.

**7. Criminal Law § 102.7— district attorney's jury argument—defendant's past criminal record summarized—no error**

The district attorney did not err by summarizing for the jury defendant's extensive criminal past, since the credibility of defendant's disavowal of his confession was a crucial decision for the jury, and prior acts of misconduct including criminal convictions may be introduced in evidence to impeach the credibility of defendant.

**8. Criminal Law § 163— jury instructions—error in recapitulation of evidence—necessity for calling court's attention to**

An error by the judge in recapitulating the evidence or stating the contentions of the parties must ordinarily be brought to the judge's attention in apt time for correction in order for an objection to the error to be preserved on appeal, and it is only where the judge erroneously instructs the jury on a material fact not in evidence that the error will be held so prejudicial as to require a new trial notwithstanding defense counsel's failure to make timely objection.

**9. Homicide § 30— first degree murder—failure to submit question of guilt of lesser included offenses—no error**

The trial judge in a homicide case did not err in instructing the jury that it could return only verdicts of first degree murder or not guilty, since the State's evidence tended to show murder in the attempted perpetration of a robbery and defendant's evidence tended to show that he was never at the scene of the crime.

**10. Homicide § 23.2— proximate cause of death—jury instructions**

The trial court in a homicide case was not required to give an instruction on the issue of whether defendant killed the victim which expressly incorporated the phrase "proximate cause."

APPEAL by defendant under G.S. 7A-27(a) from the judgment imposed by *Fountain, J.*, at the 15 March 1976 Session of UNION County Superior Court. This case was docketed and argued as case No. 74 in the Fall Term, 1976.

Defendant, charged in a bill of indictment drawn under G.S. 15-144, was convicted of the first-degree murder of Jud Parker on 26 December 1975. Evidence for the State tended to show:

About 11:20 p.m. on Friday, 26 December 1975, Jud Parker, owner and operator of Jud's Restaurant in Monroe, North Carolina, returned to his home on Cherry Street after closing the restaurant. The receipts from the night's business ($800.00) were in the cash box on the front seat of the pickup truck in which he had driven home.

Mrs. Parker, hearing several shots outside her home, ran to the back door where she saw her husband scuffling with someone on the driver's side of the truck. That person had his head lowered into Parker's chest, and Parker was pushing him toward the back of the truck. When Mrs. Parker reached her husband his assailant "had broke loose" and "was jumping over the front walk." She never saw his face. As this fleeing person was crossing the walk, Parker fired two shots at him from his .32 caliber pistol. Parker then collapsed. Medical testimony disclosed that he died almost instantly from five .25 caliber gunshot wounds in the chest.

Five neighbors testified that between 11:15 p.m. and 11:30 p.m. on 26 December 1975 they heard Mrs. Parker screaming and a number of gunshots, fired in rapid succession, coming from the Parker premises. Looking toward the Parker home the neighbors

saw a man running up Cherry Street toward Riggins Street. They were able to give only a general description of the man's height and weight. Their estimates ranged from 5'6" tall and 130 pounds to 6'3" and 200 pounds. Defendant was 6'2" tall and weighed 190 pounds at the time of the trial.

Defendant Bobby Lee Smith, aged 18, moved to Union County, North Carolina, on 16 October 1975 after his release from the South Carolina Penitentiary. Smith had lived in Florida and Germany as well as South Carolina. While in Germany, at the age of 15 or 16, he had been convicted of the felony of breaking and entering a guest house. By his own statement defendant had participated in "somewhere around fifty" felonious breaking and enterings while in South Carolina. (His brother Charles estimated the number at between fifty and one hundred.) He had been taking drugs for "a good many years," having tried all kinds, including heroin. Since coming to Union County defendant had been unemployed and had committed several forgeries and one armed robbery. He had become associated with several other unemployed young people in the area, Kathy Griffin, his girl friend; his brother, Charles Smith, and his wife; Robert Spence and his girl friend, Tammy Moser. In late 1975 defendant returned to South Carolina to purchase 1000 "hits" of mescaline, a controlled substance, which he sold "in the neighborhood."

At the time of his arrest for the murder of Jud Parker on 22 January 1976, defendant was in the Union County jail awaiting trial on unrelated charges of forgery and armed robbery. On 19 January 1975, while in jail on these two charges, defendant made an inculpatory statement to the police which caused his arrest for the murder of Jud Parker. When the State sought to introduce that statement into evidence at the trial, defendant objected and a *voir dire* hearing was held. The following information was elicited at that hearing:

Early in January of 1976, but before January 17th, Attorney Larry Harrington of Monroe had represented defendant Smith as privately employed counsel at a preliminary hearing on a charge of forgery. Sometime prior to January 17th defendant had also been charged with armed robbery of one Oxner. At his bail hearing on that charge defendant had told the court that Harrington also represented him in that case. However, he had neither contacted nor retained Harrington in that matter. On Saturday, 17

January 1976, District Attorney Carroll Lowder called Harrington and informed him that "his client" Smith "wanted out of jail" and had some "valuable information" on the Jud Parker homicide, which he would exchange for his release on bail and other considerations. Lowder requested Harrington to come to the Union County jail and represent defendant in the negotiations. Harrington, who was entertaining friends and preparing to go on a bird hunt, at first declined to go, but Lowder finally prevailed upon him to come to the jail.

At the jail Harrington first saw Smith, who told him a story which vaguely implicated a man named "Rusty" in the murder of Jud Parker. In answer to Harrington's specific inquiries defendant assured him that he himself had not participated in the Parker murder and had no connection with it. Harrington testified that he was not aware that Smith was a suspect in the Parker killing and that he had hoped to achieve some reduction in Smith's sentence on the armed robbery charge in exchange for Smith's information.

Defendant told Harrington that in exchange for his information and testimony in the Parker murder case he was demanding his immediate release on bail, probation for the armed robbery charge, and the $5,000 reward which had been offered in the Parker case. Harrington told defendant his demands were "unrealistic." Nevertheless, he communicated them to Lowder, who refused to accede to them. When Harrington told defendant that the district attorney would agree to probation only after he had served five years and that the earliest he could get bail would be on Monday after the police had checked his story, "[h]e jumped up and said that he had to get out of jail on that day. . . . He said he had to go see his girl friend. He said she was pregnant, and it was vital that he get out to see her." Harrington warned defendant "it was far more important that he look down the road than to consider his immediate needs." Defendant said, "no, that he wanted to get out of jail on that day, and he wasn't going to talk to them unless he got a promise of that." Harrington told him he had other things to do and left.

Defendant's brother Charles was in jail at that time, also charged in the Oxner armed robbery. He testified substantially as follows: On the evening of 18 January 1976 he had a conversation with Sheriff Frank Fowler, Officer Kilgore, and Malcolm Niven,

the Chief of Police of Monroe. Sheriff Fowler told Charles that he would be put in a cell with his brother that night and that unless he was able to get a confession from his brother before 11:00 a.m. the next day, Charles, Kathy Griffin, and defendant would be charged with Jud Parker's murder. Thereafter Charles Smith was put in the cell with defendant and tearfully conveyed this information to him. Also in the cell with defendant and Charles at this time were Billy Devine and Gary Watkins, both of whom were serving life sentences. Both defendant and Charles testified that defendant said to his brother, "Don't worry about it, Chuck (Charles). You won't be charged with nothing." During the night defendant concocted a story which Charles wrote down. When it was submitted to Officer Kilgore he promptly rejected it as "a lie." Defendant admits that it was a fabrication.

Officer Kilgore and Sheriff Fowler each categorically denied that either Charles Smith or defendant had been told that if defendant did not confess, Charles Smith, Kathy Griffin, and defendant would all be charged with the murder of Jud Parker. In brief summary, Sheriff Fowler testified both on *voir dire* and before the jury as follows:

On Monday, 19 January 1976, a note from defendant, written by his cell mate, Gary Watkins, informed Sheriff Fowler that defendant desired to talk with him about the Parker murder. Since it was "a city case," Fowler notified Officer Kilgore, and the two officers met defendant in the jail conference room. Fowler asked defendant if he wanted to talk to him. When he said he did, Fowler orally advised defendant of his *Miranda* rights and handed him a printed waiver listing those rights. Smith read it over, said he understood his rights, and signed the waiver (State's Exhibit 10). Prior to this time Sheriff Fowler "had never interrogated this defendant at all about any matter." No inducement, threats, or pressures were brought to bear upon defendant, who appeared well and rational in all respects. After defendant signed the waiver he began pacing the floor, and the sheriff told him that if he wanted to talk "to sit down and let's talk." Defendant sat down beside the sheriff, who asked him what he had on his mind. Defendant replied, "About the Jud Parker murder." The sheriff then inquired, "What have you got that you want to tell us about the Jud Parker murder? Do you want to get yourself straight now?" Defendant responded, "I do."

Defendant then confessed to killing Parker during the course of the attempted armed robbery in December 1975. His conversation with Officers Fowler and Kilgore lasted about an hour. As defendant talked, Fowler put it in writing. When the statement was completed, defendant read it and made one correction. He said he did not want to sign it, but he did initial and date each page of the statement, which is State's Exhibit 11.

After defendant had approved the statement he asked to speak with his girl friend, Kathy Griffin. He said she was keeping 1000 hits of mescaline for him, and he would like to talk to her. The sheriff said he had no objection provided Kilgore agreed. The latter gave his permission, and the two officers went to lunch. While they were gone defendant talked to Kathy Griffin and, when the officers returned about two hours later, defendant repudiated his confession. He claimed then, and again on *voir dire* and before the jury, that the confession was but the latest in a series of fabrications he had devised in order to keep his brother and Kathy Griffin from being charged in the case. Defendant also asserted that he had believed that the statement could not be used against him so long as he did not sign his name to it.

At the conclusion of the *voir dire* hearing, the trial judge made detailed findings of fact in accordance with the State's evidence and ruled that defendant's statement was admissible in evidence. *Inter alia*, he made the following findings:

Attorney Harrington visited defendant in jail on January 17th at the request of the district attorney. At that time Harrington represented defendant only in a forgery case; he did not represent him in the pending Oxner armed robbery case. No charges had been brought against defendant in the Jud Parker murder case, and defendant had not consulted Harrington with reference to that matter.

With reference to the admissibility of defendant's statement (State's Exhibit 11), the trial judge further found: (1) Defendant, a high school graduate, had not only been warned of his constitutional rights as set out in the *Miranda* decision but he understood these rights. (2) Defendant "knowingly, freely, voluntarily, and without any promise or duress waived each of the rights assured him by the *Miranda* decision and specifically waived the right to have counsel present and the right to remain silent and signed

. . . State's Exhibit 10." (3) "[T]he only believable evidence is to the effect that the defendant was made no promise and subjected to no duress whatever" at the time he made his statement (State's Exhibit 10); that it was "freely, knowingly, understandingly, and voluntarily made." (4) Defendant, testifying in his own behalf on *voir dire*, has said that "every statement he has ever made relating to this charge as it concerns himself and others has been false; that he has been deliberately lying for the purpose of helping himself, his brother, his girl friend, either or all; that he attempted to implicate people he knew to be innocent." (5) "[T]he overall statement of the defendant and his supporting evidence is such that the court does not accept it as true where it is in conflict with the State's evidence relating to the voluntariness and competency of the statement made by the defendant to the sheriff on January 19, 1976."

In the statement, defendant said that on the night of 26 December 1975, he and Bob Spence, one of his companions, had been riding around in Charles Smith's Ford LTD. During the ride they had agreed to rob Parker. Spence let Smith out about a block from Parker's house, and Smith waited for Parker to come home. When Parker arrived Smith demanded his money. Instead of surrendering the money Parker drew his gun and fired. Smith fired back seven times or "close to it" and then ran away. Spence picked him up, and they drove to Tammy Moser's where Smith hid the car. The next day, Smith threw the gun into Lake Twitty.

At the trial, Spence denied any knowledge of or participation in the robbery. He apparently had not been charged in the matter.

The evidence for the defendant tended to show that he was not present at the home of Jud Parker at the time when he was shot and that he knew nothing of it. Evidence for the defendant further tended to show that the neighbors' descriptions given by the Parker neighbors of the man seen running from the Parker home on the night in question did not match the physical characteristics of the defendant. This evidence further tended to show discrepancies between the neighbors' accounts of the events they observed on the night of the crime and defendant's statement to the law officers.

Cell mate Gary Watkins testified at the trial that on one occasion he, defendant and Billy Devine, another inmate, were "talking about armed robberies, just stuff in general, and Billy said, 'I'd like to shake the hand of the man that had enough balls to rub out Jud Parker with a .25.' Bob jumped off the sink and said, 'Here I am' and shook hands with Billy Devine."

The court submitted the case to the jury on the theory that Jud Parker was killed by a malefactor attempting to rob him and that the jury should find defendant guilty of murder in the first degree or not guilty. Upon the verdict of murder in the first degree the judge imposed upon defendant the sentence of death, and he appealed as a matter of right to this Court.

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

*William H. Helms for defendant appellant.*

SHARP, Chief Justice.

[1] Defendant emphasizes most his assignment of error No. 11 challenging the admission in evidence of his confession, made on 19 January 1976 to Sheriff Fowler and Officer Kilgore, that he killed Jud Parker. Defendant contends that at the time he made this admission he was represented by counsel, Mr. Harrington. His attorney's presence, therefore, was a prerequisite to a valid waiver of his right to remain silent and to have counsel present during any custodial interrogation. We reject this contention and overrule assignment No. 11 on two grounds:

(1) On 19 January 1976, the day defendant made his statement to the officers, he was neither charged with murder nor represented by counsel in this case. Uncontradicted testimony tends to show—and Judge Fountain found—that on Saturday, 17 January 1976, defendant was in jail on charges of forgery and the armed robbery of Oxner. Mr. Harrington represented him in the former charge but not the latter, although defendant had falsely stated to the court at a bail hearing that Harrington represented him in the robbery case also. For reasons variously stated, defendant was determined to get out of jail that weekend in order to see his girl friend. To that end he informed the district attorney he would exchange "valuable information on the Jud

Parker case" for his release on bond and a plea bargain in his armed robbery case.

The district attorney was interested in defendant's proposition and, under the misapprehension that Harrington represented defendant on the robbery charge, he requested Harrington to come to the jail and work out the arrangements about defendant's testimony. Although most unwilling, Harrington was finally persuaded to come to the jail. When he talked to defendant he asked him specifically whether he had any part in the murder of Jud Parker. Defendant twice assured Harrington that he had not participated in the attempted robbery which resulted in the murder. He said that on the night Parker was killed "he was at a trailer out in the country, and there were three people at the trailer . . . discussing the killing."

As set out in the preliminary statement of facts the district attorney declined to bargain on defendant's terms. Harrington gave defendant some good advice about plea bargaining and left. Defendant remained in jail over the weekend, and on Monday, January 19th, he requested Sheriff Fowler to come to the jail for the specific purpose of discussing the Jud Parker murder case with him.

From the foregoing evidence it is quite clear that Mr. Harrington never represented defendant in this case.

(2) Even had Harrington "entered this proceeding" on defendant's behalf on or before January 19th—which he had not—defendant would have retained his right to waive counsel. At defendant's request Sheriff Fowler and Officer Kilgore came to the jail to talk with him. Before they talked to him, however, he specifically, knowingly, understandingly, and voluntarily exercised that right. *See State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Elliott*, 269 N.C. 683, 153 S.E. 2d 330 (1967); *State v. Davis*, 267 N.C. 429, 148 S.E. 2d 250 (1966).

Defendant, however, would have this Court adopt the rule first enunciated by the New York Court of Appeals in *People v. Arthur*, 22 N.Y. 2d 325, 329, 292 N.Y.S. 2d 663, 666, 239 N.E. 2d 537, 539 (1968). This rule was succinctly stated in *People v. Hobson*, 39 N.Y. 2d 479, 481, 384 N.Y.S. 2d 419, 420, 348 N.E. 2d 894, 896 (1976) as follows: "Once a lawyer has entered a criminal pro-

ceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer. . . . Any statements elicited by an agent of the State, however subtly, after a purported 'waiver' obtained without the presence or assistance of counsel, are inadmissible."

We also note that in *Hobson* the court was careful to point out that "the rule of the *Arthur* case is not an absolute. Thus, the fact that a defendant is represented by counsel in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule." 39 N.Y. 2d at 483, 384 N.Y.S. 2d at 422, 348 N.E. 2d at 897.

**[2]** The *Arthur* rule, that a defendant in custody who is represented by counsel may not waive his constitutional rights in counsel's absence, is not the law in this State. *See State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Davis*, 267 N.C. 429, 148 S.E. 2d 250 (1966). Further, as the New York Court of Appeals freely conceded in *Hobson*, 39 N.Y. 2d at 483-84, 384 N.Y.S. 2d at 422, 348 N.E. 2d at 897-98, the rule of *Arthur* extended a defendant protection under the State constitution beyond that afforded by the Federal Constitution as interpreted in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

*Miranda*, of course, held that suspects in custody must be expressly warned that they have the right to remain silent during police interrogation as well as the right to consult with counsel before and during any such questioning. In *Miranda*, however, Mr. Chief Justice Warren was careful to say, "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." The Chief Justice continued by saying that after an individual in custody had been informed of his constitutional rights in the words of the *Miranda* warning and been given an opportunity to exercise them, "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be

used against him." *Id.* at 478-79, 86 S.Ct. at 1630, 16 L.Ed. 2d at 726.

Only a few courts have followed New York in holding that once an attorney has entered the case an accused cannot waive his right to counsel except in the presence of his attorney. *State v. Johns*, 185 Neb. 590, 177 N.W. 2d 580 (1970); *United States v. Thomas*, 474 F. 2d 110 (10th Cir. 1973). Other courts, including Virginia, have expressly rejected the *Arthur* doctrine. *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E. 2d 737 (1976). *Accord, Moore v. Wolff*, 495 F. 2d 35 (8th Cir. 1974); *United States v. Durham*, 475 F. 2d 208 (7th Cir. 1973); *Coughlan v. United States*, 391 F. 2d 371 (9th Cir. 1968); *State v. Marks*, 113 Ariz. 71, 546 P. 2d 807 (1976); *Shouse v. State*, 231 Ga. 716, 203 S.E. 2d 537 (1974); *Commonwealth v. Yates*, 467 Pa. 362, 357 A. 2d 134 (1976).

The case of *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977) involved the admissibility of a confession made in the absence of Williams' attorney. In affirming the ruling of the District Court and the Court of Appeals that the confession had been erroneously admitted into evidence Mr. Justice Stewart, writing the opinion of the Court, specifically noted: "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as we do, that he did not." *Id.* at 405-06, 97 S.Ct. at 1243, 51 L.Ed. 2d at 441. In his concurring opinion, Mr. Justice Powell expressed his view that "the opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel. *Ante* at 405-406, 51 L.Ed. 2d 440." *Id.* at 413, 97 S.Ct. at 1246, 51 L.Ed. 2d at 445.

Thus, we reassert and adhere to our well-established rule that in determining the admissibility of a confession by a suspect in custody, the crucial question is whether the statement was freely and understandingly made after he had been fully advised of his constitutional rights and had specifically waived his right to remain silent and to have counsel present. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973). Defendant's confession was properly admitted.

**[3]** After Sheriff Fowler was allowed to read Smith's confession to the jury, defense counsel asked him, if two hours after giving that confession, defendant had not called the statement "a bunch of lies." The district attorney's objection was sustained by the court. Fowler would have answered, "He said it wasn't true." Defendant contends that his repudiation in the afternoon was "part and parcel" of that morning's confession and that therefore it should have been admitted. We do not agree.

Moreover, were we to assume *arguendo* that labeling a statement "a bunc'. of lies" two hours after it was given to police was such an integral part of the original statement as to require the admission of the repudiation along with the confession, under the circumstances of this case the court's failure to admit evidence of this repudiation was not prejudicial error. Defendant testified that he had told Officers Fowler and Kilgore after lunch that the statement he had made that morning was a lie. Kilgore also testified that defendant had termed the confession "a bunch of lies." Where evidence of similar import to that which was improperly excluded is admitted at other times in the trial, the exclusion will not be held to be prejudicial error. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1, *cert. den.* 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1966); *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949). Assignment of error No. 3 is, therefore, overruled.

**[4, 5]** Defendant's assignment of error No. 12 covers 13 exceptions to various portions of the district attorney's summation and argument to the jury, all of which were noted for the first time in the record on appeal. No objections were made at trial to any of these remarks. We have repeatedly held that ordinarily objection to an improper argument by State's counsel must be made before the verdict so that the trial judge may be given a chance to stop the argument and instruct the jury to disregard the prejudicial material. *E.g.*, *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). On equally numerous occasions we have also held that "the argument of counsel must be left largely to the control and discretion of the presiding judge. . . ." *State v. Stegmann*, 286 N.C. 638, 654, 213 S.E. 2d 262, 274 (1975); *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E. 2d 572, 584 (1971). An exception to this rule is recognized in capital cases so that an appellate court may review the prosecution's argument in spite of counsel's laxity (*e.g.*, *State v. Smith*,

279 N.C. 163, 181 S.E. 2d 458 (1971); *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953). Even so, the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it. *See* 4 Strong's N.C. Index 3d, *Criminal Law* § 102.2, for an extensive compilation of the cases so holding.

We have carefully reviewed the prosecutor's arguments in this case, paying special attention to those instances to which defendant now takes exception. We find no error in these remarks, much less the gross impropriety which must exist to warrant an award of a new trial. *E.g.*, *State v. Locklear*, 291 N.C. 598, 607, 231 S.E. 2d 256, 261-62 (1977).

**[6]** A few examples from the 13 exceptions will suffice to demonstrate the soundness of the prosecutor's arguments. Defendant complains in exception No. 21 that the district attorney violated G.S. 8-54 when, in his argument to the jury, he commented on defendant's failure to testify: "I'll say this to you about the statement that he made to Devine, he didn't get back on the stand to deny it, did he? . . . . If Gary Watkins was telling it wrong, why didn't he get up there and say, 'You are lying Gary.' He didn't do that." This exception is answered by the simple observation that the district attorney was inquiring why defendant did not get *back* "up there" on the stand. Defendant had already chosen to avail himself of G.S. 8-54, allowing a defendant to testify in his own behalf, when State's witness Watkins was called on rebuttal. Once a defendant testifies, therefore, he assumes the status of any other witness and is subject to impeachment by the questions and arguments of opposing counsel. *State v. Noell*, 284 N.C. 670, 695, 202 S.E. 2d 750, 766 (1974); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). These arguments may include comments on the witness's failure to explain or deny incriminating evidence for, if an innocent explanation exists or a denial can properly be made, the witness may reasonably be expected to provide it.

**[7]** The argument challenged by defendant's exception No. 27 summarized defendant's extensive criminal past. The district attorney reminded the jury that defendant had admitted dealing in a variety of drugs, committing fifty breaking and enterings in

South Carolina, and being convicted of breaking and entering in Germany. Defendant contends that the sole purpose of this argument was to appeal unfairly to the passion of the jury.

The credibility of defendant's disavowal of his confession was a crucial decision for the jury in this case. Prior acts of misconduct including criminal convictions may be introduced in evidence to impeach the credibility of a defendant. *E.g., State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972); 1 Stansbury's N.C. Evidence § 112 (Brandis rev. 1973). Since the evidence was properly admitted, the prosecutor was entitled to argue the full force of that evidence to the jury. Manifestly, the purpose of this argument was the same purpose for which the evidence was admitted—to discredit defendant in the eyes of the jury so that they would not believe his sworn testimony repudiating his pretrial confession. Notwithstanding, the district attorney never traveled outside the record, argued facts not in evidence, or placed his personal beliefs before the jury with these arguments. The exceptions, upon which defendant bases his assignment No. 12, are without merit.

**[8]** In assignment of error No. 13 defendant correctly argues that during his summary of the evidence and contentions of the parties the trial judge misstated one detail of defendant's testimony. The judge told the jury that defendant contended he had never been to Lake Twitty and did not know that there was a chain across the road leading to the dam. On the contrary, defendant testified on cross-examination that he had once driven near the lake and had pulled up in front of the chain. However, defendant did not bring this misstatement to the judge's attention while there was still time to correct the error before the verdict. As with jury arguments, an error by the judge in recapitulating the evidence or stating the contentions of the parties must ordinarily be brought to the judge's attention in apt time for correction in order for an objection to the error to be preserved on appeal. More than seventy decisions nf this Court are listed in 4 Strong's N.C. Index 3d, *Criminal Law* § 163 at 837, n. 27 in support of this proposition.

It is only where the judge erroneously instructs the jury on a *material fact not in evidence*, that the error will be held so prejudicial as to require a new trial notwithstanding defense counsel's failure to make timely objection. *State v. McCoy*, 236 N.C. 121, 71

S.E. 2d 921 (1952). Clearly, defendant's prior knowledge of the existence of a chain at Lake Twitty was not a material fact, and misstating the evidence in this regard could not have had any significant effect on the verdict. It is incumbent upon an appellant not only to show error but to show prejudicial error. *E.g., State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930). This assignment is overruled.

**[9]** Defendant's assignment No. 19 addresses the trial judge's failure to instruct the jury that it could return only verdicts of first-degree murder or not guilty, thereby eliminating the possibility of a verdict of second degree murder or manslaughter. All the evidence adduced concerning the undoubted death of Jud Parker tends to show that he was killed by an attacker who had been waiting to rob him when he returned home. Parker's assailant, therefore, is guilty of murder "committed in [an] attempt to perpetrate . . . [a] robbery," that is to say, first-degree murder. G.S. 14-17. If defendant's statement to Sheriff Fowler that he shot Parker in a thwarted attempt to rob him is believed, defendant is guilty of first-degree murder. If his testimony and that of his witness is believed, he was never at the scene of the crime and therefore could not be guilty of any degree of homicide.

In this case there exists not a scintilla of evidence to support even an inference of a degree of homicide less than first-degree murder. "[W]here no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.'" *State v. Spivey*, 151 N.C. 676, 685-86, 65 S.E. 995, 999 (1909). The trial judge properly followed this injunction and instructed the jury that defendant was guilty of first-degree murder or not guilty. Defendant's assignment of error No. 19 is overruled.

**[10]** Defendant finally contends that the trial court erred in its instruction to the jury on the issue of whether defendant *killed* Parker. Defendant argues that an instruction which expressly incorporated the phrase "proximate cause" was required as, for example, "defendant assaulted the deceased with a deadly weapon and thereby inflicted a wound which proximately caused his death." Defendant refers us to *State v. Ramey*, 273 N.C. 325, 160

S.E. 2d 56 (1968) and *State v. Redman*, 217 N.C. 483, 8 S.E. 2d 623 (1940). To like effect are *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971) and *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). We do not, however, understand these cases to create an exception to the general rule that no specific language is required to give a correct instruction, so long as the jury is properly instructed on the law bearing upon each essential element of the offense charged. 4 Strong's N.C. Index 3d, *Criminal Law* § 111.

Unlike the charge before us, in the cases cited above the jury was instructed in language which assumed that the defendant had indeed killed the deceased, thus taking this issue away from the jury's consideration. In the instant case, however, the jury was told, "*if* the defendant, with the use of a .25 caliber pistol, attempted to commit armed robbery of Jud Parker and in so doing and as a part of that transaction, *shot and killed him* . . . then the killing, under those circumstances, would have been murder in the first degree." (Emphasis added.)

From the foregoing instruction the jury must have understood clearly that before they could find defendant guilty of murder they had to find beyond a reasonable doubt that defendant both shot and thereby killed Jud Parker. Since there is not the slightest evidence to suggest that Jud Parker died otherwise than from five .25 caliber gunshot wounds inflicted by his midnight assailant, a more elaborate explanation of proximate cause was unnecessary. Indeed, any such explanation might have been confusing.

We have carefully examined other portions of the judge's charge and we can find therein no error. Defendant's assignments of error Nos. 14, 15, 16, 17, and 18 are overruled.

Defendant's remaining assignments of error involve rulings which, when viewed in context, are so obviously nonprejudicial that it is unnecessary to discuss the question of their dubious merit.

The record reveals no prejudicial error in defendant's conviction of the crime of murder in the first degree for which he was charged. However, for the reasons stated in *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976), the sentence of death imposed upon defendant must be vacated and one of life imprisonment substituted therefor. Accordingly, the sentence of death is

vacated and this case is remanded to the Superior Court of Union County with the following directions: (1) The presiding judge, without requiring the presence of defendant, shall enter a judgment imposing life imprisonment for the murder of which he has been convicted; and (2) in accordance with this judgment, the clerk of the superior court shall issue commitment in substitution for the one heretofore issued. It is further ordered that the clerk furnish to defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the trial and verdict.

Death sentence vacated; life sentence substituted.

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STATE OF NORTH CAROLINA v. BETTY AGNEW

No. 75

(Filed 7 March 1978)

1. **Criminal Law § 104— nonsuit—scintilla of evidence rule**

If more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury.

2. **False Pretense § 1— obtaining property by false pretense—elements**

A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could infer that the defendant (1) obtained value from another without compensation, (2) by a false representation of a subsisting fact, (3) which was calculated and intended to deceive and (4) did in fact deceive.

3. **False Pretense § 3.1— director of county Department of Social Services—insufficiency of evidence of obtaining money by false pretense**

The evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for obtaining money from the county by false pretense either (1) under the theory that defendant falsely represented to the county that she was entitled to reimbursement for the costs of a business trip when, in fact, she had used funds advanced from a Department of Social Services checking account and was seeking to recover the same money twice, since the uncontradicted evidence showed that the Department account was used only for advances which were to be repaid when the employee received reimbursement from the county, and the representation by defendant that she was entitled to reimbursement of the funds spent on the business trip was not false at the time it was made; or (2) under the theory that defendant had received cash from two other women for their por-

tion of the cost of a hotel room and had sought a double recovery when she filed her expense report, since the expense statement disclosed that defendant sought only one-third of the cost of the room in her claim for reimbursement.

**4. False Pretense § 3.1— false representation of future event—no crime before 1975 amendment of statute**

A charge of obtaining money by false pretense prior to the 1975 amendment of G.S. 14-100 which added false representations of future events to the statutory prohibition could not be supported by evidence that defendant received a travel advance from a Department of Social Services checking account, and that defendant did not intend to repay the advance when she filed for reimbursement of her travel expenses by the county and thus by implication falsely represented the use to which the funds would be put when received, since such a representation pertained to a future event and was not a violation of the false pretense statute at the time it was made.

**5. Embezzlement § 6— director of county Department of Social Services —evidence sufficient for the jury**

The evidence was sufficient for the jury in a prosecution of the director of a County Department of Social Services for embezzlement in violation of G.S. 14-90 where it tended to show that defendant received some $1,314.74 in advances from the Department checking account, repayment of which, as of the date of an audit, could not be traced by cash receipts or bank deposit slips; defendant had control of the checking account; $430.75 had been drawn from the account to cover the cost of a business trip to Boston to attend a conference; defendant was reimbursed by the county for the expenses of the trip; five days after notice to the Department of the audit, defendant gave $900.00 in cash to one of her employees and told her that it represented repayment of defendant's advances; when the auditors first requested to see all the cash on the premises, defendant had $314.05 on hand; upon being informed by the auditors that they were unable to account for approximately $100.00 in cash, defendant subsequently showed them $100.00 in cash, telling them it had initially been overlooked; the reimbursement for the Boston trip was not deposited back into the Department checking account until seven months after the date of the check to defendant and over two months after defendant received notice of the audit; after receiving notice of the audit, defendant obtained back-dated checks from two women who shared a hotel room with her in Boston for their portion of the room cost; the auditors discovered a $180.75 disbursement from the Department account for which no corresponding check could be found; check number 459 could not be found in the bank statements and its stub had been marked "void" in the check book; defendant later found check 459, which was made out to a hotel for $180.75, and told the auditors it was used to pay the hotel bill for the Boston trip; and at this time, neither the two back-dated checks from defendant's companions nor defendant's check for her share of the hotel bill had been deposited back in the Department account, since the jury could find from the timing of the payments that defendant converted the funds to her own use and, when the danger of discovery became imminent, sought to return the money to conceal her wrongdoing, and the jury could find from the procurement of the back-dated checks, discrepancies in cash on hand and irregularities in the check book records that defendant had

guilty knowledge and converted or misapplied the funds with a fraudulent intent.

6. **Public Officers § 11— misapplication of county funds—federal aid to the blind funds paid to Department of Social Services**

Federal aid to the blind administrative funds which were paid to a county Department of Social Services were held in trust by the Department for the county and, therefore, could properly be the subject of an indictment under G.S. 14-92 for the willful and corrupt misapplication of county funds.

7. **Public Officers § 11— misapplication of county funds—advances to employee—reckless disregard of purposes for which advances to be used**

The State's evidence was sufficient for the jury in a prosecution of the director of a county Department of Social Services for the willful and corrupt misapplication of county funds where it tended to show that defendant made advances to an employee from funds held to pay the administrative expenses of the aid to the blind program in the county, the employee used the advances to pay her rent and for vacation expenses, and defendant did not ask the employee why she wanted the advances but gave them to her merely because she requested them.

8. **Public Officers § 11— misapplication of county funds—knowledge by supervisory board**

The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys does not excuse or justify the subordinate's unlawful misapplication of the funds.

9. **Criminal Law § 80— entries in records under defendant's control—admissibility against defendant**

Entries in records of a Department of Social Services maintained under the direction of defendant and checking account records controlled solely by defendant were admissible against defendant in her trial for obtaining money by false pretense, embezzlement, and misapplication of county funds.

10. **Criminal Law § 82— no accountant-client privilege in N. C.**

The trial court erred in refusing to require a witness to answer questions for the record when the witness asserted an accountant-client privilege, since North Carolina does not recognize such a privilege. However, such error was not prejudicial to defendant where nothing material would have been shown if the witness would have answered the questions.

11. **Criminal Law § 99.1— comments by court—no expression of opinion**

The trial court's comments did not constitute an expression of opinion but were reasonable efforts to maintain progress and proper decorum in a prolonged and tedious trial.

12. **Criminal Law § 119— requests for instructions—when required to be made**

While the trial judge should not have rejected instructions submitted by defendant shortly before the court was to charge the jury on the ground that they had been tendered too late, since G.S. 1-181 requires only that written requests for special instructions be submitted before the judge begins his

charge, defendant was not prejudiced thereby where the instructions in substance stated all the relevant and legally correct propositions requested by defendant.

Justice EXUM dissenting.

DEFENDANT, on indictments proper in form, was charged with and convicted of obtaining property by false pretense, embezzlement and willful misapplication of funds. We granted the State's petition for discretionary review of the decision of the Court of Appeals, 33 N.C. App. 496, 236 S.E. 2d 287 (1977); (Martin, J., concurred in by Britt and Parker, JJ.), reversing the judgment of *Cowper, J.*, May 1976 Criminal Session BEAUFORT County Superior Court, for failure to grant defendant's motions for nonsuit. This case was docketed and argued during Fall Term 1977 as No. 98.

Defendant here was director of the Beaufort County Department of Social Services. The crimes charged by these indictments concern alleged irregularities surrounding a checking account maintained by this Department.

The State's evidence tended to show the following:

Defendant had sole control of this checking account which contained funds received from the North Carolina Blind Commission for use in administering the Department's aid to the blind program, money earned by work release prisoners for distribution to their families, funds received from other counties for care of foster children being housed in Beaufort County, donations, court ordered support payments, and refunds from welfare clients who had been overpaid by the county. The so-called "blind money" was received by the Department of Social Services through 1971, but thereafter, pursuant to an opinion issued by the Attorney General of North Carolina, these funds were delivered to the county to be deposited directly into the county treasury.

On 15 July 1975 the Department of Social Services received a letter from the Board of County Commissioners stating that the county had contracted for an audit of all its departments for the fiscal year ending 30 June 1975. This audit subsequently revealed that as of 18 August 1975 defendant had received $1,314.75 in advances from the checking account, repayment of which could not be independently traced through cash receipt books or bank

deposit slips. It further appeared that $430.75 had been drawn from the account to cover the costs of a business trip to Boston made by defendant in October of 1974 to attend a conference on child abuse. Defendant filed for reimbursement from the county for the costs of this trip and on 28 February 1975 she was issued a check which included $434.63 for these expenses.

It was also disclosed that defendant had expended $1,128.94 from the account for items such as food for staff parties, two coffee pots for the office, magazine subscriptions, gifts and flowers for county commissioners and other officials and advances to Department employees for vacation and living expenses.

After receiving notice of the impending audit, on 20 July 1975 defendant called one of her employees, Sue Modlin, into her office and handed her $900.00 in cash, saying it represented repayment of defendant's advances. Defendant then directed her to find some client refunds to be repaid to the county accountant's office for that amount of money and use the cash to pay them, which was done.

Defendant's evidence tended to show that:

This account was already in existence in 1968 when defendant became director of the Department. She maintained that the blind money was discretionary and could be used for any purpose in the administration of the Department of Social Services. Other than the blind money and donations for various specific functions, this account was used as a pass-through account to channel the work release, foster care, support, and client refund moneys delivered to the Department to the proper recipients. The discretionary funds were used to pay office expenses and make advances to Department employees when their travel expense reimbursement checks were delayed. Defendant testified that the Board of Social Services was aware of and approved the practice of making travel advances. Defendant further stated that advances from the checking account were often repaid in cash and used for other Department expenditures without being repaid into the account.

Additional facts relevant to the decision are related in the opinion.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General William F. Briley for the State.*

*Wilkinson and Vosburgh, by John A. Wilkinson for defendant-appellee.*

COPELAND, Justice.

After careful consideration of the evidence in this case, we have determined that defendant's motion for judgment of nonsuit as to the charge of obtaining property by false pretense should have been allowed; however, the trial court's denial of the motions for nonsuit of the charges of embezzlement and willful misapplication of funds was proper. We have examined defendant's assignments of error concerning the conduct of the trial and found them to be without merit. The decision of the Court of Appeals, consequently, is affirmed in part and reversed in part.

**[1]** In ruling on a motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). The court in considering such a motion is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). Moreover, all evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971), and any contradictions or discrepancies therein must be resolved in the State's favor. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). Defendant's evidence which tends to rebut the inference of guilt may be considered when it is not inconsistent with the State's evidence. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971). Nonetheless, if more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury. *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955).

**[2]** A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained value from another without compensation, (2) by a false representation of a subsisting fact, (3) which was calculated and intended to deceive and (4) did in fact

deceive. *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947). We note that G.S. 14-100, which defines this crime, was amended subsequent to the date of the acts charged here so that false representations of future fulfillments or events are now also prohibited.

**[3]** The State's theory, as pointed out by the Court of Appeals, appears to be that defendant falsely represented to the county that she had expended her personal funds for the costs of the Boston trip and was entitled to reimbursement, when in fact she had used funds advanced from the Department of Social Services account to cover these expenses and thus was seeking to recover the same money twice. An examination of all the evidence presented rebuts this, however, since it was uncontradicted that the Department checking account was not responsible for travel expenses, but was used only for occasional advances which were to be repaid when the individual employee received his or her reimbursement check from the county. The representation by defendant that she was entitled to reimbursement of the funds spent on the Boston trip, therefore, was not false at the time it was made and this essential element of the crime is not supported by any evidence in the record.

The State further argues that, because defendant had shared a hotel room with two other women attending the conference and had received cash from them in payment of their portion of its cost, she had actually claimed for a double recovery when she filed her expense report. This too is not supported by the evidence, since an examination of the expense statement submitted by defendant to the county discloses that only one-third of the total cost of the room was included in her claim for reimbursement.

**[4]** The evidence also showed that defendant, after receiving notice of the impending audit, obtained back-dated checks from the women who shared the room with her in Boston and that the reimbursement received by defendant from the county was not deposited back into the Department checking account until over two months after she was notified of the audit. This could support a reasonable inference that when defendant filed for reimbursement she never intended to return the money to the Department account and thus by implication falsely represented the use to which the funds would be put when they were received. Such a

representation, however, would pertain to a future fulfillment or event, rather than a past or subsisting fact. The amendment to G.S. 14-100 which added false representations of future events to the statutory prohibition became effective 1 October 1975, some seven months after the reimbursement check was issued by the county; therefore, the representation by defendant here was not a violation of the false pretenses statute at the time it was made, since prior to the enactment of this amendment promises of future action could not be the basis of a prosecution under this statute. *State v. Hargett*, 259 N.C. 496, 130 S.E. 2d 865 (1963). Consequently, it is our conclusion that defendant's motion for judgment of nonsuit as to the charge of obtaining property by false pretenses should have been granted.

**[5]** The State next contends that there was sufficient evidence to go to the jury on the charge of embezzlement. The crime of embezzlement was unknown to the common law and is defined solely by statute. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967). Under G.S. 14-90, "If any person exercising a public trust or holding a public office, or any . . . trustee . . . or any other fiduciary . . . or any agent, . . . except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or . . . check . . . belonging to any other person . . . or organization which shall have come into his possession or under his care . . ." he shall be guilty of the felony of embezzlement.

In the instant case, the State's evidence tended to show that: Defendant had received some $1,314.74 in advances from the Department checking account, repayment of which, as of the date of the audit, could not be traced by cash receipts or bank deposit slips. Five days after the Department was notified of the audit, defendant gave $900.00 in cash to one of her employees and told her that it represented repayment of defendant's advances. When the auditors first requested to see all the cash on the premises, defendant had $314.05 on hand. Upon being informed by the auditors that they were unable to account for approximately $100.00, defendant subsequently showed them cash in the amount of $100.00, telling them it had initially been overlooked. The reim-

bursement for the Boston trip received by defendant from the county was not deposited back into the Department checking account until seven months after the date of the check to defendant and over two months after defendant received notice of the impending audit. When the auditors first examined the Department's checking account records, they discovered a $180.75 disbursement from the account for which no corresponding check could be found. Check number 459 could not be found in the bank statements and its stub in the check book had been marked "Void." Defendant later found check number 459, which was made out to Statler-Hilton in the amount of $180.75, and presented it to the auditors, telling them it was used to pay the hotel bill for the Boston conference. At this time, neither the two back-dated checks from defendant's companions on the trip nor defendant's check for her share of the hotel bill had been deposited back into the Department account. At some point during the course of the audit, the control card on which defendant recorded her personal advances from the account was altered by the addition of an extra column, apparently for approvals, in which appeared the initials of the chairman of the Board of County Commissioners.

The Court of Appeals held that there could have been no fraudulent conversion here because the allegedly missing funds were on hand for disbursement at the proper time. It is no defense to a prosecution for embezzlement, however, that the defendant intended to return the property obtained or was able and willing to do so at a later date. *State v. Howard*, 222 N.C. 291, 22 S.E. 2d 917 (1942); *State v. Summers*, 141 N.C. 841, 53 S.E. 856 (1906). Moreover, the element of fraudulent intent necessary to sustain an embezzlement conviction may be established by evidence of facts and circumstances from which it reasonably may be inferred, as well as by direct evidence. *State v. McLean*, 209 N.C. 38, 182 S.E. 700 (1935).

Defendant sought to show at trial that she had repeatedly requested bookkeeping help in her Department from the Board of County Commissioners. Yet, defendant testified that the number of budgeted positions in the county Department of Social Services had increased from 19 at the time she became director in 1968 to 62 at the time of trial. While the lack of a competent bookkeeper might arguably tend to negative fraudulent intent, this would be rebutted by the inference that someone competent to handle the

ten to fifteen minutes' work per week this account required could have been found among these additional employees.

Considering the evidence set out above in the light most favorable to the State, we conclude that the jury reasonably could have found from the timing of the payments of the various amounts by defendant that she had converted the funds to her own use and, when the danger of discovery became imminent, sought to return the money to conceal her wrongdoing. Further, the procurement of the back-dated checks, together with discrepancies in the amount of cash on hand and irregularities in the check book records, would tend to show guilty knowledge on the part of defendant and allow the jury to infer that the funds had been converted or misapplied with a fraudulent intent. We hold, therefore, that the motion for nonsuit of the charge of embezzlement was properly denied by the trial court.

**[6]** Defendant was also charged, under G.S. 14-92, with willfully and corruptly using and misapplying $1,128.94 for purposes other than those for which it was held. It is her contention that the motion for nonsuit of this indictment should have been granted because the State failed to show that the moneys which she allegedly misapplied were funds belonging to or held in trust for the county. It was further held by the Court of Appeals that the State offered no proof that the alleged misapplication was willful or corrupt.

Defendant argues that the blind funds in the Department checking account were not county money because through 1971 they had been delivered to the county Department of Social Services, rather than the county treasury. The State's evidence shows that this money consisted of federal funds distributed by the North Carolina State Commission for the Blind to help defray the costs of administering the aid to the blind programs in the county. The practice of disbursing this money to the county Department of Social Services office rather than to the county treasury was based on a 1948 opinion of the Attorney General of North Carolina. In 1971, however, the Attorney General issued an opinion, 41 Op. Att. Gen. 329 (1971), which concluded that these funds should be made payable to the county treasuries and not to the county Boards or Departments of Social Servies. It is defendant's position that all such funds received prior to this change in procedure were not moneys belonging to or held in trust for the

county and, therefore, they could not be the subject of an indictment under G.S. 14-92.

An Opinion, of the Attorney General, however, is merely advisory. *In re Assessment of Additional Taxes against Virginia-Carolina Chemical Corporation,* 248 N.C. 531, 103 S.E. 2d 823 (1958). If, under the law, the funds were properly owed to the county, the payment to the Department of Social Services would be in trust for the county, presumably to be used by the Department for administration of the aid to the blind program. Since the 1971 Attorney General's opinion appears to be correct in finding that the funds were earned on county time by county employees and therefore were moneys "belonging to the county" under G.S. 155-7, and further because defendant does not assert that this finding was erroneous, we adopt its conclusion as our own. Thus we find that the federal aid to the blind administrative funds were indeed moneys owed to the county treasury and were to be held in trust for the county upon their receipt by the county Department of Social Services.

**[7]** We next consider the determination of the Court of Appeals that the State here failed to show any willful or corrupt misapplication of these county funds. Since the State need not prove embezzlement or misapplication of the entire sum alleged in the indictment, *State v. Ward,* 222 N.C. 316, 22 S.E. 2d 922 (1942), we need review only one segment of the State's evidence to establish the requisite elements of the crime charged. There was testimony tending to show that one of the Department employees, Sue Modlin, was advanced funds by defendant from the Department checking account on two specific occasions for purposes which were entirely unrelated to her employment. The first of these advances was in the amount of $75.00 and was used by Mrs. Modlin to pay her rent. The second was for $100.00, which was used for vacation expenses. Defendant testified that all such advances came from the blind money and that she regarded the uses to which these funds were put as entirely within her discretion. Defendant further stated that she did not ask Mrs. Modlin what she wanted the advances for, but gave them to her merely because she requested them.

The words "willfully" and "corruption", as they relate to misapplication of funds under G.S. 14-92, have been defined as "[D]one with an unlawful intent," and "The act of an official or

fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." *State v. Shipman*, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932). Although these advances appear to have been repaid to the account, it is clear that their disbursement for such purely personal uses had nothing to do with defraying the administrative expenses of the aid to the blind program in Beaufort County. Such blatant misapplication of these funds, coupled with defendant's apparent reckless disregard for the purposes for which they were to be used, lead us to conclude that the jury could reasonably have inferred the necessary elements of willfulness and corruption from the facts presented.

Typical of the items purchased from this account under alleged misapplications were a gift for a State Department of Social Services official, pumpkin pies for the county Department of Social Services staff at Thanksgiving, $50.00 worth of Christmas decorations for the office, and food for the staff Christmas party.

**[8]** Defendant has also attempted to show that many of these items were approved by the county Board of Social Services and thus were not misapplications of Department funds. The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys, however, does not excuse or justify one who knowingly misapplies such funds unlawfully. *State v. Linden*, 171 Wash. 92, 17 P. 2d 635 (1932); *Glasheen v. State*, 188 Wis. 268, 205 N.W. 820 (1925). For the reasons set out above, defendant's contention that this charge should have been dismissed is without merit.

Defendant assigns many errors concerning the admission and exclusion of evidence by the trial court. Chief among these was the admission at the conclusion of the State's case, of checks, check stubs, audit reports, working papers, client refund receipts ledgers and other documents. Defendant argues that many of these exhibits contained irrelevant and incompetent material and that they were not properly authenticated.

**[9]** We have carefully examined these documents, however, and find nothing substantially prejudicial among the allegedly irrelevant portions thereof. Moreover, a review of the record discloses that each of the challenged exhibits had been authenticated before its introduction. The majority of these documents were ob-

tained from defendant by Claude Green, an investigator with the North Carolina Department of Justice, and consisted of records kept in the county Department of Social Services office under defendant's supervision. Entries in corporate books or records are admissible in evidence against the officers of the corporation in a criminal prosecution if there is evidence tending to show that some actual connection exists between the officers and the contents other than their mere status as corporate officers. *State v. Franks*, 262 N.C. 94, 136 S.E. 2d 623 (1964). This principle, logically extended to the case *sub judice*, clearly supports the admission of the documents Mr. Green obtained from defendant, since the county Department's books were maintained under the direction of defendant and the checking account records were controlled solely by her.

The remainder of the exhibits were properly identified by persons who either prepared them or received them from defendant and turned them over to Mr. Green. Defendant's assignment of error regarding the admission of the State's documentary evidence, therefore, is overruled.

During the cross-examination of the accountant who conducted the county audit, the trial court sustained objections to questions concerning whether the witness was an officer of the Washington Daily News Corporation and whether his firm did the accounting work for the Washington Daily News. Counsel for defendant then sought to have the answers to these questions placed in the record, at which time the witness asserted an accountant-client privilege. The court, on the basis of this claim, refused to order the witness to answer for the record. Defendant argues that this was an undue restriction of cross-examination and was seriously prejudicial.

**[10]** We agree that the court's refusal to require the witness to answer for the record was error, since North Carolina recognizes no accountant-client privilege. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 54, p. 160. Nonetheless, even if the witness had answered these questions, nothing material would have been shown. Defendant maintains that she would have been able to demonstrate the relevance of this evidence if she had been allowed to proceed. We note, however, that the court did not prohibit this entire line of questioning. Counsel for defendant merely failed to pursue it further after he was initially rebuffed. Under

these circumstances, we cannot speculate as to what questions defendant might have propounded to this witness. Since defendant has failed to demonstrate prejudice, this assignment of error is without merit.

New trial will not be awarded absent a showing of error so substantial that a different result likely would have ensued. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973). We have carefully reviewed defendant's remaining assignments of error concerning the trial court's evidentiary rulings and found none so prejudicial as to warrant new trial; therefore, they are overruled.

**[11]** Defendant next contends that the trial judge, by various comments in the presence of the jury, impermissibly expressed an opinion prejudicial to her in violation of G.S. 1-180. It is the duty of the trial court to supervise and control the course of the trial, including the examination and cross-examination of witnesses, so as to insure justice for all parties. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). After examining the statements challenged by defendant as violative of G.S. 1-180, we conclude that they were reasonable efforts on the part of the trial judge to maintain progress and proper decorum in what was evidently a prolonged and tedious trial. This assignment is likewise without merit and overruled.

**[12]** Defendant's final group of assignments concerns the trial court's charge to the jury. She contends that the trial judge erred in failing to give certain specific instructions requested by her. She further argues that the court did not adequately review the evidence or relate the law to the facts. The requested instructions were submitted to the court shortly before it was to charge the jury, at which time the judge stated that he would not read them to the jury because they had been tendered too late. This was not a proper basis upon which to reject the instructions, since G.S. 1-181 requires only that written requests for special instructions be submitted before the judge begins his charge.

A defendant is not entitled to have his requested instructions given verbatim, so long as they are given in substance. *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968). Moreover, the court may totally refuse instructions based on an erroneous statement of the law, *State v. Smith*, 237 N.C. 1, 74 S.E. 2d 291 (1953), or which concern issues irrelevant to the case. *State v. Smith*, 202

N.C. 581, 163 S.E. 554 (1932). We find in reviewing the record that in substance the court's instructions stated all the relevant and legally correct propositions requested by defendant. In addition, the court's review of the evidence, while concise, was accurate and sufficient to permit the jury to comprehend the issues they were to decide. This group of assignments, consequently, is overruled.

In summary, we have determined that there was insufficient evidence to go to the jury on the charge of obtaining property by false pretenses; however, the motions for nonsuit of the charges of embezzlement and willful misapplication of funds were properly denied. Further, the remaining assignments of error here reveal nothing of sufficient prejudice to merit a new trial. The decision of the Court of Appeals holding that the charge of obtaining property by false pretense should have been dismissed is affirmed. The holding that the embezzlement and willful misapplication of funds charges should have been dismissed is reversed.

Affirmed in part and reversed in part.

Justice EXUM dissenting.

While there may be statements in earlier cases that "more than a scintilla of evidence" is enough in a criminal case to survive a motion for nonsuit, *see State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955), relied on by the majority for this test, our more recent cases have correctly stated that the true test is whether there is "substantial evidence—direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the accused committed it." *State v. Stewart*, 292 N.C. 219, 224, 232 S.E. 2d 443, 447 (1977); *accord*, *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1976); *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976); compare the citations supporting the "more than scintilla" test with those supporting the "substantial evidence test" in Strong's N.C. Index 3d, Criminal Law § 106, p. 548, nn. 61-63. In its consideration of this case the Court of Appeals correctly applied the substantial evidence test, relying on our decision in *State v. Evans*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971).

Applying the substantial evidence test here, which I believe to be the proper one, I feel defendant's motions for nonsuit as to

all charges should have been allowed. There is substantial evidence here of inadequate and perhaps careless bookkeeping in the embezzlement case and poor judgment in the misapplication of funds case by a harried county employee. There is no substantial evidence of criminal or corrupt conduct on her part. I vote to affirm the well-considered decision of the Court of Appeals.

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STATE OF NORTH CAROLINA v. JACK HARVEY DAVIS

No. 13

(Filed 7 March 1978)

1. **Criminal Law § 87.2— direct examination of robbery victim—no leading question**

The district attorney's question directed to a robbery victim which directed her to "relate all of the events as you best recall them" was not a leading question, since a leading question is one which suggests the answer desired and is often a question which may be answered yes or no.

2. **Criminal Law § 99.2— question by trial court—no expression of opinion**

The trial court did not express an opinion in violation of G.S. 1-180 when a witness testified that her attention was attracted to defendant and his companions as they sat in the restaurant in which she was employed by "their talking dirty and talking loud," and the trial judge asked, "They were what?" since the judge apparently did not hear the witness and was seeking to clarify her testimony for the enlightenment of both the court and the jury, and nothing in the question tended to indicate to the jury that the court had an opinion as to the guilt or innocence of defendant.

3. **Criminal Law § 88.1— cross-examination—defendant's right not improperly limited**

The trial court did not improperly limit defendant's right of cross-examination by refusing to permit defense counsel to reserve the right to recall a certain witness, by admonishing defense counsel to move on in his cross-examination of a witness, or by sustaining objections to defense counsel's questions which were repetitious and argumentative in nature.

4. **Criminal Law § 116— charge on defendant's failure to testify—instruction given at defense counsel's request**

While it is the better practice for the trial court not to instruct on defendant's failure to testify, it is entirely proper to give the instruction upon defendant's request, and defendant is not prejudiced where the jury is made aware that the instruction is being given at the request of defense counsel.

**5. Criminal Law § 66.9— photographic identification of defendant—no suggestiveness of procedure**

There was no inherent suggestiveness in a pretrial photographic procedure where only six of the fourteen photographs used depicted men with grayish hair similar to defendant's and only the two photographs of defendant did not show a police department name plate, since the narrowing of the witness's choice down to the six photographs in no way indicated to the witness that she should select defendant's photograph from the remaining six, and the absence of a police department name plate in defendant's photograph was not so distinctive a feature as to suggest to the witness that she should select it as depicting the robber.

**6. Criminal Law § 66.1— identification of defendant—competency of 13-year-old**

The trial court did not abuse his discretion in finding that a 13-year-old who possessed keen intelligence was competent to make an in-court identification of defendant as the robber.

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

A witness was properly allowed to make an in-court identification of defendant where the evidence tended to show that the witness observed defendant at the crime scene for 30 or 40 minutes, though defendant had on a ski mask; the witness subsequently observed defendant go out into a garage where he lifted the ski mask from his face; the garage was lighted and the witness was seated a short distance from the garage; and the witness had keen eyesight and intelligence.

**8. Criminal Law § 66.12— identification of defendant—courtroom confrontation**

A witness's subsequent absolute confirmation of her earlier photographic identification of defendant was not tainted because it occurred while defendant was seated with two or three lawyers at a table in the courtroom during the preliminary hearing, since no violation of due process results when there are "unrigged" courtroom confrontations which amount to a single exhibition of an accused.

APPEAL by defendant from *McConnell, J.*, 18 July 1977, Criminal Session of STANLY Superior Court.

Defendant was charged in separate bills of indictment as follows: Indictment No. 77CR3735, armed robbery of Alvin Blackmon; Indictment No. 77CR3736, armed robbery of Jeannette Klein; Indictment No. 77CR3737, armed robbery of Mrs. Lois Cohen; and Indictment No. 77CR3894, armed robbery of Julius Cohen. The cases were joined for trial on defendant's motion, and defendant entered pleas of not guilty as to each charge.

The State's evidence tended to show that Mr. and Mrs. Julius Cohen and Mrs. Cohen's mother, Mrs. Jeannette Klein, returned to the Cohen home in Norwood, North Carolina, at about 9:30 p.m. on 27 March 1977 after attending a play at South Stanly High School. The Cohen children and some of their friends had remained in the Cohen home. As they entered the driveway, Mr. Cohen observed a woman crossing his yard. He left the automobile and called to her, and at that moment a man wearing a ski mask and armed with a pistol ordered Mr. Cohen and the other occupants of the automobile into the house. There he directed Mr. and Mrs. Cohen and Mrs. Klein to place their pocketbooks and jewelry in the center of the floor. Mrs. Cohen, upon the gunman's order, pulled the telephone out of the wall and brought him a paper bag. The cash and jewelry consisting of about $500 belonging to Mr. Cohen, approximately $200 to $300 belonging to Mrs. Cohen and approximately $100 belonging to Mrs. Klein together with assorted jewelry belonging to the parties was placed in the paper bag.

Alvin Blackmon, a teenaged friend of the Cohens, came into the house, and the robber took $.50 from him. The masked man at all times kept the pistol in view and indicated that he would kill if his orders were disobeyed. After putting the cash and jewelry into the bag, he ordered Mr. Cohen to accompany him to the yard where he told Mr. Cohen he was going to remove the mask and that he was not to turn around. The robber inquired on several occasions about a safe located in the residence and was told that there was no safe there.

Wendy Caudle, a 13-year-old babysitter, was seated on a couch in the den of the Cohen home. She observed the robber when he lifted his ski mask as he stood near the garage, a distance of 20 to 25 feet from where she was seated. She gave the police an accurate description of this man two days later. Approximately three weeks later, she picked defendant's picture from a group of 14 photographs and thereafter positively identified him at a preliminary hearing. At trial, she also unequivocally identified defendant as the robber.

Martha Swain, who had been charged as an accomplice, testified for the State and said that she, Tom Ashley, a woman named Gallimore and defendant had driven from High Point, North Carolina, to Norwood for the purpose of robbing a safe in

the Cohen home. They ate at a local restaurant in the late afternoon, and she and Ashley, without success, tried to prevail upon defendant to abandon the robbery plans. They proceeded to a point near the Cohen house where defendant gave her a mask and a shotgun with instructions to not let anyone come into the house. About that time, the Cohen automobile came into the driveway and she ran across the driveway. She discovered that Ashley and Gallimore had left. She then ran by a school house, stopped to put the shotgun in a trash can and threw it into some bushes. She was taken into custody by the police after she had walked three or four blocks. She made a statement to the police officers on that night. Her testimony was partially corroborated by a witness who worked in a local restaurant and by police officers.

After defendant had entered the Cohen residence, a young girl by the name of Bebe Crump who was in the back bedroom with one of the Cohen children called the police. Defendant fled when he observed a police car entering the Cohen driveway. A paper bag containing two sets of keys and a diamond ring belonging to the Cohens was found about a mile from the Cohen residence.

Defendant offered no evidence.

The jury returned verdicts of guilty on each of the charges, and the trial judge entered the following judgments: In case no. 77CRS3894, defendant was sentenced to life imprisonment; in case no. 77CRS3737, defendant was sentenced to imprisonment for a period of 60 years to begin at the expiration of the sentence in case no. 77CRS3894; case nos. 77CRS3735 and 77CRS3736 were consolidated for judgment and defendant was sentenced to a prison term of 60 years to run concurrently with the sentence imposed in case no. 77CRS3737.

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

*William C. Tucker for defendant appellant.*

BRANCH, Justice.

**[1]** Defendant contends that the trial judge erred by permitting the district attorney to ask leading questions.

During the direct examination of the witness Lois Cohen, the district attorney directed her to "relate all of the events as you best recall them." The trial judge overruled defendant's objection, and Mrs. Cohen related, "We saw a woman in the driveway and I stopped the car. I said, 'Julius, I saw . . . .' " Defendant objected and the trial judge permitted the witness to say that she had seen the woman that afternoon. Later in her testimony, Mrs. Cohen inquired of Judge McConnell if she could say what she told her seven-year-old son Robbie. The court allowed her to testify that she told Robbie that, "This was serious, to take my hand and go into the house like the man said."

A leading question is one which suggests the answer desired and is often a question which may be answered by the words "Yes" or "No." *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). Whether counsel may ask leading questions is a matter addressed to the sound discretion of the trial judge and in absence of abuse of that discretion his ruling will not be disturbed on appeal. *State v. Greene, supra; State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5 (1971). Obviously, the questions here challenged were not leading questions. The witness simply related what she saw and said at the time the crime was in progress. This contention is feckless. Equally without merit is defendant's argument under his assignment of error number 5 that the above questions resulted in prejudicial error to him because they were so overbroad and indefinite as to time that they failed to indicate the area of inquiry to which the questions were addressed.

**[2]** Defendant argues that the trial judge violated the provisions of G.S. 1-180 during the course of the trial. This assignment of error is based on exception number 59 which points to a question apparently directed to State's witness Donna Russell by Judge McConnell. The witness had testified that her attention was attracted to defendant and his companions as they sat in the restaurant in which she was employed by "their talking dirty and talking loud." The trial judge asked, "They were what?"

It is well settled that the trial judge must abstain from any language or conduct which tends to express an opinion as to defendant's guilt or innocence or which tends to discredit or prejudice the accused with the jury. G.S. 1-180; *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966).

When the trial judge questions a witness to clarify his testimony or to promote an understanding of the case, such questioning does not amount to an expression of the trial judge's opinion as to defendant's guilt or innocence. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969). Apparently, the trial judge in the case *sub judice* did not hear the witness and was seeking to clarify the testimony of the witness for the enlightenment of both the court and the jury. Nothing in the question tended to indicate to the jury that the court had an opinion as to the guilt or innocence of defendant. This assignment of error is overruled.

**[3]** By his assignment of error number 11, defendant contends that the trial judge improperly limited his right of cross examination.

A defendant is entitled to a full and fair cross examination upon the subject of the witness's direct examination, and this right is guaranteed by our State and federal constitutions. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972); *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969). On the other hand, it is the duty of the trial judge to expedite the trial of cases and in performing this duty he may limit repetitious and irrelevant cross examination. Court proceedings should not be hurried in such a manner as to deprive a litigant of his rights, but the court should see that the public time is not uselessly consumed. *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951). The limits of legitimate cross examination are largely within the discretion of the trial judge, and his ruling thereon will not be held error in the absence of a showing that the verdict was improperly influenced thereby. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970).

The only exception specifically argued by defendant under this assignment of error is exception number 41 relating to the trial judge's refusal to permit defense counsel to reserve the right to recall the witness Julius Cohen. We note that exception 41 was not assigned as a basis for assignment of error number 11 and therefore is not properly before us for consideration. Rule 10A, Rules of Appellate Procedure. In any event, whether a witness may be recalled is in the sound discretion of the trial judge. *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817 (1954). Our

further examination of this record discloses that defendant was apparently moving very slowly in his cross examination of the witness Julius Cohen. The trial judge did on several occasions admonish the counsel for defendant to move on. However, it appears that the rulings challenged by the exceptions upon which this assignment of error is based were rulings which sustained objections to questions which were repetitious and argumentative in nature.

Defense counsel had fully and ably cross-examined the witness Cohen before these rulings were made and before defense counsel stated that he had no further questions of the witness but would reserve the right to recall him. Under these circumstances, we hold that the trial judge did not improperly limit defendant's right of cross-examination.

**[4]** Defendant also assigns as error the court's instruction on defendant's failure to testify.

In this connection, Judge McConnell instructed the jury:

> The defendant's attorney asked me to charge you as to the right of the defendant to testify or not, as he chooses. He did not testify, and the law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way in this case.

Defendant contends that by stating that defendant's attorney requested the charge, the trial judge negated the effect of the instruction. We do not agree. While it is the better practice for the court not to instruct on defendant's failure to testify, *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976), it is entirely proper to give the instruction upon defendant's request. We are unable to discern prejudicial error because the jury was made aware that the instruction was given at the request of defense counsel.

Defendant's final assignment of error is that the trial court erred by allowing the in-court identification of defendant by the State's witness, Wendy Caudle. He contends that the circumstances under which the witness observed the armed robber on 27 May 1977 combine with the procedure used in a pretrial

photographic lineup to give rise to a substantial likelihood of misidentification.

Following an extensive *voir dire* hearing conducted to determine the admissibility of Wendy Caudle's in-court identification of defendant, Judge McConnell found, *inter alia*:

> . . . that on or about the 27th day of May, 1977 . . . the garage or carport was lighted; that the den was lighted; that Wendy Caudle was seated some short distance from the door to the garage or carport, and that she saw the masked man go out into the garage and just at a point adjacent to the garage and lift his mask, ski mask, from his face, and that she saw him and later described him . . . as being a man 6 feet tall, weighing approximately 180 pounds, with a long pointed nose . . . that on the 17th day of June, she was shown by Officer Farmer and Mr. Burpeau of the State Bureau of Investigation, 14 photographs of white males . . . that she pointed out 2 photographs of the defendant, Davis, and said that they looked like the man and that she could identify him if she could see him in person; that at a preliminary hearing held in connection with this case, she saw the defendant and pointed him out as being the person who was the masked gunman at the Cohen house . . . that Wendy Caudle is a 13-year-old young lady going into the 8th grade; she is intelligent, does not wear glasses, has keen eyesight and keen intelligence . . . and that she was some 20 feet from where she said she saw the defendant; that the defendant was in the residence of the Cohens for some 30 to 40 minutes, at which time the witness, Wendy Caudle, had an opportunity to observe his physique and other features even though he had on a ski mask. . . .

The court concluded that:

> . . . there was ample opportunity for Wendy Caudle to observe the defendant, Davis, on the night of the 27th day of May, 1977, at the Cohen home. Further, that there is nothing to indicate any suggestion by any person which would color the identification of the defendant by the said Wendy Caudle; that there were no illegal identification procedures or lineups involving the defendant; that the first time she saw the defendant in person after May 27 was at the time of the preliminary hearing, at which time she pointed him out as

the person she had seen at the Cohen home; that the in-court identification of the defendant is of independent origin, based solely on what the witness, Wendy Caudle, saw at the time of the robbery at the Cohen home on May 27 and does not result from any out of court confrontation or from any photograph or from any pretrial identification procedures suggestive or conducive to mistaken identity, and that there is nothing in the process of identification which would deny the defendant the due process of law.

Upon reviewing the evidence presented on *voir dire*, by both the State and defendant, we find that the court's findings are supported by competent evidence and they are, therefore, binding upon us. *State v. Harris*, 279 N.C. 177, 181 S.E. 2d 420 (1971). Nevertheless, the court's conclusions of law are reviewable by us. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968).

**[5]** We first turn to the possibility of any inherent suggestiveness in the pretrial photographic procedures. Here defendant contends that the procedure was impermissibly suggestive in that only six of the fourteen photographs used depicted men with grayish hair similar to defendant's and in that only the two photographs of defendant did not show a police department name plate.

Even granting that the photographs used immediately narrowed the witness's choice down to the six photographs of men with grayish hair, we do not perceive how such a limitation in any way indicated to Wendy Caudle that she should select defendant's photograph from the remaining six. The absence of a police department name plate in defendant's photograph is not so distinctive a feature as to suggest to Wendy that she should select it as depicting the armed robber. In fact, more distinctive features such as depicting defendant in different clothing, *U.S. v. Butler*, 405 F. 2d 395 (4th Cir. 1968), *cert. denied*, 396 U.S. 853 (1969), and using a color photograph of a defendant with other black and white photographs, *U.S. v. Lincoln*, 494 F. 2d 833 (9th Cir. 1974), have been held not impermissibly suggestive. Moreover, there appears to be a developing trend of authority which holds that in order to be deemed impermissibly suggestive, the feature which distinguishes a defendant's photograph from the others used must somehow point to the defendant as the perpetrator of, or otherwise connect him with, the crime. See, Annot. 39 A.L.R. 3d 1000, Section 3(b) (1971). We find no evidence

that the procedures used in instant case in any way suggested that defendant should be identified.

**[6]** Defendant challenged the competence of the witness Wendy Caudle because of her age.

There is no fixed age limit which renders a witness incompetent to testify. The test is whether the witness has sufficient intelligence to testify and to understand the obligations of an oath. Decision as to the witness's competence rests within the sound discretion of the trial judge and that discretion is not reviewable except upon a clear showing of abuse. 1 Stansbury's N.C. Evidence, Section 55, pages 160-161 (Brandis Rev. 1973). After observing and hearing this witness testify, the trial judge found her to be a 13-year-old young lady who possessed keen intelligence. He thereafter ruled her testimony to be competent. There is ample evidence to support this finding and ruling and no abuse of discretion is shown.

**[7]** Defendant further contends that the conditions under which the witness saw defendant's face and the inability of other witnesses to identify the robber are circumstances which render Wendy Caudle's identification of defendant inadmissible. He relies upon *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), to support this contention.

In *Miller*, the Court considered the admissibility of testimony of a witness who was never closer than 283 feet to the accused and had never seen the accused before. The witness was unable to tell the officers the color of the man's clothes, the color of his hair, or the color of his eyes. He described the defendant as being six feet, three inches tall and the accused was actually five feet, eleven inches. In rejecting this testimony as being inherently incredible and without probative value, this Court observed, "Where there is a reasonable probability of observation sufficient to permit subsequent identification, the credibility of the witness's identification of the defendant is for the jury . . . ." 270 N.C. at 732, 154 S.E. 2d at 906.

**[8]** In instant case, there was evidence of sufficient opportunity to observe defendant for the witness to make a subsequent identification. Neither do we find merit in defendant's contention that the witness Caudle's subsequent absolute confirmation of her photographic identification was tainted because it occurred while

defendant was seated with two or three lawyers at a table in the courtroom with an alleged accomplice sitting behind one of the lawyers. We have consistently held that no violation of due process results when there are "unrigged" courtroom confrontations which amount to a single exhibition of an accused. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). There is nothing in instant record which indicates a rigged confrontation or even a single exhibition of defendant which would violate due process.

We hold that there was no illegal pretrial identification procedure in this case. Had such illegal procedures existed as has been suggested, there is ample evidence to support the trial judge's finding that the in-court identification was of independent origin and therefore competent and admissible.

No error.

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STATE OF NORTH CAROLINA v. BILLY JOE CHAPMAN

No. 69

(Filed 7 March 1978)

1. **Criminal Law § 73.4— victim's statement—spontaneous declaration—res gestae**

In this prosecution for felonious assault, the victim's testimony that he had told his wife and his neighbor, "That's Bill Chapman. He's going to kill us," was competent both as a spontaneous declaration and as a part of the *res gestae*.

2. **Criminal Law § 169.3— admission of testimony—error cured by similar testimony admitted without objection**

In this prosecution for felonious assault, any error in the admission of the victim's testimony that defendant's wife told him defendant was "on the way up here to kill you" was cured when another witness thereafter, without objection, repeated the testimony *ipsissimis verbis*.

3. **Criminal Law § 73.1— exclusion of hearsay—no effect on other rulings permitting hearsay**

The trial court's proper exclusion of incompetent hearsay upon the State's objection did not render prejudicial the harmless error of other rulings permitting the victim to repeat hearsay statements made by his wife.

**4. Criminal Law §§ 99.4, 162.7— failure to rule on objections—harmless error**

The trial judge's failure to rule on six of the objections made by defendant during the trial was not only error but was also an abdication of the judicial function. However, such error was harmless where the judge's conduct of the trial and his various rulings did not amount singly or in combination to an expression of opinion as to defendant's guilt, and there is no possibility that the judge's failure to rule on the objections influenced the verdict.

**5. Criminal Law § 169.6— refusal to permit excluded testimony to be placed in record—harmless error**

Ordinarily, a counsel should be allowed to insert in the record the answer to a question to which objection has been sustained. However, where the witness has already answered the question sufficiently to demonstrate the immateriality of the inquiry, the judge's refusal to allow the preservation of the answer will not be held prejudicial error.

**6. Criminal Law § 169.6— refusal to permit excluded testimony to be placed in record**

A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained since, in refusing such a request, the judge incurs the risk (1) that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.

**7. Criminal Law § 86.5— cross-examination of defendant—prior acts of misconduct**

It was not error for the private prosecutor to ask defendant on cross-examination (1) whether he had stolen some angle irons which he admitted had come from his employer's premises but contended it was immaterial that he didn't pay for them and (2) whether, after having had trouble with some blacks at a beer joint, he had gone home, procured his gun, and come back for them.

**8. Criminal Law § 85.2— cross-examination of character witnesses—specific acts of misconduct**

In this prosecution for felonious assault, the trial court erred in permitting the prosecutor to ask defendant's character witnesses if they were aware that defendant on another occasion "got his gun and went after some black people in Charlotte," since a character witness may not be cross-examined as to specific acts of misconduct by defendant. However, such error was harmless where defendant stands guilty of felonious assault by his own testimony at the trial.

**9. Criminal Law § 128.1— when mistrial is appropriate**

A mistrial is appropriate only for serious improprieties which render impossible a fair and impartial verdict under the law.

**10. Criminal Law § 100— private prosecutor—duty of prosecutor to remain in charge of case**

It is a permissible practice for private prosecution, with the consent of the district attorney and the court, to assist the State in a prosecution, but in the absence of special circumstances, the law contemplates and public policy requires that the district attorney shall remain in charge of the prosecution.

ON defendant's petition for discretionary review of the unpublished decision of the Court of Appeals, filed 7 April 1976, which upheld defendant's trial before *Kirby, J.*, at the 17 February 1975 Session of GASTON Superior Court. The case was docketed and argued as Case No. 63 in the Fall Term 1976.

Defendant appeals his conviction of "assault with a deadly weapon with intent to kill inflicting serious injury," a violation of G.S. 14-32, and the judgment that he "be imprisoned for the term of not less than one year nor more than ten years." In its judgment the court recommended work-release for defendant.

The prosecuting witness, Robert J. Mauney, and the defendant, Billy Joe Chapman, are related by marriage in that Mrs. Mauney is Mrs. Chapman's aunt. Mauney lived in Stanley; defendant, about six miles away in Mount Holly. In 1967 the two men together bought a lot on Lake Norman, and each put a "vacation" mobile home on it. Thereafter relations between the two friends deteriorated. After several acrimonious incidents, in the retelling of which each accused the other of threatening his life, Chapman sold his interest in the lot to Mauney in February 1973. At that time defendant told Mrs. Mauney he "never wanted to hear tell of [Mauney], see him, or nothing else—no more"; that he "was through with him." The two men did not speak directly to one another again. Precarious communications, however, were maintained between the two families through Mrs. Lula Robinson, Mrs. Mauney's sister. At the time of the trial defendant was 43 years old.

On 13 June 1974, at Mrs. Mauney's request, Mrs. Robinson called Mrs. Chapman and asked her to have her husband return to Mauney a pair of "weight-lifting shoes." Mauney testified that several years before he had lent the shoes to defendant's son, Michael. (At the time of the trial Michael was 21 years old.) Defendant, however, testified that Mauney had given the shoes to Michael on his birthday five or six years earlier. When Mrs. Chap-

man informed defendant that "Mauney wanted the weight-lifting shoes back," he interpreted the request as a calculated harassment and was enraged by it. In pertinent part, defendant's version of his subsequent conduct, as detailed on his direct examination, is quoted below:

"As a result of talking to my wife [at supper], I pushed my plate aside, went into the bedroom. I had a .38 revolver in there. . . . My state of mind was to get him [Mauney] off my back to quit bugging me. I was angry. I was fairly angry. I'd have to be to do what I done. . . . I knew Robert Mauney carried a gun. . . . He always had the gun on him.

"My wife came in there and tried to stop me, and I remember knocking her over on the bed and all, to get her out of my way. I went and got in my truck. I proceeded to his home. When I saw him . . . he was on about the third or fourth step from the bottom [of his front porch] . . . leaning his arm over the handrail. When I stopped, I come out and I was firing at his knees down. I said, 'I want to just get you off my back. I've had enough of you. I thought we had had this over with.' I fired six shots is all I had. . . . Mrs. Zoe Mauney . . . was up on top of the porch, hollering . . . and [Mauney] jumped over the rail. My state of mind was to get him off my back. I had had enough of him. I thought enough in life was enough. . . . He jumped over the banister and came back firing while I was still firing. . . . He was behind the steps and all then, and I had a couple more shots, and I come out with those; and I pulled off just as soon as I got through with the six shots. He shot at me six times. My truck was not hit in any way. I went home. . . ."

Defendant testified on cross-examination that it was 10 minutes from the time his wife told him about the conversation with Mrs. Robinson that he arrived at the Mauney residence in Stanley. Mauney's request for the shoes made him "fighting mad," and he got his gun, a .38 snub-nose Smith & Wesson with a six-inch barrel. His wife, he stated, was hanging on him and pleading, "don't go out there and get in trouble." Notwithstanding, he "pushed her off" and drove the five or six miles to the Mauney residence with the pistol on the seat beside him. He further said: "I drove around the speed limit and I had time to think and reflect all this time about what I had planned to do when I got there. It took me 10 minutes. . . . When I pulled up . . . I took

my gun and stuck it out of the window in my right hand and started shooting. . . . I did not intend to kill him. I fired at him. . . . I fired at Mr. Mauney. I was shooting at Mr. Mauney. I meant to hit him below the knees, if I could. I just wanted him off my back. . . . When I approach a dangerous man, I approach him dangerous. Yes, sir, I'm proud of what I did. And when I went home the gun was empty. I know now that Mike came right behind my wife in another car. I was angry. I stayed angry. These bullets were .38, were special oversized bullets. They carry a big load of lead."

On redirect examination defendant said he had been in the United States Marine Corps for four years and that he was a sharpshooter. He also repeated that he "was plenty angry" when he arrived at the Mauney residence.

Mauney, aged 50, testified that bullets or fragments of bullets from defendant's gun struck him in the left side of his face, left hand, and right knee. Dr. Wilson Lynch, who treated Mauney for these wounds, said he found four small fragments in him but not a whole bullet. He described Mauney's wounds as "superficial puncture wounds" or "small points on the skin with some swelling underneath." The knee, which had "a fairly marked entry and exit wound" contained a fragment. This was the deepest wound. Two minute fragments remain in his face but there are now no scars to show the penetration. "The fragment remaining in his hand is probably half of a .38 caliber." It has become "scarred to a tendon" and the result is a limitation of motion in his left hand.

Defendant's wife, Mrs. Jean Staton Chapman, testified that when she told her husband that Mauney "wants his weight shoes that he gave Michael" he became emotionally upset and "looked like he was wild." She believed he was not "in contact with reality." Failing in efforts to keep defendant at home, she called her son Michael and told him to come at once; that she believed his father had gone crazy and was headed toward Stanley with a pistol. She then set out in her car hoping to reach the Mauney residence before he did; she arrived just in time to witness the shooting. After defendant had driven away Mauney approached her car and she inquired if he had been hurt. He said, "No, I'm not, but I got him." That statement "threw all over" her, and she told Mauney that but for his conduct they "wouldn't have all this

trouble" and she believed "he had run Bill crazy." She then left to find her husband.

Other facts necessary to the decision in this case will appear in the opinion.

*Rufus L. Edmisten, Attorney General, William A. Raney, Jr., Assistant Attorney General, and Jo Anne Sanford Routh, Associate Attorney, for the State.*

*Childers and Fowler and Roberts, Caldwell and Planer for defendant appellant.*

SHARP, Chief Justice.

Defendant brings to this Court nine of his original 15 assignments of error, to wit, Nos. 2-5 and 10-14. After a careful consideration of the record and briefs we have concluded that it would be a labor in vain to discuss in detail all of these assignments, for none discloses prejudicial error. The majority, therefore, will receive summary treatment.

The background of assignment No. 2 is this:

On direct examination Mauney testified that on the evening of 13 June 1974, while he, his wife and a neighbor, Mrs. W. S. Hyde, were sitting on the front porch and steps of his residence, defendant stopped his truck in front of the house and began shooting. When asked, "Could you describe how you saw him shoot?" Mauney replied, "He put the weapon out beside the rear view mirror, and began shooting, and I told my wife and my neighbor, I said, that's Bill Chapman. He's going to kill us. Get in the house."

**[1]** Defendant's motion to strike Mauney's entire answer was denied. Defendant now argues that the statement, "That's Bill Chapman. He's going to kill us," was unresponsive to the question and constituted an impermissible expression of opinion by the witness on a material fact. This assignment is devoid of merit for the following reasons: (1) Counsel's motion to strike was general. He did not single out the allegedly objectionable portion. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975). (2) After Mauney had testified, Mrs. Hyde took the stand and, without objection, gave essentially the same account of the shooting, repeating almost verbatim Mauney's sponstaneous declaration of defendant's in-

tent. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). (3) The challenged statement was admissible both as a spontaneous declaration and as a part of the *res gestae*. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Feaganes*, 272 N.C. 246, 158 S.E. 2d 89 (1967).

**[2]** Assignment No. 4 parallels No. 2. Mauney was allowed to testify over objection that after defendant had left the scene of the shooting he saw Mrs. Chapman sitting in her car. She called to him, "Uncle Robert, have you seen Bill? He's mad as hell and on his way up here to kill you." Mauney's response was, "He's just tried it, but he didn't get it done."

The trial judge denied defendant's motion to strike the statement "he's on the way up here to kill you." If error was committed by the admission of Mrs. Chapman's statement to Mauney, it was cured shortly thereafter when Mrs. W. S. Hyde, without objection, repeated Mauney's testimony as quoted above *ipsissimis verbis*. *State v. Greene*, *supra*; 4 Strong's North Carolina Index 3d, *Criminal Law* § 169.3.

Assignment No. 5 challenges the admission of Mauney's testimony that after the shooting his wife said to him, "Call the Doctor." That this statement is hearsay cannot be doubted, but it is also clear that its admission could not have possibly influenced the jury's verdict. Assignment No. 11 is equally trifling. Mr. W. S. Hyde, a witness for the State, testified that before Mrs. Chapman left the scene of the shooting he heard Mrs. Mauney say to her, "Honey, you're wrong about that." From the record, what Mrs. Mauney's niece was "wrong about" is so obscure it could not be held prejudicial error.

**[3]** In assignment No. 13 defendant asserts that the trial judge, after having permitted the prosecuting witness to repeat hearsay statements made by his wife, erred in sustaining the State's objection to questions intended to elicit similar hearsay from defendant. The proffered testimony related to statements Mrs. Mauney made to defendant at Lake Norman in October 1972 when she came to warn the Chapmans "to go out on the pier" because Mauney "was mad and had his pistol." Manifestly, the judge's ruling was correct, and his exclusion of incompetent hearsay upon the State's objection would not render prejudicial the harmless error of other rulings. The judge was not required to

balance the scales with an equal number of hearsay statements made by the wives of the prosecuting witness and the defendant.

**[4]** Defendant's assignment of error No. 3 relates to the failure of the trial judge to rule on six of the objections which defendant made during the trial. Defendant correctly asserts that "the parties are entitled, as a matter of right, to have the judge definitely decide all questions relating to the admissibility of evidence, and to admit or reject it accordingly." *State v. Whitener*, 191 N.C. 659, 662, 132 S.E. 603, 604 (1926). Indubitably, there are times when this obligation will appear onerous to a trial judge exasperated by too many seemingly meritless objections. Nonetheless, "counsel is entitled to an explicit ruling on each objection interposed." *State v. Staley*, 292 N.C. 160, 167, 232 S.E. 2d 680, 685 (1977); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

A trial judge's failure to rule upon an objection is not only error; it is an abdication of the judicial function. In the context of this case, however, we are convinced that the error was harmless. Defendant's objections had little, if any, merit. True, in both *Staley* and *Lynch*, *supra*, the Court reversed the defendants' convictions despite the lack of merit in the ignored objections. However, in both of those cases the trial judge's attitude and related actions, combined with the sheer number of unanswered objections, raised the reasonable inference that he had communicated to the jury an opinion that defendant was guilty as charged. By contrast, in this case, the judge's conduct of the trial and his various rulings, although not always free from error, did not amount singly or in combination, to an expression of opinion as to defendant's guilt. We perceive no possibility that the judge's failure to rule on the six objections influenced the verdict.

Assignment 10 is that the trial judge erred in refusing to allow defendant to exercise his right to put into the record the response which the prosecuting witness Mauney would have made to a question on cross-examination had he been allowed to answer.

Mauney testified on cross-examination that his pistol was loaded with "hollow tip" ammunition and that he did not have "the least idea what the effect of a hollow tip bullet is"; that he bought these hollow tip bullets from a friend. At the close of this cross-examination, counsel for defendant said, "I want to go back

to one question. Why is it you put hollow tip bullets in your gun?" The State's objection was sustained, and the court refused to permit Mauney to answer for the record. Defendant's assignment No. 10 specifies this refusal as prejudicial error.

**[5]** Ordinarily, counsel should be allowed to insert in the record the answer to a question to which objection has been sustained. Indeed, an exception to the action of the trial court will be worthless on appeal unless the answer is thus preserved. 1 Stansbury's N.C. Evidence § 26 (Brandis rev. 1973). We also note that the Rules of Civil Procedure specifically require the judge to preserve the offer of evidence in the record in a civil case. G.S. § 1A-1, Rule 43(c). However, where the witness has already answered the question sufficiently to demonstrate the immateriality of the inquiry, the judge's refusal to allow the preservation of the answer will not be held prejudicial error. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). *See State v. Willis*, 285 N.C. 195, 204 S.E. 2d 33 (1974); *Highway Commission v. Pearce*, 261 N.C. 760, 136 S.E. 2d 71 (1964). In the case under consideration, the witness had already testified that he did not know the effect of hollow tip bullets; specifically, he was unaware of their greater destructiveness on striking human tissues. Moreover, whatever his answer might have been, it would have been immaterial. The witness was the victim of a shooting; not the assailant. There is not a shred of evidence to suggest that Chapman acted out of self-defense. All the evidence tends to show that Chapman's attack upon Mauney was totally without justification.

**[6]** Notwithstanding our ruling here, we are constrained to say that we regard the trial judge's refusal to allow counsel to complete the record as a regrettable judicial mistake. A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk (1) that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.

**[7]** Assignment No. 12 asserts that the trial judge erred in permitting the private prosecutor to ask two questions concerning

"alleged prior criminal acts of the defendant." These questions were directed to defendant on cross-examination for the purpose of impeaching his credibility as a witness. As long as such questions are asked in good faith they are permissible. *E.g., State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977); *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977); *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). Accordingly, it was not error for the private prosecutor to ask defendant on cross-examination if he had stolen some angle irons which he admitted had come from his employer's premises but contended it was "immaterial that he didn't pay for them."

Likewise, it was not error for the prosecution to have asked defendant on cross-examination if, after having had trouble "with some blacks at a beer joint," he had gone home, procured his gun, and come back for them. Defendant denied that he had done anything of the sort and explained that "quite a few years ago," after he had emerged from "an eating establishment," his car "was ganged by a bunch of colored people." Seeing "no other way out of it," he reached into his glove compartment as if to get a pistol and said, "All right, come on." "And that," he said, "is all there was to it. Mr. Mauney don't know what he's talking about."

**[8]** The private prosecutor had previously addressed questions pertaining to defendant's alleged "trouble with some blacks" to two witnesses who had testified that defendant's general character and reputation in his community was good. On cross-examination these witnesses were asked if they were aware that defendant "got his gun and went after some black people in Charlotte." Each said he was unaware that such an incident had occurred. Notwithstanding, these questions were improper and defendant's objections to them should have been sustained. "When a defendant introduces evidence of his good character, the State has the right to introduce evidence of his bad character, but it is error to permit the State to cross-examine the character witnesses as to particular acts of misconduct on the part of the defendant. Neither is it permissible for the State to introduce evidence of such misconduct. The general rule is that a character witness may be cross-examined as to the general reputation of the defendant as to particular vices or virtues, but not as to specific acts of misconduct." *State v. Green*, 238 N.C. 257, 258, 77 S.E. 2d 614, 615 (1953). This rule is well established in our

jurisdiction. *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954); *State v. Church*, 229 N.C. 718, 51 S.E. 2d 345 (1948); *Barton v. Morphes*, 13 N.C. 520 (2 Dev. 1830).

The error in allowing the private prosecutor to question defendant's character witnesses about their knowledge of a specific act of misconduct by defendant, like the other errors in this trial, was harmless. This conclusion is irrefutably established as an actual fact since defendant stands guilty by his own testimony at trial. He testified that, infuriated by a request from Mauney that he return a birthday present Mauney had given his son, he got his .38 snub-nose pistol with a six-inch barrel, threw off his wife who was trying to restrain him, and drove to the Mauney home about six miles away; that during the 10 minute drive he had time to think about what he intended to do. His purpose, he said, was to get Mauney off his back; he "had had enough of him" and "enough in life is enough." Once at Mauney's, he stuck his gun out the window of his truck and fired six shots—all he had. He said, "I was shooting at Mr. Mauney. I meant to hit him below the knees, if I could. I just wanted him off my back. . . . Yes, sir, I'm proud of what I did."

In the light of defendant's admissions, the damage to the credibility of defendant's character witnesses or the damage to defendant's own character caused by the prosecutor's improper questions (were we to assume any damage was done) dwindles to insignificance. Had myriads of witnesses of unimpeachable credibility vouched for defendant's reputation and good character, any reasonable jury would still have convicted him on his own testimony.

**[9]** Although the test for harmless error has been variously stated (*see* 4 Strong's N.C. Index 3d, *Criminal Law* § 167), the applied rule has always been that so long as there is no reasonable possibility that a different verdict would be reached at a new and error free trial then the error is harmless, and defendant is not entitled to a new trial. *E.g.*, *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953). In this case the errors individually do not require reversal; collectively they did not compel the granting of a mistrial. A mistrial is appropriate only for serious improprieties which render impossible a fair and impartial

verdict under the law. *State v. Crocker*, 239 N.C. 446, 450, 80 S.E. 2d 243, 246 (1954). We therefore overrule defendant's final assignment of error, No. 14, that the trial judge erred in not declaring a mistrial because of the "prejudiced and inflammatory questions posed by the special prosecutor."

**[10]** In conclusion we note that when this case was called for trial an assistant solicitor informed the court that "Mr. Cooke appears with the State as a private prosecution on behalf of Mr. Mauney. By and with the permission of the court, we request that Mr. Cooke be allowed to examine the jury." Permission was granted and thereafter the record discloses no further participation in the case by the solicitor or his assistants. The record does show, however, that after verdict the court conferred with counsel for defendant and with Mr. Cooke with reference to punishment and that later, in open court, both made "extensive statements" on that subject. It is, of course, a permissible practice of long standing for private prosecution, with the consent of the solicitor and the court, to assist the State in a prosecution. *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). In the absence of special circumstances, however, the law contemplates that the solicitor shall remain in charge of the prosecution, and public policy requires that he do so.

For the reasons heretofore stated, in the trial below we find no error.

No error.

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STATE OF NORTH CAROLINA v. DENNIS L. GREENE

No. 20

(Filed 7 March 1978)

1. **Criminal Law § 92.3— offenses constituting parts of single scheme—consolidation proper**

Although G.S. 15A-926 does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in the statute.

2. **Criminal Law §§ 34.5, 34.8— evidence of other offenses—admissibility to show common plan or defendant's identity**

Evidence of commission of other independent and unrelated crimes or offenses is not admissible to prove an accused to be guilty of the crime for which he is on trial, but proof of commission of like offenses is admissible to show, *inter alia*, intent, plan or design to commit the offense charged or to show identity of the accused; therefore, the trial judge did not abuse his discretion by joining these cases against defendant since evidence of defendant's assault with intent to commit rape upon one victim was admissible in the cases charging defendant with kidnapping and raping a second victim three hours later to show defendant's intent and plan or design to commit the crimes, or in the language of G.S. 15A-926, to show a "single scheme or plan," and, since both victims described defendant's physical appearance and the clothing that he wore on the afternoon of the alleged crimes, evidence of the offenses committed against the second victim would have been admissible in the case charging assault with intent to commit rape upon the first victim for the purpose of establishing defendant's identity as her assailant.

3. **Criminal Law § 92.4— three offenses by one defendant—consolidation proper**

In determining whether an accused has been prejudiced by joinder, the question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other; rather, the question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. Joinder of these cases did not unjustly and prejudicially hinder or deprive defendant of his ability to defend one or more of the charges, since the three offenses occurred within a three hour time span and the offenses were all similar in nature.

Justice EXUM concurring in result.

ON certiorari to review the decision of the North Carolina Court of Appeals (34 N.C. App. 149) which found no error in defendant's trial before *Rouse, J.*, 13 September 1976 Criminal Session of ONSLOW County Superior Court.

Defendant was charged in separate bills of indictment with assault with intent to commit rape, rape and kidnapping. By bill of indictment number 76CR6927, defendant was charged with kidnapping Catherine A. Rutherford; by bill of indictment number 76CR6929, he was charged with the second degree rape of Catherine A. Rutherford; and, by bill of indictment number 76CR6928, he was charged with assault with intent to commit rape upon Debbie Elerick. The charges were consolidated for trial over defendant's objection.

The State's evidence tended to show that about 2:00 p.m. on 3 May 1976, defendant went to Debbie Elerick's apartment and gained admission by posing as a painter employed by the apartment management. By threat of a knife and with physical force, defendant took Mrs. Elerick into the bedroom where he removed her clothes and attempted to have sexual intercourse against her will. He was unable to consummate the act and left. At approximately 4:10 p.m., he picked up Mrs. Catherine A. Rutherford, who was walking to Jacksonville, where she was employed. Instead of taking Mrs. Rutherford to Jacksonville, defendant took her to a wooded area, where, by the use of force and against her will, he had sexual intercourse with her. Defendant left Mrs. Rutherford in the wooded area at about 5:00 p.m. On cross examination, Mrs. Rutherford admitted that she had lived with several different men since she and her husband had separated.

Defendant testified in his own behalf and denied that he had assaulted Mrs. Elerick in any manner. His testimony and that given by other witnesses tended to establish an alibi as to the assault upon Mrs. Elerick. He admitted that he had engaged in sexual intercourse with Mrs. Rutherford but testified that it was at her suggestion and with her consent.

The jury found defendant not guilty of kidnapping but returned verdicts of guilty of assault with intent to commit rape in each of the two remaining charges. The trial judge imposed a sentence of not less than twelve years nor more than fifteen years for the assault with intent to commit rape upon Mrs. Rutherford to run consecutively with a sentence of fifteen years for the assault with intent to commit rape upon Mrs. Elerick.

We allowed defendant's petition for discretionary review on 6 December 1977.

*Rufus L. Edmisten, Attorney General, by James Wallace, Jr., Assistant Attorney General, for the State.*

*Bailey & Raynor, by Edward G. Bailey, for defendant appellant.*

BRANCH, Justice.

The sole question presented by this appeal is whether the trial judge erred by consolidating the charge of assault with in-

tent to commit rape upon Debbie Elerick with the charges of kidnapping and rape of Catherine Rutherford. Defendant does not contend that it was error to consolidate the charges of kidnapping and second degree rape for trial.

Consolidation of criminal offenses for trial is, in part, controlled by G.S. 15A-926 which, in pertinent part, provides:

> *Joinder of offenses and defendants.* — (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

This statute became effective on 1 July 1975 and supplanted former G.S. 15-152 which provided:

> When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . .

G.S. 15A-926 differs from its predecessor in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." See, G.S. 15A-926, Official Commentary.

In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. *Pointer v. U.S.*, 151 U.S. 396 (1894); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976). However, it is well established that such a motion is ordinarily addressed to the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing of

abuse of discretion. *State v. Davis, supra; State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974).

**[1]** In instant case, defendant was indicted for two crimes of the same class or nature—assault with intent to commit rape and rape. Although G.S. 15A-926 does not permit joinder of offenses solely on the basis that they are of the same class, we approve and adopt the language of the Court of Appeals, "that the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute 'parts of a single scheme or plan,' as those words are used in present G.S. 15A-926(a)."

In *State v. Frazier*, 280 N.C. 181, 195, 185 S.E. 2d 652, 661 (1972), this Court considered the question of joinder and speaking through Lake, J., stated:

> . . . In the present case, the State contends that the murder of Miss Underwood, the kidnapping of Mrs. Collins and the robbery of Mrs. Collins were all parts of a continuing program of action by the defendant and Westbrook, covering a period of approximately three hours. Under such circumstances, evidence of the whole affair is pertinent to the several charges and there is no error in consolidating them for trial. [Citations omitted.]

As in *Frazier*, the sexual assaults upon Mrs. Elerick and Mrs. Rutherford within a time span of three hours were "parts of a single scheme or plan" by defendant to satisfy his sexual desires on the afternoon of 3 May 1976. In instant case, evidence of the whole affair is therefore pertinent to the several charges and joinder is permissible under G.S. 15A-926(a).

**[2]** Defendant, however, argues that even though the joinder might be permissible under the statute, the trial judge abused his discretion by joining the cases and thereby allowing Mrs. Elerick to testify concerning the assault upon her. In considering this contention, we initially note the general rule is that evidence of commission of other independent and unrelated crimes or offenses is not admissible to prove an accused to be guilty of the crime for which he is on trial. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Hight*, 150 N.C. 817, 63 S.E. 1043 (1909). However, equally well-established exceptions to the rule permit proof of commission of like offenses to show, *inter alia*, intent, plan or

design to commit the offense charged or to show identity of the accused. Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Davis*, 229 N.C. 386, 50 S.E. 2d 37 (1948); *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944). *See also*, 1 Stansbury's N.C. Evidence, Section 92 (Brandis Rev. 1973).

Here evidence of the assault with intent to commit rape upon Mrs. Elerick was admissible in the cases charging defendant with kidnapping and raping Mrs. Rutherford to show defendant's intent and plan or design to commit the crimes, or, in the language of the statute, to show a "single scheme or plan." Evidence of the offenses of the kidnapping and rape of Mrs. Rutherford was admissible in the case of the assault upon Mrs. Elerick for the same reason. Since both victims described defendant's physical appearance and the clothing that he wore on the afternoon of 3 May 1976, evidence of the offenses committed against Mrs. Rutherford would have been admissible in the case charging assault with intent to commit rape upon Mrs. Elerick for the purpose of establishing defendant's identity as her assailant.

**[3]** However, in determining whether an accused has been prejudiced by joinder ". . . The question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). *See also*, *State v. White*, 256 N.C. 244, 123 S.E. 2d 483 (1962). This record does not disclose that the charges against defendant are so distinct in time and factual circumstances that a joinder would unjustly and prejudicially hinder or deprive him of his ability to defend one or more of the charges.

We hold that the trial judge, acting within the framework of G.S. 15A-926(a) and in the exercise of his discretion, properly joined the cases for trial.

Defendant's petition for discretionary review was improvidently granted, and, for reasons stated, the decision of the Court of Appeals is

Affirmed.

Justice EXUM concurring in result.

I would decide this case by holding that the kidnapping and rape cases in which the victim was Catherine Rutherford were improperly consolidated for trial with the assault with intent to commit rape in which the victim was Debbie Elerick in violation of G.S. 15A-926; but since in a trial of the Elerick case the offenses against Mrs. Rutherford would have been admissible in evidence against the defendant or in a trial of the Rutherford cases the offense against Mrs. Elerick would have been likewise admissible, the defendant was not prejudiced by the erroneous consolidation.

I disagree with the majority's conclusion that the Rutherford offenses and the Elerick offense are joinable under G.S. 15A-926(a) as part of a "single scheme or plan." My view of the law on this point is as stated in my dissent in *State v. May*, 292 N.C. 644, 666, 235 S.E. 2d 178, 191-92 (1977):

> "When, however, another crime is offered as conduct tending to show defendant's plan to do an act which in turn tends to prove that the act was done, there must be more than merely some similarity between the other crime and the crime sought to be proved. The incidents must be so strikingly alike in detail that evidence of both raises a reasonable inference of the existence of a plan out of which both sprang. 'But where the conduct offered [to prove a plan] consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing Intent. . . . The added element then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*' 2 Wigmore on Evidence § 304 at 202 (3d ed. 1940). (Emphasis the author's.)"

The two incidents here are quite dissimilar in the modus operandi employed by the defendant. In the Elerick case defendant gained admission to the victim's apartment by posing as a painter employed by the apartment management. In the Rutherford cases, however, the victim was hitchhiking and picked up by defendant on the highway. The dissimilarity in the two cases negatives the existence of any common plan or scheme out of

which the defendant's attacks against the two women sprang. To say, as the majority does, that both attacks arose out of defendant's plan to satisfy his sexual impulses in effect nullifies one of the purposes of the new joinder statute which, the majority recognizes, was enacted in part to preclude the joinder of crimes merely on the basis that they are of the same class or type of offense.

In the Elerick case, however, defendant's offenses against Mrs. Rutherford would be admissible to help prove the intent with which defendant assaulted Mrs. Elerick. Similarly, in the Rutherford cases the offense against Mrs. Elerick would be admissible on the question of consent. Notwithstanding the statement quoted by the majority from *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972), these propositions demonstrate that the erroneous consolidation was harmless.

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DEVERE C. LENTZ, JR., ADMINISTRATOR OF THE ESTATE OF THAD CLAYTON ROBERTS, JR. v. ROY B. GARDIN, ADMINISTRATOR OF THE ESTATE OF LORENE LILLARD ROBERTS

No. 71

(Filed 7 March 1978)

**Negligence §§ 27.1, 37— res ipsa loquitur—effect of inference—failure to give tendered instruction—erroneous instruction**

In a wrongful death action in which plaintiff's evidence tended to show that a vehicle driven by defendant's intestate left the highway for no apparent reason, the trial court erred in failing to give defendant's requested instruction that the doctrine of *res ipsa loquitur* raised only an inference of negligence and did not compel a finding of negligence on the part of defendant's intestate, and the court misstated the law in instructing the jury that the doctrine of *res ipsa loquitur* furnishes "an inference only, and it is for you to decide whether this inference is actionable negligence; that is, is it negligence that was a proximate cause of the death," since the charge given, without the requested instruction, may have erroneously led the jury to believe that the inference of negligence was binding on them and that only the second element of actionable negligence, proximate cause, remained for their consideration.

ON defendant's petition for discretionary review of the decision of the Court of Appeals which affirmed in part the judgment entered by *Griffin, J.*, at the 20 October 1975 Session of the

Superior Court of BUNCOMBE. This appeal, docketed and argued as Case No. 156 at the Fall Term 1976, is reported in 30 N.C. App. 379, 226 S.E. 2d 839 (1976).

Action for wrongful death.

For the purpose of this appeal stipulations and uncontradicted testimony establish the following facts:

Plaintiff's intestate (Mr. Roberts) and defendant's intestate (Mrs. Roberts) were husband and wife. On 22 April 1973, between 5:00 and 5:30 p.m., Mrs. Roberts was driving her 1971 white Rambler station wagon north on North Carolina Highway No. 16, a two-lane, asphalt road. The weather was clear; the road was dry and free of defects. Mr. Roberts, aged 56, was seated beside his wife on the front seat. Miss Lois Scroggs, 69 years of age, was sitting on the back seat. At the same time Mr. Tom Thomas, aged 25, was driving his 1972 Plymouth Duster automobile south on Highway No. 16 with Mr. R. E. Dancy, aged 27, on the front seat beside him.

At a point about 2.7 miles south of Wilkesboro, N. C., on "a fairly straight stretch of highway," Thomas and Dancy observed a white Rambler station wagon approaching from a distance of about 500 feet. In their opinion, both their car and the Rambler were probably driving about the speed limit of 55 MPH. The station wagon was going from one lane to the other; "the main body of the car would go from one side of the road across to the other." Finally, the station wagon swerved in front of the Plymouth, left the road, went through a fence, and crashed into a tree on the west side of the highway. Dancy left the Plymouth to determine whether he could render any assistance while Thomas drove on to summon aid. Dancy noticed that the Rambler had left 75-100 feet of skid marks on the road in the area where it had cut in front of the Plymouth. Upon approaching the Rambler he observed that "the front of the car was mashed in, and it looked like the tree was almost against the passengers." He saw a woman behind the steering wheel, a man beside her, and someone in the back seat. The man's head was "laying out the window" and moving slightly. The situation was such that Dancy could render no assistance.

Stipulations establish that Mrs. Roberts died at approximately 5:30 p.m. on 22 April 1973 from injuries received in the collision

and that Mr. Roberts died approximately one hour later from the same cause.

Thomas testified that as the Rambler moved from one lane to the other in front of him he could not see its operator. "Based upon my observations," he said, "it would have been entirely possible for the driver to have been slumped over the wheel. As far as I could tell, the person who had been driving could have been slumped down in the seat. Actually, I simply could not see a driver at any time I observed the vehicle."

At the time of his death Mr. Roberts was 56 years old. He had been retired for two years with a retirement income of $100 a week. Mr. Roberts was a man of wide interests and acquaintanceship. Members of his family testified he was in very good health although Mrs. Roberts did most of the driving because he had back trouble.

Mr. Roberts was survived by two adult children. His son, Thad Clayton Roberts III, 31 years old at the time of the trial, lived and worked in New York. He was financially independent but enjoyed a close personal relationship with his father. The daughter, Linda Roberts Jackson, aged 36, was a divorcee with four children. She received no child support and worked only part time. Her father sent her approximately $250 a month.

The witnesses called by defendant were Mrs. Clyde Scroggs Lillard and her sister, Miss Lois Scroggs, the passenger in the back seat of the Rambler at the time of the collision. Miss Scroggs was an old friend of the Roberts. She testified that she remembered nothing about the wreck or the events immediately preceding it; that she began to think clearly only after she had been in the hospital "in intensive care for four or five weeks." The testimony of Mrs. Lillard and Miss Scroggs tended to show:

Mrs. Lillard was Mrs. Robert's stepmother. She had planned a birthday dinner for her husband on 22 April 1973, and the Roberts arrived at her home on the evening of April 21st for that event. About 11:00 a.m. on April 22nd Mrs. Roberts left the Lillard residence to go to North Wilkesboro for Miss Scroggs, who was also invited to the birthday dinner. The two returned about noon. Between then and the time Mrs. Lillard served dinner—sometime between 1:00 and 2:00 p.m.—Mrs. Lillard saw Mrs. Roberts mix a drink of vodka for herself. She might have had

more than one drink but, if she did, Mrs. Lillard did not see her. The dinner lasted "not quite as long as a couple of hours," and nobody drank any alcoholic beverages during the meal. To Mrs. Lillard's knowledge, Mrs. Roberts had only one alcoholic drink after dinner and that was in the "early afternoon." However, she "doesn't know if [Mrs. Roberts] had any additional drinks that afternoon." When the Roberts left around 5:30 p.m. both appeared normal to Mrs. Lillard.

Miss Scroggs testified that she would not describe the Roberts as heavy drinkers. She had seen Mrs. Roberts drinking vodka in the kitchen before dinner but she did not recall how many drinks Mrs. Roberts had. The vodka came from a bottle which the Roberts brought with them. Miss Scroggs testified that she did not see Mrs. Roberts drink anything after dinner, but that she might have had "two or three." Miss Scroggs herself had three drinks that day. When she left the Lillard home with the Roberts in the late afternoon neither was under the influence of alcohol. The last thing she remembers on that day "was going down the driveway and then [she] woke up in the hospital."

Defendant's attempt to introduce the medical examiner's toxicology report showing the alcoholic content of Mrs. Robert's blood was unsuccessful.

After deliberating thirty-one minutes the jury found defendant negligent, plaintiff's intestate free from contributory negligence, and awarded $100,000 in damages (the amount prayed). On appeal the Court of Appeals awarded defendant a new trial upon the issue of damages only.

*Lentz & Ball, P.A. for plaintiff appellee.*

*Morris, Golding, Blue and Phillips for defendant appellant.*

SHARP, Chief Justice.

We allowed defendant's petition for discretionary review of the Court of Appeals' decision that defendant was entitled to a new trial *only* on the issue of damages. In his new brief filed in this Court, plaintiff presented for review pursuant to N.C. App. R. 16(a), the correctness of the order of the Court of Appeals awarding defendant a new trial on the issue of damages.

Of defendant's assignments of error we consider only those challenging the correctness of the trial court's charge on the doctrine of *res ipsa loquitur.*

Plaintiff relies upon this doctrine to prove his allegations that Mr. Roberts' death was proximately caused by the negligent manner in which Mrs. Roberts operated the motor vehicle at the time it left the highway. With reference to the first issue, *inter alia,* the court correctly charged:

". . . we have another principle of law applicable in this kind of case called the doctrine of *Res ipsa loquitur,* which simply means that the nature of the occurrence itself furnishes circumstantial evidence of defendant's intestate's negligence in operating the automobile. In this case defendant's intestate was driving the automobile which left the highway on a slight curve. It is unusual for an automobile to leave the highway. When it does so without apparent cause and inflicts death, an inference is raised that defendant's intestate, the driver, was negligent. . . ."

Following the portion of the charge quoted above, the trial court gave various contentions for both parties on the first issue and then charged the jury on the issues of contributory negligence and damages.

The record shows that before the judge closed his charge he invited counsel to the bench and asked if there were any comments either would like to make out of the hearing of the jury. Counsel for defendant, apprehensive that the jury would not understand the legal import of the word *inference* as used in the court's explanation of the doctrine of *res ipsa loquitur,* requested the court to charge the jury that "while the doctrine of *res ipsa loquitur* created an inference of negligence which would allow the case to go to the jury, the doctrine and inference did not require the jury to find negligence on the part of the defendant's intestate."

Instead of giving the requested instruction the court responded by charging: "Now members of the jury, on the first issue where I charged you with reference to the doctrine of Res ipsa Loquitur, which simply means that the nature of the occurrence itself furnishes circumstantial evidence of the defendant's intestate's negligence, *I further instruct you that this is an inference only, and it is for you to decide as to whether this*

*inference is actionable negligence; that is, is it negligence that was a proximate cause of the death* and making the driver's estate liable. It is an inference which brings the issue to the jury for your decision." (Emphasis added.) (This instruction constituted defendant's assignment of error No. 33.)

Counsel for defendant then approached the bench and, out of the hearing of the jury, again requested the court to instruct the jury that while the doctrine of *res ipsa loquitur* raised an inference of negligence, it was an inference only, and did not compel a finding of negligence on the part of the defendant. The court did not give this instruction, but directed the court reporter to insert the request in the record. The court's failure to give the requested instruction is the basis of defendant's assignment of error No. 34.

Since nowhere in his charge did the judge explain to the jury that it was free to accept or reject the inference of negligence which arises when a motor vehicle leaves the highway for no apparent cause, defendant argues that the addendum quoted above was tantamount to an instruction that the inference conclusively established Mrs. Roberts' negligence, and that the only issue for the jury was whether that negligence was the proximate cause of Mr. Roberts' death. This instruction, defendant contends, not only failed to state the proposition of law which his counsel had properly requested, but it misstated the law applicable to this case.

Defendant's contention is meritorious. Actionable negligence is a want of due care which proximately results in injury to another. *State v. McLean*, 234 N.C. 283, 285, 67 S.E. 2d 75, 77 (1951). Absent the requested instruction, the judge's final charge on *res ipsa loquitur* was subject to the interpretation that the inference of negligence was binding on the jury and that only the second element of actionable negligence, proximate cause, remained for their consideration. This, of course, is not the law. If the jury concluded that the inference of Mrs. Roberts' negligence was binding on them their verdict was foreclosed, as her negligence was at least a proximate cause of Mr. Roberts' death. That jurors could be easily confused about the effect of the inferences created by the doctrine of *res ipsa loquitur* is not to be doubted. After all, confusion on this point long dwelled in the minds of learned appellate court judges. *See White v. Hines*, 182 N.C. 275, 109 S.E. 31 (1921); 48 N.C. L.Rev. 452, *infra*.

The instruction which defendant requested is in accordance with the law of this State and the court should have given it. The well-established rule is succinctly stated by Byrd in his article, *Proof of Negligence in North Carolina*, 48 N.C. L.Rev. 452, 480-81 (1970):

"Proof establishing a *res ipsa* fact situation is sufficient to take the case to the jury. Such proof creates a permissible inference of negligence that the jury is free to accept or reject, and an instruction that leaves the impression that the jury may find for plaintiff upon such proof without finding defendant was negligent is erroneous. The plaintiff is entitled to recover only if he convinces the jury by a preponderance of the evidence that his injuries were caused by defendant's negligence."

"The rule [*res ipsa*] permits the jury, but not the court, to draw an inference of negligence. In other words, it is a circumstance from which the jury may, but is not compelled to, infer a want of due care." *Etheridge v. Etheridge*, 222 N.C. 616, 619, 24 S.E. 2d 477, 480 (1943). *Accord, Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968); *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1953); *Ridge v. R. R.*, 167 N.C. 510, 83 S.E. 762 (1914); *Stewart v. Carpet Co.*, 138 N.C. 60, 50 S.E. 562 (1905). *See* 2 Stansbury's N.C. Evidence § 227 (Brandis rev. 1973); Prosser, Law on Torts § 40 (3rd ed. 1964).

Since we hold that the instructions on negligence contained prejudicial error requiring a trial *de novo*, it is unnecessary to discuss the questions of nominal damages and the propriety of a new trial on the issue of damages alone. However, upon review, we conclude that the Court of Appeals was correct in holding that the trial judge erred in his charge on damages. As to the practice of awarding a new trial on the issue of damages alone, see *Jarrett v. Trunk Co.*, 144 N.C. 299, 302, 56 S.E. 937, 938 (1907).

Error and remanded.

STATE OF NORTH CAROLINA v. FRED THOMAS McKINNEY, JR.

No. 1

(Filed 7 March 1978)

1. **Criminal Law § 87.2— conversation with district attorney—redirect examination—opening door on cross-examination**

Where defense counsel, on cross-examination of a State's witness, elicited the information that the witness had talked to the district attorney on the preceding day for five or ten minutes, the witness was properly permitted on redirect examination to state the nature of her conversation with the district attorney, the defendant having opened the door for such testimony.

2. **Criminal Law § 73.4— narrative of observed conditions**

In this homicide prosecution, testimony by defendant's companion that, immediately after the shooting, he tried to talk to defendant's sister-in-law and "she couldn't talk" but just sat there in the car screaming was simply a narrative of observed conditions substantially contemporaneous with the shooting and was properly admitted in evidence.

3. **Criminal Law § 96— repetition of excluded evidence by judge**

In a prosecution of defendant for the murder of his wife, the court did not err when, after sustaining a motion to strike a deputy's testimony that defendant told him that he would kill the officer too, and while considering a motion for mistrial, the court repeated the excluded testimony in readvising the jury that the deputy's testimony which defendant had moved to strike should not be considered and ascertaining that members of the jury would follow the court's instruction not to consider it.

ON certiorari to the Superior Court of TRANSYLVANIA to review the judgment of *Griffin, J.*, entered at the October 1976 Term, the defendant's appeal, as a matter of right, not having been perfected within the time allowed by law.

Pursuant to an indictment, proper in form, the defendant was charged with the murder of his wife, Georgia Nadene Smith McKinney. Upon a verdict finding him guilty of murder in the second degree, he was sentenced to imprisonment for life.

The defendant offered no evidence. That for the State, if true, was sufficient to show:

Defendant and his wife were living separate and apart. Their frequent communications were generally acrimonious. During the evening and until approximately midnight on 18 June 1976, the defendant's wife and his sister-in-law, also separated from her husband, were riding about in a car driven by his wife. Earlier in

the evening, they passed the house of Beatrice Barton and observed the defendant there. Shortly thereafter, the defendant went to the home of his mother, some 300 yards distant, went into a bedroom and fired a shotgun out of the window. At that time the automobile driven by his wife was again passing the houses of Beatrice Barton and his mother. Due to the elevation of the road above the house of the defendant's mother, a shot fired from the house would not have endangered the car or its occupants. Earlier that day the defendant and his wife had had a telephone conversation, the nature of which is not shown in the record.

The defendant and his companion, Chester Van Bracken, having previously been riding about together and drinking, followed the automobile in which the defendant's wife and sister-in-law were riding, Bracken driving and the defendant carrying a shotgun. Either by prearrangement or otherwise, the automobile occupied by the women stopped and that occupied by the men drove up and stopped nearby. The defendant got out of the car in which he was riding, called to his wife saying he wanted to talk to her, and walked over to her car carrying his shotgun. Before leaving his car, the defendant told his companion he was going to drag his wife out of her car and beat her, whereupon the companion, saying he did not want any part of the defendant's family arguments, got out of the car and started walking to his own home which was not far away.

The defendant went to the car occupied by the women, loaded and unloaded his shotgun several times and, while standing in front of the car, pointed the gun between the two women saying, "I have a good mind to blow both of youns damned head off." His sister-in-law told him to put the gun down. Continuing to hold it, he came around to his wife's side of the car and told her to roll the window down so he could talk to her. She rolled it down but then rolled it back up. He then opened the door and leaned against the inside of the door and they began to talk. His wife told him to put the gun down, whereupon he became angry and threw it down onto the road, breaking off a part. He then told his wife to fix the gun for him. However, he attempted to fix it himself and then asked his wife if she wanted the gun. When the women did not take it, he said he would keep it and fix it himself. Thereupon, he reloaded the gun. After further conversation he said to his wife, "I have just a good mind to kill you." She replied,

"You might as well kill me now as any time," to which he responded, "By God, I will." He thereupon stepped back, pointed the gun at his wife's head and fired it. One side of his wife's head was blown off and virtually her entire brain was blown out of her skull.

The defendant's companion, hearing the shot and the shouts of the defendant, returned. The defendant asked him to help him and to see if his wife was dead. The defendant then stopped a passing motorist and asked him to call an ambulance and the police. When the police arrived the head and upper portion of the wife's body were in the roadside ditch with her feet still in the car.

The defendant tried to get his companion to take the gun but the companion refused to do so. The officers found it in bushes some little distance from the scene of the shooting.

Before the officers arrived, the defendant said to his companion, "Look at my wife and tell me she's not dead." In her statement to the officers, the defendant's sister-in-law said that immediately after the shooting she, the sister-in-law, started screaming for help and then "went blank" and when she regained consciousness she heard the defendant screaming and saying, "I didn't mean to hurt you, honey." Blood and fragments of the wife's skull were thrown by the force of the gunshot onto the sister-in-law's face. The record does not make it clear whether the defendant's last above quoted remark was directed to the sister-in-law or to the wife.

*Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, and Marilyn R. Rich, Associate Attorney, for the State.*

*Jack H. Potts for defendant.*

LAKE, Justice.

In his brief, counsel for the defendant states that he has examined the record at great length and on many occasions and is unable to cite any authority to the effect that the errors alleged by him were prejudicial so as to warrant a new trial. He requests this Court to review the case to ascertain whether prejudicial error occurred in the trial of the defendant. Due to the nature of

the crime of which the defendant has been convicted and the sentence imposed, we have done so. We, like counsel for the defendant, find no error.

Three assignments of error are brought forward into the brief for our consideration: (1) There was error in permitting the sister-in-law, a witness for the State, to testify to a conversation she had with the district attorney; (2) there was error in permitting the defendant's companion, a witness for the State, to testify that, upon his return to the scene, he tried to talk to the sister-in-law and "she couldn't talk" but just sat there in the car screaming; (3) the court erred when, after sustaining a motion to strike certain testimony of the State's witness Whitmire, and while considering a motion for a mistrial, the court repeated that testimony to the jury. There is no merit in any of these assignments.

**[1]** On cross-examination of the sister-in-law, defendant's counsel elicited the information that she had talked to the district attorney on the preceding day for five or ten minutes. On redirect examination, over objection, the witness was permitted to state that the extent of the conversation was that the district attorney asked her if the statement she had given the police officers was the truth, she replying that it was to the best of her knowledge, and, thereupon, the district attorney told her that, when she was called to the witness stand, she should just tell the truth as to what happened and what she saw and nothing else. The defendant, having opened the door, there was no error in permitting the State, through this witness, to show the nature of the conversation.

**[2]** The comment by the defendant's companion as to the condition of the sister-in-law immediately after the shooting and her inability to talk, other than just screaming, was simply a narrative of observed conditions substantially contemporaneous with the shooting. There was obviously no error in the admission of this testimony.

**[3]** The State's witness Whitmire, a deputy sheriff who went to the scene of the shooting in response to the call to the police for assistance, testified that when he arrived at the scene, dressed in his uniform, the defendant seemed to be hysterical, was crying and had what appeared to be blood on his shirt and hand, that the

witness tried to calm the defendant down and was under the impression that there had been an automobile accident, and that the defendant said to the officer that his wife was over there dead and he, the defendant, would kill the officer too.

The record does not show the question in response to which this testimony was given. It shows that there was no objection entered until after the testimony and, thereupon, the defendant moved to strike. Assuming that the testimony was responsive to questions asked by the district attorney, the failure to object prior to the answer of the witness would waive any right to object. *State v. Edwards*, 274 N.C. 431, 163 S.E. 2d 767 (1968); Stansbury, North Carolina Evidence (Brandis Rev.), § 27. The court, nevertheless, sustained the motion to strike.

Thereupon, the defendant moved for a mistrial on the ground that the district attorney knew the witness would so testify. In the absence of the jury, the defendant's counsel was permitted to examine this witness further and the witness stated that he had advised the district attorney as to the nature of the testimony which he would give if called as a witness. The court then brought the jury back in and reminded the jury that he had sustained the motion to strike testimony to the effect that the defendant wanted to shoot this witness. The court then asked the jurors if they could abide by their oath and disregard that testimony pursuant to the court's instruction. No juror having indicated that he or she could not so disregard that stricken testimony, the court denied the motion for a mistrial. In this there was no error. The court was merely readvising the jury that the testimony of this witness which the defendant had moved to strike should not be considered by them at all and ascertaining that the members of the jury would, indeed, not consider it.

Although there is no error assigned to the charge of the court, we have carefully considered the entire charge and find therein no error.

No error.

VIRGINIA F. LEVITCH v. DAVID H. LEVITCH

No. 9

(Filed 7 March 1978)

**Divorce and Alimony § 21.6— separation agreement incorporated into divorce judgment—failure to pay alimony—contempt**

Where the trial court incorporated a separation agreement into a judgment of absolute divorce by reference and the court ordered that the separation agreement should survive the divorce action, but the court did not specifically order defendant to pay alimony pursuant to the separation agreement, the provisions of the agreement, including the alimony provisions, were enforceable by contempt.

THIS case is before us on petition for discretionary review of the decision of the Court of Appeals, 34 N.C. App. 56, 237 S.E. 2d 281 (1977), (Britt, J., concurred in by Brock, C.J., and Morris, J.), affirming the judgment of *Israel, D.J.*, 2 August 1976 Session, BUNCOMBE County District Court.

On 16 October 1973 plaintiff, Virginia F. Levitch, filed an action against her husband, David H. Levitch, seeking alimony without divorce, custody of the couple's minor child and child support. Defendant subsequently filed an answer and counterclaim. On 7 December 1973, judgment in the cause was issued granting defendant an absolute divorce from plaintiff upon a finding that the parties had voluntarily lived separate and apart for over one year. The court found as fact that the parties had executed a separation agreement on 21 November 1973 which contained express provisions resolving the issues set out in plaintiff's complaint and that at the time of the decree both parties were in compliance with the terms of the agreement. The court then concluded that, under G.S. 50-16.6(b), the separation agreement constituted a defense to plaintiff's claim for relief. The judgment then provided as follows:

". . . that the said Deed of Separation executed by the parties on the 21st day of November, 1973, shall survive this action and should be incorporated by reference herein; . . .

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED, and DECREED that the Separation Agreement heretofore entered into by the parties on November 21, 1973, be, and the same is

hereby, incorporated by reference in this judgment and shall survive this Judgment."

On 20 January 1976, plaintiff filed a motion in the cause alleging that defendant had failed to pay alimony as provided in the separation agreement and was in arrears in payments to the extent of at least $1500.00. She asked that the defendant be adjudged in contempt of court.

On 5 August 1976 the court entered an order denying plaintiff's motion on the grounds that the 7 December 1973 judgment merely incorporated the separation agreement between the parties, and did not order defendant to pay alimony as provided in the agreement.

Other facts pertinent to the decision are set out in the opinion.

*Floyd D. Brock by Jerry W. Miller, for plaintiff-appellant.*

*Riddle and Shackelford, by Robert E. Riddle and George B. Hyler, Jr., for defendant-appellee.*

COPELAND, Justice.

The sole question for our consideration here is whether the judgment incorporating the provisions of the separation agreement is enforceable by contempt. For the reasons set out below, we have determined that it is; therefore, the decision of the Court of Appeals must be reversed.

In the analogous area of consent judgments, we have held that where the court merely approves the payments the supporting spouse has agreed to make and sets them out in the judgment, nothing more than a contract results; however, a judgment in which the court adopts the agreement of the parties as its own determination of their respective rights and obligations and directs payment of the specified amounts is an order of the court. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). Judgments of the former type are enforceable only as ordinary contracts, while judgments in the latter category may be enforced by contempt proceedings. *Id.* We have further stated that, "When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree. The obligations imposed are those of the judgment, which is en-

forceable as such." *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E. 2d 71, 73 (1967).

In the instant case, the court expressly stated that it "ORDERED, ADJUDGED and DECREED that the Separation Agreement heretofore entered into by the parties . . . be . . . incorporated by reference in this Judgment." Defendant contends that since the court failed to expressly state that the alimony provided for in the agreement was ordered to be paid, this was a mere approval of the agreement, rather than an adoption of it into the judgment. The incorporation language here, however, appears sufficiently compelling to indicate an intent on the part of the court to order payment of the alimony. Indeed, in the usual case in which we have found approval rather than adoption, the court has stated merely that the agreement was approved, reviewed the subject matter of the agreement in narrative form without further order, or expressly excluded the agreement from any prejudice under the terms of the judgment. *See, e.g., Davis v. Davis*, 213 N.C. 537, 196 S.E. 819 (1938); *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946).

Defendant further argues that because the separation agreement provided that it was to be incorporated in any decree of absolute divorce subsequently obtained by the parties without merging therein, the judgment here must be interpreted to be a mere approval rather than an adoption of the agreement. As a general rule, the determinative factor in construing judgments is the intent of the court. 46 Am. Jur. 2d, Judgments, § 73. Although the intent of the parties is controlling in the interpretation of consent judgments, *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975), the decree in the instant case does not appear to have been obtained by consent.

Defendant relies upon *Williford v. Williford*, 10 N.C. App. 451, 179 S.E. 2d 114, *cert. denied*, 278 N.C. 301, 180 S.E. 2d 177 (1971), for the proposition that mere incorporation by reference is insufficient to indicate an adoption of the agreement. We see from a connected case at 10 N.C. App. 529, 179 S.E. 2d 113, *cert. denied*, 278 N.C. 301, 180 S.E. 2d 178 (1971), however, that the incorporation by reference in the judgment there was specifically stated by the district judge to have been done pursuant to provisions in a paragraph of the separation agreement. In the case *sub*

*judice*, the court found that the agreement ". . . shall survive this action and should be incorporated by reference herein . . ." and specifically ordered that it be incorporated by reference with no mention of any reason for the incorporation other than its determination that the agreement would survive the judgment. In the face of such unequivocal language, we cannot hold that a mere proviso in the agreement should overcome the express intent of the court to adopt the alimony provisions into its order.

It is our conclusion that the separation agreement, including the alimony provisions, was adopted by the court and compliance with its terms ordered in the divorce decree. The lower courts erred in ruling to the contrary; therefore, the cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

BEAMAN v. SHEPPARD

No. 45 PC.

Case below: 35 N.C. App. 73.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 March 1978.

BURKHIMER v. COBLE, COMR. OF REVENUE

No. 33 PC.

Case below: 35 N.C. App. 127.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 March 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 March 1978.

GELDER & ASSOCIATES v. INSURANCE CO.

No. 24 PC.

Case below: 34 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

HURDLE v. WHITE

No. 16 PC.

Case below: 34 N.C. App. 644.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

LOVE v. PRESSLEY

No. 14 PC.

Case below: 34 N.C. App. 503.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

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

PRINTERY, INC. v. SCHINHAN

No. 43.

Case below: 34 N.C. App. 637.

Appeal by defendant dismissed ex mero motu for lack of substantial constitutional question 7 March 1978.

SAWYER v. SAWYER

No. 38 PC.

Case below: 35 N.C. App. 154.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. BLACKBURN

No. 32 PC.

Case below: 34 N.C. App. 683.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 February 1978.

STATE v. BROWN

No. 35 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. GRIER

No. 39 PC.

Case below: 35 N.C. App. 119.

Petition by defendant for discretionary review under G.S. 7A-31 denied 20 February 1978.

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

STATE v. McMANUS

No. 20 PC.

Case below: 34 N.C. App. 751.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. McWHORTER

No. 31 PC.

Case below: 34 N.C. App. 462.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. MENSCH

No. 11 PC.

Case below: 34 N.C. App. 572.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. NELSON

No. 36 PC.

Case below: 34 N.C. App. 751.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. PAYNE

No. 54 PC.

Case below: 35 N.C. App. 154.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

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

STATE v. PETERSON

No. 52 PC.

Case below: 35 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. PURCELL

No. 19 PC.

Case below: 30 N.C. App. 258.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 March 1978.

STATE v. ROSS

No. 82.

Case below: 35 N.C. App. 98.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 March 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 7 March 1978.

STATE v. SUMRELL

No. 29 PC.

Case below: 34 N.C. App. 502.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. THOMAS

No. 25 PC.

Case below: 34 N.C. App. 534.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

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

STATE v. THOMAS

No. 12 PC.

Case below: 34 N.C. App. 594.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. VEHAUN

No. 37 PC.

Case below: 34 N.C. App. 700.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. WALKER

No. 28 PC.

Case below: 34 N.C. App. 485.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE v. WINSTEAD

No. 27 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1978.

STATE OF NORTH CAROLINA v. JIMMY BRAXTON, DAVID LEE BURDEN, BOBBY RAY HOWELL, AND LEE VERNON McIVER

No. 17

(Filed 17 April 1978)

1. **Criminal Law § 92.1— rapes by four defendants—consolidation proper**

Cases against four defendants were properly consolidated for trial, though each of the successive rapes of the prosecutrix was a separate criminal offense, since all of the offenses were parts of a common scheme or plan and each of the defendants was present, aiding and abetting in each offense; moreover, consolidation of one defendant's case with the others for trial did not deprive defendant of a fair trial because statements made to investigating officers by his codefendants were admitted in evidence over his objection, since the trial court required that each statement of the defendants be carefully edited so as to delete therefrom any reference to any other defendant. G.S. 15A-926(b)(2); G.S. 15A-927(c)(1).

2. **Criminal Law § 66.1; Rape § 5— identification of defendant as rapist—opportunity for observation—sufficiency of evidence**

Contention by one defendant in a first degree rape prosecution that his motion for nonsuit should have been allowed on the basis of the weakness of the prosecuting witness's identification of him is without merit, since the evidence tended to show that the victim first observed defendant in a well lit parking lot when he dragged her from her car; she was transported many miles on a brightly moonlit night, during which time defendant was sitting immediately beside her; thereafter, she was raped successively by defendant and his three companions in a moonlit abandoned house; and on the ride from the place where the victim was seized to the house where she was raped, the victim and her assailants passed through the well lighted streets of the City of Fayetteville and thereafter through the lighted streets of a small town.

3. **Criminal Law § 66.18— identification of defendant—no voir dire required**

Even if one defendant's general objection with no request for a voir dire was sufficient to require the court to conduct such an examination to determine the admissibility of the testimony of a witness identifying the defendant as her assailant, the failure to conduct such voir dire was harmless error beyond any reasonable doubt, since none of the four defendants made a motion, prior to trial, to suppress identification testimony by the witness; there was no suggestion in the record of any questionable pretrial identification procedures; there was no indication in the record that the witness saw any of the defendants from the time they abandoned her on a rural road after the alleged offenses to their preliminary hearing upon the present charges; there was no suggestion in the record that she ever identified, or was requested to identify, any other person than these four defendants as one of her assailants on this occasion; her opportunity to observe each defendant at the time of the occurrences was ample; and the victim's testimony, given upon a voir dire requested by another defendant to determine admissibility of identification testimony,

that the four defendants were her assailants and that her identification of them was based on her observation of them at the crime scene removed any possible doubt as to the admissibility of the victim's identification testimony.

4. **Criminal Law § 66.12— consolidation against multiple defendants—basis of identification of defendant as rapist**

Contention by one defendant in a rape trial that the prosecuting witness identified him in court as one of her assailants solely because the cases against four defendants were consolidated and, consequently, he and his three codefendants were present in the courtroom as the defendants charged with the offenses is without merit since the victim testified that she observed defendant on the night of the crime in a well lit parking lot, through the well lit streets of Fayetteville, and over moonlit roads for an extended period of time; during the ride, the victim struggled with defendant over possession of a gun which discharged, wounding defendant in the finger; on the day following the alleged crime, an officer who obtained a statement from defendant observed a wound on one of defendant's fingers; and defendant's own statement to the officer fully corroborated the victim's testimony as to defendant's part in her abduction and rape.

5. **Criminal Law § 75— defendant's oral statement reduced to writing—admissibility**

The trial court did not err in admitting into evidence a statement allegedly made by one defendant in a rape case where the evidence tended to show that the statement in question was compiled by an officer from notes made by him of defendant's oral statements, which statements were made after defendant was given the *Miranda* warnings; the written statement was then shown to defendant; defendant signed the statement; and defendant pointed out no discrepancies between the written statement and his oral statement on the voir dire to determine admissibility of the written statement.

6. **Criminal Law § 33— relevancy of evidence—test**

The test of relevancy of evidence is whether it tends to shed any light on the subject of the inquiry or has as its only effect the exciting of prejudice or sympathy.

7. **Criminal Law § 33.1— four rapists—evidence of each rapist's acts relevant**

In a first degree rape prosecution where the evidence tended to show that the victim was abducted by four men from a parking lot, transported over some distance to an abandoned house and raped, the entire occurrence from the abduction to the final release of the victim was a unified course of criminal activity in every part of which each of the four defendants was a participant; consequently, all of the evidence recounting acts of the several defendants was relevant upon the inquiry as to the guilt of each and was properly admitted unless some other rule of evidence required its exclusion.

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

The trial court properly denied one defendant's motion for nonsuit in a first degree rape prosecution where the evidence tended to show that defendant was the driver of the car in which the victim was transported from the

point of abduction in Fayetteville to an abandoned house in another county where defendant and his companions raped the victim, and the victim testified that defendant twice had sexual intercourse with her without her consent.

**9. Criminal Law § 75— defendant's oral statement reduced to writing—admissibility**

The trial court properly allowed into evidence a statement made by defendant to an investigating officer where the evidence tended to show that defendant was informed of his constitutional rights before he made the statement and that he signed a written waiver of those rights; no promises or threats were made to defendant in order to procure his statement; and, after the interviewing officer reduced defendant's oral statement to writing, defendant said that the written statement was correct and signed it.

**10. Searches and Seizures § 18— search of vehicle—consent given by owner**

The trial court properly allowed into evidence items found in a car allegedly used in the perpetration of a rape, since the owner of the car, who was the mother of one defendant, had consented to the search of the automobile by the officers.

**11. Criminal Law § 57— evidence of damage from firearm—witness's qualifications not questioned—opinion admissible**

In a prosecution for rape where the victim testified that she was abducted by the four defendants, that a struggle for possession of a gun took place during her abduction, and that the gun was fired inside the car, a detective on the sheriff's staff with 35 years experience in law enforcement and military service could properly express an opinion that damage to the inside of the car was caused by a bullet, since the qualifications of the witness to testify were never questioned by any defendant; the testimony corroborated that of the prosecutrix; and the testimony in question was not given before the jury but in its absence during the course of a voir dire examination.

**12. Criminal Law § 74.3— confession referring to codefendants—edited confession admissible**

A statement made by one defendant which had been edited to comply with the rule of *Bruton v. U. S.*, 391 U.S. 123, by deleting references to the other defendants was not inadmissible because it was not the complete statement as originally signed by defendant.

**13. Bills of Discovery § 6— discovery of aliases of prosecutrix—maiden name not an alias**

A married woman's maiden name is not an alias; therefore, the district attorney was not required to furnish such information to defendant pursuant to a discovery order requiring disclosure of all aliases by which the prosecutrix had been known.

**14. Bills of Discovery § 6— evidence withheld after discovery order—exclusion of evidence discretionary**

Since G.S. 15A-910 provides that the court "may" forbid the introduction of evidence not disclosed to the adversary in accordance with a discovery order, the admission or exclusion of such evidence is left in the discretion of the trial court.

**State v. Braxton**

APPEALS by each defendant from *Preston, J.*, who sentenced each to imprisonment for life upon his conviction of first degree rape.

The evidence before the jury on behalf of the State, the defendants having offered no evidence except upon various voir dire examinations in the absence of the jury, was sufficient to show the following:

On the evening of 11 February 1977, the prosecutrix, married and living with her husband in Raeford, North Carolina, drove alone to Fayetteville to attend a moving picture theatre. She parked her car in a lighted parking lot on Bass Street, the windows being rolled up and all the doors locked. Before she could get out of the car, another car, a white, two-door Pontiac Grand Prix, drove into the parking space beside her on the right. The defendant Burden and the defendant Braxton got out of that car, the defendant McIver being its driver and the defendant Howell being in the right front seat.

Burden went immediately to the driver's side of the woman's car and Braxton to the right side of it. Burden pointed a pistol at her and demanded that she roll down the window. When she did so, he, with the aid of Braxton, pulled her out of the car and forced her into the back seat of the white, two-door Pontiac Grand Prix driven by McIver. Burden and Braxton then got into the back seat with her and the car drove off, the woman screaming for help.

Pedestrians observed the car driving away, heard the woman's outcries, noted the license number and promptly reported the occurrence and license number to a nearby police officer. A report of the occurrence, including a description of the car and its license number, was then broadcast on the Police Information Network. By this means, the car was identified as a vehicle registered in the name of McIver's mother, a resident of Lumberton.

With McIver driving, Howell in the front passenger seat and Braxton and Burden in the rear seat with the woman, Burden waving the pistol around and pointing it at her head, the car drove out of Fayetteville and over rural roads into Robeson County. In the course of this driving, the woman, at one time, seized

the gun and pulled it from Burden's hand, firing it into the upholstery of the car until all the ammunition then in the pistol was discharged. In the process, Burden, in attempting to recover the pistol from the woman, was shot in one finger. The pistol was then wrestled away from the woman and reloaded.

After driving some distance, the car was brought to a stop in an isolated rural area and, the other three defendants getting out of the car, Howell got into the back seat and forcibly had sexual intercourse with the woman, penetrating her without her consent.

Thereupon, the other defendants returned to the car and they drove to an abandoned house, located in an isolated rural area of Robeson County within a mile or two of the residences of the several defendants, forced the woman into the house and down upon the floor which was littered with broken window glass. Each of the defendants then and there had sexual intercourse with her forcibly and against her will, first one and then other members of the group holding the pistol and Braxton firing it into the floor beside her head as she lay there. Finally, she was ordered to get up and put on part of her torn clothing and return to the car.

Driving a bit further, the defendants put the woman out on an isolated rural road and drove away. She went to a residence in the vicinity and the police were called. She described to the officers her assailants and the car, telling them of the above events.

With the aid of the reported license number and the victim's description of the vehicle, the officers located it that night in the yard of the residence in which McIver and his mother lived. A search of the car revealed bullet holes in its upholstery and floor, spent pistol cartridges and certain personal articles identified by the victim as hers. Subsequently, an abandoned house, meeting the description given by the victim of the house to which she had been taken and identified by her as that house, was searched by investigating officers who found therein, and in the yard of the house, other personal articles and partially burned articles of clothing, all identified by the victim as hers.

Over objection by each defendant, the four cases were consolidated for trial. Repeatedly, during the course of the trial, the jury was sent from the courtroom for the holding of voir dire ex-

aminations prior to the admission of evidence offered by the State. At one of these defendants Burden and Howell testified, at another Howell, alone of the defendants, testified, and at a third the mother and brother of the defendant McIver testified. Otherwise, the defendants offered no evidence. The printed record contains 391 pages of what transpired at the trial, of which 275 pages are concerned only with evidence taken on the various voir dire examinations in the absence of the jury and arguments of counsel with reference thereto, the jury having been sent from the courtroom on 12 separate occasions for this purpose. The facts therein developed, insofar as pertinent to this appeal, are set forth in the opinion.

There being no exception taken by any defendant to the charge of the trial judge to the jury, the charge is not included in the record on appeal.

*Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Associate Attorney, for the State.*

*Arthur L. Lane for Defendant Appellant McIver.*

*Adelaide G. Behan for Defendant Appellant Howell.*

*Ertle K. Chavis for Defendant Appellant Burden.*

*John Wishart Campbell for Defendant Appellant Braxton.*

LAKE, Justice.

The four defendants were represented by separate counsel, both at trial and on appeal. Each appealed from a sentence to life imprisonment imposed upon him. Their assignments of error are not the same in all respects and they filed separate briefs. Consequently, we discuss their appeals separately.

## APPEAL OF THE DEFENDANT BRAXTON

In his statement of the case on appeal, the defendant Braxton assigned as error: (1) The admission of various portions of the State's evidence, this assignment being based upon 35 unrelated exceptions; (2) the denial of 18 motions of widely varying nature made by this defendant before trial, during its progress and after the verdict; and (3) the signing and entry of the judgment.

The first two assignments obviously violate Rule 10(c) of the Rules of Appellate Procedure, 287 N.C. 671, 699, which states that each assignment of error "shall, so far as practicable, be confined to a single issue of law." This flagrant disregard for our rules is equally evident in the appeals of the other defendants also. Due to the serious nature of these cases, however, we have given careful consideration to all assignments of error made by each defendant.

Assignment of Error No. 3 is formal and requires no discussion. It presents for review only the record proper. *State v. Wilson*, 289 N.C. 531, 538, 223 S.E. 2d 311 (1976). The trial court had jurisdiction and no error appears on the face of the record proper. Furthermore, this assignment of error was not brought forward into the brief on appeal and is, therefore, deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 671, 741. This assignment is, therefore, overruled.

Assignment of Error No. 1 is, likewise, not brought forward into the brief on appeal and is, for the same reason, deemed abandoned. We have, nevertheless, carefully examined each of the exceptions upon which this assignment of error is based and find no merit in any of them. It would serve no useful purpose to discuss these rulings of the trial court *seriatim*.

In support of his Assignment of Error No. 2, the defendant Braxton contends that the court erred in denying his motion for a separate trial, allowing the motion of the District Attorney to consolidate the four cases for trial and in denying the motion of this defendant for a judgment of nonsuit. The remaining exceptions to the rulings of the trial court upon the motions of this defendant, included within his Assignment of Error No. 2, are not brought forward into the brief and, for the above mentioned reason, are deemed abandoned. We have, nevertheless, considered each of them and find each without merit. In the contention so made in the brief concerning the consolidation of the cases for trial and the denial of the motion for judgment of nonsuit, we also find no merit.

**[1]** G.S. 15A-926(b)(2) provides:

> "(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others."

The record shows that the State filed written motions prior to trial to consolidate the four cases here in question. While each of the successive rapes of the prosecutrix was a separate criminal offense, the record clearly shows that all of the offenses were parts of a common scheme or plan and each of the defendants was present, aiding and abetting in each offense. Under these circumstances, the granting of the motion for consolidation for trial rests in the sound discretion of the trial judge, and in the absence of a showing that the joint trial deprived the defendant of a fair trial, his exercise of that discretion by consolidating the cases for trial will not be disturbed on appeal. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Grundler*, 251 N.C. 177, 191, 111 S.E. 2d 1 (1959), *cert. den.*, 362 U.S. 917 (1960).

The defendant Braxton asserts that the consolidation of his case with the others for trial deprived him of a fair trial because, in violation of the rule of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), statements made to investigating officers by his codefendants were admitted in evidence over his objection.

G.S. 15A-927(c)(1) provides:

"(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the solicitor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant."

In the present case, the trial judge chose, and the District Attorney complied with, the second of these alternatives. Statements made to investigating officers by defendants Burden, Howell and McIver were the subjects of extended voir dire examinations. As a result, the trial court ruled that each such statement was admissible against the declarant, but required each such statement to be carefully edited so as to delete therefrom any reference to any other defendant. This was done prior to the introduction of such statement in evidence, the record indicating that all counsel participating in the trial collaborated in such editing. This procedure and the allowance of each such statement in evidence did not violate either G.S. 15A-927(c) or the rule of *Bruton v. United States*, *supra*. The admission of such statements was not error as to the defendant Braxton. He is not mentioned in any of the statements so edited and admitted.

**[2]** The contention of the defendant Braxton that his motion for judgment as of nonsuit should have been allowed on the basis of the weakness of the identification of Braxton by the prosecuting witness is utterly without merit. A motion for a judgment of nonsuit is properly denied when the evidence, including evidence erroneously admitted (*State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, death sentence vacated, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976), considered in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, is sufficient to afford a reasonable basis for the finding by the jury that the offense charged has been committed and the defendant was the person who committed it. *State v. Covington*, 290 N.C. 313, 327, 226 S.E. 2d 629 (1976); *State v. Warren*, 289 N.C. 551, 559, 223 S.E. 2d 317 (1976); *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

The evidence for the State is abundantly sufficient to meet this test. The testimony of the prosecuting witness, taken to be true, as it must be upon such a motion, shows successive, forcible rapes by this defendant and each of his companions. Her identification of Braxton in court as one of her assailants was clear and unequivocal. She testified that she was dragged by Braxton and Burden from her automobile, which was parked in a parking lot in which the lighting was good enough to see "pretty well." She was forced by them into the automobile parked beside her own and transported many miles, on a brightly moonlit night, during which Braxton was sitting immediately beside her and, thereafter, she was raped successively by him and his three companions in the moonlit abandoned house, into which they pushed her. It was Braxton who there virtually disrobed her and, following the successive rapes, compelled her to commit the revolting act of oral sex upon him. It was he who fired the pistol into the floor whereon she lay, the bullet striking the floor very close to her head. On the ride from the place where she was seized to the house wherein she was so raped, they passed through the well lighted streets of the City of Fayetteville and thereafter through the lighted streets of a small town. Under these circumstances, it is absurd to contend that the State's evidence is not sufficient to go to the jury on the question of Braxton's identity.

The identification of Braxton as one of the assailants is, furthermore, corroborated by the testimony of his barber that, on the day following this occurrence, Braxton had his head shaved, thus altering his appearance and that he said to another customer, who thereafter entered the barber shop, "I'm glad you can't recognize me because I got to leave town." Braxton was found by the police, three days later hiding in a closet.

After the prosecutrix had testified to the lighting in the parking lot from which she was abducted and that, hearing a knocking upon the window of her car, she turned and looked into the face of a black male standing at the window, she was asked if she recognized that man in the courtroom, to which she replied in the affirmative. Thereupon, each of the defendants objected. The objections were overruled and, with no request for a voir dire examination of the witness, she proceeded to identify that man as Burden. She testified that she reached to start her car again and thereupon Burden pulled the gun from under his jacket, stuck it

up to the window, pointed it directly at her head and directed her to roll down the window. She looked to the other side to see if she could escape through that door and, at that time, saw Braxton, identified by her in court, on the other side of her car. There was no objection specifically directed to this in-court identification of Braxton. Thereafter, without objection concerning his identification, the prosecutrix repeatedly testified concerning his presence and conduct throughout the series of events.

**[3]** Assuming, without deciding, that, under these circumstances, the general objection by Braxton, above noted, with no request for a voir dire examination of the witness, was sufficient to require the court to conduct such an examination, in the absence of the jury, as to the admissibility of the testimony of this witness concerning the identity of Braxton as one of her assailants, the failure to conduct such voir dire was harmless error beyond any reasonable doubt.

No defendant made a motion, prior to trial, to suppress identification testimony by this witness. We find in the record no suggestion whatever of any questionable pretrial identification procedures. Nothing in the record indicates that this witness saw any of these defendants from the time they abandoned her on the rural road after the alleged offenses to their preliminary hearing upon the present charges. There is no suggestion in the record that she ever identified, or was requested to identify, any other person than these four defendants as one of her assailants on this occasion. As above shown, her opportunity to observe each defendant at the time of the occurrences was ample. It is inconceivable that a voir dire examination would have disclosed any basis for objection to her in-court identification of Braxton, or any of the other three defendants, as one of the men who so abducted and raped her.

The defendant Braxton's brief states that this witness "did not identify him in the probable cause hearing," but there is nothing in the record to show that, at the probable cause hearing, she was requested to identify any of the defendants.

Some time after her identification of Braxton and Burden as the men who pulled her from her own car and of McIver as the driver of the car into which she was forced, at the request of Howell's counsel, a voir dire was conducted with reference to the

identification by the prosecutrix of Howell as the fourth man in the car into which she was forced. On this voir dire no defendant offered evidence and counsel for neither Braxton, Burden nor McIver questioned the prosecutrix. This man was sitting on the passenger side of the front seat and the prosecutrix had testified before the jury that as she entered the car she did not get a good look at him. On the voir dire, however, she testified that this man turned around and she observed his full face as the car was passing through a small town in which there were street lights and lights of filling stations. Furthermore, as she testified, the light of a bright moon prevented the house into which she was taken from being dark. The moon would, of course, cast light into the car. In the course of this voir dire the witness testified:

"Q. Did you identify him [Howell] at the District Court hearing [the preliminary hearing]?

"A. I identified all four as the ones. They didn't ask me to point them out as I recall.

"Q. Could you tell the difference between the four defendants at the District Court?

"A. Of course I could tell the difference between them.

"Q. If you hadn't seen them at the District Court hearing, would you be able to identify them today?

"A. Yes, I would have.

* * *

"Q. You are saying, then, that your testimony today, your identification today, is based on your observations of these four defendants on the night of the 10th of February, 1977, is that correct?

"A. Yes, sir."

Upon the conclusion of that voir dire, the court entered an order making full findings of fact that the in-court identification of Howell was based upon the witness' identification of him on the night of the abduction and rape, and Howell's objection to the allowance of such testimony as to him was overruled.

Clearly, the evidence thus brought forth upon the voir dire examination, conducted at the request of defendant Howell, removes any possible lingering doubt as to the admissibility of her testimony identifying the defendants Braxton, Burden and McIver.

We find no error in the record which would justify the granting of a new trial to the defendant Braxton. His conviction and the sentence imposed upon him must, therefore, be affirmed.

APPEAL OF THE DEFENDANT BURDEN

The defendant Burden, like his codefendant Braxton, in his statement of the case on appeal, assigned three errors as follows: (1) The admission of evidence over objection, this being based upon 20 exceptions; (2) the denial of 14 motions made by Burden; and (3) the signing and entry of the judgment.

For the reasons stated in connection with the appeal of the defendant Braxton, Assignment No. 3 is without merit.

Burden, like Braxton, did not bring forward into his brief any of the 20 exceptions upon which his Assignment of Error No. 1 is based. This assignment, and the exceptions upon which it is based, are, therefore, deemed abandoned. We have, however, examined each of these exceptions and the portions of the record pertinent thereto and find no merit in any of them. It would serve no useful purpose to discuss these *seriatim*. We have previously discussed, in connection with the appeal of Braxton, the matter of the admissibility of the in-court identification of Burden by the prosecutrix. No further discussion of Burden's exception thereto is necessary.

While the defendant Burden's Assignment of Error No. 2 is based upon 14 exceptions to the denial of various motions made by him, he has brought forward into his brief on appeal only the matter of the denial of his motion for a separate trial and the denial of his motion to suppress evidence of a statement made by him to one of the investigating officers. The other exceptions upon which this assignment of error was based are, therefore, deemed abandoned. Rule 28 of the Rules of Appellate Procedure, supra. We have, nevertheless, considered these abandoned exceptions and the motions to which they relate and find no merit

therein. Nothing would be gained by a detailed discussion of these.

**[4]** With reference to Burden's contention that it was error to consolidate the cases for trial, he asserts in his brief that the prosecuting witness was not able to identify him, or any of the other defendants, at the probable cause hearing. As above noted in our discussion of the appeal of Braxton, the record does not substantiate this assertion. Burden contends that the prosecuting witness identified him in court as one of her assailants solely because the cases were consolidated for trial and, consequently, he and his three codefendants were present in the courtroom as the defendants charged with the offenses. For this reason, he says, the consolidation was prejudicial to him. Burden does not contend that he was prejudiced by the admission in evidence of the carefully edited statements made by McIver and Howell to the investigating officers, or that the admission of those statements violated either G.S. 15A-927(c) or the rule of *Bruton v. United States*, *supra*.

The in-court identification of Burden by the prosecuting witness as one of her assailants was clear and unequivocal. According to her testimony, it was he who first knocked upon the window of her car in the lighted parking lot and, with a pistol pointed at her head, ordered her to roll down the window and then to get out of the car. It was he and Braxton who dragged her from her car, forced her to enter the one driven by McIver and then sat in the back seat of the car with her as they drove from the place of her abduction to the abandoned house where the multiple rapes occurred. On this long ride they traversed the well lighted streets of Fayetteville, went through a smaller town in which there were street lights and lighted filling stations and rode otherwise through bright moonlight. En route to the abandoned house, Burden was pointing the pistol at the head of the prosecutrix until she seized it from him, whereupon they struggled for it as she was firing it. Under these circumstances, it is too great a strain upon credulity to accept his contention that the only basis for in-court identification of him is the fact that he sat at the defendant's counsel table along with the three codefendants.

Furthermore, the prosecuting witness testified that, as she struggled in the car with the defendant Burden for the possession

of the pistol, it fired several times and the defendant Burden exclaimed that she had shot him in the finger. Officer Lovette, who interviewed Burden and obtained a statement from him the following day, testified that one of Burden's fingers had "a wound on it."

Finally, Burden's own statement to Officer Lovette fully corroborates the woman's testimony as to Burden's part in her abduction from the parking lot in Fayetteville, her transportation to the abandoned house in Robeson County, his being wounded when the woman seized the pistol and fired it, and his having had sexual intercourse with her.

Clearly, the identification of Burden as one of the woman's assailants was not brought about by the consolidation of these cases for trial.

**[5]** Burden next contends that the court erred in denying his motion to suppress the above statement made by him to Officer Lovette. Before this statement was introduced in evidence, the court conducted a voir dire examination in the absence of the jury. Upon it, Officer Lovette and the defendant Burden testified. Burden testified that, at about noon on the day following the alleged rapes, he voluntarily went to the courthouse because he had heard the police were looking for him and there met Officers Lovette and Thompson. He testified that he did not make a statement to Lovette but did make one to Thompson. His mother, father and some friends were with him at the time. He told Officer Thompson that he did not want a lawyer present but did want to make a statement. When shown the statement which the State proposed to offer in evidence and, after the above mentioned editing, did put in evidence, Burden testified that he did not make "that statement." He acknowledged that the officers read to him a statement of his rights and that the signature upon the statement in question looked like his. His testimony was that Officer Lovette and Officer Thompson both read the statement of his rights to him and then Officer Lovette left the room.

Officer Lovette testified on this voir dire that he interviewed Burden and advised him of his constitutional rights pursuant to the *Miranda* formula, whereupon Burden indicated that he understood his rights and wished to make a statement. Officer Lovette testified that he promised Burden nothing and did not

threaten him or use any form of coercion to secure a statement from him. He further testified that while the statement was being made by Burden, Officer Thompson and Burden's parents were present. He further testified that Burden made an oral statement of which Officer Lovette made notes and then reduced the statement to writing during the afternoon. He further testified that Burden made another statement to Officer Thompson in the absence of Officer Lovette. This second statement was then reduced to writing and Burden, in the presence of Officer Lovette, acknowledged it as his statement, whereupon Officer Lovette signed the statement as a witness thereto.

At the conclusion of this voir dire, the court made full findings of fact, including a finding that the defendant was advised of his constitutional rights pursuant to the *Miranda* formula, and that the statement made by Burden to Officer Lovette was made knowingly, understandingly and of his own free will without any promise or threat or coercion being used. Thereupon, the court concluded that such statment made by the defendant to Officer Lovette was admissible in evidence.

In his brief, the defendant Burden does not contend that he was not fully advised of his constitutional rights. His contention is that while Officer Lovette prepared the writing signed by Burden as his statement, such writing was "not the complete statements of the defendant but a story put together by the police officer" and, therefore, not admissible as the defendant Burden's own statement. In this contention there is no merit. The written statement, which Officer Lovette testified he compiled from notes made by him of Burden's oral statements, was shown to Burden and, according to the testimony of the officers, signed by Burden. Under these circumstances, it is immaterial that the written statement was not, word for word, identical with the oral statement. No discrepancies were pointed out by Burden in his testimony on the voir dire. We find no error in the admission in evidence of the statement.

Neither Burden's brief nor our own careful examination of the entire record discloses any error prejudicial to him. His conviction and sentence are, therefore, affirmed.

## APPEAL OF THE DEFENDANT McIVER

The defendant McIver, like Braxton and Burden, in his statement of the case on appeal, makes three assignments of error: (1) The court erred in the admission of certain evidence, this being based upon 58 exceptions to various rulings with reference to the admission or exclusion of testimony or exhibits; (2) the court erred in denying certain motions of this defendant, this being based upon exceptions to 13 rulings upon various motions made by McIver; (3) the signing and entry of the judgment.

As above stated, the third assignment of error is purely formal and requires no detailed discussion. The court had jurisdiction and no error appears upon the face of the record proper. Furthermore, this assignment of error is abandoned due to the failure of the defendant to bring it forward in his brief on appeal. Rule 28 of the Rules of Appellate Procedure, *supra.*

Like Braxton and Burden, this defendant has abandoned virtually all of the exceptions to rulings of the court upon the admission of evidence which were cited in his statement of the case on appeal as the basis for his Assignment of Error No. 1, through his failure to bring them forward into his brief on appeal. Rule 28 of the Rules of Appellate Procedure, *supra.* As in the appeals of those defendants, we have, however, examined those exceptions and the portions of the record pertinent thereto and find no merit in any of them. No useful purpose would be served by a discussion of these abandoned exceptions.

**[6]** In his brief McIver contends that the court erred in admitting, over his objection, irrelevant evidence. He states, correctly, that the test of relevancy of evidence is whether it tends to shed any light on the subject of the inquiry or has as its only effect the exciting of prejudice or sympathy. This Court so stated in *State v. Page*, 215 N.C. 333, 1 S.E. 2d 887 (1939), cited by the defendant, and again in *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. den.*, 384 U.S. 1020 (1966). The defendant lists, as instances of this alleged error, 11 of his exceptions to the rulings of the court on the admission of evidence, but he does not state wherein these portions of the evidence of the State fail to meet the above test of relevance. Our examination of the portions of the records to which these exceptions relate discloses beyond question the relevancy of each such bit of evidence as measured

by the foregoing test. No useful purpose would be served by a detailed recounting of these bits of the evidence.

[7] McIver contends further, in connection with his Assignment of Error No. 1, that the evidence with respect to the activities on this occasion of the other three defendants should not be used to determine the guilt or innocence of the defendant McIver and that the introduction of such evidence at the trial of McIver was error such as to entitle him to a new trial. This contention is utterly without merit so far as the question of the relevancy of such evidence is concerned. The evidence for the State, if true, as the jury obviously found it to be, shows clearly that the four defendants acted in concert throughout in carrying out a common plan to accomplish a common purpose. The uncontradicted evidence of the victim is that each of the four defendants was present, aiding and abetting throughout the entire occurrence, from the abduction in the Fayetteville parking lot to the abandonment of the victim on a lonely road in Robeson County some three hours later. Each was present, aiding and abetting, while each of the other defendants raped the victim. Thus, each would be accountable for such rapes, as principal in the second degree, even if he, himself, had not had sexual intercourse with the victim. *State v. Overman*, 269 N.C. 453, 473, 153 S.E. 2d 44 (1967); *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897); *State v. Dowell*, 106 N.C. 722, 11 S.E. 525 (1890); *State v. Jones*, 83 N.C. 605 (1880). It is upon this theory that these cited cases hold a woman may be convicted of rape and so may the husband of the victim. The entire occurrence from the abduction to the final release of the victim was a unified course of criminal activity, in every part of which each of the four defendants was a participant. Consequently, all of the evidence recounting acts of the several defendants is relevant upon the inquiry as to the guilt of each and was properly admitted unless some other rule of evidence requires its exclusion. There is no merit in McIver's Assignment of Error No. 1.

With reference to his Assignment of Error No. 2, McIver contends that it was error to consolidate for trial his case with the cases of the other three defendants. We have discussed this contention in reference to the appeal of Braxton and no further discussion thereof is required in connection with the appeal of this defendant.

McIver also makes the related contention that, in violation of the rule of *Bruton v. United States*, *supra*, his right to a fair trial was prejudiced by the admission in evidence, over his objection, of the carefully edited statements made to the investigating officers by Burden and Howell. The statement of neither Burden nor Howell, so edited, implicates McIver in any part of the activities of the declarant related in such statement. Therefore, the admission of such statement in evidence does not violate the Bruton rule.

**[8]** McIver's contention that it was error to deny his motion for judgment of nonsuit is obviously lacking in merit. The testimony of the prosecuting witness was that McIver was the driver of the car in which she was transported from the point of abduction in the City of Fayetteville to the abandoned house in Robeson County wherein the multiple rapes occurred. Her testimony was that McIver there twice had sexual intercourse with her without her consent. The rule governing the consideration of a motion for judgment of nonsuit is as above stated in connection with the appeal of Braxton. It need not be restated here. There is simply no merit whatever in this contention of McIver.

**[9]** There is no error in the denial of McIver's motion to suppress the evidence of his own statement to the investigating officer. Before this statement was admitted in evidence the court conducted a voir dire examination in the absence of the jury. McIver did not testify at this voir dire examination. The evidence of the officer was that McIver was taken to the Sheriff's Department at 4:30 a.m., on 11 February 1977 (the night the alleged offense occurred). He made his statement at approximately 11:40 a.m., the same day. After the interviewing officer reduced McIver's oral statement to writing, McIver said that the written statement was correct and signed it. Before the statement was made, the officer advised McIver of his constitutional rights, pursuant to the *Miranda* formula, and McIver signed a written waiver of those rights, including his right to have counsel present during his interrogation. No promises or threats were made to McIver in order to procure his statement. The court found the facts to be as the officer so testified. We find no error in the denial of McIver's motion to suppress evidence as to the statement so given by him.

The defendant McIver's motions to set aside the verdict as contrary to the weight of the evidence and for the granting of a new trial for unspecified errors were directed to the discretion of the trial court and its rulings thereon are not reviewable in the absence of an abuse of discretion, which does not appear in this case. *State v. Manuel*, 291 N.C. 705, 231 S.E. 2d 588 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960).

**[10]** McIver's motion to suppress evidence found in the car by investigating officers has no merit. The registered owner of the automobile was McIver's mother. The court conducted a voir dire examination and found that she consented to this search of the automobile by the officers, having consented to their taking it from the yard of her home, where the officers found it, to the courthouse. Evidence on the voir dire supports this finding and it is, therefore, conclusive. *State v. Fox*, 277 N.C. 1, 24, 175 S.E. 2d 561 (1970); *State v. Gray*, 268 N.C. 69, 79, 150 S.E. 2d 1 (1966), *cert. den.*, 386 U.S. 911 (1967).

Neither the brief of McIver, nor our careful search of the entire record, reveals any error entitling McIver to a new trial. His conviction and the sentence imposed upon him will, therefore, not be disturbed.

## APPEAL OF THE DEFENDANT HOWELL

The defendant Howell first assigns as error the failure of the trial court to sustain his objections to four alleged leading questions by the District Attorney. The fourth of these questions was not leading since it did not suggest the answer desired. The other three questions were obliquely leading but two of them related to introductory matter and the remaining question dealt with the relatively trivial matter of the time when the pistol was fired by Braxton in the room of the abandoned house wherein the witness was allegedly raped by each of the defendants. We observe no possible prejudice to this defendant resulting from the form of these questions. It is elementary that counsel should not ask his own witness leading questions on direct examination but is equally well established that the allowance of such questions is within the sound discretion of the trial judge. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). This assignment of error is without merit.

The defendant Howell next assigns as error the overruling of his objections to certain evidence on the ground that such evidence was repetitious. The bits of testimony to which these exceptions are directed were trivial and the defendant was not prejudiced thereby even if this were not a matter in the discretion of the trial judge, which it is.

The defendant Howell's next assignment of error relates to nine other miscellaneous rulings of the court overruling objections by this defendant to evidence introduced by the State and to one alleged expression of opinion by the court concerning a hole in the floor of the house, which the investigating officer testified was, in his opinion, caused by a bullet. These various rulings are simply stated in the brief without any argument or authority cited in support of the defendant's position concerning them. The record indicates that the alleged expression of opinion by the court was not a statement by the court at all but a continuation of the testimony of the State's witness. The several rulings of the court to which this assignment relates were clearly correct and no useful purpose would be served by discussing them in detail.

The defendant Howell's Assignment of Error No. 3 is that the court erred in not instructing the jury that two specified portions of the State's evidence did not apply to the defendant Howell. The first such portion of the testimony was in response to the District Attorney's question to the victim of the assaults as to what the four defendants were doing while the victim was firing, within the car, five shots from the pistol which she had seized from the defendant Burden. In overruling the objection of this defendant's counsel to that question, the judge directed the witness to be specific as to which defendant was doing what. Her reply was, "All four of the men in the car had started yelling at each other," which, under the circumstances, was, to say the least, quite plausible testimony. The witness then stated that Braxton, McIver and the third man, subsequently identified by her as Howell, were yelling at Burden and asking him why he gave her the gun. She testified that Burden's response was that he did not give it to her; she took it and had shot him in the finger. Thereupon, she testified, Burden retook the gun from her and Braxton took it from him and reloaded it. This bit of evidence clearly related to all of the defendants. The other portion of the

evidence to which this assignment relates was the testimony of the State's witness Clawson, the barber, that he shaved all the hair from Braxton's head the morning after the offenses are alleged to have occurred. It was not necessary for the court to instruct the jury that this testimony did not relate to the defendant Howell. The trial court was entitled to assume that the jury had sufficient intelligence to know that without being so instructed. There is no merit whatever in this assignment of error.

Howell's Assignment of Error No. 5A relates to the ruling of the trial court concerning certain items found by the investigating officer in the McIver automobile while the automobile was still in the yard of the McIver residence. On voir dire examination, there was a direct conflict between the testimony of the investigating officer and the testimony of McIver's brother and mother as to whether the mother, who was the registered owner of the car, then gave the officer permission to search the car. The court ruled that such consent had not been shown by the State and, therefore, ruled that the items then taken from the car were not admissible as against McIver but were competent evidence as against the other defendants because they had no standing to object to the search of the car. In his brief the defendant Howell concedes that he did not have standing to object to that search of the automobile. We find no error in this ruling of the trial court prejudicial to the defendant Howell.

**[11]** This assignment of error also includes the court's admission of testimony of the investigating officer who searched the car after it was removed to the Sheriff's office with the consent of McIver's mother, the registered owner of the car. This was not the same officer who had removed certain articles from the car while it was in the McIver yard. The testimony of this second investigating officer was that in his search of the car at the Sheriff's office, which the court found to have been with the consent of the registered owner, he found in the inside rear of the car bloodstains and a hole in the side panel and, adjacent thereto, an indentation of a bullet which had not penetrated entirely through the panel. The defendant Howell now contends that his motion to strike this testimony should have been allowed because this was "pure conjecture" on the part of the officer. The testimony tended to corroborate that of the prosecutrix with reference to the firing of the pistol within the car. Obviously, the

witness, a detective on the Sheriff's staff with 35 years experience in law enforcement and military service, would be competent to express an opinion as to the cause of the damage to this interior panel of the automobile. The record does not indicate any statement by this defendant, or any of his codefendants, as to the basis of the objection to the testimony or any indication of a desire by them to inquire into the qualifications of the witness. Furthermore, the testimony in question was not given before the jury but in its absence during the course of a voir dire examination. We find no merit in this exception.

**[9]** Defendant Howell's Assignment of Error No. 5E is to the failure of the court to grant his motion to suppress the evidence of his own statement to the investigating officer. In this assignment also there is no merit. In one of the numerous voir dire examinations conducted throughout this trial, prior to the court's ruling upon Howell's motion to suppress evidence of this statement, the officer, who interviewed Howell and who took the statement from him, testified that he, prior to questioning him, advised Howell as to his constitutional rights pursuant to the full *Miranda* formula. This officer further testified that Howell was then awake and alert and indicated that he fully understood these rights, that no promise or inducement was made him in order to obtain the statement and no coercion whatever was exerted upon him to persuade him to make it. According to this officer's testimony on the voir dire examination, this advice as to his rights was given to Howell just moments prior to the interview in which Howell's statement was made, this being at approximately 11:40 a.m., following Howell's arrest at approximately 5 a.m., which, in turn, was some four or five hours after the alleged offenses.

Howell testified on this voir dire to the effect that he was not advised of any of his constitutional rights, either by the arresting officer or the one who interviewed him, saying: "No, he didn't read no rights to me. Ain't no Sheriff or no detective read rights to me. Ain't nobody read any of them to me." He further testified that while he did make a statement to the officer, it was not the one offered in evidence by the State. He acknowledged that he signed the paper purporting to be his statement but said the officer would not let him see it and did not read it to him. He also acknowledged that at the time of his arrest he signed a paper

purporting to be a waiver of his constitutional rights, but said he did not read it and simply signed it as he was directed by the officer to do. He went to the Eleventh Grade in school and said he could write a little but could not read well.

At the conclusion of this voir dire, the court entered an order containing findings of fact, in accordance with the testimony of the officers, that when Howell was first arrested at approximately 5 a.m., he was advised of his rights by the arresting officer and signed a waiver thereof, that at approximately 11:40 a.m., he was again advised of his rights by and made a statement to the interviewing officer, no promise or threat having been made and no coercion having been exercised upon him. Upon these findings, the court concluded that all of his constitutional rights were properly related to Howell, that Howell signed the waiver of rights understandingly and made the statement to the officer voluntarily and understandingly. The court thereupon denied the motion to suppress evidence of the statement.

Prior to the introduction of Howell's statement in evidence before the jury, another voir dire was conducted with reference to events at the time of his arrest, which was approximately 5 a.m., some six and a half hours prior to the making of the statement. On this second voir dire, a police officer testified: He was one of three officers who went to the McIver home in search of the McIver automobile; when McIver subsequently arrived at the residence, he took the officers to Howell's residence, advising them that he had been with Howell all night; at the request of the officers, Howell then accompanied the officers and McIver to the McIver residence. Howell was not then under arrest and was so advised; he, McIver and the officers then went, in the officers' car, to the Sheriff's office where detectives talked with Howell and McIver separately.

The officer in whose car Howell rode from his own residence to that of McIver, and thence to the Sheriff's office, testified on this second voir dire that he "advised him of his rights when he got into my car," this being "the thing that we usually do to anyone that we are questioning or talking with."

On this second voir dire, Howell also testified. He again denied that the above mentioned officer advised him of any rights

and said he first refused to go to the Sheriff's office but then went at the insistence of the officers.

Thereupon, Officer Thompson, a member of the Sheriff's staff, testified on this second voir dire: He first saw Howell in a room by himself at the Sheriff's office about 4:30 a.m., then knowing Howell was a suspect in this case; he then went into the room where Howell was and read him his rights from a form sheet and explained those rights to him; Howell then signed a waiver of those rights and thereafter Officer Thompson asked Howell if he knew anything about the rape case; Howell stated that he did not know anything about it. Subsequently, Officer Thompson procured a warrant for Howell's arrest and arrested him.

At the conclusion of this second voir dire, the court again denied Howell's motion to suppress the evidence of his statement and permitted an edited version thereof to be read to the jury, the editing having been done by the court and all counsel so as to delete from the original statement, as written by the interviewing officer, any references therein to the other three defendants in order to comply with the rule laid down in *Bruton v. United States*, supra.

The findings of the court upon the said voir dire examinations, being supported by evidence, are conclusive. *State v. Fox, supra; State v. Gray, supra.* They establish that the statement by Howell was made freely and voluntarily, was not induced by threats or promises and was made after he had been fully advised of and understood his constitutional rights as set forth in the Miranda formula.

**[12]** The defendant Howell next contends that the edited statement introduced in evidence before the jury was not the statement actually made by Howell. Obviously, it was not the complete statement as originally signed by Howell for, in order to comply with the rule of *Bruton v. United States, supra,* certain references in the original statement to the other defendants had been deleted. This editing made the statement somewhat incoherent, but a comparison of the original statement with the edited copy fails to show any prejudice to Howell resulting from the editing. Howell, in his brief, concedes that the edited statement "complies with the dictates of *Bruton v. United States*," *supra.* His contention that the use of his statement so edited

deprived him of his right of confrontation and of due process of law is completely baseless. As against him, the entire statement was admissible. The edited statement was no more prejudicial to him that would have been the entire original statement, nor did the editing distort the meaning of the statement as to him. There is no merit in this assignment of error.

Prior to trial, the defendant filed a motion for discovery pursuant to G.S. 15A-902(a). An order of discovery was entered by the court directing in full the discovery sought in the defendant's motion. The defendant now contends that the court erred in admitting evidence of which the defendant had not been advised, pursuant to the said discovery order. This consisted of the following:

(1) A photograph of the defendant Howell, himself, which a witness, one of the investigating officers, testified correctly portrayed his appearance when that officer observed him at the Sheriff's office the night the offense occurred. At the time this was introduced in evidence, the defendant Howell objected without any statement of reason for his objection and made no reference to his motion for discovery.

(2) The testimony of the physician who examined the prosecutrix following the alleged assaults. When this witness was called to the stand, the defendant Howell objected to his being allowed to testify, for the reason that he had asked for a copy of the physician's report in the discovery motion and the District Attorney had then stated he did not have such report in his possession. In response, the District Attorney informed the court that he still did not have a medical report and, furthermore, such report would, in his opinion, be privileged as between the physician and his patient.

(3) The admission in evidence of partially burned articles found by investigating officers in or near the house where the rapes are alleged to have occurred and identified by the prosecutrix as portions of her clothing and other personal articles. To the introduction of this evidence, the defendants objected on the ground that, with reference to these articles, the order of discovery had not been obeyed. The court conducted an extensive voir dire and concluded that, as to these articles, the State had

complied with the order of the court and the provisions of the discovery statute.

(4) The entire testimony of the prosecutrix. The basis for this objection to this evidence was that the order for discovery directed the State to disclose all aliases by which the prosecutrix had been known. The District Attorney replied at that time that he did not know of any such aliases. The defendant Howell contends that the maiden name of the prosecutrix should have been disclosed. The court ruled that the District Attorney had complied with the discovery order.

**[13, 14]** There is no merit whatever in this contention by the defendant Howell. Obviously, a married woman's maiden name is not an alias. Furthermore, G.S. 15A-910 provides that the court "may" forbid the introduction of evidence not disclosed to the adversary in accordance with a discovery order. Thus, the admission or exclusion of such evidence is left in the discretion of the trial court. *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). There was no abuse of discretion in the court's ruling and there is no merit in this assignment of error.

**[2]** The defendant Howell's next assignment of error is that the court abused its discretion in finding that the identification of Howell by the prosecutrix was of independent origin. We have previously discussed the admissibility of the witness' identification of the defendants in connection with the appeal of Braxton. No further detailed discussion of this matter is required in connection with the appeal of Howell. With reference to the identification of the defendant Howell, the court conducted a voir dire examination in the absence of the jury, the evidence at which clearly disclosed ample opportunity of the prosecutrix to see and remember the appearance of Howell during her long ride in the car with him from the point of abduction to the point of her release on the lonely road in Robeson County. It was a bright moonlight night and, in the course of the ride, they passed through a small town with street lights and lighted filling stations. At that time, Howell turned around from his position in the front seat beside the driver and the prosecutrix saw his full face. The house in which the multiple rapes occurred was not dark because of the bright moonlight. Both there and at the time when he, according to her testimony, raped her in the automobile, she

was obviously in close proximity to him long enough for her to observe and remember his appearance. There is no merit in this assignment of error.

The defendant's motion for judgment of nonsuit was properly overruled, for reasons heretofore discussed in connection with the appeal of the defendant Braxton. His motions to set aside the verdict as being against the weight of the evidence and for a new trial were, as heretofore stated, addressed to the discretion of the trial court and, in the denial thereof, there was no error. His motion for arrest of judgment was properly denied, there being no defect appearing upon the face of the record proper. For the same reason, his exception to the signing and entry of the judgment requires no discussion.

This defendant, like his codefendants, has had a fair trial in accordance with the law of this State. His conviction and sentence will not be disturbed.

As we said in *State v. Overman*, 269 N.C. at 470, "Contributory negligence by the victim is no bar to prosecution by the State for the crime of rape," so the prosecutrix' going alone in the evening to the part of the City of Fayetteville where she was abducted does not affect the validity of the judgment here entered.

As to the Defendant Braxton: No error.

As to the Defendant Burden: No error.

As to the Defendant Howell: No error.

As to the Defendant McIver: No error.

STATE OF NORTH CAROLINA v. SUSAN M. RICHARDS

No. 55

(Filed 17 April 1978)

1. **Criminal Law § 69— telephone conversations—establishing identity of caller**

Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established. However, it is not always necessary to prove the identity of the caller before introducing evidence of the conversation, particularly in criminal prosecutions where secrecy, anonymity and concealed identity are generally resorted to, but it is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case.

2. ***Criminal Law § 69— telephone conversations—identity of caller—circumstantial evidence***

In this prosecution for murder and conspiracy to commit murder, there was sufficient circumstantial evidence to identify a telephone caller as "Bob Stem" so as to permit the victim's wife to testify as to telephone conversations with the caller concerning a business trip the victim was taking and a note cosigned by the victim and Bob Stem where the evidence showed that the telephone numbers at the home of the victim and his wife were unlisted; the victim's wife had taken telephone calls numerous times over a period of six months from a caller who always identified himself as Bob Stem and who asked to speak to the victim; she would then hear the victim talking with the caller concerning business dealings; she recognized the voice of the caller on the occasion in question as being the same voice which had called the home several times a week for six months; and defendant told an accomplice that Bob Stem had instigated the killing and had provided information by which the accomplice and defendant located the victim while he was on a business trip.

3. **Conspiracy § 5.1— failure to try third person for conspiracy—evidence of third person's involvement**

In a prosecution for murder and conspiracy with a second person to commit murder, the State's election not to try a conspiracy indictment naming a third person and defendant as conspirators did not bind the State to refrain from offering evidence of the third person's involvement in order to convict defendant, and defendant was not unfairly surprised by testimony showing the third person's involvement in the crimes charged against defendant.

4. **Homicide § 17— business dealings between victim and another—motive for killing**

In this prosecution for murder and conspiracy to commit murder, testimony by the victim's wife regarding business dealings between her husband and another person was relevant to support the State's theory that such other person had a financial motive for wanting to murder the victim and hired defendant to kill the victim.

**5. Searches and Seizures § 7— seizure of pistol—incident to lawful arrest**

A pistol which an arresting officer observed in a bedroom to which defendant had gone to obtain clothing and personal effects was properly seized incident to defendant's lawful arrest to insure the safety of the arresting officers and to prevent the escape of defendant.

**6. Searches and Seizures § 24— probable cause for warrant**

Probable cause existed for the issuance of a warrant to search an apartment occupied by defendant and her accomplice for a .25 caliber pistol used in a murder where the affidavit to obtain the warrant contained facts from which the issuing magistrate could find probable cause to believe that the pistol might be concealed in the apartment and that the informant through whom some of the information was acquired was reliable.

**7. Searches and Seizures § 40— seizure of items not named in warrant**

Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were "the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime," or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items were discovered inadvertently, that is, there was no intent on the part of investigators to search for and seize the contested items not named in the warrant.

**8. Searches and Seizures § 40— seizure of items not named in warrant—nexus between items and crime—inadvertent discovery**

Although a .38 caliber pistol and a .22 caliber sawed-off rifle were not named in a warrant to search an apartment occupied by defendant and her accomplice for a .25 caliber pistol used in a murder, an appropriate nexus between the .38 caliber pistol and rifle and criminal activity was established, and those items were inadvertently and properly seized during a search pursuant to the warrant, where information possessed by the officers at the time of the search that the accomplice was a hired killer and that he and defendant had been seen prior to the killing with several small handguns gave the officers probable cause to believe that the seized guns might be connected with and used as evidence in the killing under investigation, and where the evidence on voir dire supported the conclusion that the officers did not enter the apartment intending to search for or seize anything other than a .25 caliber pistol which they believed to be the murder weapon.

**9. Searches and Seizures § 22— probable cause for warrant—failure to show oral testimony was sworn—Georgia law**

Where probable cause for issuance of a search warrant was clearly supplied by an officer's affidavit, there was no error under Georgia law in the State's failure to show that additional information presented orally by the affiant was in the form of sworn testimony.

**10. Searches and Seizures § 39— seizure of guns in Georgia—crime in North Carolina—Georgia law**

Georgia's law did not prohibit the seizure of guns in that state pursuant to a search warrant because the crime under investigation was committed in North Carolina.

**11. Constitutional Law § 48— right to effective assistance of counsel**

The right to the assistance of counsel secured by the Sixth Amendment to the Federal Constitution, as applied to the states through the Fourteenth Amendment, and by the North Carolina Constitution, Article I, §§ 19 and 23, guarantees the effective assistance of counsel.

**12. Constitutional Law § 48— effective assistance of counsel—physical incapacity—specific acts or omissions**

The question of whether a defendant has been denied the effective assistance of counsel because of the physical incapacity of counsel does not turn on the physical incapacity as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance.

**13. Constitutional Law § 48— effective assistance of counsel—loss of hearing—failure to object to letter**

In this prosecution for murder and conspiracy to murder, defendant was not denied the effective assistance of counsel on the ground that defense counsel lost ninety percent of the hearing in his left ear during the course of the trial and was unable to object to testimony by an accomplice's former wife as to the contents of a letter she had written concerning the murder where defense counsel's cross-examination of the witness indicated that counsel was well aware of the contents of the letter; a portion of the letter supported defendant's contention that the accomplice committed the murder without her knowledge or assistance; the letter, for the most part, was admissible as a prior consistent statement; any technically inadmissible portions of the letter were inconsequential; and whether counsel should have objected to the letter was largely a question of trial tactics.

**14. Constitutional Law § 48— effective assistance of counsel—loss of hearing—cross-examination of witnesses—presentation of evidence**

There is no merit in defendant's contention that she was denied the effective assistance of counsel on the ground that defense counsel lost ninety percent of the hearing in his left ear during the course of the trial and was thus unable to cross-examine properly some of the State's witnesses and to present defendant's evidence effectively.

DEFENDANT appeals from judgment of *Rousseau, J.*, at the 22 November 1976 Criminal Session of GUILFORD County Superior Court. This case was argued as No. 18, Fall Term 1977.

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

*Percy L. Wall and Robert S. Cahoon, Attorneys for defendant appellant.*

EXUM, Justice.

Upon separate bills of indictment defendant was tried and convicted of first degree murder of one John Charles Conaghan (76-CR-20163) and conspiracy with one James Wertheimer to commit this murder (76-CR-20298). She was sentenced, respectively, to life and ten years imprisonment, the ten-year sentence to run concurrently with the life sentence. Defendant's motion to bypass the Court of Appeals on the conspiracy conviction was allowed 3 May 1977.

Defendant's assignments of error are based on her contentions that (1) the trial court erred in admitting certain testimony by the widow of the deceased, on grounds of insufficient identification of a telephone caller, unfair surprise, hearsay and relevancy; (2) the trial court erroneously admitted into evidence certain weapons which were unlawfully seized; and (3) she was denied effective assistance of counsel at trial. After carefully examining each of these contentions, we find no error in the trial.

Although this murder occurred in Greensboro, North Carolina, the victim, defendant, and the state's principal witness, James Wertheimer, who according to his testimony was defendant's accomplice, were all residents of Georgia. Wertheimer testified, in essence, that during the summer of 1975 in Atlanta defendant prevailed upon him to help her murder Jack Conaghan. Defendant told Wertheimer that a friend of hers wanted Conaghan killed and would pay $2500 to have it done because Conaghan was a "con artist that had . . . ripped the [friend] off . . . for quite a bit of money." Wertheimer and defendant made elaborate plans for the murder which defendant's "friend" wanted accomplished somewhere other than Atlanta. Through information supplied by defendant, which she said came from "Bob," Wertheimer learned that Conaghan would be at the Hilton Inn, Greensboro, around 23 October attending a furniture market. During the preparations in Atlanta for the killing Wertheimer testified that the person he understood to have proposed the kill-

ing called the apartment where he and defendant lived and identified himself, when Wertheimer answered, as "Bob Glick." On 22 October 1975 Wertheimer and defendant traveled from Atlanta to Greensboro in two cars—she in her Pinto and he in a 1961 Cadillac which he had purchased cheaply and which they planned to discard after the killing. They located Conaghan's room at the Hilton Inn in Greensboro. Shortly after midnight they both entered the room, robbed Conaghan of $40, and defendant killed Conaghan by shooting him in the back of the head four times at close range with a .25 caliber pistol. After Wertheimer and defendant returned to Atlanta on the morning of 23 October, they read newspaper accounts of the murder. Defendant then stated her intention to collect the money. She gave Wertheimer for the first time the name, address and telephone number of Bob Stem as being her friend who instigated the killing, saying she was afraid Stem would try to "double cross" her. Several days later by prearrangement Wertheimer followed defendant to the Cumberland Mall in Atlanta, where he observed her engage in a transaction with a balding man who appeared to be 40 or 45 years old. Wertheimer and defendant returned separately to the apartment where both were then living. Wertheimer arrived first. Ten or fifteen minutes later defendant returned with $2300 in cash remarking that she would get the balance due her in a few days.

Defendant testified as follows: She accompanied Wertheimer to Greensboro on 22 October because he had told her he needed to deliver a car and collect some money. When they stopped at a restaurant Wertheimer made a telephone call and on returning told her he had contacted the man he wanted to see. She followed him to a Zayre parking lot where he told her to wait and that he would be back in about an hour. She waited about two hours until he returned at approximately 2:00 a.m. They left the Cadillac in the parking lot where, Wertheimer explained, someone would pick it up. They drove back to Atlanta. Defendant admitted knowing Bob Stem. She had once been employed by him and had attended some "concept therapy" meetings conducted by him and his wife in their home. Defendant denied talking with Bob Stem about killing anybody, hearing the name Jack Conaghan prior to her arrest, being in the Greensboro Hilton, and ever shooting anyone.

I

Other evidence for the state tended to identify defendant's friend, the instigator of the crime, as Bob Stem. The testimony of Mrs. Peggy Conaghan, widow of the deceased, tended to establish the identity of Bob Stem, his relationship to Conaghan, and his reasons, or motive, for hiring defendant to kill Conaghan. The admission of this evidence forms the basis of several assignments of error, none of which are meritorious.

Mrs. Conaghan, over defendant's strenuous and continuing objections, was permitted to testify that a person who identified himself as "Bob Stem" telephoned the Conaghan apartment on a Sunday, 19 October, the day before her husband departed for Greensboro. She answered the phone, and the caller asked to speak to "Jack." She overheard her husband tell the caller that he was getting ready to go out of town, would be gone for a week and a half to two weeks, would be staying at the Hilton Inn in Greensboro, and would be driving a light blue Chevrolet. Her husband also told him what time he would be leaving Atlanta and approximately what time he would arrive at the Hilton. She further testified that around 6:00 p.m. on Monday, 20 October, the same person called again and asked if Jack were there. She replied that her husband had left that morning and should be in Greensboro. The caller asked her again concerning the type of car her husband had driven, and she told him the blue Chevrolet.

On cross-examination of Mrs. Conaghan the defendant brought out that a business, Jadon Industries, in which her husband was a principal, was a plaintiff seeking damages of $1,400,000 in a lawsuit pending in Charlotte, North Carolina. Her husband was going to stop off in Charlotte on his way to Greensboro to confer with attorneys about this case, and he mentioned this intention to Bob Stem in their telephone conversation on 19 October. She had heard her husband discuss this lawsuit with Bob Stem over the telephone on many prior occasions.

On redirect examination, again over defendant's strenuous objections, Mrs. Conaghan testified that on other occasions she and Bob Stem had discussed over the telephone a $150,000 note payable to the Trust Company Bank and co-signed by her husband and Bob Stem. She said this note was secured only by a

credit life insurance policy for the full amount of the note on the life of her husband.

Defendant objected to Mrs. Conaghan's testimony on direct and redirect on the grounds (1) that the caller was insufficiently identified; (2) defendant was unfairly surprised by evidence tending to show that she and Bob Stem had conspired together; (3) testimony regarding what her husband had told Bob Stem over the telephone was inadmissible hearsay; and (4) the testimony regarding the business dealings between Conaghan and Stem was irrelevant.

**[1]** "Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established." *State v. Williams*, 288 N.C. 680, 698, 220 S.E. 2d 558, 571 (1975). "If the call was *from* the person whose identity is in question, the mere fact that he represented himself to be a certain person is not enough" to identify him as that person, 1 Stansbury's N.C. Evidence § 96, p. 310 (Brandis Rev. 1973) (hereinafter "Stansbury"); *accord*, *State v. Williams*, *supra*. "Identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence." *State v. Williams*, *supra*, 288 N.C. at 698, 220 S.E. 2d at 571. It is not always necessary to prove the identification before introducing evidence of the conversation, particularly in criminal prosecutions where secrecy, anonymity and concealed identity are generally resorted to. In such cases it is "only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case . . . ." *State v. Strickland*, 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948).

**[2]** In light of these principles there was here sufficient circumstantial evidence to identify Mrs. Conaghan's caller as Bob Stem, notwithstanding the fact that she had never personally met Bob Stem. Most of these circumstances are revealed in the testimony of Mrs. Conaghan. She related that the telephone numbers at the Conaghan residence were unlisted. She had taken telephone calls numerous times over a period of six months from a caller who always identified himself as Bob Stem and who asked to speak to her husband. She then would overhear her husband talking to the caller concerning business dealings. She herself had

talked to the caller concerning business dealings between him and her husband. She recognized the voice of the caller on the day before her husband left for Greensboro and the day of his leaving as being the same voice which had called the home several times a week for a period of six months. Defendant herself in cross-examining Mrs. Conaghan brought out the fact that Bob Stem was interested in the Charlotte lawsuit and had discussed it many times on the telephone with Mr. Conaghan. We find this evidence, the substance of the conversations on October 19 and 20, and the testimony of Wertheimer that defendant told him her friend "Bob Stem" had instigated the killing and had provided her with information by which Wertheimer and defendant located the whereabouts of Conaghan in Greensboro clearly sufficient to identify the caller to Mrs. Conaghan as this same Bob Stem. Similar circumstances were present in *State v. Williams*, *supra*, 288 N.C. 680, 220 S.E. 2d 558 (1975), where we held that the evidence was sufficient to identify the caller.

**[3]** Neither are we persuaded by defendant's contention that she was unfairly surprised by the testimony of Mrs. Conaghan tending to show a conspiracy between her and Bob Stem. Defendant's argument is this: Bob Stem was charged with conspiring with defendant to murder Jack Conaghan in another indictment which was listed on the trial calendar with the two cases now being considered. Stem was present in the courtroom on opening day of the session. The state elected not to call this indictment for trial. Defendant argues in her brief as follows:

> "The State elected to try defendant on the indictment charging the conspiracy with Wertheimer and declined to call for trial the conspiracy charge involving defendant and Stem. Having done so, it is argued, the State put defendant on notice that the conspiracy being tried involved only defendant and Wertheimer and not Stem. For all practical purposes, this constituted a bill of particulars and was notice to defendant that the State was not intending to pursue the defendant and Stem conspiracy. Defendant was led to believe through the actions of the District Attorney that only two conspirators were involved—not three."

Defendant on oral argument informed the court that, when the state elected not to call the Stem conspiracy indictment for trial,

Stem was excused from the courtroom and presumably returned to Atlanta. Had defendant realized, she argues, that the state was going to pursue the Stem conspiracy at defendant's trial, defendant would have subpoenaed Stem and used him as a witness.

The state's election not to try the conspiracy indictment naming Stem and defendant as conspirators was merely an election by the state not to put Stem on trial at that time. Absent from further express understanding between the state and defendant regarding the nature of the evidence the state intended to produce, we fail to see how the state's election would indicate to defendant that *evidence* of Stem's involvement would not be adduced at defendant's trial. An election not to pursue Stem for his alleged conspiracy does not bind the state to refrain from offering evidence of the conspiracy in order to convict defendant. As defendant argues elsewhere in her brief, the theory of the state's case against her was that Bob Stem had financial reasons for wanting to murder Jack Conaghan. He employed defendant to commit the crime, and she in turn enlisted the aid of Wertheimer. Furthermore, the record shows that in March, 1976, counsel for defendant was furnished with a copy of a statement Wertheimer gave to law enforcement officers in Georgia during December, 1975. This statement substantially coincided with Wertheimer's testimony at trial. Wertheimer's testimony constitutes evidence of a conspiracy between Stem and defendant. Mrs. Conaghan's testimony is simply more of the same kind of evidence. Defendant's brief also informs us that Bob Stem had been tried at the 17 January 1977 Session of Guilford Superior Court on "substantially the same evidence" presented in the trial of defendant. Stem, however, testified at that trial and denied his involvement in the killing. The jury acquitted him. The point is that all of the indictments returned against Wertheimer, Stem, and defendant arise out of substantially the same set of facts. There is, consequently, no basis for defendant to argue that she was unfairly surprised by testimony showing Bob Stem's involvement in these crimes charged against her.

**[4]** Defendant's argument that Mrs. Conaghan's testimony regarding the business dealings between her husband and Stem was irrelevant is patently without merit. Defendant argues that this evidence, although irrelevant, was "high prejudicial" to her. It was of course highly prejudicial for the same reason that it was

relevant. It tended to prove the state's theory of this bizarre killing. It showed Stem's motive for hiring defendant to do the job. Whether in fact Stem hired defendant was an important factual issue in the case. Any circumstance bearing on that issue was therefore relevant. Although the state had made out a case of first degree murder with Wertheimer's testimony about what he and defendant did in Conaghan's hotel room, it was not limited to offering the evidence legally required for conviction. It is not required, for example, that the state show motive for a killing, but evidence of motive, if otherwise admissible, "is not only competent, but often very important, in strengthening the evidence for the prosecution . . . ." *State v. Casey*, 201 N.C. 185, 203, 159 S.E. 337, 346 (1931); *accord*, *State v. Vestal*, 278 N.C. 561, 592, 180 S.E. 2d 755, 775 (1971). Here evidence tending to show Stem's motive for wanting Conaghan killed tended to strengthen the state's contention that Stem hired defendant to do the killing. It thereby strengthened the case against defendant herself.

II

Defendant assigns as error the admission into evidence against her of three firearms, a .38 caliber INA revolver (Exhibit 77), a .38 caliber Smith and Wesson revolver (Exhibit 79), and a .22 caliber Mossberg sawed-off rifle (Exhibit 81). The context in which these weapons were offered was this: During the presentation of its case in chief the state offered testimony that defendant possessed a .38 caliber Smith and Wesson pistol in addition to a .25 caliber automatic pistol which Wertheimer had purchased for her at her request; that Wertheimer and defendant had test fired a gun in Wertheimer's garage shortly before the murder; that Wertheimer and defendant had between them four guns during the period of time immediately prior to the murder; and that during this time Wertheimer had made two silencers, one for a pistol and the other for a rifle with a sawed-off barrel. Wertheimer testified in addition that when he went to defendant's apartment in September, 1975, she claimed two unidentified men had entered her apartment and beaten her. Wertheimer then observed defendant "sitting in the apartment at the dining room table with her pistol, a .38 short, Smith and Wesson chromeplated." Wertheimer also testified that, at the time of the shooting of Conaghan, defendant possessed "her" .38 caliber pistol

which she handed to Wertheimer just before she shot Conaghan with the .25 caliber automatic pistol.

The state sought to offer Exhibits 77, 79 and 81 during its case in chief. Upon objection, a voir dire was conducted. During the course of the voir dire defendant withdrew her objection to Exhibit 77 and the state withdrew its tender of Exhibits 79 and 81. Exhibit 77 was then offered without objection.

On her direct examination defendant several times denied owning or possessing a firearm. She specifically denied having had a firearm on the occasion of the beating in September, 1975. Thereafter on cross-examination defendant denied having had a .38 caliber pistol in her apartment at 1650 Austell Road in December, 1975, after the shooting.

In rebuttal the state again tendered Exhibits 79 and 81. Defendant objected and, with the tender of these exhibits, was permitted by the court to lodge an objection against the introduction of Exhibit 77. Based on the voir dire which had been earlier conducted, the trial judge made findings of fact and concluded that all of the exhibits were properly admissible.

All of these weapons were found by investigating officers in December, 1975, at 1650 Austell Road, Apartment M-8, Marietta, Georgia, where both Wertheimer and defendant then lived together. Exhibit 77 was seized on 1 December 1975 at the time of defendant's arrest. Exhibits 79 and 81 were seized on 2 December 1975 during the course of a search of the apartment by investigating officers conducted pursuant to a search warrant authorizing the search for and seizure of a .25 caliber pistol thought to be the murder weapon.

Defendant complains of the introduction into evidence of all of these weapons on the ground that they were unlawfully seized. We conclude that all of the weapons were lawfully seized and overrule this assignment of error.

**[5]** We first consider the admission into evidence of Exhibit 77 seized at the time of defendant's arrest on 1 December 1975. On voir dire the state introduced evidence tending to show that late in the evening on 1 December officers from Greensboro and the Atlanta area went with an arrest warrant to the apartment on Austell Road in Marietta, Georgia, where Wertheimer and defend-

ant were living together. Wertheimer came outside and was arrested as he reached in his pocket for a .38 caliber Derringer, which was also seized at that time. The officers then entered the apartment and placed defendant under arrest. At her request she was permitted to go to her bedroom to get clothing and personal effects. Detective Allen Travis accompanied her. The officers had information that Wertheimer and defendant had entered into a "suicide pact" to the effect that "they would not be taken alive if police had an opportunity to corner them in an attempt to make an arrest." When Travis followed defendant to her bedroom he observed in the open top drawer of a dresser a .38 caliber pistol (Exhibit 77) which he then seized and found to be loaded with five hollow-point bullets. Defendant offered no evidence on voir dire. The trial court found the facts in accordance with the state's evidence and concluded that the pistol was properly seized incident to defendant's lawful arrest. We agree.

Clearly the seizure of this weapon to insure the safety of the arresting officers and to prevent the escape of defendant was reasonable. In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. We sustained similar seizures of weapons under similar circumstances in *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976), *death penalty vacated in companion case*, 429 U.S. 809 (1976), and *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975). In *Alford* we noted, 289 N.C. at 381, 222 S.E. 2d at 228, "At that time [when officers had burst into an apartment for the purpose of arresting defendants] the 9 millimeter pistol was in plain view on a dresser. The seizure by the police of the pistol, which was in plain view during their search for Carter who, under the existing conditions, was aware of their presence and could use such weapon to make good his escape, was entirely justified." The United States Supreme Court in *Chimel v. California*, 395 U.S. 752, 763 (1969) indicated that weapons may be seized incident to a lawful arrest if they are in areas where

> "an arrestee might reach in order to grab a weapon or evidentiary items . . . . A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate

> control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

See also *Giacalone v. Lucas*, 445 F. 2d 1238 (6th Cir. 1971). It is not clear from the record precisely how far defendant was from the dresser at the time the officer seized the pistol. Justification for such a seizure as this, however, does not depend on showing with mathematical precision that defendant could have reached the weapon moments before the seizure. The seizure in this case was well within the rationale permitting seizures incident to a lawful arrest for the protection of the arresting officers and to prevent the escape of the arrestee. The area, being in the same bedroom with defendant, was one "from within which" defendant might have gained possession of the weapon.

We now take up the admission into evidence of State's Exhibits 79 and 81, both seized during the execution of a search warrant. Defendant argues that these weapons were erroneously admitted because there was no probable cause for the issuance of the warrant and the weapons seized were not described in the warrant.

**[6]** There is no merit to defendant's contention that probable cause was lacking for the issuance of this warrant. The warrant was obtained from a Georgia judicial officer upon the affidavit and oral testimony of Michael Whaley, an investigator in the office of the Fulton County District Attorney. The affidavit recited affiant's belief that Wertheimer and defendant had on their premises at 1650 Austell Road, Apartment M-8, Marietta, Georgia, a certain .25 caliber automatic pistol and that this pistol constituted evidence in the case of the Conaghan murder in Greensboro. The affidavit then recited the facts upon which this belief was based as follows: Conaghan was killed on 23 October 1975 with a .25 caliber automatic pistol in a Greensboro motel. A reliable informant had stated to Whaley that Wertheimer killed Conaghan. A search of Wertheimer's former residence at 2612 Dogwood Terrace, Atlanta, by the affiant resulted in the seizure of certain .25 caliber bullets of the type used in Conaghan's murder. The informant told Whaley further that Wertheimer kept weapons at a place where he was living prior to the killing. A search of this residence failed to reveal the presence of weapons,

and all of Wertheimer's property and effects had been removed from that address. Affiant himself, through surveillance, had established Wertheimer's present address at 1650 Austell Road, Apartment M-8, Marietta, Georgia. Wertheimer had been arrested for the murder of Conaghan, and the arrest warrant was attached to and made a part of the affidavit by reference. The informant was believed to be reliable because information earlier given by the informant had been verified. The details of this verified information were set out in the affidavit. This affidavit alone contained facts from which a magistrate could find probable cause to believe that a weapon used in the murder of Conaghan, to wit, a .25 caliber automatic pistol, might be concealed at the named apartment on Austell Road. Furthermore, the affidavit contained facts sufficient for the magistrate to adjudge that the informant through whom some of the information was acquired was reliable. We conclude therefore that the warrant was lawfully issued. *United States v. Harris*, 403 U.S. 573 (1971); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); G.S. 15A-244.

With regard to defendant's contention that Exhibits 79 and 81 were not named in the warrant and were therefore unlawfully seized, we start, of course, with the Fourth Amendment to the United States Constitution, which prohibits "unreasonable searches and seizures" and provides that "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." In *Marron v. United States*, 275 U.S. 192, 196 (1927) the Supreme Court said:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

Nevertheless the search for and seizure of items not named in the warrant were upheld in that case as incident to a lawful arrest.

The strict rule stated in *Marron* has been substantially eroded if not abrogated altogether by later cases of the United States Supreme Court. In *Harris v. United States*, 390 U.S. 234 (1968), the Court sustained the seizure of an automobile registration card used in evidence against the defendant at his trial. The card was found by a police officer who, after the car had been impounded, was engaged in securing the vehicle by rolling up the windows and locking the doors. When he opened one door for this purpose he saw the registration card laying face up on the metal stripping over which the door closed. The Court said, 390 U.S. at 236:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

This doctrine has been used a number of times by this Court in sustaining the seizure of items in plain view during the execution of a search warrant when those items were not named in the warrant. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Newsom*, 284 N.C. 412, 200 S.E. 2d 617 (1973).

There is no showing in this record that Exhibits 79 and 81 were in "plain view" at the time they were seized in the sense, at least, that no "search" was necessary to uncover their existence. The only evidence on this point is that one detective testified that he found Exhibit 79 in a dresser drawer with "ladies clothing, slips, panties, bras, and things of this nature." Neither the location nor the circumstances surrounding the seizure of Exhibit 81 appear in the record. This is not, however, fatal to our conclusion that these items were lawfully seized.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the majority opinion engaged in a wide-ranging discussion of the law of search and seizure. This opinion stated, 403 U.S. at 465:

> "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the cir-

cumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

"An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character."

The Court said further, 403 U.S. at 467-68:

"Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it."

[7] We interpret *Coolidge* and the cases upon which it relies to mean that, where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (*i.e.*, the items were "the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime," *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 295 (1967), and cases there cited at n. 1; or were items for which probable cause existed to believe that they were evidence of criminal activity and would "aid in a particular apprehension or conviction," *id.*, at 307) and the items are discovered "inadvertently." These previously announced rationales for warrantless, plain view seizures have sometimes been referred to as a requirement that there be a "nexus between the items seized and criminal behavior." *State v. Newsom, supra*, 284 N.C. 412, 200 S.E. 2d 617 (1973). The meaning of the inadvertence requirement, first alluded to in *Coolidge*, is not entirely clear. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974) and authorities cited therein. We interpret it to mean that there must be no intent on the part of investigators to search for and seize the contested items not named

in the warrant. In discussing this requirement in *Coolidge* the Court said, 403 U.S. at 470-71:

> "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'Per se unreasonable' in the absence of 'exigent circumstances.'
>
> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.' "

This is the interpretation we applied in *State v. Rigsbee, supra; see also State v. Zimmerman*, 23 N.C. App. 396, 209 S.E. 2d 350 (1974).

**[8]** We conclude that the record in this case establishes an appropriate nexus between Exhibits 79 and 81 and criminal activity and that these items were inadvertently seized.

After hearing evidence on voir dire, the trial court found as facts that the investigating officers had information that Wertheimer was in the possession of certain weapons; that Officer Michael Whaley had previously searched the prior residence of Wertheimer for a .25 caliber pistol, which he did not find there; that the search warrant specified a .25 caliber pistol; and that in the course of executing the search for this pistol pursuant to the warrant the officers seized Exhibits 79 and 81. The trial court concluded that the officers were entitled to seize these two weapons. There is ample evidence in the record to support the trial judge's findings that the search of the apartment was for the .25 caliber pistol and not for Exhibits 79 and 81. Findings of fact made by the trial judge and conclusions drawn therefrom are binding on appellate courts if supported by evidence in the record. *State v. Rigsbee, supra*, 285 N.C. 708, 208 S.E. 2d 656 (1974).

The fact that Exhibits 79 and 81 are deadly weapons goes a long way toward satisfying the nexus between these items and criminal activity. This, taken together with the fact that the officers had information at the time of the search that Wertheimer, one of the defendants, was a hired killer and had been seen prior to the killing with several small handguns, and the fact that a .38 caliber Derringer was taken from his person at the time of his arrest the day before the search, is enough, we believe, to give the searching officers probable cause to believe that Exhibits 79 and 81 might be connected with and used as evidence in the crime under investigation.

The officers were engaged in a search for what they believed was the murder weapon itself. They had information that Conaghan had been shot with a .25 caliber weapon. They had found .25 caliber bullets and casings in Wertheimer's former residence in Atlanta. They asked particularly for a search warrant specifying a .25 caliber pistol. While they were aware of the possibility, generally, of the existence of other weapons which had been observed to be at one time or another in the possession of Wertheimer and the defendant, they did not have a description of these weapons nor did they have information as to their probable location. Their testimony on voir dire together with the information provided in the affidavit used to obtain the warrant consequently supports the conclusion that they did not enter the premises at 1650 Austell Road intending to search for or seize anything other than what they believed to be the murder weapon itself. The discovery and seizure of Exhibits 79 and 81, therefore, was inadvertent. *State v. Rigsbee*, *supra*, 285 N.C. 708, 208 S.E. 2d 656 (1974).

Our holding here, contrary to what was concluded on similar facts by the New York Court of Appeals in *People v. Baker*, 23 N.Y. 2d 307, 244 N.E. 2d 232 (1968), decided before *Coolidge*, does not transform the warrant which authorized the search into a general warrant—a device, as noted in *Baker* at 320-21, 244 N.E. 2d at 238, "abhorred since colonial days and banned by both the Federal and State Constitutions." Such warrants are banned, too, by the North Carolina Constitution, Art. I, § 20. The general warrant against which these constitutional provisions speak did not specify items to be searched for or persons to be arrested nor were they supported by showings of probable cause that any par-

ticular crime had been committed. *See generally, Stanford v. Texas*, 379 U.S. 476 (1965); *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Brewer v. Wynne*, 163 N.C. 319, 79 S.E. 629 (1913).

The search warrant issued in this case, as we have already demonstrated, was not such a warrant. The fact that evidence not specified in the warrant was discovered inadvertently during its execution does not make it so. The searching officers were duly authorized to enter the apartment and make the search. We do not have here the situation where the item named in the warrant was found and a search then continued for other items. Seizure of the other items under such circumstances probably could not withstand the rationale of *Coolidge*. The searching officers in this case never found the .25 caliber pistol which was the object of the search and which was particularly described in the warrant. They did, however, find State's Exhibits 79 and 81 during the course of this search for the .25 caliber pistol.

For a pre-*Coolidge* case which reaches the same conclusion as ours under quite similar facts, see *United States v. Alloway*, 397 F. 2d 105 (6th Cir. 1968).

Defendant relies also on Georgia law in challenging the legality of the seizure of these weapons. She argues the law of that state "is controlling since the arrest, issuance of the search warrant and seizure of the weapons took place there." Defendant's argument at this point seems to encompass two distinct propositions. The first is that in interpreting the United States Constitution the Georgia cases have set a higher standard for official conduct than have the North Carolina or federal cases. In this regard, however, we are not bound by the decisions of the Georgia courts. *State v. Myers*, 266 N.C. 581, 146 S.E. 2d 674 (1966). The second proposition is that, even if the Federal Constitution does not require their exclusion, these weapons were seized in violation of Georgia Code § 27-303 and cases decided thereunder, and thus it was error to admit them against defendant at her trial in this state. We assume, without deciding, that such a violation of Georgia law would have the effect urged by defendant. Nevertheless, we have examined the Georgia statute and cases cited by defendant and found nothing that would render the seizure of these weapons illegal thereunder.

It should be noted that with reference to searches and seizures the Georgia criminal procedure statutes, like comparable provisions of Chapter 15A of the North Carolina General Statutes, *see particularly* G.S. 15A-242 and 15A-253, appear to be codifications of federal constitutional requirements.

**[9]** Defendant's first contention based on Georgia law is that the state, having the burden of showing probable cause at the time the warrant was issued, *Sheppard v. State*, 138 Ga. App. 597, 226 S.E. 2d 744 (1976); *Bell v. State*, 128 Ga. App. 426, 196 S.E. 2d 894 (1973), also had the burden "to show that any information considered by the Magistrate other than that contained in the affidavit was under oath." Defendant points to Michael Whaley's testimony on voir dire that he orally apprised the judicial officer of certain information not contained in the affidavit. She urges the absence of a showing that this additional information was given under oath as a failure by the state to meet its burden under Georgia law. The Georgia cases said to require such a showing are *Campbell v. State*, 226 Ga. 883, 178 S.E. 2d 257 (1970); *State v. Bradley*, 138 Ga. App. 800, 227 S.E. 2d 776 (1976); and *State v. Causey*, 132 Ga. App. 17, 207 S.E. 2d 225 (1974). None of those cases, however, considered the qustion whether information not given under oath may supply probable cause for issuance of a warrant. *Campbell* and *Causey* each considered the sufficiency of an affidavit and other sworn testimony and found that probable cause had been shown. *Bradley* held that, where the information in the affidavit was defective, the state had failed to show that probable cause existed on the basis of further information the affiant testified he had related orally to the issuing officer. In the present case, where probable cause was clearly supplied by the affidavit, we perceive no error in the state's failure to show that additional information presented orally by the affiant was also in the form of sworn testimony.

**[10]** Defendant further contends that the seizure of Exhibits 79 and 81 was illegal under *Zimmerman v. State*, 131 Ga. App. 793, 207 S.E. 2d 220 (1974). That case held invalid the seizure of three typewriters by officers searching the defendant's warehouse pursuant to a warrant that specified "illegal weapons and explosives, sawed off shotguns, fully automatic rifles and fragmentation grenades." The officers had only a suspicion "based upon their experience" that the typewriters were stolen, though the suspicion

was subsequently confirmed. The Georgia Court of Appeals stated, 131 Ga. App. 794, 207 S.E. 2d 221:

> "The validity of the seizure must rest upon the provisions of Code Ann Sec 27-303(e) which provides in part: '. . . when the peace officer is in the process of effecting a lawful search, nothing in this section shall be construed as precluding him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing or matter, the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia.' In order to make a seizure under this provision of the law, the officer effecting it must have probable cause to believe that the articles seized were tangible evidence of the commission of crime."

Defendant argues that Georgia Code § 27-303, as construed in *Zimmerman*, renders the seizure of Exhibits 79 and 81 illegal because these weapons were neither (1) stolen or embezzled property, nor (2) items or objects the possession of which was unlawful, nor (3) items or objects which were tangible evidence of the commission of a crime against the laws *of the State of Georgia*. However, Georgia Code § 27-303 plainly does not restrict an officer executing a search to the seizure of objects in the categories enumerated by defendant. The language, "nothing in this section shall be construed as precluding him," merely provides that none of the things which follow are protected from seizure by that statute. This proviso does not purport to be an exhaustive listing of what may be seized in Georgia, and *Zimmerman* did not so costrue it. *Zimmerman* merely took the statute as the starting point for its probable cause analysis and concluded that no probable cause existed to believe the typewriters were evidence of criminal activity. As we have already shown, there was probable cause to believe Exhibits 79 and 81 were evidence in the very criminal activity under investigation. We do not believe Georgia law prohibited their seizure because the crime under investigation was committed in North Carolina.

Defendant's assignments of error directed to the admission of Exhibits 77, 79, and 81 are overruled.

III

Defendant next assigns as error the trial court's denial of her motion for mistrial after defense counsel, Mr. Percy L. Wall, lost ninety percent of the hearing in his left ear during the course of trial. The trial began on Monday, 29 November 1976. Mr. Wall first mentioned his hearing problem to the court sometime on Wednesday. The problem became worse Thursday morning, and around 1:45 p.m. Mr. Wall went to the office of Dr. J. Gary Lee for an examination. The court heard defendant's motion for mistrial at 3:50 p.m. on Thursday.

At the hearing Mr. Wall informed the court that Dr. Lee had conducted numerous tests but had been unable to determine the cause of the hearing loss. Additional tests were scheduled for the next morning. Dr. Lee had indicated to Mr. Wall that the results of these tests might require his hospitalization and that he should stay off his feet at least seven to ten days pending diagnosis. Mr. Wall gave the court a note signed by Dr. Lee which read, "Mr. Wall has suffered a sudden sensorineural hearing loss in his left ear. I strongly advise that he not work for the next week or two minimum, depending on the cause of his problem. I would consider his attempting to continue with the ongoing trial as detrimental to any chance for recovery of his hearing." The court further ascertained that Attorney Z. H. Howerton, Jr., and Mr. Wall had been appointed initially to represent defendant and that both had worked on the case in preparation for trial, although the conduct of the trial itself was primarily Mr. Wall's responsibility. The record then shows:

> "COURT: All right, let the record show that the trial of this case was begun on Monday, November 29th, that some forty-one witnesses have heretofore testified in the trial of this case; that several of these witnesses have been from the State of Georgia, one being from Washington, D. C., that there have been some 76 different exhibits identified in the course of this trial to date; that the district attorney advises that he only has two or three more witnesses to call; that two defense attorneys were appointed by the court to represent the defendant in February, 1976; that both of these attorneys have participated in the preparation of the case for trial; that Mr. Wall has conducted the cross examination of the State's witnesses, and upon statement of defense counsel,

Mr. Howerton has conducted extensive research; that the defendant through her counsel has stated that she intended to offer evidence in her defense; that the defense is ready or will be ready to go forward with their evidence with the exception of Mr. Wall's physical condition, and that Mr. Wall's physical condition is such, based on the certificate from the doctor, that if he continues in the trial of this case that it might be detrimental to the recovery of his hearing, he having suddenly lost the hearing or a portion of the hearing in the left ear; that Mr. Howerton has been a member of the Guilford County Bar for some twenty-five years; that to this court's knowledge Mr. Howerton has appeared on numerous occasions and in the court's opinion is an outstanding trial lawyer; that it is now three-fifty on Thursday afternoon, the trial of this case having been conducted during the normal court hours from Monday morning until twelve-thirty today; therefore, the court in its discretion denies the motion for a mistrial but will allow Mr. Wall to withdraw from the further participation in the trial of this case due to his physical condition and, in fact, this court would not attempt to force Mr. Wall to do anything which might jeopardize his health; however, the court is of the opinion that due to the length of the case, the nature of the case, and the evidence that has been presented, that the trial of this case should be continued by Mr. Howerton."

After the court had thus denied defendant's motion, there occurred this colloquy:

"MR. WALL: May I make a statement to the court?

"COURT: Yes, sir.

"MR. WALL: My client indicates to me that she feels that she cannot proceed during the course of the trial without me. I have been in the case since February and I have worked many, many hours on it. I have no intention of getting out of the case if it continues.

"COURT: Mr. Wall, I have excused you from continuation of the trial of this case.

"MR. WALL: No, sir, I am not going to leave this case, if your Honor please, if it is possible.

"COURT: Well, again, I am going on what the doctor recommended.

"MR. WALL: I understand.

"COURT: I certainly would not expect or impose any obligation on anyone whatsoever to continue the trial of this case.

"MR. WALL: I appreciate the court's position, and I am sure the court can appreciate my position. We are dealing here with something that is more important than expense or anything else. We are dealing with the liberty of an individual, and I feel so strongly that it is necessary that I remain in the case that I am going to stay in it.

"COURT: Well, I assume that would be against your doctor's recommendation, Mr. Wall, and I certainly do not quarrel with your doctor's recommendation."

Mr. Wall, adhering to the highest traditions of the legal profession, continued to represent defendant for the remainder of the trial. Defendant now claims that due to his physical impairment, Mr. Wall was not able to represent her effectively and that she was therefore deprived of effective assistance of counsel.

**[11]** The right to assistance of counsel is secured by the Sixth Amendment to the Federal Constitution, as applied to the states through the Fourteenth Amendment, and by the North Carolina Constitution, Article I, Sections 19 and 23. *Avery v. Alabama*, 308 U.S. 444 (1940); *Powell v. Alabama*, 287 U.S. 45 (1932); *State v. Harris*, 290 N.C. 681, 231 S.E. 2d 252 (1976); *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). This right is no mere formality but is designed to guarantee effective assistance of counsel. *Reece v. Georgia*, 350 U.S. 85 (1955); *Powell v. Alabama, supra; State v. Sneed, supra.*

Courts inquiring whether an accused has been denied effective representation have required a stringent standard of proof, stating the traditional test that no constitutional infirmity is shown "unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." *State v. Sneed, supra* at 612, 201 S.E. 2d at 871, and authorities therein cited; Annot., 26 A.L.R. Fed. 218 (1976). This traditional test has

been criticized, *see e.g.*, J. Finer, Ineffective Assistance of Counsel, 58 Corn. L. Rev. 1077 (1973); H. Bines, Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus, 59 Va. L. Rev. 927 (1973), and it was recently rejected by the Fourth Circuit Court of Appeals in *Marzullo v. Maryland*, 561 F. 2d 540 (4th Cir. 1977). That court, relying on *McMann v. Richardson*, 397 U.S. 759 (1970), held the proper standard to be "representation within the range of competence demanded of attorneys in criminal cases." 561 F. 2d at 543. The Attorney General of Maryland filed a petition for certiorari with the United States Supreme Court on 2 December 1977, seeking review of the question whether *McMann* renders inapplicable at all stages of trial the traditional "farce or mockery" test for determining competency of counsel. 22 Crim. L. Rep. 4143 (11 January 1978). The Supreme Court has not yet acted on this petition. Whatever test we might apply in this case, however, there is simply nothing in the record to show that counsel's physical incapacity created a situation in which defendant was deprived of effective assistance of counsel.

**[12]** Our research has disclosed surprisingly few cases involving the physical incapacity of counsel. Nearly all we have found held there was no denial of the right to effective assistance of counsel. *See e.g., United States ex rel Pugach v. Mancusi*, 310 F. Supp. 691 (S.D.N.Y. 1970); *People v. Schiers*, 160 Cal. App. 2d 364, 324 P. 2d 981 (1958), *rev'd on other grounds*, 19 Cal. App. 3d 102, 96 Cal. Rptr. 330 (1971); *see generally* Note, 49 Va. L. Rev. 1531, 1550-51 (1963); Annot., 74 A.L.R. 2d 1390, 1420-23 (1960); *but see State v. Keller*, 57 N.D. 645, 223 N.W. 698 (1929) (intoxication of counsel during trial entitled defendant to new trial). We think, however, and the cases seem to reflect, that the question does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. *State v. Sneed*, *supra*, 284 N.C. 606, 201 S.E. 2d 867 (1974). We also recognize that the trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation.

Defendant contends that her attorney's loss of hearing rendered his assistance ineffective in that he was unable to object to the admission of certain incompetent evidence, to cross-examine properly some of the state's witnesses, and to present defendant's evidence effectively. We do not doubt defense counsel's assertion that his hearing difficulty left him frustrated and dissatisfied with his performance. Nevertheless, it does not appear from this record that defendant received ineffective representation or was prejudiced as a result of counsel's disability.

**[13]** In support of her contention that counsel failed to object to incompetent evidence defendant refers only to the admission of testimony concerning a letter written by Mrs. James Wertheimer on 25 October 1975. Before the letter was offered Mrs. Wertheimer had testified at length in corroboration of some of the testimony earlier given by her husband. She testified, for example, that she had overheard several conversations between her husband and defendant during which they "would talk about this dude and this deal they had going and that Bob was not feeding the information they needed." She said her husband had referred several times "to the fact that they were supposed to make a hit and that he and Mrs. Richards had been following this dude. He said the dude's name is Jack Conaghan. . . . They either called him a dude or a turkey." Mrs. Wertheimer heard all of this with a large measure of disbelief until, according to her testimony, she read in the obituary column of an Atlanta paper of the death of Jack Conaghan. She then testified that she panicked and wrote a "letter" which she placed in her safety deposit box. She read the letter to the jury without objection as follows:

> "To Whom It May Concern, in the event of my death, accidental or otherwise, I want it made known that I have knowledge of the murder of John Charles Conaghan, and I wrote Jack in parentheses. This crime was committed by my ex-husband, James Harry Wertheimer, and his girl friend, Susan Richards, who were at this time residing in Smyrna, Georgia. I had been told so many lies by my husband that I assumed this was a lie, too, but this morning I read the obituaries and realized that he was telling the truth. He mentioned a man named Bob who drives a red Cadillac with a white landau top and claimed to be involved with a man

named Frank who came from Miami to Atlanta to set up a prostitution ring between Chattanooga and Atlanta. Frank was supposedly killed around July 1, 1975. That's the day my husband came back from Chicago and moved in with Susan Richards. Between the two of them, they had four guns, two of which Jim built silencers out of lawn mower mufflers for. He has threatened my life and has told me he is the only thing protecting me from Susan Richards. Susan has a safety deposit box which contains further evidence. The key is kept in the ice tray in her freezer. All I ask is protection for my three children who are completely innocent and should be free of all involvement in any of this. I have signed it Judy H. Wertheimer. It is dated 10-25-75. At the bottom I wrote that the car used in the incident was a black and white Cadillac purchased from Doyle Richards in Brookhaven. My ex-husband drives a 1967 LeMans, License No. GLB-365. It's a navy blue convertible."

We are satisfied that whether counsel should have objected to this letter was largely a question of trial tactics and his failure to object is no indication that he was rendering ineffective assistance. The reference in the letter tying Wertheimer to some kind of prostitution ring and possibly the death of someone named Frank who was involved in the ring was helpful to defendant's theory of the case. This aspect of the letter was explored in detail on defendant's cross-examination of Mrs. Wertheimer. Defendant's defense theory as recited in her brief "was that the murder of John Conaghan was carried out by Wertheimer without her knowledge or assistance; that he had become involved with and obligated to certain criminal elements and that to discharge this obligation he killed Jack Conaghan; that he drove the Cadillac to Greensboro and left it to be picked up by someone who was connected with the criminal element and who may have assisted him in committing the murder." The bald conclusion in the letter that the crime was committed by Wertheimer and defendant might have been, strictly speaking, incompetent. It is beyond question, however, that the jury understood this letter to be based on what Mrs. Wertheimer had heard both from her husband and the defendant. Indeed the second question asked Mrs. Wertheimer on cross-examination by Mr. Wall brought out the fact that the information in the letter "came from my husband

and from the obituary column in the newspaper." In essence her testimony tended to corroborate that of her husband, and the letter corroborates her testimony. Thus the letter, for the most part, is admissible as a prior consistent statement. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). Mr. Wall's cross-examination of Mrs. Wertheimer indicates that he was quite aware of the letter's contents. Whatever matter in the letter which might have been technically inadmissible was, when considered in context, inconsequential.

**[14]** We have searched the record in vain for any other indications that defendant was deprived of the effective assistance of counsel. Defense counsel's cross-examination of Judy Wertheimer covers more than five pages as summarized in the record. It is obvious that counsel understood her answers and developed his line of questioning accordingly. Mr. Wall's cross-examination of the state's chief witness, James Wertheimer, covers more than fourteen pages and similarly reflects not only effective but superb representation. Altogether Mr. Wall cross-examined thirty-two of the thirty-nine witnesses for the state, including every witness who testified after defendant's motion for mistrial was denied. After denial of the motion the record is replete with objections, motions to strike, and other instances of Mr. Wall's vigorous efforts.[1]

1. Note, for example, the following excerpt of the direct examination of Mr. J. R. Ash called in rebuttal by the state:

"Q. Mr. Ash, I place before you an item that has been marked for identification as State's Exhibit 79. What is State's Exhibit 79?

MR. WALL: Objection.

COURT: Overruled.

A. State's Exhibit 79 is a .38 caliber Smith and Wesson revolver.

MR. WALL: Motion to strike.

COURT: Motion denied.

Q. What occasion, if any, on the 2nd day of December, Mr. Ash, did you have to see that weapon?

A. We seized the weapon.

MR. WALL: If your Honor please, I object to this.

COURT: Objection overruled.

A. We seized this weapon in Apartment M-8 located at 1650 Austell Road pursuant to a search warrant.

Q. Where, Mr. Ash, if you know, was that weapon located?

A. In the bedroom of the apartment in the dresser drawer, I don't recall exactly which one.

We hold that, notwithstanding Mr. Wall's hearing disability, his efforts and the assistance of Mr. Howerton provided defendant with effective legal representation throughout the proceedings. This assignment of error is overruled.

We find in this trial

No error.

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Q. What, if any, other items were in the drawer where this—

MR. WALL: Objection to that.

Q. Where this particular weapon was recovered, Mr. Ash?

MR. WALL: I object to that.

COURT: Overruled.

MR. WALL: May I be heard just a minute?

COURT: Yes.

MR. WALL: This is rebuttal testimony that the State is offering. What can it rebut?

COURT: Overruled.

A. The other items located in the dresser drawer were ladies clothing, slips, panties, bras, and things of this nature.

MR. WALL: Move to strike.

COURT: Motion denied.

Q. Also referring to what is in front of you as State's Exhibit 80, what is Exhibit 80, please?

A. State's Exhibit 80 is a brown holster.

MR. WALL: Objection to that and move to strike.

MR. JOHN: I will withdraw any questions with regard to State's Exhibit 80."

STATE OF NORTH CAROLINA v. DAVID LEE FULCHER

No. 27

(Filed 17 April 1978)

1. **Criminal Law § 43.1— photograph of defendant—admissibility for illustrative purposes**

The trial court did not err in allowing into evidence a photograph of defendant taken by the police during the process of booking the defendant following his arrest since the victims of the crimes charged and a police officer used the photograph to illustrate their testimony, and the judge instructed the jury to consider the photograph for the purpose of illustrating testimony.

2. **Criminal Law § 43.1— police photographs of defendant—admissibility**

In a prosecution for kidnapping and crime against nature, the trial court did not err in allowing into evidence photographs of defendant and four other people to show the exact set of photographs from which the two victims made their pre-arrest identification of their assailant; moreover, defendant was not prejudiced by introduction of the photographs of himself, taken from a front and a side view, though there was little likelihood that the jury would fail to conclude that the photographs had been taken from police files and thus that defendant had a prior criminal record, since defendant himself, by his previous cross-examination of the State's witnesses, brought into question, before the jury, the propriety of the pre-arrest identification procedures, and it was therefore proper to permit the State to show the jury the photographs used in that process.

3. **Criminal Law § 99— impartiality of judge required**

G.S. 1-180 imposes upon the trial judge the duty of absolute impartiality and prohibits the expression by him of any opinion, express or implied, as to the credibility of any of the evidence or as to the weight to be given it.

4. **Criminal Law § 122.1— jury's request for instructions—no expression of opinion by trial court**

The trial court did not improperly express an opinion with respect to defendant's alibi evidence where the jury requested that the testimony of two of defendant's alibi witnesses be read back to it, but the judge denied the request, saying, "I am not going to be able to allow the testimony of these various witnesses to be read back to you, for if you emphasize certain portions of it out of context it might tend to exaggerate it."

5. **Kidnapping § 1.1; Criminal Law § 80— motel registration card—admission harmless error**

In a prosecution for kidnapping and crime against nature which occurred at a motel where the victims were staying, the trial court erred in allowing into evidence a motel registration card purporting to show that a man named David L. Fulcher had registered at the motel and occupied a certain room on the day of the offense with which defendant was charged, since the motel manager, who testified concerning the completion, signing and keeping of

registration cards, did not purport to identify defendant as the man who signed the card in question; however, in view of the positive, in-court identification of the defendant by the two victims and the other evidence strongly corroborating their identification of him, the error in admission of the registration card must be deemed harmless beyond a reasonable doubt.

**6. Criminal Law § 83; Kidnapping § 1.1— tape restraining kidnap victims—admissibility of roll of tape**

In a prosecution for kidnapping and crime against nature where defendant bound his victims with gray, metallic colored tape, the trial court did not err in allowing defendant's brother-in-law to testify that on the day after the crimes in question were committed he observed a roll of gray, metallic colored tape fall out of defendant's car while defendant's wife was removing her possessions from the car, since the relevance of the tape to the issue of the identification of the defendant as the assailant of the two women was obvious, and since the admission into evidence of the tape did not violate G.S. 8-57 because that statute is applicable only to the spouse of a defendant and the defendant's wife's involvement in discovery of the tape did not amount to a declaration by the wife.

**7. Statutes § 5— construction—statutory question avoided**

If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such questions, the courts should construe the statute so as to avoid the constitutional question.

**8. Statutes § 5.1— construction—legislative intent controlling**

The cardinal principle of statutory construction is that the intent of the Legislature is controlling.

**9. Kidnapping § 1— asportation not required—substantiality of time and distance not required**

The offense of kidnapping does not require any asportation whatever where there is the requisite confinement or restraint; moreover, where the State relies upon asportation of the victim to establish a kidnapping, it is not required that the asportation be for a substantial distance, and where the State relies upon confinement or restraint, it is not required that such continue for some appreciable period of time. Hence, the Court of Appeals erred in its holding that "substantiality" in terms of distance or time is an essential of kidnapping and its pronouncements as to proper jury instructions thereon. G.S. 14-39.

**10. Kidnapping § 1— confine and restrain defined**

As used in G.S. 14-39, the term "confine" connotes some form of imprisonment within a given area, while the term "restrain," though broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement.

**11. Kidnapping § 1— restraint to facilitate commission of other felony—when kidnapping conviction is proper**

G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of another felony such as forcible rape or armed robbery, also kidnapping so as to permit the conviction and punishment of defendant for both crimes; however, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.

**12. Criminal Law § 26.5; Kidnapping § 1— kidnapping and crime against nature—binding up of victims—kidnapping separate offense—no double jeopardy**

There was no violation of the constitutional provision against double jeopardy in the conviction and punishment of defendant for two crimes against nature and two crimes of kidnapping where the evidence tended to show that defendant bound the hands of each of two women, procuring their submission thereto by his threat to use a deadly weapon to inflict serious injury upon them, thus restraining each woman within the meaning of G.S. 14-39, that his purpose in so doing was to facilitate the commission of the felony of crime against nature, and that defendant did in fact commit the crime against nature upon each of the women.

ON certiorari to the Court of Appeals to review its decision, reported in 34 N.C. App. 233, 237 S.E. 2d 909, finding no error on the defendant's appeal from *Kivett, J.*, at the 6 December 1976 Session of FORSYTH. The defendant's appeal, as a matter of right, from the decision of the Court of Appeals was dismissed upon the motion of the Attorney General.

Pursuant to four separate indictments, each proper in form, the defendant was found guilty of the kidnapping of each of two young women and of forcing each of them to commit with him a crime against nature. The two charges of kidnapping were consolidated for judgment and, in those cases, the defendant was sentenced to imprisonment for 28 to 40 years. In each of the cases charging the commission of a crime against nature, the defendant was sentenced to imprisonment for 10 years, these two sentences to run consecutively with respect to each other but both to run concurrently with the sentence for kidnapping.

The defense is alibi. The defendant, a parolee from the Federal prison system, which circumstance was not made known to the jury, did not testify in his own behalf. Thus, except by virtue of defendant's plea of not guilty with reference to each

charge, the State's evidence as to the commission of the alleged offenses is not controverted and the principal issue of fact is as to the identification of the defendant as the perpetrator of them.

The defendant also contends, as a matter of law, that the sentence upon the charges of kidnapping is improper for that G.S. 14-39, which defines and prescribes the punishment for kidnapping, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals adopted a construction of this statute which, if correct, the defendant, in oral argument, conceded would remove the basis for his contention that the statute is unconstitutional. The statute had not previously been construed by the Appellate Courts of this State.

The evidence for the State, if true, was sufficient to show:

On the evening of 8 September 1976, the two young women, on a vacation trip from their homes in Canada, reached and took lodging in Motel No. 6 in Winston-Salem. On previous visits to Winston-Salem, they had stayed at this motel. There were no telephones in the rooms of the motel but telephones available for use of its guests were at a well lighted alcove in or near the lobby, a well lighted hallway leading thereto from the room assigned to and occupied by the young women.

A few minutes after their occupancy of their room, at approximately 7:30 p.m., both of the young women went to the telephone alcove in an unsuccessful effort to place calls to their friends in the city. While so engaged, both of them observed the defendant, not previously known to them, using, or purporting to use, one of the other telephones in the alcove. Their attention was called to him by a comment which he made to one of them and by his general demeanor which they regarded as "strange." They remained in the telephone alcove on this occasion, some four feet from the defendant, for approximately fifteen minutes.

It was the custom of the motel, upon receipt of an incoming call for a guest, to send a messenger to the room of the guest to notify him or her of such call. At approximately 10:30 p.m., the defendant knocked at the door of the room occupied by these young women, who looked out through the curtain and observed that he was the man previously seen by them in the telephone

alcove. He advised them that there was a telephone call for their room. Thereupon, one of the women went to the telephone alcove where she found one of the telephones off the hook but "dead." The defendant was observed by her for "about a minute" in the well lighted alcove. She thanked him and returned to the room.

At approximately 11:00 p.m., the defendant again knocked at the door of the room and was once more recognized by the women, who looked through the glass window and observed him standing about six inches away and under a light over the door to the room. Again, he said there was a telephone call so, again, one of the young women went to the telephone alcove and again found the telephone "dead." The defendant was again standing in the alcove and said, "Someone is trying to play a joke on you." He then walked with the young woman back along the hallway to the door of her room. She observed that he was wearing a "big belt" from which a bunch of keys was hanging by a chain. In response to her inquiry, he said that he did not work at the motel. Arriving at her door, she again thanked him for his trouble and thereupon "felt something" at her side. Thinking he "was trying to be fresh," she uttered an exclamation, whereupon he pushed her into the room saying: "Don't make a sound. I've got a knife." They then went into the room where the other young woman had remained and the defendant closed the door, again saying: "I've got a knife. I can kill you. Don't make a sound. Just cooperate and everything will be okay." He did, in fact, have an open knife in his hand, the blade being about four inches in length.

The defendant then compelled the two young women to lie upon one of the beds and, taking from his pocket a roll of tape, some three inches in width and metallic gray in color, he tore off strips of the tape and with these bound the hands of each woman behind her back. While they were so bound, he compelled each of them, in turn, to commit an act of oral sex upon his person. In the course of this conduct one of the young women observed that the defendant had a small growth upon the side of his sex organ. The presence of such growth upon the defendant was observed and testified to by a medical expert who, pursuant to an order of the court, over defendant's objection, examined the defendant during the course of the trial.

During or after the completion of the offense against the second of the young women, the first broke free from her bonds and snatched the defendant's knife. A struggle for the knife followed, during which the other young woman managed to get the door of the room open and flee down the hall to the motel lobby, whereupon the defendant fled from the room and down the hallway in the other direction, escaping from the motel.

In a matter of minutes, city police officers arrived at the motel and the women described their assailant to them in the presence of the motel manager, who immediately advised the officers that the description seemed to fit a man registered in the motel and produced the motel's registration card for the room occupied by such man, the name shown on the card being "David L. Fulcher." Over objection, this card was introduced in evidence, the manager having testified that he did not personally observe the filling out of that card by the occupant of the room, purportedly David L. Fulcher, but that it was the regular business practice of the motel to have each guest complete and sign such card, which card the motel then kept in its permanent records.

The investigating officers at once communicated with police headquarters and ascertained that the police did have a photograph of one "David L. Fulcher." This photograph and those of four other men, also taken from the police files, were immediately brought to the investigating officers at the motel and shown by them to the two young women separately. One of them advised the officers that the photograph of the defendant was a photograph of their assailant. The other young woman said that her assailant had certain resemblances to two of the subjects shown in the photographs, one of these being the defendant. Each photograph bore upon the chest of its subject a prison number, which number was covered, by order of the trial judge, before the photograph was placed in evidence before the jury.

Thereupon, the defendant was arrested at an all-night restaurant approximately a mile from the motel, the arrest being made not over two hours after the offenses were committed. At the time of his arrest, the defendant was wearing clothing, a belt and bunch of keys fitting the description of the clothing, belt and keys worn by their assailant given by the two young women to the investigating officers immediately after they were attacked.

The defendant's own physical description then also fit that given by the two young women of their assailant. The photograph, having been made several years before, showed him as substantially younger and thinner.

When the defendant was arrested, his car was impounded by the police. It was released to the defendant's brother the following day. On that day, the defendant's wife, from whom he was separated, went with her brother to the car and, with the consent of the defendant's brother, in whose custody it was, opened the door of the car and removed therefrom her clothing and other belongings. As she did so, a roll of gray, metallic colored tape fell out of the car onto the ground. It was picked up by the brother of the defendant's wife and was later delivered by him to the investigating police officers. This roll of tape, identified by the two young women as the roll possessed and used by their assailant, was introduced in evidence over objection. Strips of tape used by their assailant in binding and gagging the two young women were also introduced in evidence.

*Rufus L. Edmisten, Attorney General, by Henry H. Burgwyn, Associate Attorney, for the State.*

*J. Randolph Cresenzo for Defendant.*

LAKE, Justice.

Upon his appeal to the Court of Appeals, the defendant, in his case on appeal, assigned 25 alleged errors in rulings by the trial court. Eleven of these were not brought forward into the brief filed by him in the Court of Appeals and are, therefore, deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 679, 741. Six of the remainder have not been brought forward into the defendant's brief filed in this Court and these are, likewise, abandoned. Rules 16(a) and 28(a) of the Rules of Appellate Procedure, *supra.*

As stated in Rule 16(a): "Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed

in the Supreme Court." We, therefore, shall discuss only the defendant's Assignments of Error Nos. 2, 3, 7, 15, 18, 19, 23 and 24, several of these being grouped together for the purpose of discussion. Due, however, to the serious nature of the offenses of which the defendant has been found guilty and of the sentences imposed, we have given consideration to all of the defendant's assignments of error and we find no merit in any of those so deemed abandoned.

We turn our attention first to the defendant's contentions with reference to the admission of evidence and alleged expressions of opinions by the trial judge concerning such evidence, these contentions relating to Assignments of Error Nos. 2, 3, 7, 15, 18 and 19. These contentions relate both to the convictions for the crimes against nature and to the convictions for the offenses of kidnapping and are primarily concerned with the matter of the identification of the defendant as the assailant of the two women.

**[1]** Defendant's Assignments of Error Nos. 2 and 3 relate to the admission in evidence, over his objection, of photographs, State's Exhibits 3 and 5. The State's Exhibit 3 is a photograph taken by the police during the process of booking the defendant following his arrest, some two hours after the offenses are alleged to have been committed. An officer present at the taking of the photograph testified that it fairly and accurately portrayed the appearance of the defendant at that time. Each of the two women testified that it fairly and accurately portrayed the defendant as he appeared to them at the time of these offenses. Each of the three witnesses testified that he or she could use this photograph to illustrate his or her testimony concerning the appearance and dress of the defendant at the time of his arrest, with reference to the police officer, and at the time he was in their room, with respect to the women. Each such witness then described the appearance and costume of the defendant at the time in question, using the photograph to illustrate such testimony. The court, in admitting the exhibit into evidence, instructed the jury, "You may consider the photograph for the purpose of illustrating and explaining his testimony and the testimony of the girls, when testified by them at an earlier time." In this ruling there was no error. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); Stansbury, North Carolina Evidence, Brandis' Rev., § 34.

[2] The State's Exhibit No. 5 consisted of five pairs of photographs (front and side views of each subject), one each of the defendant and four other individuals. The photographs of the defendant had been taken several years earlier when he was thinner and his hair was cut differently. All of the photographs were obtained by the investigating officer from photograph files at the police station within minutes after the offenses were committed and after the manager of the motel had stated to the investigating officer that the description by the two women of their assailant seemed to be a description of a guest in the motel, the motel registration card for whom bore the name David L. Fulcher. These photographs were promptly exhibited to the two women, separately, with no suggestion by the investigating officer as to which was a photograph of the suspect. One of the young women positively identified the photograph of the defendant as a photograph of the assailant. The other was uncertain as between the photograph of the defendant and the photograph of one of the other subjects, saying that each bore some resemblance to the assailant.

Exhibit No. 5 was admitted into evidence without any limiting instruction, none being requested. In this there was no error. Exhibit No. 5 was not offered or used at the trial to illustrate the appearance of the defendant at the time of the commission of the offenses or to illustrate the testimony of any witness concerning this. The purpose of this exhibit was to show, as it did, the exact set of photographs from which the two young women made their pre-arrest identification of their assailant. The photographs were not illustrative, but substantive evidence of that matter and were properly admitted in evidence for that purpose, if not otherwise objectionable.

The defendant contends that Exhibit No. 5 (specifically the defendant's two photographs appearing therein) was otherwise objectionable for the reason that the photographs brought to the jury's attention the circumstance that the defendant had a prior criminal record. Each such photograph, in its original form, bore upon the chest of the subject a plaque showing a prison number, this being supported by a small chain around the neck of the subject. Before the photographs were admitted in evidence, the number so shown was covered so that it was not visible to the viewer of the photograph. The defendant contends, however, that

the chain around the neck of the subject of each photograph remained visible so that it was obvious that the photograph was a "Rogue's gallery" picture. He further contends that the covering of the numbers before the photographs were exhibited to the jury did not make the nature of the photographs less apparent.

It is unquestionably true, as the defendant contends, that when a defendant charged with a criminal offense does not take the stand as a witness and does not offer evidence of his good character, the State cannot offer evidence of his bad character, including his previous criminal record, nothing else appearing. *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977); *State v. Shrader*, 290 N.C. 253, 264, 225 S.E. 2d 522 (1976); Sizemore, Character Evidence in Criminal Cases in North Carolina, 7 Wake Forest Law Rev., 17, 30 (1970); Stansbury, North Carolina Evidence, Brandis' Rev., § 104 (1973).

On cross-examination, before the jury, of each of the young women, the defendant had previously developed the fact that the investigating officers showed the young women five photographs in the pre-arrest identification procedure and had further developed differences between the appearance of the other subjects of these photographs and the description of their assailant given by the women to the officers. The obvious purpose of such cross-examination was to discredit the identification by the women of the defendant as their assailant. Under these circumstances, it was clearly permissible for the State to put the photographs in evidence for the consideration of the jury.

In *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970), pre-arrest identification procedures included the showing to the victim of a single photograph, which was a photograph of the defendant taken from police files. This photograph was introduced in evidence by the State over objection. Before the photograph was so introduced, the name of the Police Department and the date appearing on the photograph in its original form were covered by an evidence tag, as was done in the present case. The defendant there, as here, contended that the introduction of this photograph tended to apprise the jury of the fact that he had been in trouble before and suggested that he had been convicted of other crimes, thereby reflecting unfavorably upon his character.

In the *Hatcher* case, *supra*, the defendant testified. Thus, evidence of prior convictions, introduced thereafter, would have been proper. It does not appear in the reported decision whether the defendant had so testified when the photograph in question was introduced in evidence. Speaking through Justice Huskins, this Court said that the covering of the above features of the photograph left nothing upon it connecting the defendant with previous criminal offenses, so that the photograph was "only an ordinary photograph, which was offered and admitted for illustrative purposes bearing upon identification of defendant." We held, "[T]he photograph, with inscription and date deleted, was properly admitted for illustrative purposes on the question of identity."

The present case is not entirely within the coverage of *State v. Hatcher, supra.* In the present case, the double photograph (front and side view on the same card) of each of the four subjects, with or without the small chain visible about the neck of the subject, is so similar in style to photographs of "wanted men" displayed in post office lobbies across the nation as to leave little likelihood that the jury would fail to conclude that these were photographs taken from police files. Thus, the use of them almost inevitably conveyed to the jury the circumstance that the defendant had had prior experience with police photography and thus tended to show bad character. However, the defendant having, by his previous cross-examination of the State's witnesses, brought into question, before the jury, the propriety of the pre-arrest identification procedures, there was no prejudicial error in permitting the State to show the jury the photographs used in that process. There is, therefore, no merit in the defendant's Assignments of Error Nos. 2 and 3.

**[3]** The defendant's next contention (Assignment of Error No. 7) is that in five instances the trial judge expressed an opinion with reference to the evidence, in violation of G.S. 1-180. As the defendant asserts, this statute imposes upon the trial judge the duty of absolute impartiality and prohibits the expression by him of any opinion, express or implied, as to the credibility of any of the evidence or as to the weight to be given it. *State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972). The flaw in the defendant's contention is that in none of the five instances to which this

assignment of error is directed, or elsewhere in the record, was there any such expression of opinion by the trial judge.

**[4]** After beginning its deliberations, the jury returned to the courtroom with the request that the testimony of two of the witnesses, called by the defendant to establish an alibi, be read back to it, the foreman saying, "We cannot agree upon the testimony as to what was really said." After consultation with counsel, out of the presence of the jury, the judge denied the request, saying, "I am not going to be able to allow the testimony of these various witnesses to be read back to you, for if you emphasize certain portions of it out of context it might tend to exaggerate it."

The granting of such request by the jury is within the discretion of the trial judge. *State v. Furr*, 292 N.C. 711, 726, 235 S.E. 2d 193 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). However, we think it is generally inadvisable. See: *State v. Thomas and Wilkins*, 292 N.C. 527, 234 S.E. 2d 615 (1977).

The defendant does not contend in the present case that the denial of the request was error. His contention is that the judge's explanation of his denial was an expression of opinion that the evidence tending to establish an alibi for the defendant was of little consequence. We do not think the jury could have put such an extremely strained construction upon the judge's statement, especially in view of his clear charge upon alibi as a defense, his accurate summary of the testimony of the defendant's witnesses with reference thereto, and his instructions that it was for the jury to determine the weight to be given the evidence and that it would be "highly improper" for the jury to interpret any statement of his during the trial as indicating any intention by him to influence its verdict.

It would serve no useful purpose to discuss in detail the other instances in which the defendant now asserts the judge expressed an opinion contrary to G.S. 1-180. The record simply does not support such contention. We, therefore, find no merit in the defendant's Assignment of Error No. 7.

**[5]** The defendant's Assignment of Error No. 15 relates to the admission in evidence, over objection, of a motel registration card purporting to show that a man named David L. Fulcher had

registered at the motel and occupied Room No. 90 on the day of the offenses with which the defendant is charged.

The motel manager's testimony as to the business practices of the motel concerning the completion, signing and keeping of registration cards would permit the introduction of such registration card in evidence, if otherwise competent, to show that someone, representing himself to be David L. Fulcher, had so registered at the motel. *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895 (1950); Stansbury, North Carolina Evidence, Brandis' Rev., § 155. However, the manager, in his testimony, did not purport to identify the defendant as the man who signed the registration card. Consequently, the admission of the card into evidence was error. *State v. Austin*, 285 N.C. 364, 204 S.E. 2d 675 (1974); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). This error does not, however, extend to the admission of the manager's testimony that, after hearing the women describe their assailant, he told the police that the description fit a man staying at the motel. This was a matter within the manager's personal knowledge and, as to this testimony, there was no objection. Again, there was no objection to the testimony of Police Officer Worsham that, as a result of the manager's statement, one of the investigating officers went to the motel office and, thereafter, obtained from the police station the picture of the defendant, which was one of the five pictures constituting the State's Exhibit No. 5.

In view of the positive, in-court identification of the defendant by the two women and the other evidence strongly corroborating their identification of him, the error in the admission of the registration card must be deemed harmless beyond a reasonable doubt. The test of harmless error "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." *State v. Turner*, 268 N.C. 225, 232, 150 S.E. 2d 406 (1966), and cases there cited; *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 807, 97 S.Ct. 44, 50 L.Ed. 2d 69 (1976). In this respect, the present case is easily distinguishable from *State v. Austin*, *supra*. There the improperly admitted registration card, purporting on its face to show that the defendant and his daughter occupied a motel room together on the night on which she testified the crime of incest was committed at that motel, was, itself, highly prejudicial

evidence tending to show the commission of the crime charged. The defendant's Assignment of Error No. 15, therefore, affords no basis for granting him a new trial.

**[6]** The defendant's Assignments of Error Nos. 18 and 19 relate to the admission into evidence, over his objection, of a roll of tape, which the two victims of the assault testified was similar in appearance to that used by their assailant in binding their hands. Strips of tape so used by the assailant were also introduced in evidence. Thus, the jury was in a position to compare the appearance of these strips with the roll and to draw its own conclusion as to whether the strips had been torn from the roll.

Within two hours after the offenses were committed, the defendant was arrested and his car was taken into the custody of the police who, on the next day, released it to his brother. On that day, while the car was at the home of his brother, the defendant's wife, accompanied by her own brother, went to the car and, as she removed therefrom certain clothing and other articles belonging to her, the roll of tape fell out of the car onto the ground. It was immediately observed and picked up by the defendant's brother-in-law. It was he who delivered it to the police and who testified as a witness for the State concerning the circumstances of its finding.

The relevance of the tape to the issue of the identification of the defendant as the assailant of the two women is obvious. The defendant's contention to the contrary has no merit. Likewise, his contention that the admission is evidence of this roll of tape violates G.S. 8-57 has no merit. That statute, after providing that the husband or wife of a defendant in a criminal action is competent to testify as a witness for the defendant, provides, "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding," with exceptions not here material. As the defendant asserts, this statutory prohibition has been extended to testimony concerning declarations made by the husband or wife of the defendant, while not in the presence of the defendant, even though there was no objection interposed to such testimony. *State v. Dillahunt*, 244 N.C. 524, 94 S.E. 2d 479 (1956); *State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763 (1952); *State v. Reid*, 178 N.C. 745, 101 S.E. 104 (1919).

The declaration of the wife in the Dillahunt case would clearly have been incompetent hearsay, apart from G.S. 8-57, and, upon objection, would have been equally inadmissible had the declarant been some person other than the spouse of the defendant. However, neither G.S. 8-57 nor the Hearsay Rule has any application to the testimony of the present defendant's brother-in-law. The defendant's wife did not testify against him and the witness did not testify as to any declaration by the wife. As the defendant says, an act, such as a gesture, can be a declaration within the meaning of this rule, but there was no such act by the wife here. The witness' testimony was with reference to what he, himself, saw fall from the defendant's automobile. The fact that, at the time the witness so observed the tape fall from the defendant's automobile, the defendant's wife was engaged in the independent act of moving articles from the vehicle does not make the discovery of the tape a declaration by the wife or the testimony of this witness concerning it incompetent. There is, therefore, no merit in the defendant's Assignments of Error Nos. 18 and 19.

There was, therefore, no prejudicial error in the trial of the defendant upon the two charges of crime against nature. He has been given a fair trial in accordance with the law of this State upon these charges and, in each case, has been found guilty of a loathsome offense for which he has been given a sentence not exceeding the maximum provided by the statute therefor. The judgments imposed for these offenses will, therefore, not be disturbed.

We now turn to the contention of the defendant that the trial court erred in its failure to dismiss the two charges of kidnapping. In his Assignments of Error Nos. 23 and 24, the defendant contends that the alleged two kidnappings were not "true kidnappings" but were merely acts incidental to the commission of the crimes against nature. Consequently, he contends that, as applied to him in the present case, G.S. 14-39(a)(2) violates both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. If so, the statute would also violate Article I, § 19, of the Constitution of North Carolina.

G.S. 14-39(a), effective 1 July 1975, provides:

"(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 guardian 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." (Emphasis added.)

The defendant's contention is that if the statute be construed to permit his conviction, under the circumstances of this case, both for crime against nature and for kidnapping, the statute violates the Fourteenth Amendment to the Constitution of the United States. He contends the statute, so construed, permits the District Attorney, in his unbridled discretion, to "stack" against one offender charges for the crime of kidnapping and for the crime to facilitate which the alleged kidnapping was committed, while electing to prosecute another offender, under identical circumstances, for but one of the said crimes. In this way, he contends, the State is authorized by the statute, so construed, to increase arbitrarily the penalty for the felony to facilitate the commission of which the alleged kidnapping was done. Such authority, if it exists, gives the District Attorney added leverage in the plea bargaining process, so as to bring about a plea of guilty to the charge of the felony to facilitate which the alleged kidnapping was committed. The defendant contends he has been prosecuted in the present case for kidnapping solely for the purpose of permitting the imposition upon him of a sentence in excess of the maximum provided by the statute for the offense of crime against nature, which, he says, is the real offense committed.

The Court of Appeals, in a thorough, well documented and carefully written opinion, said:

"Thus, it is obvious that a literal interpretation of the new kidnapping statute [G.S. 14-39] would create two crimes instead of one, with resulting unfairness and the potential for abusive prosecutions. And this in turn would call into question the constitutionality of the statute under the due process clause. The prosecutorial application of the same could violate the equal protection clause of the Federal Constitution. These problems can be avoided only by a broader judicial construction of the statute which provides basic guidelines for prosecutions thereunder by highlighting the difference between incidental and primary kidnapping by dealing directly with the qualitative risk to which the victim is exposed.

* * *

"We conclude that a fitting judicial definition must demand consideration of whether the unlawful restraint or confinement was substantial in terms of duration and not merely incidental to the commission of another crime. The asportation element similarly requires a consideration of substantiality in terms of distance and again not merely incidental to another crime.

* * *

"If the charge against the defendant is kidnapping by *unlawful confinement*, the trial judge in instructing the jury must define the term in substance as meaning confinement for a substantial period and not merely incidental to the commission of another crime.

* * *

"If the charge against the defendant is kidnapping by *unlawful restraint*, the trial judge in instructing the jury must define the term in substance as meaning restraint for a substantial period and not merely incidental to the commission of another crime.

* * *

"If the charge against the defendant is kidnapping by *moving from one place to another*, the trial judge in instruct-

ing the jury must define the term in substance as meaning movement from one place for a substantial distance and not merely incidental to the commission of another crime. ***"

**[7]** It is well settled that if a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question. *Lynch v. Overholser*, 369 U.S. 705, 711, 82 S.Ct. 1063, 8 L.Ed. 2d 211, 215 (1962); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, 1361 (1936); *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976); *Milk Commission v. Food Stores*, 270 N.C. 323, 331, 154 S.E. 2d 548 (1967); *State v. Barber*, 180 N.C. 711, 104 S.E. 760 (1920); *Re Keenan*, 310 Mass. 166, 37 N.E. 2d 516, 137 A.L.R. 766 (1941); 16 Am. Jur. 2d, Constitutional Law, § 146; 16 C.J.S., Constitutional Law, § 98(b). The Court of Appeals relied upon this principle in reaching its above quoted construction of G.S. 14-39(a); that is, the statutory offense of kidnapping is not committed unless the defendant confined or restrained the alleged victim for a substantial period of time or moved the victim a substantial distance. We must, therefore, determine whether G.S. 14-39(a) is reasonably susceptible of such construction.

**[8]** The cardinal principle of statutory construction is that the intent of the Legislature is controlling. *In re Arthur, supra; Quick v. Insurance Co.*, 287 N.C. 47, 56, 213 S.E. 2d 563 (1975); *In re Beatty*, 286 N.C. 226, 229, 210 S.E. 2d 193 (1974); *In re Appeal of Martin*, 286 N.C. 66, 77, 209 S.E. 2d 766 (1974); *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281 (1972). We are not at liberty to give to a statute a construction at variance with such intent, even though such construction appears to us to make the statute more desirable and to free it from constitutional difficulties. *See: State v. Camp*, 286 N.C. 148, 151, 209 S.E. 2d 754 (1974); *Shue v. Scheidt, Commissioner of Motor Vehicles*, 252 N.C. 561, 564, 114 S.E. 2d 237 (1960); 73 Am. Jur. 2d, Statutes, § 197. As an aid in ascertaining the intent of the Legislature, we must take into account the law prior to the enactment of the statute. *See: Milk Commission v. Food Stores, supra*, at p. 332; *State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944); *State v. Mitchell*, 202 N.C. 439, 445, 163 S.E. 581 (1932).

Prior to the rewriting of G.S. 14-39 by the Session Laws of 1975, Ch. 843, this statute simply made kidnapping a felony punishable by imprisonment for life and did not define or prescribe the elements of the offense. Consequently, its elements were determined in accordance with the common law of this State. *State v. Ingland*, 278 N.C. 42, 50, 178 S.E. 2d 577 (1971); *State v. Lowry* and *State v. Mallory*, 263 N.C. 536, 540, 139 S.E. 2d 870 (1965).

In *State v. Ingland, supra*, speaking through Justice Huskins, this Court held that "in order to constitute kidnapping there must be not only an unlawful detention by force or fraud but also a carrying away of the victim," the distance the victim is so carried away being immaterial. In *State v. Lowry* and *State v. Mallory, supra*, we had previously held, likewise, that any carrying away of the victim is sufficient and the distance of such asportation is immaterial. This rule we affirmed in *State v. Hudson*, 281 N.C. 100, 104, 187 S.E. 2d 756 (1972), where we also reaffirmed our previous determinations that "in the kidnapping of a person the law considers the use of fraud as synonymous with force" and "threats and intimidation are equivalent to the actual use of force or violence." *See: State v. Gough*, 257 N.C. 348, 126 S.E. 2d 118 (1962); *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966).

In *State v. Dix*, 282 N.C. 490, 502, 193 S.E. 2d 897 (1973), speaking through Justice Sharp, now Chief Justice, we noted that in each of the above cases (*State v. Ingland, State v. Lowry* and *Mallory*, and *State v. Hudson*) the asportations of the victims by the defendants were substantial, so that there was no necessity in those cases for us to establish the rule that the distance of the victim's removal from his original location was immaterial, and we rejected such rule, saying, "The 62-foot asportation [from one place to another in the same building] was purely incidental to defendant's assault upon the jailer and the rescue or jail delivery which he accomplished," and we held the asportation insufficient to support a conviction of kidnapping, Justices Huskins and Higgins dissenting.

In *State v. Roberts*, 286 N.C. 265, 277, 210 S.E. 2d 396 (1974), speaking through Chief Justice Bobbitt, we set aside a conviction for kidnapping where the defendant had pulled a child a distance of 80 to 90 feet (apparently for the purpose of committing a sex-

ual assault upon her) and said: "Here the entire incident occurred during the seconds it took defendant to pull Kathy a distance of 80 to 90 feet. *** To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment. We hold the evidence, when considered in the light most favorable to the State, insufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping." Justices Huskins and Higgins again dissented.

The present statutory definition of the crime of kidnapping, enacted in 1975, must be construed in the light of these then recent decisions of this Court. When so considered, it is clear that the Legislature intended to change the law as therein declared.

**[9]** That is, the Legislature rejected our decision in *State v. Ingland, supra*, to the effect that there must be both detention and asportation of the victim, the statute plainly stating that confinement, restraint *or* removal of the victim for any one of the three specified purposes is sufficient to constitute the offense of kidnapping. Thus, no asportation whatever is now required where there is the requisite confinement or restraint.

It is equally clear that the Legislature rejected our determinations in *State v. Dix, supra*, and in *State v. Roberts, supra*, to the effect that, where the State relies upon asportation of the victim to establish a kidnapping, the asportation must be for a substantial distance and where the State relies upon "dominion and control," i.e., "confinement" or "restraint," such must continue "for some appreciable period of time." Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.

It follows that the Court of Appeals erred in its holding that "substantiality" in terms of distance or time is an essential of kidnapping and in its pronouncements that the trial judge must instruct the jury that "confinement" or "restraint," as used in this statute, means confinement or restraint "for a substantial period" and that "removal," as used in this statute, requires a movement "for a substantial distance." We, therefore, cannot approve the in-

structions to juries proposed by the Court of Appeals upon these points.

We find nothing in G.S. 14-39, as now written, which indicates any legislative intent to change our holding in *State v. Hudson*, supra, to the effect that the use of fraud, threats or intimidation is equivalent to the use of force or violence so far as a charge of kidnapping is concerned.

**[10]** As used in G.S. 14-39, the term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute. Such restraint, however, is not kidnapping unless it is (1) unlawful (i.e., without legal right), (2) without the consent of the person restrained (or of his parent or guardian if he be under 16 years of age), and (3) for one of the purposes specifically enumerated in the statute. One of those purposes is the facilitation of the commission of a felony.

**[11]** It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (*e.g.*, a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such

larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written. Let us suppose, for example, a restraint for the purpose of committing rape followed by a rescue of the victim before the contemplated rape is accomplished. Such a restraint would constitute kidnapping under G.S. 14-39. We need not presently determine whether the perpetrator thereof could also be convicted of and punished for assault with intent to commit rape.

**[12]** We turn now to the application of these principles to the facts as disclosed by the record in the present case. The evidence for the State is clearly sufficient to support a finding by the jury that the defendant bound the hands of each of the two women, procuring their submission thereto by his threat to use a deadly weapon to inflict serious injury upon them, thus restraining each woman within the meaning of G.S. 14-39, and that his purpose in so doing was to facilitate the commission of the felony of crime against nature. This having been done, the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature ever occurred.

The restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time. Each woman was so bound, and thereby restrained, so as to reduce her ability to resist, so as to prevent her escape from the room during the commission of the crime against nature upon the other, and so as to prevent her from going to the assistance of her companion. Thus, the restraint of each was for the purpose of facilitating the commission of the felony of crime against nature. It was also for the purpose of facilitating the flight of the defendant from the room after the perpetration of the two crimes against nature. Either such purpose satisfies the statutory definition of kidnapping.

There is, therefore, no violation of the constitutional provision against double jeopardy in the conviction and punishment of the defendant for the two crimes against nature and also for the two crimes of kidnapping.

G.S. 14-39, as herein construed, is not vague. The conduct which it forbids is clearly set forth in the statute. The punishment prescribed is severe but is not cruel or unusual in the constitutional sense. *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. den.*, 418 U.S. 905; *State v. Carter*, 269 N.C. 697, 153 S.E. 2d 388 (1967); *State v. Davis*, 267 N.C. 126, 147 S.E. 2d 570 (1966). Consequently, the statute, on its face, does not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, or the Law of the Land Clause of Article I, § 19, of the Constitution of North Carolina, or the Cruel or Unusual Punishment Clause of either Constitution. The statute applies to all who violate it without exception or classification. Consequently, it does not, upon its face, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the like clause contained in Article I, § 19, of the Constitution of North Carolina.

It is only when this statute is applied to a particular defendant in conjunction with another law punishing another crime that the constitutional problem of double punishment may arise. As above noted, neither the Fourteenth Amendment to the Constitution of the United States nor Article I, § 19, of the Constitution of North Carolina forbids the prosecution and punishment of a defendant for two separate, distinct crimes, even though the second offense follows the first in quick succession and was the purpose for which the first offense was committed, as in the case of larceny or rape following a burglary. No violation of either the Federal or the State Equal Protection Clause is necessarily shown by the circumstance that, as to some defendants, the sentences for such successive crimes are made to run consecutively while as to other defendants, convicted of the same successive crimes, the sentences are made to run concurrently, or the circumstance that one is prosecuted for both crimes while the other is prosecuted for but one. These are matters left to the sound discretion of the prosecuting attorney and of the trial court.

In any event, a defendant whose sentences are made to run concurrently is not in a position to raise this constitutional issue.

The present defendant is, for this reason, in no position to raise that question. His two offenses of kidnapping were consolidated for judgment and for these crimes he was given a sentence well within the maximum which might have been imposed for one such offense. For each of the two crimes against nature of which he has been properly convicted, the defendant was given the maximum sentence provided by statute for such offense and these two sentences were made to run consecutively. However, these two sentences were made to run concurrently with the longer sentence for kidnapping. Thus, the total term of imprisonment to which this defendant has been sentenced for the four crimes is actually less than might lawfully have been imposed upon him for only one of the kidnapping offenses.

This defendant has not been tried or punished twice for the same offense. He has not been coerced into a plea bargaining arrangement through the threat of prosecution on multiple charges, for this defendant did not plead guilty to anything.

Nothing herein should be construed as an indication that this Court cannot or will not give relief to a defendant where, through vindictive prosecutorial abuse, criminal charges, arising out of the same course of conduct, have been arbitrarily stacked like pancakes, one upon another, with the result that the total punishment imposed is so disproportionate to his offenses as to violate that fundamental concept of fairness which is the basis of due process of law. Suffice it to say that we find no such abuse in the present case.

In the application of a statute to specific cases, criminal or civil, it is the function of courts to carry out the intent of the Legislature, not to nullify it, except where the statute, so applied, would conflict with the superior voice of the Constitution. While it is not our function to advise the Legislature, we deem it not inappropriate to call to its attention serious questions of constitutionality and practicality which are brought to our notice in our performance of our own function.

In a carefully written, analytical discussion of G.S. 14-39, it has been said: "Kidnapping as now defined overlaps other crimes for which the prescribed punishment is less severe. This creates a very real potential for prosecutorial abuse of discretion by allowing imposition of a more severe punishment in circumstances

which do not warrant it." Slaughter, "Kidnapping in North Carolina—A Statutory Definition for the Offense," 12 Wake Forest Law Rev., 434.

It may well be that the Legislature, upon further consideration, may wish to amend G.S. 14-39 so as to restore to the definition of the crime of kidnapping so much of the rule of *State v. Ingland*, supra, as made asportation of the victim an essential element of the offense, leaving confinement or restraint, for the prescribed purpose, without asportation punishable as false imprisonment, but not as kidnapping. It may also wish to consider the advisability of clearly defining "remove from one place to another" so as to require more than a minor asportation, such as is sufficient for larceny at common law. That is, the Legislature may deem it advisable so to word the statute that an assailant who, with knife or gun, forces his victim from the living room of her home into the bedroom where he rapes her, or forces a merchant from the public part of his store into his office and there compels him to open his safe, will not be punishable for kidnapping in addition to the offense of rape or the offense of armed robbery.

In the present case, the defendant, in a fair and lawful trial, has been convicted of a revolting sexual offense for which the Legislature has decreed that the maximum punishment is a sentence to imprisonment for 10 years. In such case, there is the possibility of use of the kidnapping statute as a device by which to procure a sentence deemed more appropriate for the commission of the crime to facilitate which the defendant committed a confinement, restraint or removal within the literal limits of G.S. 14-39.

It is, however, for the Legislature, not this Court, to determine the advisability of such a change in the law as now declared in G.S. 14-39. So long as the law remains as there declared, it will be the duty and purpose of this Court so to apply it, subject to the above mentioned application of the Law of the Land Clause if and when appropriate.

No error.

IN RE: GORDON M. WILKINS, M.D.

No. 39

(Filed 17 April 1978)

1. **Physicians, Surgeons, and Allied Professions § 6.1— hearing to revoke medical license—procedural due process**

Respondent was not denied procedural due process in a hearing to revoke his license to practice medicine where he was notified in writing of the charges against him, was given ample time in which to prepare his defense, was present in person and represented by able counsel of his choice at the hearing, was confronted by his accusers, was given ample opportunity to cross-examine them and testified in his own behalf.

2. **Physicians, Surgeons, and Allied Professions § 6— drug prescriptions not for legitimate medical purpose—vague-overbroad challenge to statute and order**

Since charges brought against a physician for prescribing controlled substances outside the course of the legitimate practice of medicine and not for any legitimate medical purpose have no relation to any of the freedoms protected by the First Amendment of the Constitution, the physician's "vague-overbroad" challenge to the statute under which the Board of Medical Examiners acted and a prior order of the Board suspending the revocation of his license is not to be weighed in the delicate scales used in cases where First Amendment freedoms are at stake.

3. **Physicians, Surgeons, and Allied Professions § 6— revocation of medical license—statute and suspension of revocation—test for vagueness and over-breadth**

In the application of a statute authorizing the revocation of a license to practice medicine or any order suspending the revocation of such license to subsequent medical practice by a licensee, not involving his First Amendment freedoms, the facts of the case must determine the decision of the courts as to vagueness and over-breadth, and the test is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden.

4. **Physicians, Surgeons, and Allied Professions § 6— revocation of medical license—constitutionality of statute and order suspending revocation**

A statute authorizing the revocation of a physician's license to practice medicine for "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," former G.S. 90-14, and an order of the Board of Medical Examiners suspending the revocation of a medical license upon the condition that the physician "conduct his practice of medicine in accordance with proper professional and ethical standards" are not unconstitutionally vague and overbroad when applied to the actions of a physician in prescribing highly dangerous controlled substances for complete strangers without making any examination of such patients or any inquiry as to their medical history or current symptoms and complaints, since it is obvious that

any reasonably intelligent physician would know that such actions would constitute a violation of the statute and order.

5. **Physicians, Surgeons, and Allied Professions § 6— authority to suspend revocation of medical license**

The Board of Medical Examiners had authority to suspend its order of revocation of a physician's license upon the condition that the physician "not violate a State or Federal law."

6. **Physicians, Surgeons, and Allied Professions § 6.2— proceeding to revoke medical license—breach of N. C. law—quantum of proof**

Since a proceeding before the Board of Medical Examiners for the revocation of a physician's license on the ground that he has breached a condition of a prior, suspended order of revocation that he not violate a State or Federal law is a civil proceeding, such breach of the condition of suspension does not have to be shown beyond a reasonable doubt, but only by a preponderance of the evidence. Therefore, the Board of Medical Examiners could properly find that a physician violated the laws of N. C. by writing prescriptions for controlled substances outside the course of professional practice and not for a legitimate medical purpose, although criminal charges against the physician based on such prescriptions were dropped when his trial ended in a mistrial.

7. **Physicians, Surgeons, and Allied Professions § 6.2— revocation of medical license—prescriptions for drugs not for legitimate medical purpose—sufficiency of evidence, findings, conclusions**

Evidence before the Board of Medical Examiners supported the Board's findings that respondent physician in six instances prescribed the controlled substances Didrex, Desoxyn or Butacaps for complete strangers "without determining whether or not such drugs were necessary for the treatment of any ailment or disease and not for any legitimate medical purpose and not in the course of the legitimate practice of medicine," such findings supported the Board's conclusions that such conduct constituted a violation of the laws of North Carolina, constituted dishonorable and unprofessional conduct affecting the practice of medicine, and constituted a violation of a condition of the suspension of a prior revocation of respondent's license, because of a felony conviction, that he violate no State or Federal law, and such conclusions supported the order of the Board revoking respondent's license to practice medicine in North Carolina.

8. **Physicians, Surgeons, and Allied Professions § 7— revocation of medical license—absence of racial discrimination—denial of motion for remand**

The superior court did not err in the denial of respondent physician's motion to remand a license revocation proceeding to the Board of Medical Examiners for further proceedings on the ground that the Board's revocation of respondent's license to practice medicine was racially motivated where respondent made no preliminary showing of any basis for his accusation of racial discrimination, and the record clearly shows that the revocation of respondent's license was not due to prejudice against members of his race.

In re Wilkins

APPEAL by respondent from *Griffin, J.*, at the 8 August 1977 Civil Session of MECKLENBURG.

On appeal by the respondent from the order of the Board of Medical Examiners of the State of North Carolina, hereinafter called the Board, revoking the respondent's license to practice medicine in North Carolina, the Superior Court reviewed the transcript of the evidence and of the proceedings before the Board. The court concluded that the Board's findings of fact are supported by susbstantial, material and competent evidence set forth in the record and that its conclusions of law are supported by the said findings of fact and are in accordance with law. The court overruled the respondent's motion to remand the matter to the Board for purposes of discovery and taking additional evidence and affirmed the Board's order revoking the respondent's license.

The record discloses that Dr. Wilkins was duly licensed to practice medicine in North Carolina and has engaged in such practice in Charlotte since 1946. In 1974, he was convicted in the Superior Court of Mecklenburg County upon the charge that he wilfully and feloniously prepared and subscribed to a false and fraudulent proof of loss, including a false and fraudulent medical bill and a false and fraudulent attending physician's report, with the intent that such documents be presented to an insurance company with reference to an automobile accident. He was sentenced to imprisonment for two years, suspended upon condition that he pay a fine of $2,000 and the costs of the action, and remain of general good behavior and not violate any criminal laws of the State of North Carolina or the United States of America.

In consequence of this conviction, following a hearing by the Board, upon due notice, the Board, on 23 October 1974, entered its order revoking the respondent's license to practice medicine in North Carolina, but suspended this order upon the condition that for a period of five years the respondent "shall not violate a State or Federal law and that for such period he remain of good behavior and conduct his practice of medicine in accordance with proper professional and ethical standards, that he keep adequate records of every patient treated or attended by him regardless of the nature of the patient's illness or condition, and that he appear before this Board at its meeting to be held in December, 1975, or

at such other times as may be requested by the Board, and that he furnish to the Board such records or other information concerning his practice of medicine that the Board may require from time to time, and furnish evidence satisfactory to the Board of his compliance with the foregoing conditions of suspension of the order as may be requested by the Board." The record does not indicate any appeal from that order.

On 31 August 1976, the respondent was duly notified by the Board that the Board had preferred against him the following charges:

"1. On November 5, 1974, you issued a written prescription to John Prillaman for Didrex, 50 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law.

"2. On November 12, 1974, you issued a written prescription to James Madden for Dexozyn [corrected to Desoxyn], 15 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law.

"3. On December 10, 1974, you issued a written prescription to John Prillaman for Didrex, 50 mg., quantity 100, and Butasol capsules, 50 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law.

"4. On December 10, 1974, you issued a written prescription to James Madden for Dexozyn [corrected by consent to Desoxyn], 15 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law.

"5. On January 3, 1975, you issued a written prescription to George Arnold for Didrex, 50 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law.

"6. On February 20, 1975, you issued a written prescription to John Prillaman for Didrex, 50 mg., quantity 100, and Butacaps, 50 mg., quantity 30, not for any legitimate medical purpose and not in the course of the legitimate practice of medicine and in violation of law."

On 26 October 1976, the Board duly notified the respondent that it would hold a hearing upon the above charges "for the purpose of the Board determining whether or not you have failed to comply with the terms and conditions upon which the order revoking your license to practice medicine in the State of North Carolina was suspended by this Board on the 23rd of October, 1974, and particularly whether or not you performed and engaged in the following conduct [the above six charges]."

Following the said hearing, at which the respondent appeared and testified and was represented by counsel, the Board, on 10 January, 1977, entered its order revoking the respondent's license to practice medicine in North Carolina. The order contained the separate finding of the Board as to each of the above six charges, the Board finding as to each such charge that the respondent had, on the dates specified, issued a prescription to the person specified for the drugs specified "without determining whether or not such drugs were necessary for the treatment of any ailment or disease and not for any legitimate medical purpose and not in the course of the legitimate practice of medicine." Upon these findings of fact, the Board concluded that the said conduct of the respondent "constituted a violation of the laws of North Carolina and constituted dishonorable and unprofessional conduct affecting the practice of medicine, and constituted a violation of and failure to comply with the terms and conditions upon which revocation of the license to practice medicine heretofore issued by this Board to Dr. Wilkins was suspended by this Board by order entered by the Board dated October 23, 1974."

Upon the respondent's appeal to the Superior Court, that court stayed the order of the Board "pending the outcome of the review of petitioner's appeal in the Superior Court of Mecklenburg County," and, upon the entry of the judgment of the Superior Court, again stayed the order of the Board and the judgment of the court "pending the outcome of the review of petitioner's appeal in the North Carolina Appellate Division." Thus, notwithstanding the order of the Board revoking his license and the judgment of the Superior Court affirming that order, the respondent has been permitted for 16 months to continue his practice.

Prior to the taking of evidence at the hearing before the Board on the present charges, the respondent moved that there be stricken from each of the above mentioned six charges the phrase "and in violation of law," for the reason that the respondent had previously been brought to trial on each of these charges in a criminal proceeding at which "the jury deadlocked in its decision and the charges were subsequently dismissed." The respondent further moved to dismiss the entire proceeding before the Board on the ground that he was, thereby, placed twice in jeopardy for the same acts which were the basis for the above mentioned criminal proceeding against him. The Board denied both of these motions.

The evidence at the hearing before the Board upon the present charges was, in substance, as follows:

TESTIMONY OF JOHN PRILLAMAN

He is an undercover agent of the State Bureau of Investigation. In the course of his duty he went to the office of the respondent on 5 November 1974 and, after a short wait in the reception room, was instructed to go in to see the respondent in his inner office. The respondent was seated at his desk. The witness entered and sat down beside the desk. He had never seen the respondent before. The respondent made no examination of the body of the witness and asked him no question concerning his health or symptoms. The witness told the respondent he would like to get some Dexedrine, to which the respondent simply said, "No," without any other comment. The witness then told the respondent he wanted to get something and the respondent replied he would give the witness "either Ionamin or Didrex." The witness replied that he would rather have Didrex as he had used it before. The only reason the witness gave the respondent for desiring a prescription for Didrex was that he was a truck driver and stayed on the road "all the time" and needed something to keep him awake. The respondent then wrote the prescription for Didrex, quantity 30. The respondent asked the witness' name and the witness gave him a fictitious name and address. The witness then asked the respondent how much he owed the respondent and was told, "$8.00," which amount he paid the respondent and left the office. This was the entire consultation on this visit.

On 10 December 1974, this witness again went to the office of the respondent and, after a short wait, was told to go back to the respondent's inner office, which he did. There he sat beside the respondent at the latter's desk and told him he wanted to get another prescription for Didrex. The respondent asked his name again. The witness gave him the same fictitious name and address. The respondent then wrote the prescription for Didrex and handed it to the witness. The witness then told the respondent that he drove a truck, that he was taking Didrex which worked "real good" to keep him awake but he couldn't get to sleep, so he needed something so that he could go to sleep when he wanted to and asked the respondent to give him something for that purpose. The respondent then took the same prescription back from the witness and wrote "Butacaps," quantity 30, thereon, and returned the prescription to the witness. The witness then paid the respondent $10.00 and left the office. This was the entire consultation on this visit to the respondent's office. No one then made any examination of the body of the witness or asked him any other questions concerning his reason for wanting these medications. No nurse or any other member of the respondent's staff took the witness' temperature or blood pressure or made any other type of preparation. On each visit of this witness to the respondent's office, the respondent asked the name and address of the witness and referred to "a calendar-type thing, a big calendar."

On 20 February 1975, this witness again went to the office of the respondent, entered the reception room and gave his name and stated he wanted to see the respondent. After a short wait, he was told to go back into the respondent's inner office, which he did. He sat down and told the respondent he wanted another prescription for Didrex. Again, the respondent asked his name and was given by the witness the same fictitious name and address. The respondent immediately wrote a prescription for Didrex, quantity 100, and handed it to the witness. The witness then told the respondent he would like another prescription for the Butacaps. The respondent then wrote another prescription for Butacaps, quantity 30. The respondent asked the witness on this occasion "how they were doing," the witness responded that the Didrex were doing "real well," that he could stay awake as long as he wanted to with them and drive the truck and when he wanted to go to sleep he could take the Butacaps and get to sleep.

Upon receiving the two prescriptions, the witness asked the respondent how much he owed him for the visit and the prescriptions and was told $12.00, which the witness paid the respondent and left the office. This was the entire consultation on that visit.

(Each prescription given to this witness was introduced into evidence. Each bore directions as to how the drug was to be taken and each specified "No refill." The witness had the prescriptions filled and turned the substances received by him from the drug store over to Agent Holbrook of the State Bureau of Investigation. The witness did not take any of the drugs so obtained by him.)

The witness never indicated to the respondent that the witness wanted these drugs for any use other than his own personal use. At the time of his visits to the office of the respondent, the witness weighed approximately 190 pounds. He never mentioned to the respondent that he wanted the pills in order to lose weight. He was never weighed while in the respondent's office. At the time of the hearing, the witness weighed approximately 178 pounds and was five feet ten inches in height. At the time of his visits to the respondent's office, he was not under the influence of any drugs and there was nothing about his appearance to indicate he was a user of drugs. On the second visit, he did not ask for a larger quantity of Didrex than the amount specified in the first prescription. The respondent simply wrote the prescription for a larger number of pills.

TESTIMONY OF JAMES W. MADDEN

This witness is a special agent of the Federal Drug Enforcement Administration. On 12 November 1974, acting in cooperation with the State agency, he went to the office of the respondent and asked the receptionist if he could see the respondent. She asked his name and he gave his correct name. After a short wait in the reception room, he was instructed to go in to see the doctor and went into the respondent's inner office.

The respondent was standing just inside the doorway and the witness asked, "Doc, can I get some Desoxyn?" The respondent said, "I guess so." The respondent sat at his desk and the witness took a chair beside the desk. The respondent started writing a prescription. He asked the witness his name and address, which

he put at the top of the prescription. He then handed the witness the prescription. The witness asked how much he owed the respondent and was told, "$10.00." The witness paid the respondent $10.00 and left the office. This was the entire consultation on the occasion of that visit by this witness to the office of the respondent. While in the respondent's presence, he did not remove his jacket or any of his clothing and he was in the presence of the respondent less than two minutes.

This was the first visit of this witness to the office of the respondent. On this occasion he received no physical examination from the respondent or any member of his staff. No medical history was taken. The witness gave no reason why he needed the medication and no inquiry was made by the respondent as to any such reason.

On 10 December 1974, this witness returned to the office of the respondent and, after a short wait in the reception room, went in to see the doctor. When he went into the inner office, he asked the respondent if he could get some more Desoxyn. The respondent asked how long it had been since he had been there before. The witness said, "About a month ago." The respondent glanced at the book that he had upon his desk and said, "All right." He then started writing the prescription for 30 Desoxyn. He again asked the name and address of the witness and entered this on top of the prescription. The witness asked him how much he owed him and the respondent said, "$10.00," which amount the witness paid the respondent and thereupon left the office with the prescription. This was the entire consultation on the occasion of the witness' second visit to the respondent's office.

The witness did not observe the respondent make any entry in any record. He did not observe any card with his name on it or any folder or anything which looked as if it might contain information concerning the witness. Neither the respondent nor any member of his staff made any examination of the witness or took any information concerning his medical history.

(The above mentioned prescriptions given to the witness Madden were introduced in evidence. Each specified, "No refill," and bore directions as to how the pills were to be used.)

The witness had these prescriptions filled and delivered the substance received to Agent Holbrook of the State Bureau of Investigation. When he went into the office of the respondent, the witness was not under the influence of any intoxicant or narcotic. He had not used any of the drugs himself and his appearance did not indicate use of drugs.

TESTIMONY OF GEORGE ARNOLD

This witness is an agent of the State Bureau of Investigation. At the time of his visit to the office of the respondent, he was engaged in investigating diversion of pharmaceutical drugs which were "diverted to illegitimate channels and eventually ended up in street use."

On 3 January 1975, the witness visited the office of the respondent and gave a fictitious name to the receptionist, telling her that he wished to see the doctor. After a short wait in the reception room, he went back to the interior office of the respondent who was sitting at his desk. The witness told the respondent that, when the witness formerly worked in Fayetteville, there was a doctor who prescribed Preludin to keep the witness awake while he worked and asked if the respondent could help him. The respondent said, "No." The witness then said, "How about Didrex?" The respondent asked the name of the witness and was given a fictitious name and address. The respondent then wrote a prescription for 30 Didrex, 50 mgs., with directions to take one at 10:00 a.m. The witness then stood up, paid the respondent $10.00 and left the office. This was the entire consultation on this visit to the office of the respondent.

(The prescription so given to this witness was introduced in evidence, it being for Didrex with directions as to its use and specifying, "No refill.")

The respondent did not ask this witness any question about the state of his health or symptoms and made no examination of his body. The witness did not remove any part of his clothing during the visit to the office of the respondent. On this visit to that office, the witness was not under the influence of any drug, narcotic or alcohol. The story as to the obtaining of Preludin from the doctor in Fayetteville was fictitious. The witness did not tell the respondent that he wanted to convert these drugs to some il-

legal use but merely told him that he wanted to stay awake while he worked. The respondent did not encourage the witness to come back and get more pills or to tell his friends to do so. On this visit to the respondent's office, this witness was not examined and no history was taken and no questions were asked him, except as to his name and address. The respondent wrote the name "on a calendar" which was "like a log book."

TESTIMONY OF C. D. HOLBROOK

This witness is a special agent of the North Carolina State Bureau of Investigation. Possessed with a search warrant, he searched the office of the respondent on 27 March 1975 for records pertaining to the visits to that office of each of the above witnesses. He found in the office a "Doctor's Daily Record Book" containing a page for each date of the year; the name of each individual patient was entered on a line of such page, together with the medication and the charge. There was nothing else entered on the page. The book contained pages showing the visits of Prillaman, Madden and Arnold. In each instance, the fee recorded in the book was $2.00 less than the fee which the above witnesses actually testified they paid the respondent. The respondent advised this witness that he had no other records concerning these visits.

The book did not contain any entries of diagnoses of any patients and, in only two or three instances per page, was there an entry showing a patient's blood pressure. This witness did not find in the record book any "preponderance" of entries of prescriptions. He did not find in the office what he would consider an abundance of drugs on hand. His search was limited to a search for records.

TESTIMONY OF THE RESPONDENT

The respondent recalls the visit of the witness Prillaman to his office on 5 November 1974. He is quite certain he listened to him and made notes and that Prillaman did not ask for anything to keep him awake. He recalls prescribing for him Didrex as a weight control medicine. On the second visit Prillaman mentioned that the prescription was not controlling his appetite so he increased the dosage. He did not weigh Prillaman on any occasion. He seldom weighs his patients. He did take Prillaman's blood

pressure and found it normal. Since it was normal, he did not enter it on the book referred to in the testimony of the witness Holbrook.

On the visit of the witness Prillaman to the office on 20 February 1975, the respondent wrote a prescription for Butacaps because Prillaman said he was unable to sleep and the respondent considered Butacaps a mild sedative, one not used "on the street" as a "downer." The respondent uses Butacaps frequently for elderly patients and others who need a mild sedative and, in his opinion, it is an appropriate drug for that purpose. He does not use Didrex for any purpose other than weight control.

The respondent recalls that the witness Madden asked for appetite control pills and the respondent prescribed Desoxyn. The purpose of the prescription was to control his appetite. He checked Madden's blood pressure but did not weigh him or measure his height. On Madden's second visit, he requested the respondent to give him a prescription for Desoxyn. The respondent checked his book to make sure it was appropriate with reference to the amount of time between the two prescriptions. Finding out the time was approximately correct, he gave Madden another prescription for Desoxyn. He does not recall whether he took Madden's blood pressure on this second visit.

On the occasion of Arnold's visit to his office, the respondent refused to write a prescription for Preludin. Arnold said he wanted something to control his appetite, to keep his weight down, so the respondent gave him Didrex after checking his blood pressure. Since the blood pressure was normal, he did not make an entry of it in the book.

Whenever a patient comes into his office, he has an opportunity to see the patient as he comes through the door and observes his appearance. Based upon his observation and experience in 30 years of practice, he did not note any condition in these three witnesses which would indicate the likelihood of any reaction to the type of medication prescribed. Each appeared to be healthy and normal looking.

In writing prescriptions for Prillaman, Madden and Arnold, the respondent exercised his best medical judgment as to whether or not the prescriptions written by him were appropriate

for the uses for which he wrote them on those occasions. He had no notion that there was any attempt on the part of any of them to obtain drugs for any unlawful purpose.

He did not think that Didrex was a stimulant or "upper." He was a little taken aback when the witness Holbrook informed him that it was classified as such. At the time the prescriptions were written, he did not know this. He used it solely as an appetite control pill. He now knows it is an amphetamine. He is aware that the use of amphetamines as an appetite control substance is disapproved by the Medical Profession generally, but he has never had any adverse complications from such use during his practice.

Prillaman did not mention to the respondent that he needed to stay awake and, had he done so, the respondent would not have given him a prescription. He knew that Dexedrine, for which Prillaman first asked, was used as an "upper" and that is the reason he refused to give a prescription for it. He would not have prescribed Didrex to keep the patient awake. In his opinion, it is not proper medical practice for a doctor to prescribe a stimulant to enable the patient to stay awake. Such a request from the patient would be a request for "uppers."

He was, at the time of the visits of these agents, prescribing Desoxyn for some of his patients for appetite control. He knows that Desoxyn has amphetamine in it. He would not consider prescribing Desoxyn just to keep a person awake as proper medical practice. He knew, at the time of the visits of these agents, that Desoxyn was a Class II controlled substance under the laws of the United States and the laws of North Carolina.

He did not prescribe these drugs for the reasons given by the above witnesses. To prescribe these drugs for the purposes testified to by Prillaman, Madden and Arnold would not, in his opinion, constitute proper medical practice, and for him to prescribe such drugs, under the circumstances and for the purposes testified to by these witnesses, would be a violation of the Controlled Substances Law.

Prillaman appeared to him to be overweight, though he did not weigh him. Madden also appeared to be overweight. The respondent would not say that Arnold was overweight but he ap-

peared, at the time of his visit, to be "a little heavier" than at the time of the hearing. He has many patients who come in and say they want to lose a few pounds, so he gives them appetite control pills for about 30 days.

In his opinion, he has kept the records required by the previous order of the Board. He did not understand this to require a medical history of the patient.

Neither Prillaman, Madden nor Arnold requested the respondent to give him something to keep him awake. None of these asked specifically for an appetite suppressant. One of them came in and asked for something to control his weight. He does not know whether the other two specifically mentioned appetite or weight control but he does know none of these witnesses asked for something to keep him awake. Each either asked for an appetite depressant or expressed a desire to lose weight or the respondent assumed that was what he wanted. Prillaman, Madden and Arnold did not testify truthfully. In his opinion, they did not forget what had occurred on their visits to his office and, therefore, "They lied to get their point over."

He is quite certain that Agent Holbrook has had other people come into his office asking for other drugs. He knows people have been to his office through the years asking for certain things for which he would not write prescriptions for them. Had Prillaman, Madden and Arnold asked for something to keep them awake, they would not have gotten anything from him.

If the Board so desires, he has no objection to keeping a complete medical history on all of his patients.

REBUTTAL TESTIMONY OF GEORGE ARNOLD

He is 27 years of age. His height is five feet ten inches and his weight approximately 139 polunds. At the time of his visit to the respondent's office, he weighed about 143 pounds. He has never had any problem about weight control.

REBUTTAL TESTIMONY OF C. D. HOLBROOK

He has been connected with this type of investigation since it was started in October, 1974. The only agents known to him to have made any undercover visits to the office of the respondent were Agents Prillaman, Madden and Arnold on the occasions to

which they testified at this hearing. He is not aware of any such visits by any other people associated with other law enforcement agencies. He would not know about that. He would have no way of knowing if people not connected with the Law Enforcement Agency had visited the office of the respondent making requests for drugs.

*Smith, Anderson, Blount & Mitchell by John H. Anderson for Board of Medical Examiners of the State of North Carolina.*

*Chambers, Stein, Ferguson & Becton by James E. Ferguson II and James C. Fuller, Jr., for Respondent.*

LAKE, Justice.

By G.S. 90-1, the Medical Society of the State of North Carolina is declared to be a body politic and corporate. By G.S. 90-2, the Board of Medical Examiners of the State of North Carolina, herein called the Board, was established "in order to properly regulate the practice of medicine and surgery." The Board consists of seven regularly graduated physicians appointed by the Medical Society. G.S. 90-3. In addition to its authority and duty to examine applicants for license to practice medicine or surgery in this State, conferred upon it by G.S. 90-9, the Board is authorized by G.S. 90-14 to "revoke and rescind any license granted by it." This statute, which was rewritten in 1977, provided at the time of the matters involved in this appeal:

> "The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it *** has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, State or Federal, of any felony or other criminal offense involving moral turpitude ***. The findings and actions of the Board of Medical Examiners in revoking or rescinding and refusing to issue licenses under this section, shall be subject to review upon appeal to the Superior Court, as hereinafter provided in this Article. The Board of Medical Examiners may, in its discretion, and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked and rescinded."

G.S. 90-14.1 prescribes the notice to be given to a licensee of a hearing convened to consider the revocation or recision of his license. It is not contended that the provisions of this statute were not fully complied with in this instance. G.S. 90-14.6 provides that at such hearing the admissibility of evidence is governed by the rules applicable to civil actions. In the present instance, it is not contended that any incompetent evidence was admitted or any competent evidence rejected. The scope of judicial review of an order of the Board revoking a license is set forth in G.S. 90-14.10, which provides:

> "Upon the review of the Board's decision revoking or suspending a license, the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this Article, or are arbitrary or capricious. At any time after the notice of appeal has been filed, the court *may* remand the case to the Board for the hearing of any additional evidence which is material and is not cumulative and which could not reasonably have been presented at the hearing before the Board." (Emphasis added.)

G.S. 90-14.11 provides for appeal to the Supreme Court of North Carolina under rules of procedure applicable in other civil cases.

In 1974, the respondent was convicted in the Superior Court of Mecklenburg County of a felony—the making of a false and fraudulent proof of loss, including a false medical bill and a false physician's report, for filing with an insurance company in relation to an automobile accident. No appeal was taken from that conviction and the resulting judgment thereon. G.S. 90-14, as it then read, expressly authorized the Board to revoke and rescind his license to practice medicine in this State, upon proof of such conviction, without any qualification or suspension of such revoca-

tion. The respondent does not dispute that authority in the present proceeding. Instead of doing so, the Board revoked the respondent's license but suspended such order of revocation, thus giving the respondent a second chance. One of the conditions of such suspension of that order of revocation was that, for five years, the respondent "remain of good behavior and conduct his practice of medicine in accordance with proper professional and ethical standards." No judicial review of that order of the Board was requested by the respondent. Nothing in the record indicates any request by him for clarification of its terms.

That order of the Board was entered 23 October 1974. The record of the hearing before the Board in the present proceeding contains clear evidence that, less than two weeks after that order was issued by the Board, the respondent wrote a prescription for Didrex at the request of a complete stranger, with no physical examination of him, no taking of his medical history and no questions as to any symptoms, aches or pains experienced by such person. According to the testimony of Prillaman, the stranger so requesting and receiving this prescription from the respondent, he gave the respondent no reason for desiring such prescription except that he was a truck driver and needed something to keep him awake.

Didrex is not listed by that name in the Controlled Substance Act, G.S. 90-86 et seq. That is a manufacturer's trade name. It is also known as Speed. Its chemical name is Benzphetamine Hydrochloride. This being its chemical composition, it is a Schedule II controlled substance according to the provisions of G.S. 90-90(c) which states:

> "The following controlled substances are included in this schedule:
>
> * * *
>
> "(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule [which is not the case with Didrex]:

"1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.

* * *

"3. Methamphetamine, including its salts, isomers and salts of isomers."

G.S. 90-90 also provides:

"This schedule [Schedule II] includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Authority shall find: *a high potential for abuse*; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and *the abuse of the substance may lead to severe psychic or physical dependence*." (Emphasis added.)

The record before us contains clear evidence that this was not an isolated, accidental oversight or mistake in judgment. The evidence, if true, as the Board obviously believed it to be, shows that within the next three and a half months the respondent, under virtually identical circumstances, gave to persons not medically examined by him, either physically or by questions, and whose medical histories and whose current conditions, symptoms or complaints were completely unknown to him, three other prescriptions for Didrex, two for Desoxyn and two for Butacaps.

Desoxyn and Butacaps are also controlled substances. "Desoxyn is a trade name used by Abbott Laboratories, North Chicago, Illinois, for Methamphetamine Hydrochloride." *State v. Newton*, 21 N.C. App., 384, 386, 204 S.E. 2d 724 (1974). It is and at the time the respondent so prescribed it was, a Schedule II controlled substance and, like Didrex, a highly dangerous drug. Butacaps, or Butasol capsules, are Butabarbital, also a controlled substance, apparently somewhat less dangerous than Didrex and Desoxyn.

Judicial review of a revocation of license by order of the Board does not authorize the reviewing court to substitute its discretion for that of the Board. G.S. 90-14.10 provides that the court "may reverse or modify the decision [of the Board] if the

substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this Article, or arbitrary or capricious."

Clearly, the findings of the Board that the respondent wrote the above mentioned prescriptions "without determining whether or not such drugs were necessary for the treatment of any ailment or disease and not for any legitimate medical purpose and not in the course of a legitimate practice of medicine," are supported by evidence in the record, although contradicted by the testimony of the respondent, himself. The findings of the Board, so supported, are conclusive upon judicial review of the Board's order. *See, In re Willis*, 288 N.C. 1, 215 S.E. 2d 771 (1975), which involved judicial review of an order of the comparable Board of Law Examiners rejecting an applicant for license, and which cited in support of this pronouncement *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d 810 (1957), and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957).

**[7]** Upon these findings of fact, the Board concluded that the conduct of the respondent, so found, constituted a violation of the laws of North Carolina, constituted dishonorable and unprofessional conduct affecting the practice of medicine and also constituted a failure to comply with the terms and conditions upon which the Board had suspended its 1974 order revoking the respondent's license to practice medicine in North Carolina. The question now before us is whether the above mentioned findings of fact support the conclusions so drawn by the Board. In our opinion, they do.

Upon his appeal to this Court, the respondent does not deny the sufficiency of the evidence before the Board to support its said findings of fact. His contention on this appeal is that the statute under which the Board acted (G.S. 90-14) and the conditions of suspension of the 1974 order of the Board are both "vague and overbroad" and, thus, the order now before us for review, which revokes his license to practice medicine in North Carolina, violates his right to due process of law as established by the Constitution of North Carolina. Article I, § 19, and by the

Fourteenth Amendment to the Constitution of the United States. We find no merit in these contentions.

**[1]** The Board clearly did not deny the respondent procedural due process. He was notified in writing of the charges against him, given ample time in which to prepare his defense, was present in person and represented by able counsel, of his choice, at the hearing, was confronted by his accusers, was given ample opportunity to cross-examine them and testified in his own behalf. Procedurally, the hearing was conducted in accordance with the statute and fulfilled the requirements of the Due Process Clause of the Federal and the Law of the Land Clause of the State Constitution.

**[2]** Obviously, the charges brought before the Board against the respondent have no relation whatever to any of the freedoms protected by the First Amendment to the Constitution of the United States. Consequently, the "vague-overbroad" challenge to the statute and to the 1974 order of the Board is not to be weighed in this case in the delicate scales required to be used in cases where First Amendment freedoms are at stake. *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed. 2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975).

In *United States v. Powell*, supra, 423 U.S. at 93, the Court, speaking through Mr. Justice Rehnquist, said, in a case not involving First Amendment freedoms, "[S]training to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it." In *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), in which also First Amendment rights were not involved, the Court, speaking through Mr. Justice White, said: "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky Court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it.'" As Mr. Justice Holmes, speaking for the Court, in *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57

L.Ed. 1232 (1913), said, "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some manner of degree."

G.S. 90-14 authorizes revocation of the license to practice medicine or surgery where the licensee "has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession." The 1974 order of the Board suspended the then revocation of the respondent's license to practice on condition that he "conduct his practice of medicine in accordance with proper professional and ethical standards."

It is reasonable to assume, as we do, that as one goes toward the outer edges of the concepts of "unprofessional," "dishonorable" or "professional and ethical standards," with reference to the practice of medicine, as in the practice of law or the other learned professions, he reaches an area in which there is room for difference of opinion among the most honorable and respected practitioners. There is, we are satisfied, no sharply defined drop off point between ethical and professional medical practice and that which is unethical and unprofessional. However, there is at and around the central core of these concepts much conduct which so clearly constitutes improper practice that few, if any, members of the profession would seriously claim to be unaware that such conduct is not consistent with these concepts.

**[3]** It would obviously be futile to attempt to catalog in a statute, or in an order of the Board conditionally revoking the license of a practitioner, every conceivable improper practice in which the licensee is forbidden to engage. Neither the Federal nor the State Constitution requires such a tedious exercise in futility in order to save a disciplinary statute, or order, from attack on the ground of vagueness and over-breadth. In the application of such statute or order to subsequent medical practices by a licensee, not involving his First Amendment freedoms, the facts of the case at hand must determine the decision of the courts as to vagueness and over-breadth. *United States v. Mazurie, supra.* The test is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden.

**[4]** We think it obvious that any reasonably intelligent physician would know that to prescribe a highly dangerous drug for a com-

plete stranger, without making any examination of the patient or any inquiry as to his medical history or current symptoms and complaints, would be included within the phrase "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," the terminology of G.S. 90-14, and would not constitute practice "in accordance with proper professional and ethical standards," the language of the Board's 1974 order. Thus, we find both the statute and the Board's order easily survive the "vague and over-broad" attack by the respondent when "examined in the light of the facts of the case at hand." *United States v. Mazurie, supra.*

In any event, in the present case, the respondent, himself, testified that, in his opinion, it is not proper medical practice to prescribe Didrex or any other stimulant just to keep the patient awake. Again, he testified that he knew Desoxyn was a Class II controlled substance and stated that, in his opinion, it would not be proper medical practice for any doctor to prescribe these drugs for the purposes "testified to by Mr. Prillaman, Mr. Madden and Mr. Arnold." His contention is that he prescribed them for a different purpose. Thus, we are brought to the simple question of whether the respondent prescribed Didrex and Desoxyn for these individuals for the purpose and under the circumstances to which the individuals each testified, or prescribed them for a different purpose and under different circumstances as the respondent testified. This is not a question of law but a question of fact upon which the Board had before it conflicting testimony. The credibility of the witnesses and the resolution of conflicts in their testimony is for the Board, not a reviewing court, and the findings of the Board supported, as these findings are, by competent evidence, are conclusive upon judicial review of the Board's order.

Furthermore, in the order under review, the Board concluded that the respondent's conduct, in the six instances found by the Board to have occurred, "constituted a violation of the laws of North Carolina." Another condition upon which the Board suspended its 1974 revocation of the respondent's license, was that "for a period of five (5) years from this date Gordon M. Wilkins, M.D. shall not violate a State or Federal law." In *State v. Best*, 292 N.C. 294, 310, 233 S.E. 2d 544 (1977), speaking through Justice Huskins, we said:

"Where a licensed physician merely writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and nothing more, such act is not a violation of G.S. 90-95(a)(1). However, if that prescription is written outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates G.S. 90-108."

In the order here under review, the Board found as a fact, in connection with the issuance of each of the six prescriptions in question, the respondent issued the prescription "not for any legitimate medical purpose and not in the course of the legitimate practice of medicine." These findings, being supported by competent evidence in the record, are conclusive on judicial review of the order of the Board.

G.S. 90-14 does not authorize the revocation of a license of a physician on the ground that he has violated a law of this State or a Federal law unless and until he has been convicted thereof. The record before us discloses that the respondent was charged in the criminal courts of Mecklenburg County with the violation of the applicable statute of this case in the writing of the said six prescriptions, but he was not convicted and the criminal charges against him were dropped when a mistrial resulted from the inability of the jury to reach a verdict.

**[5]** However, the 1974 order of the Board was issued in consequence of the respondent's actual conviction of a felony in the Superior Court of Mecklenburg County, so that at that time an unqualified revocation of the respondent's license was within the authority of the Board. The Board suspended its revocation of his license, at that time, on condition that he "shall not violate a State or Federal law." The respondent accepted that condition of suspension of the revocation of his license. It is clear and unequivocal. We find nothing in G.S. 90-14, or any other statute relating to the authority of the Board, which precludes the Board from suspending its order of revocation upon such condition. *Compare*, G.S. 15A-1343(b)(1) authorizing one convicted of a criminal offense to be placed on probation upon condition that he "not commit any criminal offense."

**[6]** A proceeding before the Board for the revocation of a physician's license on the ground that he has violated such condition of

a prior, suspended order of revocation, is a civil proceeding. Consequently, such violation of the condition of suspension of the prior order does not have to be shown beyond a reasonable doubt, but only by a preponderance of the evidence. *In re Kincheloe*, 272 N.C. 116, 157 S.E. 2d 833 (1967), *cert. den.*, 390 U.S. 1024 (1968).

**[7]** We, therefore, conclude that the findings of fact made by the Board are fully supported by competent evidence in the record, these findings support the conclusions of law reached by the Board and those conclusions support the order of the Board revoking the license of the respondent to practice medicine in North Carolina. The revocation of the license is authorized by and is in accord with both G.S. 90-14 and the conditions of the 1974 order of the Board.

**[8]** There remains for consideration only the contention of the respondent that the Superior Court erred in its denial of his motion, filed before the hearing in the Superior Court, that the matter be remanded to the Board for further proceedings. The alleged ground of the motion is that he has been denied by the Board the equal protection of the laws in that the order of the Board was based "wholly or in part upon the petitioner's [respondent's] race and color."

The motion for remand states, "It is the petitioner's position that white doctors, similarly situated and upon similar conduct and behavior have not been treated as severely as petitioner and that this disparate treatment constitutes racially discriminatory action by the Board in violation of petitioner's constitutional rights." The motion requested the court to remand the matter to the Board and allow him 180 days "discovery time so that petitioner can take the depositions of the current and past members of the Board of Medical Examiners, inspect prior records of the Board of Medical Examiners involving other cases, and promulgate to the Board interrogatories designed to determine whether the action taken against petitioner had a racial intent and/or impact."

The record discloses not one shred of evidence of such discrimination or that the race of the respondent had any bearing whatever upon the order of the Board. The respondent was notified in writing of the charges against him on 31 August 1976. He filed his answer thereto on 29 September 1976, simply deny-

ing each allegation. On 26 October 1976, he was given notice that the matter would be heard by the Board and the hearing was had on 8 December 1976. Nothing whatever in the record indicates that in the intervening three months the respondent requested permission to examine, or made any effort to examine or make any inquiry into, actions of the Board in cases involving other physicians. No evidence of any action of the Board indicating bias against or antipathy toward physicians of the respondent's race was presented or even suggested to the Superior Court in support of this motion. From the time of the respondent's notice of appeal to the Superior Court to the filing of his brief in this Court 13 months elapsed. In that time, the respondent has apparently discovered nothing whatever to justify his accusation against the Board. In his brief in this Court, he says:

> "After the hearing [before the Board], however, Dr. Wilkins became aware of matters, not of record, that caused him to question the objectivity with which his case was reviewed by the Board. Specifically, Dr. Wilkins received statements, became aware of rumors and read media coverage of other situations—all of which suggested that black doctors in general and Dr. Wilkins in particular were being subjected to higher standards of review by the Board and were subjected to consistently more severe punishment at the hands of the Board than were white doctors similarly situated.
>
> "As such rumors persisted in the spring and summer of 1966 [presumably 1976], Dr. Wilkins, through counsel, sought to develop a record necessary to bring these issues before the court for determination on the merits. N.C. General Statutes Sec. 90-14.8 to 14.10 does not provide for discovery as is contemplated in the Rules of Civil Procedure. However, in Section 14.10, the opportunity is presented to a respondent to petition the Superior Court for remand to allow development of the record regarding matters not previously covered in the proceedings below. This, Dr. Wilkins sought to do by motion filed on 5 July 1977."

The Superior Court was not required to remand this matter to the Board for further proceedings in the absence of some preliminary showing by the respondent of basis for his accusation

of racial discrimination and prejudice against the respondent. Now, eight months after the denial of the motion in the Superior Court and 15 months after the issuance of the order of the Board, the respondent brings to our attention no basis for his allegation except unspecified "statements," "rumors" and "media coverage" with no indication as to the source or credibility of such alleged bases for his accusation.

The respondent's accusation against the Board and his exception to the denial of his motion by the Superior Court do not merit detailed discussion. His counsel appears to proceed upon the theory that the mere facts that the respondent in a revocation of license proceeding, or a defendant in a criminal action, is a member of the Negro race and has been found guilty of the alleged misconduct is sufficient to make out a prima facie case that the administrative body or the jury which ruled against him was racially biased. Such a contention is patently absurd.

In the present instance, moreover, we are not limited to the obvious insufficiency of the respondent's argument in support of his contention. The record discloses that the Board in 1974 had ample basis for an unqualified, instantly effective, revocation of the respondent's license for his conviction of a felony in connection with the practice of medicine. With no obligation whatever to do so, the Board gave him a second chance. He has simply failed to measure up to the reasonable conditions imposed upon that opportunity by the Board.

Notwithstanding the findings and order of the Board in the present matter, its order of revocation has been stayed pending judicial review, first in the Superior Court and now in this Court. Thus, the respondent has been allowed to continue the practice of medicine for more than 15 months after the order of the Board revoking his license to do so was entered. The order of the Board in the 1974 proceeding, the record of the hearing before the Board in this proceeding, and the treatment of the respondent since that order was entered, clearly belie his charge that the revocation of his license to practice medicine in this State is due to prejudice against members of his race.

Affirmed.

MARIE PONDER CLARK v. PATRICIA PROFFITT CLARK (FOWLER), AND CECIL CLARK, GUARDIAN OF GENE WAYNE CLARK, JOHN LLOYD CLARK, GAMBELL CLARK AND GILA CLARK

No. 64

(Filed 17 April 1978)

1. **Contempt of Court § 8— willful disobedience of child custody order—punishment for contempt "withheld"—appeal from contempt order permissible**

Plaintiff was entitled to appeal an order adjudging her in contempt since findings by the trial court that she had willfully disobeyed the court's child custody orders, if sustained, would convict her of both civil contempt under G.S. 50-13.3 and criminal contempt under G.S. 5-1(4); G.S. 5-2 would permit plaintiff to appeal the adjudication of contempt even though the court had imposed no punishment; and the court's "withholding" of punishment without further limitation would allow the court to impose it in the future, and under these circumstances the order holding her in contempt "affected a substantial right" and was therefore appealable. G.S. 1-271; G.S. 1-277.

2. **Contempt of Court § 8— judge's findings of fact—conclusiveness**

In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment.

3. **Infants § 6.1— failure to comply with custody order—sufficiency of findings**

Evidence was sufficient to support the trial court's finding that plaintiff failed to comply with its child custody order requiring plaintiff to deliver the children in question to the sheriff's office at certain times so that defendant could pick them up, and plaintiff's contention that there was no evidence that she was aware of the existence or terms of the order is without merit, since the evidence tended to show otherwise and since neither receipt of a copy of the order nor knowledge of its exact words was a condition precedent to plaintiff's obligation to comply with it.

4. **Infants § 6.1— failure to comply with custody order—sufficiency of findings**

Evidence was sufficient to support the trial court's finding that plaintiff willfully violated its child custody order providing for the children's visitation with defendant by advising the children in question that they did not have to visit with the defendant, their mother, or with their grandmother.

5. **Infants § 6.2— visitation rights modified—showing of changed circumstances required**

The Court of Appeals erred in its decision of *Clark v. Clark*, 23 N.C. App. 589, which concluded that defendant was not required to show changed conditions in order to secure a modification of her visitation privileges, since an agreement by the parties that the court may change visitation privileges in a custody order without any showing of changed conditions does not relieve the court of its duty to determine whether changed circumstances affecting the welfare of the child justify a modification; however, that error has no

significance on this appeal, since the court, in each order entered after the original judgment, made findings demonstrating one or more significant changes in circumstances affecting the welfare of the children in question and justifying the changes made.

6. **Infants § 6.7— "custody"—inclusion of visitation rights**

The word "custody" as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody.

7. **Infants § 6.7— visitation rights awarded—failure to find children's best interests**

The trial court erred in ordering visitations by the children in question with defendant, their mother, without finding that the visits were in the children's best interest.

8. **Infants § 6.4— child custody—consideration of child's wishes**

In determining the custody and visitation rights incident to the award of custody of children ages 15, 13 and 12, it is appropriate and desirable for the judge to ascertain and consider the children's wishes in respect to their custody.

ON plaintiff's petition for discretionary review of the unpublished decision of the Court of Appeals filed 18 May 1977, which vacated in part the order of *Lacey, J.*, entered 4 June 1976 in the District Court of MADISON, docketed and argued at the Fall Term 1977 as Case No. 59.

Proceeding for the custody of minor children brought under G.S. 50-13.1 *et seq.* (1976 Replacement).

Gene Wayne Clark (Gene), born 12 April 1960, John Lloyd Clark (John), born 11 April 1963, Gambell Clark (Gambell), born 5 January 1965, and Gila Clark (Gila), born 6 September 1966, are children of the marriage of Wayne Calvin Clark, now deceased, and defendant-appellee, Patricia Proffitt Clark, now Mrs. David Fowler (defendant). Plaintiff-appellant, Marie Ponder Clark (Mrs. Clark), the children's paternal grandmother, instituted this action on 3 May 1972 against their mother, defendant-appellee, who was then a resident of Alabama. Other named defendants are the children themselves and their testamentary guardian, Cecil Clark.

After an extensive hearing on 11 August 1972, Judge J. Ray Braswell signed the first order in the case, a consent judgment by which Mrs. Clark acquired legal custody of the four children. Pertinent portions of the judge's detailed findings of fact are summarized or quoted below:

On or about 15 August 1967 defendant left her husband, Wayne Clark (Clark) and never lived with him again. Thereafter, by a deed of separation, she relinquished the sole custody of the children to their father. For sometime before, and at all times after February 1968, the four children resided with Mrs. Clark and their father until his death on 29 April 1972. Both before and after her son's death Mrs. Clark cared for the children, attended to their discipline and education, and provided them a happy and secure home. During these years defendant visited the children "only at very infrequent intervals, never corresponded with them, or requested information about them." By her conduct "she did abandon her children" and render herself "unfit to presently have the care and custody of her infant children."

Judge Braswell found Mrs. Clark to be a fit and proper person to have the care and custody of the four children and that the children's best interest required that they be committed to her custody. Whereupon, he awarded their "sole care and custody" to Mrs. Clark. He also found, however, that it was in the best interest of the children that they be allowed to visit with their mother in the Madison County home of her parents, Mr. and Mrs. Bernard Proffitt. After requiring defendant and her parents to post a bond guaranteeing that the children would not be removed from the State and that they would be returned to Mrs. Clark after each visit, the court gave defendant the privilege of visiting her children in the home of her parents on the fourth weekend of each month from 10:00 a.m. on Saturday until 6:00 p.m. on Sunday. In addition the judgment contained the following provision:

"This cause is retained for further orders and particularly for entry of special order further specifying the visiting privileges of the defendant, Patricia Proffitt Clark, which said special order only may be entered without showing of change of condition but any such special order shall be entered only after appropriate notice."

The next judgment in this proceeding was rendered in open court on 4 March 1974. Between 11 August 1972 and 4 March 1974, *inter alia*, the following events had occurred:

In November 1972 David Fowler, with whom defendant had been living in Birmingham, Alabama, obtained a divorce from his former wife and married defendant. Thereafter defendant and

Fowler moved into a three-bedroom apartment in a large apartment complex. Defendant, previously unemployed, became the resident manager of the apartment complex, earning from $350 to $1,200 per month. Fowler's income as a Southern Railroad trainmaster was at least $1,400 monthly.

Sometime prior to 3 October 1973 defendant had moved in the cause that the consent judgment of 11 August 1972 be changed to give her custody of the four children. This motion was heard in open court on 3 October 1973 with all parties and their counsel present and participating. At the conclusion of the evidence the matter was continued so that the parties could agree on a child psychologist to provide expert testimony for the court's consideration. Thereafter, "agreement having failed," Judge Braswell notified counsel he would render judgment in open court on 4 March 1974. At that time plaintiff was permitted to call as witnesses the two boys, Gene and John; and, with the consent of counsel, the judge talked with the two girls, Gambell and Gila, in open court.

In addition to the facts set out in the two preceding paragraphs, "from competent evidence received in open court on October 3, 1973 and March 4, 1974," the court found the facts summarized below (enumeration ours):

1. Defendant, now 32 years of age, and her husband, now 34 years old, have good reputations in the community in which they live. Since 11 August 1972 defendant has traveled from Alabama to Madison County every month that she was allowed to visit her children. She has spent much money on these repeated trips and on long distance telephone calls, "and generally has done all she reasonably could to demonstrate her love for her children and to win their love and affection for her."

2. Mrs. Clark, a 57-year-old widow, lives alone with her four grandchildren. The children have a strong attachment to their grandmother, relatives, friends, and pets. They receive social security benefits of $406 per month with which plaintiff provides for their basic personal needs.

3. Defendant is not welcome in plaintiff's home. Without notice to defendant Mrs. Clark changed her telephone to an unlisted number. Plaintiff testified that she "didn't do anything to

tell [Mrs. Fowler] of the change." Defendant was unable to obtain the unlisted telephone number for about three weeks and was unable to have her weekly telephone visits with the children during the interval.

4. Defendant and her husband are able and both desire to provide for the children in their home in Birmingham. The relations between defendant, her husband, and the four children "are warm and affectionate as demonstrated during the times when the children and their mother and stepfather have been permitted to visit together."

5. The four children have great affection for each other. Gene, the eldest, is mature for his 14 years and appears to exercise a strong influence upon his younger brother and two sisters. Although expressing affection for his mother and stepfather he insists he will refuse to leave the home of his grandmother and the community in which he has been reared.

Upon the foregoing findings the court concluded, *inter alia*:

1. A "substantial change in the circumstances affecting the children" has occurred "since the order of custody award of August 11, 1972."

2. Defendant is a fit and proper mother and her husband is a fit and proper person for a parent.

3. Plaintiff is "a fit and proper person to serve as parent to the children." She tacitly disapproves of defendant and makes "no overt effort" to develop in the children "a wholesome sentiment of love and respect for their mother."

4. A sudden permanent change of custody and community residence and separation from each other at this time could harm the children and their future development. It is in the children's best interest that each of them continue to reside with their grandmother but that they "have frequent visits, contacts, and associations with their natural mother and her husband."

The court specifically continued the visiting privileges allowed defendant in the 1972 judgment and granted her the additional privilege of visiting the children and having them visit her in or out of the State at such other times "as shall be mutually agreed upon between the parties." This additional privilege was

conditioned, however, upon the execution and deposit of a $7,500.00 bond guaranteeing the return of the children in accordance with the parties' agreement or the order of the court. The judgment further decreed that any conduct on the part of either plaintiff or defendant which tended to interfere with the development or existence of a natural bond of affection among the children themselves, or between the children and their mother or Mrs. Clark, would constitute grounds for modification of the order.

Judge Braswell signed the foregoing order on 10 April 1974. Plaintiff appealed to the Court of Appeals, which affirmed the order on 20 November 1974. *Clark v. Clark*, 23 N.C. App. 589, 209 S.E. 2d 545.

On 17 April 1975 the parties were again before Judge Braswell upon defendant's motion for custody of her children. Upon the evidence adduced he found the following facts (enumeration ours):

1. Since 10 April 1974 defendant and her husband terminated their employment in Alabama, where defendant was earning $12,000 per year and Mr. Fowler $19,000 per year, and moved to Weaverville, North Carolina. This move was made so that defendant would live closer to her children and have a better opportunity for enlarged visitation privileges. Defendant is now unemployed and Mr. Fowler is employed by Southern Railway at an annual salary of $16,000.

2. Defendant and her husband have purchased a newly constructed residence located in Buncombe County about 30 minutes from Mrs. Clark's residence in Madison County. Defendant's home has four bedrooms, two baths, and furnishings adequate to meet the needs of the children.

3. On various occasions since 10 April 1974 Mrs. Clark has demonstrated her hostility and antagonism toward defendant. She has interfered with communication between the mother and her children at various public and school functions and has refused to permit the children to visit defendant in the manner and to the extent contemplated by the order of 10 April 1974. She has allowed Gene, who is now only 15 years old, to determine when and for how long he and the three younger children shall visit with

their mother. Gene, while of sufficient maturity to choose for himself between his mother and his grandmother, "is not sufficiently mature to make these important decisions on behalf of his younger brother and sisters."

4. Both the grandmother and the mother are fit and proper persons to have the custody, supervision and control of the children. The court's intent that the children be permitted frequent visits, contacts and associations with their natural mother and her husband, expressed in the order of 19 April 1974, has not been carried out; and it is not in the children's best interest that they be exposed to frequent doubt and uncertainty as to whether and when they shall be permitted to visit their natural mother.

Upon the foregoing findings Judge Braswell concluded that circumstances had changed substantially since the entry of the order of 10 April 1974; that it was in the children's best interest that their primary custody remain with Mrs. Clark but that their best interest also required them to have frequent contacts, visits and associations with their mother. He therefore ordered (1) that Gene be permitted to decide when and under what circumstances he would visit his mother; (2) that one week after the ending of the school year the custody of John, Gambell, and Gila be placed in defendant until one week before the beginning of school, this arrangement to continue until each child shall arrive at the age of eighteen; (3) that during the school year custody of John, Gambell, and Gila shall remain with plaintiff, but during this time the three children shall visit with defendant in her home from 6:00 p.m. on Friday until 6:00 p.m. on Sunday on each second and fourth weekend of every calendar month, beginning on 25 April 1975. Provision was also made for the children to visit with defendant at specified periods during the Thanksgiving and Christmas holidays.

The judgment further specified that the custody provisions set out above encompassed social, athletic, and all other events and that the custody provisions were made "absolute in the party designated." Each was enjoined at all times from interfering with the custody of the other. This order was rendered in open court on 17 April 1975, signed on 8 May 1975, and filed as of 12 May 1975.

On 10 June 1975 Judge Braswell cited plaintiff to show cause why she should not be adjudged in contempt of court. This citation was based on two affidavits by defendant which alleged that plaintiff had made it impossible for defendant to obtain the children on 25 April 1975 and on 6 June 1975 as provided in the order of 17 April 1975; that plaintiff had told John he could defy the court order and had advised the children on one occasion to go with defendant but to run away from her the next day, and that plaintiff had informed defendant that she would not enforce the court's order.

In answers filed 3 July and 5 August 1975 respectively, plaintiff denied the averments of defendant's affidavits and alleged that on two occasions after she had packed the children's clothes for their visit with defendant they ran away when they saw defendant approaching and secluded themselves until late at night, to plaintiff's great distress; that the drastic change of custody made in the order of May 1975 separated the three younger children from their brother Gene, their friends, recreational and church activities, and the environment in which they had lived for eight years; that their unhappiness caused them to run away from a swimming pool in Buncombe County where their mother had left them in order to return to plaintiff's home in Madison County by thumbing rides on the highway; and that the change of custody created turmoil which has interfered with their emotional well-being. Plaintiff asked that the question of custody be reopened and that the "children be returned absolutely and unconditionally to plaintiff."

Defendant's two motions that plaintiff be adjudged in contempt and defendant's motion to amend the custody orders of 17 April 1975 came before Judge Robert E. Lacey on 5 August 1975. After hearing the evidence Judge Lacey made the following pertinent findings of fact:

1. On 26 April 1975 Mrs. Clark prepared John, Gambell, and Gila for their weekend visit with defendant and told them their mother would pick them up, then left them playing in the yard of her home under the supervision of "a baby sitter"; that when the children saw their mother approaching they ran "over a bank" and secreted themselves "until the late hours of the evening" to

avoid going with her; that Mrs. Clark was not at home and did nothing to prevent the children from visiting with their mother.

2. On 9 May 1975 the three children visited defendant in accordance with the court order.

3. On 23 May 1975 plaintiff kept Gila with her upon the doctor's orders but turned Gambell and John over to defendant. However, on the following day at a ball game in Marshall these two children ran away from their mother and returned to plaintiff's home. On 14 June 1975 plaintiff delivered John, Gambell, and Gila to the Madison County Sheriff's Department for defendant to pick them up, but the children again ran away and were not found until late in the evening. On 16 June defendant and her husband forcibly removed Gambell and Gila from the Bible School which they were attending in Marshall and kept them at her home in Buncombe County until 31 July 1975. On that date defendant left Gambell and Gila at the Moose Lodge Swimming Pool near Asheville for the afternoon. When she departed the two girls left the pool premises and hitchhiked to plaintiff's home in Madison County.

4. After the order of 17 April 1975 was entered plaintiff read it to John, Gambell, and Gila and informed them that "by order of the court," they had to obey it. At no time did she ever tell the children they could disobey the order of the court, but she did not "ever order the children from their home."

5. Dr. John Patton, a licensed psychiatrist who had examined the three younger children for over a year, opined that it was not in their best interest to be forced to visit their mother against their wishes or to be separated from Gene, their older brother; that the separation of the children from their grandmother and brother during the period between 16 June 1975 and 31 July 1975 had been detrimental to their emotional stability; and that each child is mature enough to express an opinion as to where he should live and "said opinion should be considered by the court."

6. Each child testified that he desired to live with his grandmother rather than with defendant.

7. Defendant, her husband, and three other witnesses testified that a warm and friendly relationship existed between defendant and the children from and after 17 April 1975.

Upon the foregoing findings Judge Lacey concluded: (1) The maturity and emotional stability of John, Gambell, and Gila make their wishes with reference to their custody relevant to decision. Through their actions and statements they have indicated a strong desire to live with Mrs. Clark and there is no suggestion that, if forced to visit with defendant against their will, they would remain with her. (2) At no time following the order of 17 April 1975 has Mrs. Clark defied or refused to obey the order. (3) The circumstances have changed since the entry of the order of 17 April 1975, and it is no longer in the best interest of the children that they be forced to remain with defendant against their will. The welfare of the children will best be served by placing them in the sole care, custody and control of the plaintiff and by allowing—not compelling—them to visit with defendant.

In an order signed 13 August 1975 Judge Lacey, upon the foregoing findings and conclusions, exonerated Mrs. Clark from contempt and dismissed the citations issued to her on 10 June and 9 July 1975. "Until the further orders of this court . . . ," he decreed, "Mrs. Clark shall have the full care, custody and control" of the three children and that "they shall be allowed but not compelled to visit with their mother . . . at such time or times as they may specify or desire." He then continued "this matter" until 18 September 1975 "at which time the said case will be heard by the court on its merits."

The adjourned hearing was not held until 20 November 1975. On that day, after "having heard the evidence," Judge Lacey found that none of defendant's four children had visited with her since 13 August 1975. He entered an order which continued the care, custody and control of the children in the plaintiff and, in addition, "modified the orders heretofore entered" by directing (1) that hereafter Gila and Gambell shall visit with their mother on the fourth weekend each month from 8:00 a.m. on Saturday until 6:00 p.m. on Sunday, but in November 1975 "said visitation privilege shall be on the fifth weekend"; (2) that the two children shall visit with the maternal grandmother, Mrs. Proffitt, at her residence on the second Sunday of each month from 2:00 p.m. until 6:00 p.m. and with their mother at her residence from 4:00 p.m. on December 25, 1975 until 6:00 p.m. on December 31, 1975; (3) that on the occasion of every visitation above plaintiff shall deliver the two girls to the Madison County Sheriff's Department

in sufficient time for defendant or Mrs. Proffitt to pick them up; and (4) that the two boys be permitted to visit with their mother at such times as they determine.

On 5 February 1976 defendant filed a verified affidavit and motion in which she averred that since 24 November 1975 neither she nor Mrs. Proffitt had been able to visit with the children because of plaintiff's refusal to obey the order of that date; and that it was "no longer in the best interst and welfare of the children" to be in the custody of plaintiff, "who is counseling the children in disobedience of the lawful constituted authority of this State." Upon these allegations defendant moved that plaintiff be cited for contempt and that the custody of the children be placed in defendant or a third party.

On 29 January 1976, in accordance with defendant's motion, Judge Lacey cited plaintiff to appear before him on 4 March 1976 "or as soon thereafter as the court will hear the motion and show cause . . . why she should not be adjudged in contempt of court . . . and for further hearing as to whether or not the custody of said children should be changed as set forth in the Motion."

For undisclosed reasons the cause was not heard on 4 March 1976. On 5 April 1976 defendant filed a second motion for an order giving her custody of the children. She averred that plaintiff has continuously refused to permit the children to visit defendant and has counseled them to disobey the court's order; that plaintiff is now physically ill and unable to care and provide for the children; and that they have been required to do all the cooking and other housework, including tasks they are not old enough to perform, and they have been injured while performing such tasks without supervision.

Judge Lacey heard the citation of 20 January 1976 and defendant's motion of 5 April 1976 on 4 June 1976. At that time both plaintiff and defendant offered evidence.

As a witness for the defendant, plaintiff's physician testified that for ten years plaintiff has been a chronic diabetic, requiring constant medication and medical supervision; that she is overweight, has had high blood pressure for many years, and "is on and off" high blood pressure medicine; that she suffers from coronary artery insufficiency, is subject to anginal attacks, and is

"on nitroglycerine." At the time of the hearing she had recently been hospitalized for elevated blood sugar and a bladder infection. She has been advised to take "no strenuous exercise" but "to live a normal life." The doctor would make no prognosis about her continuing coronary insufficiency.

In addition to the physician's testimony defendant's evidence tends to show:

Defendant went to the office of E. Y. Ponder, Sheriff of Madison County, and brother of Mrs. Clark, sometime before 8:00 p.m. on 29 November 1975, the fifth Saturday in November, for the purpose of picking up the children as directed by Judge Lacey on 20 November 1975. The children were not there. When approached, the sheriff told defendant he would not believe she was supposed to have the children until she showed him a court order. He told her that if she "wanted to go home and get the court order" and then find him in Mars Hill (where he was going to investigate a robbery) he would look at it and see whether she had anything to stand on. Defendant did not see her children that weekend.

On the second Sunday in December defendant went to the home of her mother, Mrs. Proffitt, expecting to see the children as directed in the order of 24 November 1975, but they were not there. The night before defendant had talked to Gila, Gambell and John on the telephone and they had told her "that they didn't know whether they were coming to [Mrs. Proffitt's] or not; that they thought that they had other plans but that they might come." Mrs. Proffitt went to the jail for them on that Sunday but they were not there. The sheriff called Mrs. Clark's home but she was not there.

On Christmas Day Mrs. Proffitt called Mrs. Clark's residence and talked with Gene, who told her he and the others were not coming to her house for the scheduled Christmas visit. "Gene acts as spokesman for the children; [Mrs. Clark] has been using him as spokesman all along." In consequence defendant did not go to the jail to pick them up. On the Saturday morning after Christmas defendant waited outside the jail about an hour for the children but they did not come.

Before the children's scheduled visit in January defendant had a telephone conversation with her son Gene. He told her "that they absolutely" could not come to her house again until after they had another hearing. Because of that conversation defendant did not go to the jail for the children again. In January Mrs. Clark told Mrs. Proffitt in a telephone conversation that she did not mind the children visiting with her and Mr. Proffitt but they were not to go to defendant's home in Weaverville.

On February 15, 1976, Mrs. Clark delivered the children to Mrs. Proffitt and from 1:00 p.m. until about 5:45 defendant visited with the children at her mother's home. At that time the children received their Christmas presents and demonstrated affection for defendant and pleasure at being with her. The only other occasions on which defendant saw the children between 20 November 1975 and the June 1976 hearing were at two wrestling matches in which Gene and John participated and when defendant went to the school to check on Gila and Gambell after hearing that Mrs. Clark was in the hospital. During Mrs. Clark's absence, she discovered Gila's hand had been injured in the rollers of a wringer-type washing machine and Gambell's hand had been burned when her blouse caught fire from the stove while cooking supper.

When asked by plaintiff's counsel on cross-examination whether she had "any evidence" that if the two girls were returned to her "they would not run away again," defendant replied that she loved the children and they loved her and she didn't "really believe they really ran away"; that during the summer of 1975 "there was somebody constantly calling them, continuously wanting to be with them," trying to keep them upset and dissatisfied; that Mrs. Clark never called but Gene did. It was, "We love you—we miss you." Gambell's softball team would call to say, "We need you to play softball."

Defendant also stated that on March 10, 1976 she moved from Weaverville to Knoxville, Tennessee, where she and her husband were living in a two-story, five-room house.

The plaintiff elected not to testify. She called as witnesses defendant Cecil Clark, the children's testamentary guardian (a resident of Hickory, North Carolina); Sheriff E. Y. Ponder and his

deputy, the jailer, Clayton Grindstaff; Gene Clark; Gila Clark; and Gambell Clark.

Cecil Clark testified that on Christmas Day and on the fourth weekend in December 1975, January and March 1976 he took the children to the Madison County jail at the times ordered by the court, except for the fourth weekend in February when their uncle died, and that they went voluntarily; that no one ever appeared to pick up the children and he always took them back home. On cross-examination he admitted that at no time on these occasions or thereafter did he ever contact defendant or Mrs. Proffitt; that he had been at the November hearing and was familiar with the November 1975 court order; and that he had told the children if they didn't want to visit defendant he wouldn't make them—that the decision was theirs.

Sheriff Ponder testified that the children were brought to the jail on Christmas Day and on various weekends through March but nobody ever came to pick them up. He recalled the fifth weekend in November 1975 when defendant came to the jail for the children and they were not there. He said he called his sister, Mrs. Clark; that she told him she had not seen the court's order and "she did not know exactly what she was supposed to do"; and that he then told defendant if she would go home and get her copy of the order he would carry it out but without it he could do nothing.

The jailer, Deputy Sheriff Grindstaff, testified that the children had come to the sheriff's office regularly on the second Sunday afternoon and on the fourth Saturday of each month and had waited there "until after the time they were supposed to be picked up." He said, "I never had no reason to call Pat Fowler; that's not part of my job."

Gene, the oldest of the four children, had become 16 and acquired a driver's license by the time of the June 1976 hearing. He testified of his own knowledge that Gambell and Gila had been taken to the Madison County jail every second and fourth weekend since the November 1975 hearing. On two occasions he himself had "brought them into the jailhouse and sat there until about 8:30" before going back home.

On cross-examination Gene said he was at the November 1975 hearing when the girls' visitation schedule with their mother was announced, and that "he supposed" he was the one who had whispered to his grandmother that they had plans for the fourth weekend in November and had thus caused the fifth weekend to be substituted as the visiting period for that month. Conceding that he had had conversations with Mrs. Proffitt about visiting and bringing the girls to see her, Gene said, "I have never told my Grandmother Proffitt that [the girls] were up there [at the jail] and no one came to pick them up. I figured she knew that she was supposed to be there; I couldn't figure out why they had not come." Gene also said that he had talked to his mother several times since the November 1975 hearing; that he had also talked to her on the two occasions she attended the wrestling matches; and that "on neither of these occasions did [he] ask her why there wasn't someone at the jail, and on none of the telephone conversations did [he] ever [tell] her . . . that the girls had been brought to the jail." He denied ever telling his mother that the two girls could not come on the fourth weekends. Gene also said on cross-examination, "[O]ne time that we had to visit, Grandmother did tell [Gambell] that she would not make her go if she didn't want to. We weren't going to force none of the kids into doing something against their will that we saw no cause to."

Gila, then "nine or ten years old and in the fourth grade," testified that Mrs. Clark had told her "once or twice" that she didn't have to visit her mother or Mrs. Proffitt if she didn't want to. Gambell was unable to remember whether Mrs. Clark had ever made similar statements to her.

Following the hearing Judge Lacey entered his order dated 4 June 1976. The pertinent part of his findings are summarized below (enumeration ours):

(1) Since November 24, 1975 Mrs. Clark has been hospitalized for "a diabetic condition, elevated blood sugar, a bladder infection, and cardiac insufficiency." She responded favorably to treatment and has been advised by her doctor to lead a normal life, free from any unnecessary stress.

(2) Defendant and her husband have moved from Weaverville to Knoxville, Tennessee, where they live in a two-story, five-bedroom home. As the children's natural mother she "is anxious

to have the children visit with her, and is a fit person to have liberal visitation privileges with her children."

(3) On the occasions since November 1975 when they have visited with defendant the children have had a good relationship with her, and there is no evidence of abuse or misconduct by defendant.

(4) On 29 November 1975 Mrs. Clark "did wilfully fail and refuse to deliver Gila and Gambell Clark to the Madison County Sheriff's Department in order to permit the defendant . . . to pick up the children for visitation as provided in the order dated November 24, 1975; and further that [Mrs. Clark] did advise Gambell Clark that she did not have to go to visit with her grandmother, Hazel Proffitt, on the postponed visit of the second week in February unless she wanted to go, and on other occasions the plaintiff had advised Gambell and Gila Clark that they did not have to visit with the defendant or the grandmother unless they wanted to, in violation of the order of November 24, 1975 and other orders of this court."

(5) Plaintiff continues to be a fit person to have the custody of the children and it is in their best interest that she continue to have their custody.

(6) Defendant is a fit and suitable person to visit with her children and to have liberal visitation privileges.

Upon the foregoing findings the court adjudged:

(1) By reason of the conduct specified in paragraph (4) above Mrs. Clark "is in contempt of this court. . . . The court does hereby withhold punishment for said contempt, but makes said findings as a part of the record herein."

(2) The care, custody and control of the children who are the subject of this proceeding continues in Mrs. Clark upon the following terms and conditions:

a. Gene and John Clark shall visit with defendant at such time as they shall determine.

b. Beginning 28 May 1976, and continuing thereafter, Gila and Gambell Clark shall be permitted, allowed and encouraged to visit with their mother on the fourth weekend of each calendar

month from 5:00 p.m. on Friday until 5:00 p.m. on Sunday. Further, they shall be allowed, permitted, and encouraged to visit with their mother during the summer vacation from 5:00 p.m. on Sunday afternoon, 18 July 1976 until Friday afternoon 13 August 1976.

Other provisions of the judgment "permitted, allowed, and encouraged" Gambell and Gila to visit their maternal grandmother during certain hours on the second Sunday of each month and with their mother during a part of the Thanksgiving and Christmas holidays. However, at the times specified for each visit the judgment required plaintiff to cause the two children to be transported to the Burger Plaza on the Marshall Bypass with proper "equipment" for visiting and there delivered to defendant or her mother, Mrs. Proffitt. At the termination of their visit defendant was ordered to return the children to the Burger Plaza to be delivered to Mrs. Clark or her designee.

Plaintiff appealed from the foregoing order to the Court of Appeals, which held that since Judge Lacey had not punished plaintiff for her contempt she was not aggrieved by the adjudication and therefore could not appeal from it. However, because the order lacked an explicit finding that the visitation privileges awarded defendant were in the best interest of the children, the Court of Appeals vacated those provisions of the judgment and remanded the cause "for proper findings and conclusions on this point." We allowed plaintiff's petition for discretionary review.

*Long, McClure & Dodd for plaintiff appellant.*

*Riddle & Shackelford for defendant appellee.*

SHARP, Chief Justice.

We consider first plaintiff's contentions that the trial court erred in finding her in contempt and that the Court of Appeals erred in holding that adjudication unappealable because, punishment having been withheld, she was not a party aggrieved.

**[1]** With reference to her right to appeal plaintiff argues that the findings she had willfully disobeyed the court's orders providing for the custody of Gambell and Gila, if sustained, convict her of both civil contempt under G.S. 50-13.3 and criminal contempt under G.S. 5-1(4). Citing *Willis v. Power Co.*, 291 N.C. 19,

229 S.E. 2d 191 (1977) and *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313 (1967), she asserts that G.S. 5-2 permits her to appeal the adjudication of contempt even though the court has imposed no punishment. Pointing to the provision of the judgment that plaintiff "is in contempt of this Court and . . . the Court does hereby withhold punishment for said contempt, but makes said Findings as a part of the record herein," plaintiff maintains that by "withholding" punishment for her adjudged contempt the court did not thereby waive, relinquish, or abandon the right to impose punishment at a later date. On the contrary, she insists, merely "to withhold" punishment without further limitation is to retain the right to impose it in the future, and under these circumstances the order holding her in contempt "affected a substantial right" and is therefore appealable. G.S. 1-271; G.S. 1-277.

The cited cases sustain plaintiff's contentions, and we hold that she was entitled to appeal the order adjudging her in contempt. Thus, the next question is whether the record supports the trial court's findings.

**[2]** In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *Rose's Stores v. Tarrytown Center, supra; Cotton Mill Co. v. Textile Workers Union*, 234 N.C. 545, 67 S.E. 2d 755 (1951); 3 Strong's North Carolina Index 3rd, *Contempt of Court* § 8 (1976). We hold that both direct and circumstantial evidence supports Judge Lacey's findings and affirm his adjudication that plaintiff is in contempt of court.

**[3]** With reference to the court's finding that on 29 November 1975 plaintiff willfully refused to deliver Gila and Gambell to the Madison County Sheriff's Department so that defendant could pick them up in accordance with the court's order dated 24 November 1975, plaintiff contends that "there is no evidence she was aware of the existence or terms of the order." This contention will not withstand a scrutiny of the record, which contains evidence tending to show:

(1) At the conclusion of the hearing on 20 November 1975 Judge Lacey announced the terms of its judgment in open court. The judgment was signed on November 24th. It was filed on

November 26th and copies mailed to the attorneys for the parties. Defendant had her copy on November 29th.

(2) Plaintiff was in court on 20 November 1975 when Judge Lacey announced his ruling that thereafter Gambell and Gila would visit defendant the fourth weekend of each month, except that during the current month of November the visitation would be on the fifth weekend, just nine days away. The variation for November was made after Gene or one of the other children had called Mrs. Clark's attention to the fact that they had previously made plans for the fourth weekend.

(3) The children's testamentary guardian, their Uncle Cecil Clark, had also been at the November 1975 hearing and testified that he was familiar with the court's order. On cross-examination he recalled that at the end of the hearing Judge Lacey had announced that defendant was to have the children on the fifth weekend in November.

(4) Sheriff Ponder testified, without objection, that on the fifth weekend in November when defendant came to his jail for the children he called his sister, Mrs. Clark, and "she said she had not seen the order; it had never been presented to her."

(5) Gene Clark, then 15 years old, when asked on cross-examination if he could "give any reason why the two girls did not go to the jail on the fifth weekend in November like the judge had said in court?" replied, ". . . it seems like I recall something about we had not gotten a copy of the order saying that they were supposed to go on the fifth weekend."

From the evidence adduced the conclusion is inescapable that on 29 November 1975 Mrs. Clark, the children, and their testamentary guardian all had knowledge of the substance and meaning of the order which Judge Lacey enunciated on November 20th, signed on November 24th, and filed on November 26th, and that Mrs. Clark, using as an excuse the fact that she did not have a copy of the order in hand, willfully failed and refused to deliver the children as required by the order. Neither receipt of a copy of the order nor knowledge of its exact words were conditions precedent to her obligation to comply with it. *See Cotton Mills v. Local 584*, 251 N.C. 240, 147, 111 S.E. 2d 471, 475 (1959); 3 Strong's North Carolina Index 3rd, *Contempt of Court* § 3.1 (1977).

**[4]** The court's finding that "[p]laintiff has advised Gambell and Gila Clark that they did not have to visit with the defendant or the Grandmother [Mrs. Proffitt] unless they wanted to, in violation of the Order of November 24, 1975, and other Orders of this Court" is likewise supported by competent record evidence. Gene testified that on at least one occasion plaintiff told Gambell she would not make her visit Mrs. Proffitt if the child didn't want to do it. He added, "We weren't going to force none of the kids into doing something against their will that we saw no cause to." Gila, then "nine or ten," testified that once or twice Mrs. Clark had told her that she would not have to make the visits against her will. When asked if plaintiff had ever told her she did not have to visit her mother if she didn't want to, and whether plaintiff had told John, Gila, and Gene not to go to Weaverville, Gambell, then eleven years old, replied that she could not remember. Further, Mrs. Proffitt testified that sometime early in 1976, in a telephone conversation, Mrs. Clark told her that she did not mind the children visiting with her and Mr. Proffitt, "but that they were not to go to Weaverville."

Plaintiff's assignment of error challenging the sufficiency of the evidence to support the trial court's finding that she had willfully violated the order of 24 November 1975 is overruled.

The record in this case tells a sad story. In August 1967 defendant left her husband and four children, then aged respectively eight, five, three, and two years, and for five years thereafter had no contact with them. During this time plaintiff assumed the role of mother; she gave them tender, loving care and a comfortable, secure home. The children lived happily with plaintiff and their father until his death in April 1972, and since then have lived with plaintiff. Understandably, they return plaintiff's affection and give her the love children customarily give their mother. Under these circumstances it is not surprising that plaintiff has been unwilling to share the children with their mother and has resented, and attempted to thwart, defendant's efforts to reestablish a mother's relationship with the children, as well as the court's efforts to assist defendant in doing so.

The two judges before whom this controversy has come have at all times recognized the bond of affection between plaintiff and the children and that plaintiff has earned the right to their

primary custody. With judgmatical objectivity, however, the judges have weighed a consideration which plaintiff obviously has not permitted herself to contemplate: Her life expectancy is less than defendant's, and it is not in the children's interest that the court ignore the possibility of plaintiff's disablement or death prior to the majority of one or more of them. The testimony of her physician that she is overweight and now suffering from diabetes, high blood pressure, coronary artery insufficiency and anginal attacks corroborates that possibility and supports its probability.

From the beginning of this litigation the judges have recognized that while it was best for the children to remain in the custody of their grandmother, it was also in their interest "to have frequent visits, contacts and associations with their natural mother," and since her marriage, with her husband. After the entry of the order of 11 August 1972, defendant, albeit a resident of Alabama for over two years, and despite great expense, journeyed to Madison County every month she was allowed to visit her children, telephoned them frequently, and "generally did all she reasonably could to demonstrate her love for the children and to win their love and affection." The children responded, and warm and affectionate relations developed between them and their mother and stepfather.

However, the factual findings contained in the judgments indicate that plaintiff's hostility and antagonism toward defendant increased as defendant's personal situation and status improved, and the court increased her visitation privileges. Inevitably plaintiff's attitude and conduct were reflected in the attitude and conduct of the children toward defendant. In consequence, on 13 August 1975, Judge Lacey directed that until the further orders of the court the children should be allowed to visit defendant at any time they desired but not be compelled to visit her. Three and one-half months later, upon a finding that the children had not visited defendant since the entry of the August order, on 24 November 1975 Judge Lacey ordered once-a-month compulsory visitations with defendant and with Mrs. Proffitt. *Inter alia*, in consequence of plaintiff's willful violations of the November order, her deteriorating physical condition, and the children's improved relations with their mother, on 4 June 1976 Judge Lacey entered the order under review.

With reference to this order plaintiff contends (1) that the visiting privileges awarded defendant in the judgment of 4 June 1976 cannot be sustained because they are unsupported by either a finding that changed conditions justified the visitations specified or that these visitations are in the best interest of the children; and (2) that the Court of Appeals erred in holding that under its decision in *Clark v. Clark*, 23 N.C. App. 589, 209 S.E. 2d 545 (1974), which "stands as the law of [this] case," defendant is not required to show changed conditions in order to secure a modification of her visitation privileges. *See* 3 Lee, North Carolina Family Law § 226 (Cum. Supp. 1976). We consider first contention (2). *See Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E. 2d 649 (1974); *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973).

**[5]** In the consent judgment of 11 August 1972, the first order entered in this cause, the court retained the proceeding "for further orders and particularly for entry of special order further specifying the visiting privileges of the defendant . . . , which said special order only may be entered without showing of change of condition but . . . only after appropriate notice." In both *Clark v. Clark, supra*, and its unpublished decision from which plaintiff now appeals, the Court of Appeals held that the above-quoted provision estops plaintiff from raising the issue of changed conditions. We agree with plaintiff that the Court of Appeals erred in making this ruling.

**[5, 6]** An agreement by the parties that the court may change visitation privileges in a custody order without any showing of changed conditions does not relieve the court of its duty to determine whether changed circumstances affecting the welfare of the child justify a modification. It is clear that "the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974). G.S. 50-13.7(a) (Replacement 1976) provides that "[a]n order of a court of this State for custody . . . of a minor child may be modified at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." Visitation privileges are but a lesser degree

of custody. Thus, we hold that the word "custody" as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody. As Justice Branch said in *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E. 2d 357, 361 (1968) with reference to the rule that a change in custody requires a finding of changed circumstances, "to hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved."

Notwithstanding, the error in *Clark v. Clark, supra*, has no significance on this appeal because the order of 6 June 1976 contains findings of changed circumstances affecting the welfare of the children which, were the issue of changed conditions decisive on this appeal, would suffice to sustain the visitation award. Indeed, the order in *Clark v. Clark*, and in each order entered after the August 1972 judgment, the court made findings demonstrating one or more significant changes in circumstances affecting the welfare of the children and justifying the changes made.

**[7]** Plaintiff's contention (based on her assignment of error No. 19) that the visitations ordered in the judgment of 4 June 1976 are not supported by a finding that required visits are in the children's best interest must be sustained. The Court of Appeals correctly held that the case must be remanded for proper findings and conclusions on this issue.

**[8]** In view of the time which will have elapsed since the order of 4 June 1976 the trial judge will, without undue delay, conduct a plenary hearing. Thereafter he will make such order with reference to the custody of the infant children, and visitation rights incident to the award of their custody, as he shall determine to be in their best interest under the conditions then prevailing. The ages of these children render it appropriate and desirable for the judge to ascertain and consider their wishes in respect to their custody. As stated in 3 Lee, North Carolina Family Law, § 224:

"When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when

it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. . . . The preference of the child should be based upon a considered and rational judgment, and not made because of some temporary dissatisfaction or passing whim or some present lure."

Reversed in part; affirmed in part; and remanded.

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STATE OF NORTH CAROLINA v. GEORGE SMITH ALSTON ALIAS GEORGE ALSTON, JR.

No. 41

(Filed 17 April 1978)

1. **Criminal Law § 128.2— inability of jury to agree—memorandum to trial judge—mistrial**

A written memorandum from the jury to the trial judge that "due to lack of sufficient evidence, the jury cannot come to the agreement that this defendant . . . is in fact the man that committed these crimes" did not amount to an acquittal of defendant, and the trial judge properly withdrew a juror and declared a mistrial when the entire jury panel then unequivocally indicated to the judge that they were deadlocked and there was no possibility that they would ever be able to agree upon a verdict. Therefore, defendant was not placed in double jeopardy when he was thereafter placed on trial upon the same charges.

2. **Criminal Law § 57— testimony of ballistics expert**

The trial court properly allowed a ballistics expert to give his opinion that a bullet taken from an assault victim's body was fired by a pistol taken from defendant and that the bullet could not have been fired from any other weapon.

3. **Criminal Law § 88.4— cross-examination of defendant—improper question—harmless error**

In this prosecution for kidnapping, armed robbery and felonious assault in which the victim testified that at the time of the crimes defendant wore an unreadable name tag on his jacket, but the victim admitted on cross-examination that he testified at a previous trial that there was no name tag on defendant's jacket, and defendant testified that his jacket bore the name "Alston" and the name could be seen plainly, the defendant was not prejudiced by the district attorney's question as to whether he had "ever tried to read it

looking a .32 caliber pistol in the face," although the question was argumentative and not designed to elicit competent evidence.

4. **Criminal Law § 102.5— cross-examination of defendant—ability to recognize truth**

Where defendant admitted that he had given two conflicting statements under oath, the prosecutor inquired as to which should be believed, and defendant stated, "You believe which one you want," defendant was not prejudiced by the prosecutor's question as to whether defendant would know the truth if it stood right there in front of him, since defendant invited the prosecutor's question, and it served only to reflect defendant's admission that he had lied under oath.

5. **Criminal Law § 88.4— cross-examination of defendant—markings on fired bullet**

Where the State's evidence tended to show that a bullet taken from the victim's back was fired from a gun found in defendant's possession, and defendant testified that he had studied the makeup of guns in his Army training, the district attorney's questions to defendant concerning the markings which are made on bullets when fired from a gun were relevant and admissible to establish whether defendant possessed sufficient expertise to shed more light upon the relationship between the pistol found in his possession and the bullet taken from the victim's body.

6. **Criminal Law § 86.6— impeachment of defendant—statements in transcript of prior trial**

Where defendant testified that he had given certain testimony in a former trial, the district attorney was properly permitted to impeach defendant by asking him to point out such testimony in the transcript of the former trial.

7. **Kidnapping § 1.3— failure to give "substantiality" instructions**

The trial court did not err in failing to instruct the jury that kidnapping by unlawful confinement or unlawful restraint means confinement or restraint for a substantial period and that kidnapping by unlawfully moving one from one place to another means movement for a substantial distance.

8. **Kidnapping § 1.2— sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction for kidnapping where it tended to show that the victim was fraudulently caused to enter defendant's automobile by defendant's false promise to take him to a certain store, the victim was transported several miles, and defendant produced a pistol and forced the victim to walk fifty feet or more into the woods where he robbed and shot the victim.

9. **Criminal Law § 113.3— credibility of victim's identification testimony—failure to recapitulate—subordinate feature**

Where the trial court recapitulated defendant's evidence relating to the elements of the crime charged, to the identification of defendant as the perpetrator of the crimes, and to defendant's alibi defense, the court did not err in failing to recapitulate evidence pertaining to the weight or credibility of

the victim's identification of defendant absent a specific request for instructions on this subordinate feature of the case.

**10. Criminal Law § 114.3— instructions—details not related to factual elements of charges—no expression of opinion**

The trial court in a kidnapping, armed robbery and felonious assault prosecution did not express an opinion in instructing the jury that certain details concerning the description of the automobile driven by defendant and the physical characteristics of defendant were not of themselves related to the factual elements of the charges and were not in issue in the case, since the obvious thrust of the instruction was to tell the jury that it should not be lost in a maze of details in their search for the answers to the ultimate question of defendant's guilt or innocence.

**11. Criminal Law § 114.3— instructions—details not related to factual elements of charges—no expression of opinion**

The trial court's instruction that the jury could and should consider whether or not any given witness had testified truthfully about details not related to the factual elements of the crimes charged and his recitation of examples of such details did not constitute an expression of opinion that the State's evidence was more essential to their deliberations than defendant's evidence since the trial court did not limit its recitation of such evidence to that presented by the State, and the court did not state or intimate that any of this evidence was essential to the jury's determination of defendant's guilt or innocence.

**12. Criminal Law § 122.2— coercion of verdict**

A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.

**13. Criminal Law § 122.2— instruction urging jury to agree—surrender of own judgment**

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment.

**14. Criminal Law § 122.2— instructions urging verdict—appellate review**

In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

**15. Criminal Law § 122.2— instructions urging verdict before jury deliberations**

It is not reversible error for the trial court to give an instruction before the jury begins its deliberations urging the jury to agree.

**16. Criminal Law § 122.2— instructions on expense of another trial—no coercion of verdict**

The trial court did not coerce a verdict by instructing the jury before it began its deliberations on the inconvenience and expense of another trial should the jury become deadlocked.

**17. Criminal Law § 122.2— instructions on duty of jury to deliberate—no coercion of verdict**

The trial court did not coerce a verdict by instructing the jury before it began its deliberations (1) that an agreement would ease the tension within the jury and that disagreement would be "the first step toward deadlock," and (2) that the jury "should not talk endlessly nor go over and over again the same point, nor put up with any juror who wants to," where the impact of this portion of the charge, when read contextually and as a whole, was to warn the jury not to make a hasty decision without due deliberation and to instruct the jurors that in the course of such due deliberation they should be willing to exchange viewpoints openly but not endlessly discuss any given point; furthermore, any coercive effect of such instructions was dispelled by the court's instruction that, if after due deliberation, any juror sincerely believed that his decision was correct, he should "stick to it though (he) stand(s) alone."

APPEAL by defendant from *McLelland, J.*, 15 August 1977 Criminal Session, CUMBERLAND Superior Court.

Defendant was indicted and tried upon a bill of indictment which charged him with kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. Prior to his arraignment, defendant entered a plea of former jeopardy which Judge McLelland denied. Upon arraignment, defendant entered a plea of not guilty to each charge.

At trial, the evidence offered by the State tended to show that shortly after noon on 30 December 1976, James R. DeLay, Jr., was walking home when defendant, whom he did not know at that time, stopped and offered him a ride. DeLay accepted and in the course of their conversation told defendant that he had to go to a certain store to get parts for his automobile. Defendant offered to take DeLay to the store in exchange for gas money. DeLay agreed and was first taken home where he changed clothes. Defendant then explained that he too wanted to go home to change clothes but instead drove to a wooded area off of Vass Road.

After stopping the car, defendant produced a pistol and forced DeLay to walk about 50 feet into the woods where he was

ordered to empty his pockets. Defendant then instructed DeLay to write a check for $250.00. The check was made payable to George Alston. DeLay was then ordered to walk in front of defendant and, after the two men had walked about 50 feet, defendant fired his pistol twice striking DeLay in the back with the second shot.

Thereafter, at DeLay's suggestion, the first check was torn up and another check was written for cash. The two men proceeded to a bank in Fayetteville where the check was cashed at a drive-in window. Defendant then released DeLay who immediately called the police. This entire series of events took place during a period of two to three hours.

Before going to the hospital, Delay attempted to retrace with the police the places where he and his assailant had been. He gave the police a description of his assailant as a black male, about 25 years old, about 6'1" tall, and weighing approximately 175 pounds. He also described the automobile as a white Monte Carlo or Grand Prix with a red Landau roof, white seats and some fur on the steering wheel. On 5 January 1977, DeLay identified defendant from a photographic lineup, and on 22 January 1977, he again identified defendant as his assailant after having seen him in a live lineup. At trial, DeLay twice made positive in-court identifications of defendant without objection by defense counsel.

The teller who cashed DeLay's check on 30 December 1976 picked defendant's picture from a group of six as the man who was with DeLay when the check was cashed. However, during her cross-examination at trial, she stated that she could not make a positive in-court identification of defendant.

Sergeant J. D. Gibson, U.S.A., testified that he was on duty as an MP on the night of 30 December 1976 when he received a bulletin concerning a kidnapping, armed robbery and attempted murder. The transmission described the suspect's vehicle as a late model Pontiac or Chevrolet, white with red pin-stripes. The suspect was described as male, approximately six feet tall, weighing 150 to 175 pounds. Gibson later saw defendant leave the N.C.O. Club and enter an automobile which fit the description given in the bulletin. He followed the car for some distance and finally stopped it. Defendant, who was driving, was accompanied

by three other people. Gibson "frisked" the occupants and placed defendant under arrest upon finding a pistol on his person.

Douglas Branch of the State Bureau of Investigation was qualified as an expert in ballistics and testified that he examined the bullet taken from DeLay's body and compared it with the pistol taken from defendant on the night of 30 December 1976. In his opinion, the bullet was fired from defendant's gun.

Defendant testified and offered evidence in the nature of an alibi. He admitted that he owned the pistol taken from him by the military police on 30 December 1976 but denied that he had seen DeLay on that date. He further testified that he did not fire the pistol on that date. He also offered other witnesses whose testimony tended to corroborate his alibi defense.

On rebuttal, the State offered medical testimony concerning the treatment of DeLay's wound and to the effect that the bullet was removed on 17 July 1977. The State also offered other corroborative and cumulative evidence.

The jury returned verdicts of guilty on each count. Defendant was sentenced to twenty years imprisonment on the charge of assault with a deadly weapon with intent to kill inflicting serious injury, a consecutive sentence of life imprisonment on the charge of kidnapping and an additional sentence of life imprisonment on the charge of armed robbery, which was imposed without provision that it was to run consecutively.

*Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State.*

*James M. Cooper, for defendant appellant.*

BRANCH, Justice.

**[1]** Defendant first assigns as error the denial of his plea of former jeopardy. At the 9 May 1977 Session of Cumberland Superior Court, defendant was put to trial on the same charges for which he was prosecuted in instant case. After several hours of deliberation, the jury transmitted the following note to the presiding judge:

> Your Honor, due to lack of sufficient evidence, the jury cannot come to the agreement that this defendant, George Alston, is in fact the man that committed these crimes.

Thereafter the jury returned to the courtroom and the following dialogue took place:

> Court: You have been numerically divided 8 to 4 all day except for the first ballot that you took during the day as you stood, as I recall, 7 to 5 and that there has been no change from the time you first determined that your division was 8 to 4 until this moment?
>
> Foreman: That's right, sir.
>
> Court: Tell me whether, sir, you feel the jury is hopelessly deadlocked and that there is no possibility that it will come into agreement?
>
> Foreman: I am.
>
> Court: Those of you Ladies and Gentlemen who are members of the jury who concur in the view of the foreman that you are hopelessly deadlocked and that there is no possibility that you would ever reach agreement, that is, that the 12 of you would ever be able to concur and agree with regard to a verdict in this matter will you raise your hand.

The remaining jurors indicated their concurrence with the foreman's statement by raising their hands. Judge Godwin thereupon withdrew a juror and declared a mistrial.

In *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971), defendant was charged with safecracking. After deliberating for two hours and forty-five minutes, the jurors returned to the courtroom and stated that they were of the opinion that they never could reach a verdict. The trial judge thereupon declared a mistrial. When the cause came on for a retrial, defendant moved for dismissal on the ground of former jeopardy and Judge Burgwyn overruled that plea. This Court affirmed and speaking through Justice Sharp (now Chief Justice) stated:

> . . . the general rule is that an order of mistrial in a criminal case will not support a plea of former jeopardy. . . .

> When the jurors declare their inability to agree, it must be left to the trial judge, in the exercise of his judicial discretion, to decide whether he will then declare a mistrial or require them to deliberate further. . . .
>
> After a jury has declared its inability to reach a verdict, the action of the trial judge in declaring a mistrial is reviewable only in case of gross abuse of discretion, and the burden is upon defendant to show such abuse. . . . 279 N.C. at 486.

Defendant argues that the written memorandum to the trial judge amounted to an acquittal. We do not agree. The jury had been instructed that one of the possible verdicts which it could return was a verdict of not guilty, and we assume that the jurors possessed sufficient intelligence to comprehend that instruction. Even more convincing is the fact that the entire jury panel unequivocally indicated to the trial judge that there was no possibility that they would ever be able to agree upon a verdict.

The trial judge correctly denied defendant's plea of former jeopardy.

**[2]** There is no merit in defendant's contention that the trial judge erroneously admitted expert testimony. S.B.I. Agent Douglas Branch was admitted as an expert in the field of ballistics by stipulation of counsel. He testified that he had made extensive tests relative to the pistol taken from defendant's person and the bullet removed from the victim's body. He testified without objection that in his opinion, the bullet taken from the victim's body was fired by the pistol taken from defendant. The district attorney then asked the witness if he had an opinion as to whether any other gun could have fired the bullet. Over objection, the expert witness replied: "Yes sir, I do. It could not have been fired from any other weapon."

The essential question in determining the admissibility of expert opinion evidence is whether the witness has acquired such skill through study or experience so as to make him better qualified than the jury to form an opinion on the subject matter. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); 1 Stansbury's North Carolina Evidence, Section 133 (Brandis rev. 1973). This Court has recently held that an expert's opinion as to

whether an unfired .22 cartridge had been chambered in the defendant's rifle was admissible into evidence. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870 (1972).

Here the witness's expertise was not challenged. The record is replete with evidence showing his study and experiments with the pistol and bullet, and it is recognized by our Court that guns and bullets are proper subject matter for expert testimony. Certainly this witness was better qualified to express an opinion as to the subject matter of the challenged evidence than the jury.

Defendant next contends that the court committed prejudicial error by permitting the district attorney to cross-examine him about his ability to read a name tag while looking at a .32 caliber pistol.

**[3]** During his cross-examination, defendant described the clothing he wore on 30 December 1976 including a name tag on his jacket bearing the name "Alston." The witness DeLay had testified that defendant wore a name tag but that it was unreadable. Defendant had previously elicited testimony to the effect that at a previous trial in May, 1977, the witness DeLay had testified that there was no name tag on defendant's jacket. It was in this context that the district attorney asked the question, "Have you ever tried to read it looking a .32 caliber pistol in the face." Defendant, over objection, finally answered, "Yes, the name you could see it plainly." We are inclined to agree with defendant's argument that the district attorney was trying to rehabilitate the State witness's conflicting testimony. The question posed by the district attorney was argumentative and was not designed to elicit competent evidence. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). However, it is evident that defendant had the better of this exchange and, therefore, no prejudicial error resulted.

**[4]** During his cross-examination of defendant, the district attorney called his attention to a portion of the transcript of a former trial in which defendant testified that he told a Mr. Gaylor that he had been out gambling on the morning of 30 December 1976. The following exchange then occurred:

> MR. GREGORY: Were you gambling with Lomack on the morning of the 30th of December, 1976?

A. No, I was not.

When I told Mr. Desilva at that time under oath was not the truth. I lied about that; I was not gambling. When I testified at that trial, I testified that to be the truth. When I testified today or yesterday that I was not gambling I testified that to be the truth.

MR. GREGORY: Mr. Alston, which one are we to believe?

A. I don't know. You believe which one you want.

MR. GREGORY: Would you know the truth if it stood right there in front of you?

MR. COOPER: Objection.

COURT: Overruled. Answer it.

A. Yes, I would.

It is defendant's position that the trial judge erred by permitting the district attorney to ask defendant, "Would you know the truth if it stood right there in front of you?"

It is improper for the prosecutor to place before the jury inadmissible and prejudicial matter not consistent with the facts in evidence. Likewise, it is improper for counsel to assert his personal opinion concerning the veracity of a witness, *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), or to state that a witness has lied to the jury. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). Nevertheless, considering the context in which the challenged question was asked, we find no prejudicial error. The witness had just admitted that he had given two completely different statements under oath. When the prosecutor inquired as to which should be believed, the witness replied: "You believe which one you want." These facts do not present the picture of a harassed browbeaten witness. Rather, it appears that defendant invited the remark of the district attorney. At most, the question served only to reflect defendant's admission that he had lied under oath.

**[5]** Defendant further assigns as error the rulings of the trial judge which permitted the district attorney to question him concerning the markings which are made on bullets when fired from

a gun. Defendant argues that this evidence was irrelevant and that it unduly emphasized the testimony of the ballistics expert which had been offered by the State. We do not agree.

It is well settled that in criminal cases every circumstance that is calculated to throw light upon the supposed crime is relevant and admissible if competent. 2 Strong's North Carolina Index 2d, *Criminal Law*, Section 33 (1967).

Defendant had previously stated that in his Army training, he had studied the makeup of guns sufficiently to know how they operated. However, he stated that he was unable to answer any of the questions concerning the markings made upon a bullet when a gun is fired. Unquestionably, these questions were relevant in that the markings on the bullet offered in evidence by the State tended to show that the bullet which was taken from the victim's back was fired from a gun found in defendant's possession on the same night the crimes were committed. The district attorney was exploring the possibility that defendant might possess sufficient expertise to shed more light upon the relationship between the firearm found in defendant's possession and the bullet taken from the victim's body. Thus, the evidence was relevant and admissible.

**[6]** Defendant's contention that the trial judge erred by permitting the district attorney to cross-examine him concerning the content of a transcript of a former trial is also without merit. In instant trial, defendant testified that his gun was in his unlocked trailer at the time the charged crimes were committed. On direct examination, defendant stated that he had so testified at a former trial. The district attorney then asked defendant to point out this testimony in the transcript of the former trial.

In this jurisdiction, the scope of cross-examination covers a wide range. It is permissible to impeach or impair the credibility of a witness. The materiality and extent of cross-examination are matters which are largely within the discretion of the trial judge. *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971); *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959).

Here it is obvious that defendant was being cross-examined for the purpose of impeaching him, and we find no abuse of discretion in the ruling of the trial judge. Further, defendant had

already testified that he *knew* that the transcript of the previous trial did not contain any statement about the location of the gun. Thus, his objection to this question was of no avail since evidence of like import had already been admitted without objection. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973).

**[7]** Defendant assigns as error the trial judge's instruction concerning the offense of kidnapping. He relies upon the recent case of *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), and cites the failure of the court in instant case to instruct that kidnapping by unlawful confinement means confinement for a substantial period and not merely incidental to the commission of another crime; that kidnapping by unlawful restraint means restraint for a substantial period of time and not merely incidental to the commission of another crime; or that kidnapping by unlawfully moving one from one place to another means movement for a substantial distance and not merely incidental to the commission of another crime.

We allowed certiorari to the North Carolina Court of Appeals in *Fulcher*. By decision filed 17 April 1978, this Court, reasoning that the instructions proposed by the Court of Appeals are changes which are in the province of the Legislature, stated:

> It follows that the Court of Appeals erred in its holding that "substantiality" in terms of distance or time is an essential of kidnapping and in its pronouncements that the trial judge must instruct the jury that "confinement" or "restraint," as used in this statute, means confinement or restraint "for a substantial period" and that "removal," as used in this statute, requires a movement "for a substantial distance." . . .

Thus defendant's argument that the charge in instant case was erroneous because of the omission of the substantiality requirements in the charge on kidnapping cannot be sustained.

**[8]** By this assignment of error, defendant also argues that the evidence before the jury in the case *sub judice* did not support a conviction of kidnapping because the victim willingly accompanied defendant to the place where he was robbed and shot. The evidence does not support this position.

A person may be kidnapped by fraud as well as by force. *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied*, 414 U.S. 1160 (1974). In our opinion, Mr. DeLay was fraudulently caused to enter defendant's automobile and then taken several miles to the area where the robbery and felonious assault took place. Further, under our present statute, there was ample evidence of kidnapping when defendant produced a pistol and forced Mr. DeLay to walk fifty feet or more into the woods where he committed the felonious assault.

This assignment of error is overruled.

**[9]** Defendant next argues that the trial judge committed prejudicial error in his charge to the jury by giving greater stress to the State's evidence and by expressing an opinion as to the weight which should be given to certain evidence.

In summarizing the evidence presented by defendant, the trial judge specifically brought to the attention of the jury the evidence which tended to establish defendant's alibi defense, evidence that defendant had never seen DeLay until the probable cause hearing, and defendant's specific denial of the crimes charged. Defendant contends, however, that the trial judge erroneously failed to summarize the evidence pertaining to the victim's ability to recall his assailant's name, whether or not the description given by the victim fit someone other than defendant, and whether or not the car driven by defendant was the one used by the victim's assailant and thereby intimated to the jury that such evidence was unimportant. We disagree.

In summarizing the evidence in his charge to the jury, a trial judge is required to state the evidence only to the extent necessary to apply the law applicable to the case. *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E. 2d 101 (1950). He is not bound to recapitulate all of the evidence. *State v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823 (1946); *State v. Gould*, 90 N.C. 658 (1884). Further, absent a special request, the court is not required to summarize that evidence which merely reflects upon the credibility of a given witness. *Smith v. Kilburn*, 18 N.C. App. 204, 196 S.E. 2d 588, *cert. denied*, 283 N.C. 754, 198 S.E. 2d 723 (1973).

Here Judge McLelland recapitulated evidence relating to the elements of the crimes charged, to the identification of defendant

as the perpetrator of the crimes, and to defendant's alibi defense. These were the substantial features of the case. Moreover, the omissions of which defendant complains pertained to the weight or credibility of the victim's identification of defendant. Defendant did not specifically request instructions on this subordinate feature of the case, and the trial judge was, therefore, not required to so instruct the jury. *Metcalf v. Foister*, 232 N.C. 355, 61 S.E. 2d 77 (1950); *Smith v. Kilburn, supra.*

By this same assignment of error, defendant contends that the trial court expressed an opinion as to the weight to be accorded certain evidence (1) by instructing the jury that the truth of certain details need not be established in order to reach a verdict, (2) by instructing the jury that part of the State's evidence was essential to its deliberations, and (3) by intimating to the jury that some of the evidence presented was not essential to its deliberation.

**[10]** During the course of the trial, both the State and defendant offered a great deal of evidence concerning the description of the automobile defendant allegedly drove at the time the crimes were committed and minute details as to the physical characteristics of defendant. With respect to this evidence, the trial court instructed the jury as follows:

> Inasmuch as a substantial portion of trial time was taken up with testimony concerning details not of themselves related to the factual elements of the charges against the defendant I deem it necessary to caution you about your consideration of such evidence.
>
> The name of the defendant is not an issue . . . The defendant's age is not an issue, nor is his height, his race, the stubble on his chin, his clothing, nor the tint, shape or framing of his sunglasses. . . .
>
> The color of the license plate on David Gaylor's automobile is not an issue, neither is the existence of a crack in the windshield. . . .
>
> The color of the button on the gear shift lever is not what this trial is about. . . .

**[11]** The obvious thrust of this instruction was to tell the jury that it should not be lost in a maze of details in their search for

the answer to the ultimate question of defendant's innocence or guilt. Although the court may have gone into unnecessary detail in making this cautionary instruction, we find no impermissible expression of opinion by the court. The trial judge further clarified the duty of the jurors in this respect by then instructing them that they could and should consider whether or not any given witness had testified truthfully about details not related to the factual elements of the crimes charged. As examples of the details to which he referred, the trial judge mentioned the appearance of Gaylor's car, whether or not it had been washed, the circumstances under which the victim was able to observe his assailant and the fact that he had failed to identify defendant at a photographic lineup. Defendant, however, argues that this latter instruction had the effect of charging the jury that the *State's* evidence was more essential to their deliberations than defendant's. We do not agree.

We first note that the trial court did not limit its recitation of evidence in this instance to that presented by the State. Moreover, the court never stated, or even intimated, that any of this evidence was *essential* to the jury's determination of defendant's guilt or innocence. The trial court *did* instruct the jury that they could consider inconsistencies in details which did not pertain to the essential elements of the charges in determining the degree of credibility to be given any witness. Such an instruction is proper. *Wooten v. Cagle*, 268 N.C. 366, 150 S.E. 2d 738 (1966). The instruction here given fell with equal force upon both the State's and defendant's evidence.

Neither can we agree with defendant's contention that the charge erroneously expressed an opinion that some of the evidence presented was not essential to the jury's deliberation. Our examination of this record shows that the court clearly and correctly instructed the jury that the weight to be given the evidence was a matter solely for determination by it. *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757 (1950).

We hold that the trial judge did not give unequal stress to the State's evidence or express an opinion in violation of G.S. 1-180 in this portion of the charge.

However, defendant's more serious assignments of error relate to the trial judge's instructions which defendant contends

coerced the jury into returning a verdict. Specifically, defendant complains of (1) the court's mention of the inconvenience and expense of empaneling another jury to try the case, (2) the court's statement that an agreement would ease the tension within the jury but that disagreement would be the first step towards deadlock, (3) the court's admonition that the jury should not put up with any juror who wanted to discuss one point endlessly, and (4) an intimation by the court that any juror who found himself in the minority should question the correctness of his decision.

*Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154 (1896), is the landmark case on coercive instructions designed to force a verdict. There the Court approved an instruction to the effect:

> . . . that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. . . . 164 U.S. at 501

**[12, 13]** Although the instructions approved in *Allen* have long been recognized as acceptable, confusion has arisen because of extensions and modifications made to the originally approved charge by other courts. Therefore, the use of such charge has been the subject of much criticism, *see*, Annot., 41 A.L.R. 3d 1154 (1972); Annot., 38 A.L.R. 3d 1281 (1971); Annot., 100 A.L.R. 2d 177 (1965), and some jurisdictions have abolished their use. *State v. Thomas*, 86 Ariz. 161, 342 P. 2d 197 (1959). However, our Court has solidly established certain rules for our guidance, *e.g.*, a trial

judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977); *State v. Roberts*, 270 N.C. 449, 154 S.E. 2d 536 (1967). If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966).

**[14]** In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. *State v. Cousin, supra; State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951).

**[15]** Here the so-called "dynamite charge" was given before the jury had begun its deliberations and consequently before there was any disagreement among the jurors. While the giving of such an instruction as part of the initial charge to the jury has been disapproved, *see, e.g., Credit Union v. Reed*, 42 Ill. App. 2d 336, 192 N.E. 2d 447 (1963), there appears to be a growing trend of authority which supports the use of a mild form of such a charge in the original instructions of the court. McBride, The Art of Instructing the Jury, Section 3.61 (1969). *See also*, N.C. G.S. 15A-1235 (effective 1 July 1978). Thus, absent other factors, giving such an instruction before the jury commences its deliberations is not reversible error. We must, therefore, turn our attention to the specific matters upon which defendant bases this assignment of error.

**[16]** Initially, we find no error in the court's mention of the inconvenience and expense of another trial should the jury become deadlocked. Although such a charge has been questioned, *see, United States v. Harris*, 391 F. 2d 348 (6th Cir. 1968), our Court has held that the isolated mention of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Brodie*, 190 N.C. 554, 130

S.E. 205 (1925). In fact, the general rule appears to be that the trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. *See*, Annot., 85 A.L.R. 1420 (1933). However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. *Allen v. United States*, *supra; State v. McKissick*, *supra.*

**[17]** Defendant also assigns as error the trial judge's statements (1) that an agreement would ease the tension within the jury and that disagreement would be "the first firm step toward deadlock" and (2) that the jury "should not talk endlessly nor go over and over again the same point, nor put up with any juror who wants to."

One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. *Hammond v. Bullard*, 267 N.C. 570, 148 S.E. 2d 523 (1966); *State v. Truelove*, 224 N.C. 147, 29 S.E. 2d 460 (1944).

The statements of which defendant here complains were part of the following instruction by Judge McLelland:

> . . . I urge all of you to recognize that a duty to make a decision causes tension and discomfort. That making the decision brings relief that it is natural to want that relief and to want it as soon as possible. You should be aware therefore that your natural inclination would be to decide first and to deliberate second and to deliberate only if you have to. If you all agree the tension will be ended quickly and no one will have had the risk of appearing to be foolish but if you do not agree you will have taken differing positions and by doing so will have taken the first firm step toward deadlock.
>
> People not just jurors tend to defend the position that they take and the more those positions are assailed the stouter they defend them. I urge you to deliberate first, I

urge each of you to express your views, not your convictions, your views to your fellow jurors and to listen to what each juror has to say. To be concerned and not so much as convincing the others of the merits of your views as with carefully considering all views in order to be sure that your own have merit. Even when you believe that everything has been said that ought to be said and every view expressed that ought to be expressed, if a juror wants further to explore any phase of the case listen to what that juror has to say and join in the exploration. Of course, you should not talk endlessly nor go over and over again the same point nor put up with any juror that wants to.

You know, I trust, that you may not agree to abide by the decision of the majority. None of you should vote with the majority simply because it is a majority, nor should any of you vote against the majority simply to oppose the majority. Vote your own conviction.

Then, if there is still a division reconsider first the correctness of your own decision, voice to the others not the strength and wisdom of your position and the weakness of the position of those who do not agree with you. You will have done that already but any misgivings you may have about your own decision and any weaknesses known to you. Do not be concerned with saving your face, upholding your integrity, sticking to your guns. *Though you have taken a firm position if after reconsideration and further deliberation with your fellow jurors you come to believe it not correct change it but if you have carefully, fully, openly and honestly considered all of the evidence, the arguments of counsel, the instructions as to the law, the views of every juror and have carefully reconsidered your decision and still believe it correct stick to it though you stand alone.* (Emphasis ours.)

It would appear that the trial judge may have permitted himself to wander into uncharted philosophical fields as he explained the process of deliberation to the jury and that some of his statements, taken out of context, might have been somewhat confusing. However, upon a contextual reading of this charge, we are of the opinion that its impact was to warn the jury not to make a hasty decision without due deliberation and to instruct

them that in the course of such due deliberation they should be willing to openly exchange viewpoints but not endlessly discuss any given point. Taken as a whole, this portion of the charge did not coerce the jury into reaching a verdict.

Further, Judge McLelland completed his charge with a strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone." While this particular instruction was not given in the exact language previously approved by this Court, *see*, *State v. McKissick*, *supra*, we are of the opinion that it was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. In our opinion, this instruction, given at the termination of the "dynamite charge," dispelled any coercive effect which might have resulted from the challenged statements.

This case is, however, the latest in a long series of cases in which courts have been required to pass upon the acceptability of instructions urging a verdict. Under normal circumstances, we would have deemed it appropriate to here establish definite guidelines in order to prevent future problems with such charges. However, the General Assembly has made such efforts unnecessary by the enactment of G.S. 15A-1235, effective 1 July 1978 which provides:

> *Length of deliberations; deadlocked jury.*—(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

G.S. 15A-1235 is based upon the standards approved by the American Bar Association. *See*, American Bar Association Standards Relating to Trial by Jury, Section 5.4 (Approved Draft 1968). This enactment provides our trial judges and our practicing bar with clear standards for such instructions.

By his final assignment of error, defendant contends that the overall effect of the trial court's charge to the jury was to create an impermissible expression of opinion as to the guilt or innocence of defendant. The specific exceptions which form the basis for this assignment of error have already been addressed in our discussion of defendant's other assignments of error, and we have found that none of them individually warrant granting defendant a new trial. While it is possible that several errors, harmless in and of themselves, may combine to form an expression of opinion, we are not persuaded that such is true in instant case.

In view of the overwhelming evidence in this case pointing to defendant as the perpetrator of the charged crimes and the complete absence of coercion by threat or expression of opinion as to defendant's guilt on the part of the trial judge, it is inconceivable that the court's instructions adversely affected the verdict.

We have carefully reviewed this entire record and find no error sufficiently prejudicial so as to warrant granting defendant a new trial.

No error.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND PIEDMONT NATURAL GAS COMPANY, INC. v. RUFUS L. EDMISTEN, ATTORNEY GENERAL DOCKET NO. G-9, SUB 152

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. v. RUFUS L. EDMISTEN, ATTORNEY GENERAL DOCKET NO. G-5, SUB 116

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND NORTH CAROLINA NATURAL GAS CORPORATION v. RUFUS L. EDMISTEN, ATTORNEY GENERAL DOCKET NO. G-21, SUB 147

No. 60

(Filed 17 April 1978)

1. **Utilities Commission § 9— no appeal from Commission rule—res judicata inapplicable**

Although no appeal was taken from orders of the Utilities Commission promulgating a rule establishing procedures by which natural gas companies could apply for rate adjustments to recover costs and account for revenues associated with gas exploration programs, the Attorney General was not prohibited by the principle of res judicata from challenging the validity of that rule in an appeal from an order approving surcharges pursuant to the rule, since rule making activities of the Commission are an exercise of the delegated legislative authority of the Commission and are not governed by the principle of res judicata, and they are reviewable by an appellate court in later appeals of closely related matters.

2. **Gas § 1; Utilities Commission § 6— natural gas—rate increase for exploration costs—validity**

The Utilities Commission acted within its authority to compel adequate and efficient utility service to the citizens of this State in establishing a rule permitting natural gas companies to adjust their rates to recover excess costs of approved gas exploration programs where the Commission found that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most

feasible means for obtaining additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies.

**3. Gas § 1; Utilities Commission § 6— costs of gas exploration—operating expenses**

The Utilities Commission did not err in ordering that excess costs of approved gas exploration programs be included as operating expenses of natural gas utilities in determining natural gas rates.

**4. Gas § 1; Utilities Commission § 6— rate increases for gas exploration costs—failure to declare hearings as general rate case**

The Utilities Commission did not err in failing to declare proceedings in which natural gas rate increases for exploration costs were approved to be general rate cases when exceptions to the Commission's orders were heard pursuant to G.S. 62-90(c), since the scope of such hearings is limited by the statute to the exceptions on which the particular appeal of a final order or decision is based, and the Commission is without authority to declare such hearings to be a general rate case.

**5. Gas § 1; Utilities Commission § 6— rate increases for gas exploration—absence of hearing**

The Utilities Commission did not err in allowing natural gas utilities to increase their rates to recover excess exploration costs without a hearing since the Commission had authority under G.S. 62-134(a) to allow requested rate changes to go into effect for good cause shown, a Commission rule permitted the allowance of an exploration rate increase upon a finding that the increase would not raise the utility's rate of return above the level most recently approved for it in a general rate case, and such finding by the Commission in each case constituted a finding of good cause. Furthermore, the Attorney General was not prejudiced by the Commission's action allowing the increase in rates to go into effect without a hearing since the Commission may later order a refund pursuant to G.S. 62-132.

**6. Gas § 1; Utilities Commission § 6— rate increase for gas exploration—freedom of contract**

Even if a Utilities Commission rule permitting natural gas utilities to increase rates to recover excess costs of approved gas exploration programs constituted forced investments in risk capital by the public and thus violated the ratepayers' freedom of contract, the rule was not unconstitutional since the severe adverse economic effects sought to be avoided by approval and funding of the gas exploration programs outweighed the infringement of the freedom to contract, if any, arising from the rate increases allowed by the rule.

**7. Gas § 1.1; Utilities Commission § 6— rate increase for gas exploration—equal protection**

A Utilities Commission rule permitting natural gas companies to increase rates to recover excess costs of approved gas exploration programs did not violate the Equal Protection Clauses of the North Carolina and United States Constitutions because no attempt was made to determine which customers

would benefit from the programs or were responsible for the gas shortage, since it was within the authority of the Commission to determine that all North Carolina gas ratepayers would benefit from increased supplies of natural gas, both through assured availability and improvement in the State's economy; nor does the rule violate equal protection on the ground that present ratepayers provide the funds and future ratepayers might be unjustly enriched, since the rule requires that funds received from rate increases for exploration expenses be segregated on each utility's books and that the beneficial interest in any gas discovered or profits generated through exploration activities be preserved for customers paying such rate increases.

Justice LAKE dissenting.

Justices BRANCH and EXUM join in the dissenting opinion.

THIS matter came before us on petition for discretionary review of the decision of the Court of Appeals, 32 N.C. App. 787, 236 S.E. 2d 734 (1977), (*Brock, C.J.*, concurred in by *Parker* and *Arnold, JJ.*, reported under Rule 30(e)), affirming orders of the North Carolina Utilities Commission. This case was docketed and argued during Fall Term 1977 as No. 44.

On 17 January 1975, Piedmont Natural Gas Company filed an application with the Utilities Commission seeking authority to increase its rates by a surcharge on all rate schedules, the proceeds of which were to be used to fund an exploration program to discover new sources of natural gas independent of Piedmont's principal pipeline supplier, Transcontinental Gas Pipe Line Corporation (Transco). In response to this application, the Utilities Commission, by order of 17 February 1975, established Docket No. G-100, Sub 22, for the purpose of conducting a rule making investigation into the feasibility of increasing the supplies of natural gas to North Carolina. This order also provided that all five North Carolina intrastate natural gas distributing utility companies, as well as the Attorney General, were to be parties to these proceedings. Similar applications for exploration and drilling surcharges were filed by the other four natural gas distributing companies in March, 1975 and notice of the proposed surcharge was given to each of the customers of the five utilities.

Hearings were conducted May 13-15, 1975, at which extensive testimony and exhibits were received in evidence concerning the proposed exploration surcharge, the probability of securing additional natural gas supplies for North Carolina consumers, alter-

native avenues for securing natural gas supplies, alternative methods of financing the proposed exploration programs, and the consequences to industrial, commercial and residential gas consumers of North Carolina if additional gas supplies were not obtained. On 26 June 1975, the Commission issued an order in which it adopted Commission Rule R1-17(h). This order granted no specific increase in rates; rather, it established by rule certain procedures for participation by the utilities in exploration and drilling programs and for making applications for rate adjustments to recover costs and account for revenues associated with such programs.

During August of 1975, the Commission issued orders approving three exploration and drilling ventures. On 11 December 1975, the Commission provided in a further order that only 75% of the financing of participation in exploration projects was to come from customer funds, with the remaining 25% to be obtained from stockholder monies. No appeal appears to have been taken from any of these orders.

In November and December of 1975, three of the five North Carolina natural gas utilities filed for rate increases, pursuant to Rule R1-17(h), to recover excess costs of the approved exploration ventures. The Commission approved these tracking rate increases in January, 1976, whereupon the Attorney General gave timely notice of appeal and filed exceptions to the approval orders. Upon motion of the applicants, a hearing on the Attorney General's exceptions was held before the Commission on 16 March 1976. On 8 April 1976, the Commission issued supplemental orders approving the tracking increases and affirming its earlier rate increase orders.

The three rate dockets were consolidated for purposes of appeal and, as noted earlier, the orders of the Utilities Commission were affirmed by the Court of Appeals.

Additional facts relevant to the decision are set out in the opinion.

*Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Robert P. Gruber, and Assistant Attorney General Jesse C. Brake for Intervenor-Appellant.*

*Commission Attorney Edward B. Hipp and Associate Commission Attorney Antoinette R. Wike for Appellee, North Carolina Utilities Commission.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos and James T. Williams, Jr., for Piedmont Natural Gas Company, Inc., appellee.*

*Boyce, Mitchell, Burns & Smith, by F. Kent Burns and James M. Day for Public Service Company of North Carolina, Inc., appellee.*

*McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy for North Carolina Natural Gas Corporation, appellee.*

COPELAND, Justice.

The appellees initially contend that, because no appeal was taken from the Commission order establishing Rule R1-17(h), the Attorney General is bound by the principles of res judicata and may not now challenge the validity of that rule. For reasons which follow, we have determined that this contention is not well taken; thus, we have considered the Attorney General's arguments concerning the authority of the Commission to permit utilities to recover excess costs of exploration ventures through a tracking rate. It is our conclusion that these actions were within the power of the Commission; therefore, the decision of the Court of Appeals must be affirmed.

**[1]** We first examine the appellees' contention that the Attorney General's failure to appeal the Commission order promulgating Rule R1-17(h) should foreclose any review of the lawfulness of the procedure approved in that order. We have earlier held that, "Only specific questions actually heard and finally determined by the Commission in its *judicial* character are res judicata, and then only as to the parties to the hearing." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 570, 126 S.E. 2d 325, 333 (1962) (emphasis added). It is argued that the actions of the Commission here were adjudicatory because G.S. 62-60 provides that, "For the purpose of conducting hearings, making decisions and is-

suing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law."

G.S. 62-23, however, states that, "In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60. The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest." The proceeding which led to the issuance of Rule R1-17(h) was denominated by the Commission at the outset to be a rule making investigation. Indeed, the effect of the order was the promulgation of a rule of general application to all natural gas utilities subject to the jurisdiction of the Commission. The rate making activities of the Commission are a legislative function. *Utilities Commission v. General Telephone Company*, 281 N.C. 318, 189 S.E. 2d 705 (1972). Rule making is likewise an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and G.S. 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. 73 C.J.S., Public Utilities, § 59, pp. 1138-1139. Exercises of the Commission's rule making power, therefore, are not governed by the principles of res judicata and are reviewable by this court in later appeals of closely related matters. *See also*, 2 K. Davis, Administrative Law Treatise, § 18.08 (1958).

The Attorney General argues that, in approving these rate surcharges to fund gas exploration and drilling ventures, the Utilities Commission exceeded its statutory authority by permitting the utility companies to obtain forced investment capital from their ratepayers under the guise of recovering operating expenses. It is his assertion that the costs of these programs properly should have been borne by financing out of retained earnings or other methods and recouped through the rate base in a general rate making proceeding.

This contention in substance attacks the validity of Rule R1-17(h), in which the Commission established procedures for participation by natural gas utilities in exploration and drilling programs and for applications for rate changes to recover costs and account for revenues associated with such programs. The rule directs the formation of a committee composed of representatives from the gas utilities, the Commission, and the utilities' wholesale municipal customers. This committee's function is to select exploration projects for presentation to the Commission for approval. Following such approval, the projects may be implemented by the utilities.

The rule further provides that:

> "(6) On or before June 1 of each year, each natural gas utility shall file with this Commission a statement of all reasonable costs incurred and revenues received from Commission-approved exploration programs during the six months period ended the preceding March 31. On or before December 1 of each year, each natural gas utility shall file with this Commission a similar statement for the six months period ended the preceding September 30."

A utility may recover the costs of its Commission-approved projects for the previous six months reporting period by filing for an increase in its rates through a tracking charge. Such increases are limited, however, to the amount by which reasonable costs of the programs exceed revenues received from them. In the event revenues received should exceed reasonable costs, the utility must file to adjust its rates downward by an amount sufficient to amortize these excess revenues over the following six months period.

The Commission stated in its order issuing this rule, as well as in the rule itself, that, under the existing circumstances, exploration and development costs of new gas supply sources were ordinary and reasonable operating expenses of public utility gas distribution companies.

The Attorney General asserts that this rule contemplates a procedure which, in substance, merely collects risk capital from consumers and thereby shifts the enterprise risks of gas exploration from willing investors over to a captive consuming public. He

strongly argues that this violates the basic tenets of free enterprise and assigns to the operating expense element of the rate making formula in G.S. 62-133 a function which it was not intended to bear, that of attraction of capital. We have earlier noted in a different context, however, that because a public utility is a legally regulated monopoly, "[M]any of the basic principles of the Free Enterprise System, which govern the operations of and the charges by industrial and commercial corporations and those of the corner grocery store, have no application to the regulation of the services or charges of a utility company." *Utilities Commission v. General Telephone Company, supra*, at 335, 189 S.E. 2d, at 716-717.

At the time of the promulgation of Rule R1-17(h), it was the declared policy of the State of North Carolina in G.S. 62-2 of the Public Utilities Act to, among other things, ". . . promote adequate, economical and efficient utility services to all of the citizens and residents of the State." Since the issuance of this rule, and prior to the approval of the rate increases challenged here, G.S. 62-2 was amended to recognize that the availability of adequate and *reliable* supplies of electricity and natural gas are a matter of State public policy. G.S. 62-131(b) requires every public utility to render adequate, efficient and reasonable service. In addition, under G.S. 62-32 and G.S. 62-42, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service. *Utilities Commission v. Morgan*, 277 N.C. 255, 177 S.E. 2d 405 (1970), *aff'd on rehearing*, 278 N.C. 235, 179 S.E. 2d 419 (1971).

Following hearings on the proposed rule making, the Commission found as fact that: (1) an emergency gas shortage existed in North Carolina; (2) unless North Carolina gas utilities were able to obtain additional gas supplies, they would be unable to render adequate and efficient service to their customers; (3) without additional gas supplies, many industries in North Carolina would be unable to continue operations, resulting in layoffs and consequent losses of payrolls, production, sales and profits, which would produce adverse effects on the economy of the State; (4) unless additional gas supplies were found for North Carolina gas utilities, substantial increases in rates to gas customers in this State would be necessary in order to meet increases imposed by the utilities' sole pipeline supplier, as well as to cover the spreading

of fixed costs over a smaller sales volume; (5) the most feasible method for increasing gas supplies to the State at lowest cost was through programs of exploration and development by each North Carolina gas utility; (6) the gas utilities were unable to fund exploration and drilling programs of sufficient size to obtain additional gas supplies for the State through traditional methods of debt and equity financing and retained earnings; and (7) prudent expenditures of funds for exploration purposes during periods of severe and deepening curtailment of pipeline supplies of gas were ordinary and reasonable operating expenses of intrastate natural gas distribution companies. Since the evidence on which these findings of fact were based was not brought forward in the record on appeal, they are deemed supported by competent, material and substantial evidence and are binding on this Court. *Utilities Commission v. Woodstock Electric Membership Corporation*, 276 N.C. 108, 171 S.E. 2d 406 (1970).

**[2]** In view of these findings of fact, we hold that the Commission, in ordering that the reasonable costs of approved exploration projects were to be recoverable through tracking rate increases, acted within its acknowledged duty and authority to compel adequate and efficient utility service to the citizens of this State. It is clear from the Commission's findings that, without additional gas supplies, the gas utilities would be unable to render adequate service to their customers, that exploration programs were the most feasible means for obtaining these additional supplies, and that the utilities were unable, through traditional methods of financing, to fund sufficient exploration projects to obtain these supplies. Under these circumstances, the Commission was well within its authority in approving the exploration concept and including the excess costs in the price of gas to customers, since these expenses were incurred for their benefit and the excess profits, under the Commission's order, were preserved for the customers paying the rate increase.

**[3]** Nonetheless, the Attorney General argues that the tracking rate was impermissible since the Commission erred in ordering that these costs were to be included as operating expenses. When a narrow construction of the operating expense element of a regulatory act would frustrate the purposes of the act, however, the term should be liberally interpreted and applied. *Bourland v. City of Fort Smith*, 190 Ark. 289, 78 S.W. 2d 383 (1935). Moreover,

the purpose of the Public Utilities Act is to put the policies enumerated in G.S. 62-2 into effect. *Utilities Commission v. Morgan, supra.* As was indicated earlier, one of the primary policies set out in G.S. 62-2 is to promote adequate utility services to all the citizens of the State and, more recently, to promote the availability of reliable supplies of natural gas. A restrictive interpretation here of the operating expense element of the rate making formula would severely limit the ability of the Commission to act in the best interest of the consuming public in emergency situations. We decline to interpret the meaning of operating expense so narrowly. According to the Commission's findings, if no new supply source were obtained, the utilities would be unable to supply adequate service to their customers and severe repercussions to the economy of the State would ensue. In such a situation, the costs of these projects, handled as outlined above, must be said to be operating expenses if practical effect is to be given the Act. *See, Bourland v. City of Fort Smith, supra.*

It is also worthy of note that, two days before the order issuing Rule R1-17(h) was handed down, the legislature enacted an amendment to G.S. 105-116 exempting exploration and drilling surcharges collected by North Carolina gas utilities from the franchise tax provided for in that section. While our holding is not based on this amendment, we do view it as indicative of the intended scope of the Commission's legislative authority in this area.

We have determined, therefore, that the acts of the Commission were within its statutory authority and the Attorney General's assignments of error to the contrary are overruled.

**[4]** The Attorney General next assigns as error the failure of the Commission to declare the proceedings in which these rate increases for exploration costs were approved to be general rate cases under G.S. 62-133. Under Rule R1-17(h), the Commission may permit exploration tracking rate increases to become effective if, after reviewing the data required to be filed with a gas utility's semi-annual exploration program reports, it concludes that the requested rate increases will not result in increasing the applicant company's rate of return over the rate of return most recently approved for that company in a general rate case. These rate increases, as noted earlier, were initially approved by the

Commission in orders issued in January, 1976. The Attorney General filed notice of appeal and exceptions to each of these three orders. In response to motions filed by the applicant companies pursuant to G.S. 62-90(c), the Commission set hearings on these exceptions for 16 March 1976. At these hearings the Commission, upon inquiry by the Attorney General, declared that the proceedings were not general rate cases. On 8 April 1976, supplemental orders were issued by the Commission affirming its earlier orders approving the rate increases.

G.S. 62-137 provides that:

> "In setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility, the Commission shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate return."

Relying primarily on his characterization of the exploration costs as capital accumulation, the Attorney General asserts that the Commission erred in declaring that these proceedings were not general rate cases. He also contends that he was prejudiced here in that if the Commission had declared these proceedings to be general rate cases, he would have been entitled to the special procedure for hearings in general rate cases outlined in G.S. 62-81.

We have determined, however, that the Commission acted within its authority in finding expenditures for exploration and drilling programs to be operating expenses. Moreover, G.S. 62-90(c), pursuant to which these hearings were held, states, "The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearings before the Commission." G.S. 62-137, therefore, is inapplicable to proceedings conducted under G.S. 62-90(c), since their scope is limited by statute to the exceptions on which the particular appeal of a final order or decision is based, leaving the Commission without authority to declare the hearings a general rate case or complaint proceeding.

The Commission may consider only the grounds upon which the applicant asserts that the Commission's order or decision is unlawful, unjust, unreasonable or unwarranted, including alleged errors committed by the Commission. G.S. 62-90(a). Should the Commission determine that any of the exceptions are well-taken, it may set the case for further hearing under the authority in G.S. 62-80 to rescind, alter or amend its decisions or orders. *See Utilities Commission and Nantahala Power and Light Co. v. Edmisten*, 291 N.C. 575, 232 S.E. 2d 177 (1977). At that time a declaration of the scope of the proceedings would be proper if, as here, the prior order had been issued without hearing, *see, Utilities Commission and Carolina Power and Light Co. v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976) (outlining three methods by which rate increases may become effective without hearing), since this would be the first opportunity for a finding by the Commission, in setting hearings, as to whether the case involved questions requiring a determination of the entire rate structure and overall rate of return.

**[5]** It is also maintained that the Commission's failure to conduct a hearing prior to approval and implementation of the rate increases invalidates the original rate orders. We have recently held, however, that, in addition to other methods, the Commission may by an affirmative order under G.S. 62-134(a) allow requested rate changes to go into effect, either conditionally or unconditionally, for good cause shown. *Utilities Commission and Carolina Power and Light Co. v. Edmisten, supra.*

In Rule R1-17(h), the Commission provided that it could allow an exploration tracking rate increase to go into effect on a finding that the requested increase would not raise the utility's rate of return above the level most recently approved for it in a general rate case. The Commission made such findings in these intitial orders; therefore, good cause was shown to allow the rate increases to become effective.

In addition, rates which are merely *permitted* or *allowed* to go into effect without hearing are to be distinguished from those which are *established* after full hearing, findings, conclusions and formal order because the latter are deemed just and reasonable, " '. . . and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable.'

G.S. 62-132. Rates which the Commission simply allow to go into effect by any of the three methods described are subject to being challenged by interested parties or the Commission itself and after a 'hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission *may*' order refund pursuant to the provisions of G.S. 62-132." *Id.*, at 352, 230 S.E. 2d, at 666. Such refund may be ordered even absent a utility's agreement to provide one. *Id.* The Attorney General, consequently, was in no way prejudiced by the action of the Commission in approving these rate increases without hearing and may not secure reversal on such grounds. G.S. 62-94(c). This assignment of error is without merit and overruled.

**[6]** In his next assignment of error, the Attorney General argues that the actions of the Commission here violated Due Process and resulted in a denial of Equal Protection of the laws to the ratepaying public under the North Carolina and United States Constitutions. He initially contends that the orders here violated substantive Due Process under our Law of the Land Clause, N.C. Const. art. 1 § 19, and the federal Due Process Clause, U.S. Const. amend. XIV § 1, in that they were an attempt to collect risk capital from the public to finance new private enterprises.

It has been clearly stated, however, that substantive Due Process will no longer be used in federal constitutional law to review the wisdom of state economic regulations. *Ferguson v. Skrupa*, 372 U.S. 726, 10 L.Ed. 2d 93, 83 S.Ct. 1028 (1963). Still, decisions of the United States Supreme Court construing the federal Due Process Clause, while persuasive, are not binding upon this Court in interpreting the North Carolina Constitution's Law of the Land Clause. *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970).

Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision. *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968). The authority to set rates to be charged by a public utility for its services rests in the Legislature and is delegated by it to the Utilities Commission under sufficient rules and standards to guide the Commission in exercising this power. *Utilities Commission v. State*, 239 N.C. 333, 80 S.E. 2d 133 (1954).

The Attorney General relies on our decision in *Bulova Watch Company v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974), to support his contention that the rate increases here were forced investments and thus violative of the ratepayers' freedom of contract. In that case we acknowledged that we may not declare a statute unconstitutional merely because we deem it economically unwise; however, we stated that where an individual's freedom of contract is infringed by a statute, it must be declared invalid unless the law's benefit to the public outweighs the infringement. We further determined there that protection of producers of trademarked articles against price-cutting or unfair use of the trademark were insufficient benefits to offset the substantial infringement the non-signer clause of the North Carolina Fair Trade Act imposed.

We hold here, however, that the severe adverse economic effects sought to be avoided by approval and funding of these exploration projects present a sufficient public concern to outweigh the infringement, if any there be, arising from the rate increases ordered by the Commission. This argument, therefore, is without merit.

**[7]** Regarding his Equal Protection claim, the Attorney General contends that the rates approved here were determined arbitrarily and capriciously, in that no attempt was made to determine which customers would benefit from the programs or were responsible for the gas shortage and, further, that discrimination might arise between present ratepayers who were providing the funds and future ratepayers who might be unjustly enriched. We have earlier noted, however, that rate making is not an exact process. *Utilities Commission v. Morgan*, 278 N.C. 235, 179 S.E. 2d 419 (1971). Moreover, state economic regulatory classifications need bear only a rational relationship to a legitimate governmental objective in order to withstand an equal protection challenge. *New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed. 2d 511, 96 S.Ct. 2513 (1976); *Duggins v. North Carolina State Board of Certified Public Accountant Examiners*, 294 N.C. 120, 240 S.E. 2d 406 (1978).

It was certainly within the authority of the Commission to determine that all North Carolina gas ratepayers would benefit from increased supplies of natural gas, both through assured

availability and improvement in the State's economy. While finer distinctions arguably could have been drawn in terms of breaking down the rate schedules so as to match likely rewards from the programs to specific classes of ratepayers, a State is not required to solve all aspects of an economic dilemma at once and may proceed one step at a time to overcome such problems. *Williamson v. Lee Optical*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955). In addition, the Commission provided in subsection (7) of Rule R1-17(h) that funds received from rate increases for exploration expenses are to be kept segregated on the utilities' books and the beneficial interest in any gas discovered or profits generated through exploration activities funded by such increases are to be preserved for customers paying such increases. Thus, any discrimination between present and future ratepayers would appear to have been avoided, since any rewards accruing from these increases must be preserved for the customers actually supplying the funds.

The Attorney General also maintains that procedural Due Process was denied the ratepaying public here in that allegedly insufficient notice was provided the public before these rate increases were put into effect. As we noted earlier, however, these rate increases were not rates *made*, *fixed* or *established* by the Commission, since no rate hearing was held prior to their being put into effect; thus, any interested party may challenge these rates and, even absent a utility's undertaking to do so, obtain a refund should the Commission find the increases to be erroneous. *Utilities Commission and Carolina Power and Light Co. v. Edmisten, supra.* Any Due Process rights which interested parties may have are fully protected by this procedure. *Id.* This assignment of error, therefore, is overruled in its entirety.

We have reviewed the Attorney General's remaining assignments of error and find them to be without merit; thus, they are overruled. For the reasons given, we have determined that the actions of the Utilities Commission here were within its statutory authority, free of procedural error and violative of no constitutional provisions; therefore, the decision of the Court of Appeals affirming the orders of the Commission is

Affirmed.

Justice LAKE dissenting.

Commissioner Purrington, the only dissenting member of the Utilities Commission, summarized rather well my own view of this matter, saying:

> "Investment in exploration for natural gas by a gas distribution company is no different from investment in a coal mine by an electric utility except that the risks in the former investment are many times greater. Both investments can be advantageous to the Company in carrying out its utility function, but neither are utility functions (sic). Therefore, the cost of neither should be treated as a utility expense. For in so doing (and thereby passing through the cost thereof to the consumer in his rate), the source of capital funds is shifted from the investor to the consumer.
>
> "In a free enterprise economy, investment decisions must be voluntary rather than imposed by regulatory authority. In my view, both the prior order in this docket and this further order require the consumer to become an involuntary investor in one of the most speculative enterprises known. * * * The company should bear the burden alone of raising investment capital."

As Chief Justice Barnhill, speaking for a unanimous Court, said in *Utilities Commission v. Motor Lines*, 240 N.C. 166, 81 S.E. 2d 404 (1954): "The Utilities Commission is a creature of the Legislature. It may exercise only such authority as is vested in it by statute. And such authority must be exercised by it in accord with the standards prescribed by law." This elementary principle of law has been repeatedly recognized and applied by this Court. *Utilities Commission v. Mechandising Corp.*, 288 N.C. 715, 220 S.E. 2d 304 (1975); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705 (1972); *Utilities Commission v. R.R.*, 268 N.C. 242, 245, 150 S.E. 2d 386 (1966); *Utilities Commission v. Finishing Plant*, 264 N.C. 416, 420, 142 S.E. 2d 8 (1965); *Utilities Commission v. Greyhound Corp.*, 224 N.C. 293, 29 S.E. 2d 909 (1944).

Before reaching the merits of the Attorney General's appeal, two preliminary contentions of the appellees should be set at rest. The first is that this appeal is too late, the contention being

that the Attorney General should have appealed when the Commission entered its order promulgating its Rule R1-17(h) establishing procedures to be followed in raising rates to recover gas exploration costs. The answer in such order was not then appealable. "[N]o appeal may be taken from an order by which the Commission adopts and promulgates a general regulatory rule of supervisory nature." *Utilities Commission v. Greyhound Corp., supra.* Not until rates for gas service were actually changed pursuant to this rule was there an appealable order. Thus, the present appeal is timely.

The second of these contentions is that no ratepayer appeared before the Commission in opposition to the adoption of Rule R1-17(h), or in opposition to the increase in gas rates presently in controversy and, on the contrary, the Textile Manufacturers Association and the Brick Manufacturers Association appeared before the Commission and expressed their approval of the proposed surcharge to raise funds for gas exploration. Obviously, if these groups of manufacturers, who are so vitally affected by a gas shortage, desire to contribute to the cost of a gas exploration venture, there is nothing which prevents their doing so, but their willingness to make such contributions cannot justify an order by the Commission requiring residential users and operators of small businesses to make proportionate contributions. It is equally obvious that the failure of these small consumers of gas to appear before the Commission does not support the appellees' inference that they do not object to the increase. We may, and should, take judicial notice of the well known fact that it is exceedingly expensive to employ adequate counsel and qualified expert witnesses to contest a utility's application for a rate increase. The oft-repreated cry of utility companies, "No one but the Attorney General appeared in opposition to the proposed rate," ignores the stark fact of economic life that a consumer, whose rate the utility proposes to raise by a relatively small sum per month, cannot afford to contest the lawfulness of the exaction before the Commission and in the appellate courts. That is why there were no consumers before the Commission protesting this rate increase. That is why the Legislature has authorized the Attorney General to appear in behalf of the consumers. G.S. 62-20. The thinly veiled suggestion that the Attorney General is an officious intermeddler in such

matters is unworthy of serious consideration or extended discussion.

A third preliminary point, which was, in my view, given unjustified importance by the Court of Appeals, is the fact that on 26 June 1975, two days before the Utilities Commission issued its order promulgating Rule R1-17(h), the Legislature amended G.S. 105-116(c) to add thereto a proviso.

Chapter 105 of the General Statutes is the Revenue Act. It does not relate to public utilities except insofar as it affects them as taxpayers. It has no obvious relation to the regulatory or rate-making powers of the Utilities Commission, these being dealt with in Chapter 62 of the General Statutes. G.S. 105-116 imposes a "franchise or privilege tax on electric light, power, gas, water, sewerage, and other similar public service companies not otherwise taxed." This tax, computed pursuant to a somewhat complex formula, set forth in the statute, is, roughly, six per cent of the gross receipts derived by the utility from its business within the State. The amendment of 1975 added this proviso to this tax statute:

> "Provided further, that said tax shall not be applicable to special charges collected within this State by natural gas utilities pursuant to drilling and exploration surcharges approved by the Utilities Commission, where such surcharges are segregated from the other receipts of the natural gas utility and are devoted to drilling, exploration and other means to acquire additional supplies of natural gas for the account of natural gas customers in North Carolina and where the beneficial interest in said surcharge collections is preserved for the natural gas customers paying said surcharges under rules established by the Utilities Commission."

The General Assembly adjourned two days later. Sessions Laws 1975, p. 1544.

Obviously, there is a logical basis for exempting from the operation of a franchise tax, measured by a company's gross receipts from its regular business in this State, which receipts are available for use for its general corporate purposes, revenues collected by it for the financing of explorations elsewhere, especially

when those revenues are, by order of the Utilities Commission, specifically earmarked for use only in such exploration and, therefore, are received and held by the company as a trust fund for that purpose. To read into such a legislative exemption from such taxation, a legislative intent to grant to the Utilities Commission a wholly new power, never before asserted by it or supposed to reside in it, and so to amend an entirely different chapter of the General Statutes, as did the Court of Appeals, appears to me completely unrealistic and unwarranted. G.S. Chapter 105, the Revenue Act, and G.S. Chapter 62, the Public Utilities Law, are completely unrelated legislative programs. They are not *in pari materia.*

Such an obscure and circuitous approach by the Legislature, if it were intent upon enlarging the regulatory and rate-making powers of the Utilities Commission, the Legislature's own creature, seems most unlikely since all that would be needed for that purpose would be a direct and simple amendment to G.S. 62-133, which is the statute prescribing the procedure for fixing a utility company's rates, or the equally direct and simple addition of a new section to G.S. Chapter 62, Article 3, which is the portion of the chapter specifying the powers conferred upon the Utilities Commission. A far more plausible explanation of this enactment, passed in the haste of the closing days of the legislative session, is that the Legislature had no other purpose than that which plainly appears upon the face of the bill — to exempt such revenues from the reach of the franchise tax. This 1975 amendment to the Revenue Act appears to me, therefore, to shed no light whatever upon the question before us.

These facts plainly appear:

1. The distribution of natural gas for sale to consumers thereof is one business; the production of such gas is another; prospecting, or exploring, for such gas is still another.

2. These North Carolina utility companies have heretofore been engaged in the first such business only, not in the second or the third. They have never held themselves out to the public as being engaged in the business of production of natural gas or in the business of prospecting therefor. They hold no certificate of convenience and necessity for either production of or prospecting for natural gas.

3. These North Carolina utility companies have had, and now have, no duty whatsoever to the public to produce natural gas or to prospect therefor. They have not been ordered by the Utilities Commission to engage in either of those businesses, but only permitted by the Commission to do so within limits approved by the Commission. They require no such permission so long as they engage in such business activities, directly or through subsidiaries, with capital supplied by their stockholders, provided they do not jeopardize their public service undertakings to the North Carolina public.

4. What they have been granted by the Commission is not permission to invest their own money in this new business of prospecting for deposits or fields from which natural gas can be produced. What they have been granted by the Commission is permission to extract from North Carolina consumers of natural gas, purchased by these companies from other sources, over and above a fair rate for such purchased gas, new, additional capital with which to embark upon this new business of prospecting for now undiscovered gas fields or deposits.

5. The proposed prospecting will not be done in North Carolina for there is no presently known reason to suppose there are such undiscovered sources of natural gas in this State.

6. Due to the rapid expansion of the use of natural gas in industrial plants, there is presently a critical shortage of such gas in this State and elsewhere.

7. The companies' motivation in turning into this new business—prospecting for natural gas deposits—is not philanthropic, nor is it concern for the comfort and welfare of consumers of gas *per se*. Their motivation is certainly not reprehensible, but it keeps the issue sharply defined to label it correctly—self-interest. Each company has many millions of dollars invested in its present plant—a distribution system. If its supply of gas dwindles and sputters out, the company will become bankrupt. It is just as simple as that! The companies fear this may happen, so they want to venture into the wholly new business of prospecting for a new source of gas.

8. The companies' managements, seeing this ominous prospect, have gone to the companies' present owners—their

stockholders and bondholders—have shown them the prospect and have, in effect, said to them: "To save your own present investment, we must have a further investment of new capital with which to prospect for new gas fields. Let us have this new capital in return for new bonds, or new stock, issued by the company, or its new subsidiary." But the existing bondholders and stockholders, represented in such matters by experienced experts, have said, in effect: "Oh, no! We invest in safe ventures, not in wildcat prospecting schemes. Don't look to us for capital with which to grubstake such a risky venture as that!"

9. Unable to get any prospecting capital from the "informed" sources, the companies have turned to the Utilities Commission and have said, in effect: "Make the North Carolina householder, merchant and manufacturer supply us with prospecting capital. We shall extract just a little each month from each consumer and then no one will have enough at stake to enable him to afford the cost of fighting the exaction." The Commission has replied, in effect: "Quite so! This is clearly best for the consumers of gas. We will compel the consumers of natural gas so to contribute the necessary capital by increasing the fair rates, otherwise paid by them, by a surcharge earmarked for prospecting. They will have to put up the capital for this venture, for otherwise you can cut off their gas service for nonpayment of their gas bills."

The difficulty is that the Commission has not been given authority so to conscript capital from unwilling investors, even if it be true that such a prospecting venture is for the best interests of the consumers of natural gas in North Carolina. The Commission does not have authority to do whatever it believes to be in the best interests of the public, not even if this Court agrees with that evaluation of the proposal. We need not presently inquire into whether the Legislature could, constitutionally, authorize the Commission so to conscript capital for a venture found by the Commission to be in the public interest and reasonably likely to succeed. Presently, it is a sufficient answer as to this question that the Legislature has not conferred upon the Utilities Commission authority to conscript from unwilling investors capital for such a prospecting business.

Prospecting for natural gas is not a public utility business. G.S. 62-3a defines "public utility," as that term is used throughout G.S. Chapter 62. The term includes the businesses of owning or

operating "in this State" facilities for "producing," "transmitting," "delivering or furnishing" piped gas to the public for compensation. The business of prospecting or exploring for deposits of natural gas is not one of these. "Neither the Commission nor this Court has authority to add to the types of business defined by the Legislature as public utilities." *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 268, 148 S.E. 2d 100 (1966).

G.S. 62-3d expressly provides: "If any person conducting a public utility shall also conduct any enterprise not a public utility, *such enterprise is not subject to the provisions of this Chapter.*" (Emphasis added.) G.S. 62-133, the statute which prescribes the procedure to be followed by the Utilities Commission in fixing rates to be charged for public utility service (*i.e.*, the distribution of natural gas for consumption in this State), does not authorize the Commission to take into consideration expenditures by the utility company in its non-utility business (*i.e.*, its business of prospecting for deposits of natural gas). In fixing rates for a "public utility" service, the Commission has heretofore consistently and properly excluded from consideration revenues derived from and expenses incurred in the company's non-utility businesses. The above cited statutes plainly so require.

In *Utilities Commission v. Lee Telephone Co.*, 263 N.C. 702, 140 S.E. 2d 319 (1965), this Court held that in fixing rates for public utility service in this State, the Utilities Commission may not take into consideration revenues received, expenses incurred or return derived by a public utility company from even its public utility business in another state. *A fortiori* in fixing rates for gas distributed in this State, the Commission may not take into account expenses incurred or revenues derived by the company from its non-utility, prospecting business conducted in another state. That is precisely what the Commission has done in authorizing these utilities to impose a surcharge upon the otherwise fair rates for gas distributed by them in North Carolina, which surcharge it computes on the basis of expenses incurred in their prospecting business in states other than North Carolina. For this further reason, the orders from which these appeals are taken were not within the authority of the Utilities Commission and the surcharge may not lawfully be collected, however laudable may have been the purpose of the Commission.

The several appellees cite G.S. 62-2, 30, 31, 32, 42(a), 130 and 131 as sources of the Commission's authority to conscript capital for prospecting from involuntary investors who consume gas purchased and distributed to them by the appellee utilities. These statutes do not support that position.

G.S. 62-2 is entitled, "Declaration of policy." It declares it to be the policy of this State to provide "fair regulation of *public utilities*," "to promote the inherent advantage of *regulated public utilities*," "to promote adequate * * * *utility service*," "to provide just and reasonable rates * * * for *public utility services*," "to * * * promote harmony between *public utilities*, their users and the environment," "to foster the continued service of *public utilities*," "to seek to adjust the rate of growth of regulated energy supply facilities" and "to cooperate with other states and with the federal government in promoting * * * *public utility service* and reliability of *public utility* energy supply." To those ends, it declares "authority shall be vested in the North Carolina Utilities Commission to *regulate public utilities* * * * *in the manner and in accordance with the policies set forth in this Chapter.*" (Emphasis added throughout.) It then expressly states: *"Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission."* (Emphasis added.) As above shown, the business of prospecting for deposits of natural gas in other states is an "enterprise" not subject to the regulatory jurisdiction of the Commission and is not a "public utility" as that term is used throughout G.S. Chapter 62, including this declaration of State policy. In this respect, there is no difference between G.S. 62-2 before and after the 1975 amendment thereof.

G.S. 62-30 provides:

> "*General powers of Commission.*— The Commission shall have and exercise such general power and authority to supervise and control the *public utilities* of the State *as may be necessary to carry out the laws providing for their regulation*, and all such other powers and duties as may be *necessary or incident to the proper discharge of its duties.*" (Emphasis added except section title.)

G.S. 62-31 provides:

"*Power to make and enforce rules and regulations for public utilities.*— The Commission shall have and exercise full power and authority *to administer and enforce the provisions of this Chapter* and to make and enforce reasonable and necessary rules and regulations *to that end.*" (Emphasis added except section title.)

G.S. 62-32 provides:

"*Supervisory powers; rates and services.*— (a) Under the rules *herein prescribed* and subject to the limitations *hereinafter set forth*, the Commission shall have general supervision over the rates charged and service rendered *by all public utilities in this State.*" (Emphasis added except section title.)

(b) The Commission is hereby vested with all power necessary to require and compel any *public utility* to provide and furnish to the citizens of this State reasonable service *of the kind it undertakes to furnish* and fix and regulate the reasonable rates and charges to be made *for such service.*" (Emphasis added.)

As above noted, the business of prospecting for deposits of natural gas, especially in other states, is not a public utility business or service within the meaning of these sections of Chapter 62. Therefore, these provisions do not empower the Utilities Commission to conscript from unwilling investors (consumers of natural gas) capital with which to finance such prospecting.

G.S. 62-130 authorizes the Commission "to make, fix, establish or allow just and reasonable rates *for all public utilities subject to its jurisdiction.*" (Emphasis added.) Obviously, rates fixed to supply to a prospecting business capital with which to operate its explorations in another state do not fall within the authority granted by this section. By hypothesis, the rates (exclusive of this surcharge) now charged users of gas purchased and distributed by these utility companies to the public in North Carolina are "just and reasonable." If not, the appropriate procedure for making them so is prescribed in G.S. 62-133.

G.S. 62-131 provides:

"*Rates must be just and reasonable; service efficient.*— (a) Every rate made, demanded or received *by any public utility*, or by any two or more public utilities jointly, shall be just and reasonable.

"(b) Every *public utility* shall furnish adequate, efficient and reasonable service." (Emphasis added except section title.)

Clearly, this statute does not authorize the Commission to conscript capital from unwilling investors (i.e., consumers of gas) in order to finance a non-utility, prospecting venture in another state. We need not presently determine whether it authorizes the Commission to require a distributing gas company to invest its own funds in so hazardous a venture for the Commission has not required any of these utility companies to do that. They are authorized but not required so to invest their own funds. The question before us is, Does G.S. Chapter 62 authorize the Commission to conscript capital for such a venture from users of natural gas in North Carolina? In my opinion, it clearly does not.

G.S. 62-42(a), cited by Piedmont Natural Gas Company and by Public Service Company, simply authorizes the Commission upon its finding, after a hearing, that the service of a public utility is inadequate, to direct such utility to improve its service. Obviously, that statute does not authorize the Commission to conscript capital from the utility's customers for the purpose of financing the utility's prospecting ventures in another state.

The reliance by the appellees upon these statutory provisions as support for this unprecedented order of the Commission shows convincingly that there is no provision in G.S. Chapter 62 which confers the authority upon the Commission so to conscript capital for these non-utility, out-of-state ventures.

Justices BRANCH and EXUM join in this dissent.

STATE OF NORTH CAROLINA v. ROBERT McLEAN, JR.

No. 33

(Filed 17 April 1978)

**1. Criminal Law § 75.9— statements made to police officer—volunteered statements**

Statements made by defendant to a police officer were not the result of custodial interrogation and therefore inadmissible because they were made without benefit of *Miranda* warnings where the evidence tended to show that defendant was in jail for an unrelated charge when he made the statements in question; the officer walked into the room where defendant was and placed in defendant's view a work pad and a check belonging to defendant which had been found at the crime scene; the officer had in his pocket the arrest warrant charging defendant with rape; the officer said nothing; defendant took the check, looked at it and said it was his; defendant then observed a cap which had been found at the crime scene in the officer's hands; defendant began to act nervous, his hand began to quiver, and he said, "What's that man?"; the officer continued to remain silent; and as the officer started to leave the room, defendant stated, "I liked to have been a free man."

**2. Constitutional Law § 30; Bills of Discovery § 6— motion to inspect pretrial written statement denied—no in camera inspection—no error**

Where a rape victim gave the prosecuting attorney a handwritten statement several days after she was assaulted, and she made mention of this statement during the course of her cross-examination, the trial court erred in denying defendant's request to inspect the statement without first conducting an *in camera* inspection and making findings of fact; however, such error was not prejudicial to defendant since (1) the statement was only weakly favorable and material to the defense in that the victim testified that she was knocked unconscious when defendant forced her to the ground but the statement made no mention of unconsciousness, and (2) the statement did not create a reasonable doubt as to defendant's guilt.

**3. Criminal Law § 88.2; Rape § 4.3— victim's environment of sexual promiscuity—cross-examination improper**

In a rape prosecution where defense counsel asked the victim whether the persons who responded when she banged on the door of her apartment after she had been assaulted were wearing any clothes, the trial court did not err in instructing defense counsel that such questioning was improper, since that which the defense sought to establish—that the victim lived in an "environment of sexual immorality and promiscuity"—was irrelevant in this case where defendant denied that any act of intercourse or other assault took place, and since the court's instruction did not significantly deprive defendant of the opportunity to test the victim's recollection of the events which transpired on the evening she was assaulted.

**4. Rape § 5— second degree rape—sufficiency of evidence**

Evidence was sufficient to support a verdict of guilty of second degree rape where it tended to show that defendant followed the victim to her apartment parking lot where they had a discussion concerning the victim's hitting of defendant's car; defendant knocked the victim to the ground and had intercourse with her against her will; and items belonging to defendant were subsequently found at the crime scene.

**5. Criminal Law § 86.2— prior offense—question asked in good faith—presumption**

Where the record in a rape case contained no information from which it could be determined whether questions concerning a prior offense of defendant involving tampering with an automobile occupied by a female were asked in good faith, it is presumed that the action of the trial court in permitting the questions was correct, but even if any error was committed in this respect, it was entirely harmless, since defendant was afforded an opportunity to explain the circumstances surrounding his arrest and conviction, and defendant was entitled, on request, to an instruction that the jury should consider evidence of prior crimes or acts of misconduct only for the purpose of determining the weight to be given defendant's testimony.

**6. Criminal Law § 162— improper question—jury instructed to disregard**

The trial court did not abuse its discretion in denying defendant's motion for mistrial made after the prosecutor, in his cross-examination of defendant, asked if defendant had been discharged from the Army for psychiatric reasons, since defendant's objection to the question was sustained and the jury was instructed to disregard the question.

Justice EXUM dissenting.

DEFENDANT appeals from judgment of *McConnell, J.*, 29 August 1977 Regular Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the second degree rape of Gwen Denise Walker, age twenty, on 30 April 1977 in Wake County.

Gwen Denise Walker testified that she was a student at North Carolina State University in Raleigh and resided with Mary Dupree, Dougie Brown and Mary Yohe in a ground-floor apartment at 1832 Wilshire Avenue off Oberlin Road.

After eating with her friend Karen Atwood at Crabtree Valley Mall on 30 April 1977, she and Karen stopped at a grocery store and picked up a six-pack of beer. She then left Karen at the College Inn on Western Boulevard and stopped at Jimmy Bain's,

a local tavern, where she remained until approximately 1 a.m. While there she drank one beer and talked to several friends.

Leaving Jimmy Bain's Tavern about 1 a.m. in Karen's car, she traveled down Hillsborough Street and turned into Oberlin Road, at which time she heard a noise as if the car had hit the curbing. She proceeded down Oberlin and at Clark Avenue heard a car engine accelerating behind her. That car continued to follow her. She turned into Wilshire and then into the driveway at the apartment house where she lived and parked in back of the apartments. At that point the car which had been following her pulled into the parking lot and stopped between the parked cars and the apartment building. A black man, identified by Miss Walker as defendant Robert McLean, Jr., got out of the car and accused her of hitting his car. Miss Walker examined a little dent on defendant's car, denied she hit his vehicle and said the dent did not look like a car had caused it. Defendant stated he was going to make her pay for hitting his car. He then grabbed her, knocked her against a parked car and threw her to the ground, leaving her addled and her vision blurred. "The next thing I knew when I looked up he was inside of me. . . . He was having intercourse with me. I was fighting and told him to please not do that. I did not actually recall him removing my pants or panties. I was just crying and the next thing I knew, I was crying real loud. Eventually, he stopped, got up and hurried off."

Miss Walker heard the car start and pull off rapidly. In a few seconds she arose, tried to adjust her pants, walked to her apartment, banged on the door and it was opened by Mary Dupree. In a few moments Dougie Brown and her boyfriend James Calloway came to the door. She told all of them she had been raped by a black man. She was crying and at times hysterical.

Dougie Brown and James Calloway testified that Miss Walker, when admitted to the apartment that night, was very ruffled and her hair was matted—"It had grass and leaves in it. She had mascara smeared all over her face where she had been crying and she was still crying. Her pants were unzipped and her belt was unbuckled. There were leaves and pine needles on her clothes."

Around 8 a.m. on the same morning James Calloway found in the parking lot behind the apartment building where Miss Walker

said she had been raped, a driver's license and a checkbook (State's Exhibits 11 and 12), both containing the name "Robert McLean, Jr.," and a cap (State's Exhibit 10).

Miss Walker did not report the rape to the police and told her friends to keep silent. She became so emotionally upset however that on 4 May 1977 she called her sister Mrs. Patrice Solberg, an attorney in Chapel Hill, and said she needed to confer with her. The Solbergs took her to their home in Chapel Hill where she stayed through 11 May. Miss Walker delivered the cap, the checkbook and the driver's license to them and told them what had occurred. At their insistence she went with them to the police on 5 May 1977 and told Detective J. C. Holder what had occurred. At that time they delivered to Officer Holder a paperbag containing the cap, checkbook and driver's license. On 10 May 1977 Detective Holder obtained a warrant charging defendant with the rape of Miss Walker.

Sometime between 30 April and 13 May, 1977, defendant was arrested and placed in jail for tampering with an automobile, an offense entirely unrelated to this case. At about 7:55 a.m. on 13 May, Detective Holder went to the jail. He had in his pocket at the time the arrest warrant charging defendant with rape. Officer Holder walked into the room carrying in his hand a work pad and a check which was found at the scene of the rape in the rear parking lot of 1832 Wilshire Avenue. He also had the cap found at the scene. The check had the name "Robert McLean, Jr." on it and was on top of the work pad in plain view. Officer Holder did not speak. He placed his work pad and the check on top of a desk in plain view of defendant but said nothing. Defendant reached over, looked at the check, took hold of it and said, "This is my check. I wrote this check when I did not know how to write checks. However, the check is good." Officer Holder said nothing. When defendant observed the cap he looked at Officer Holder, began to act nervous, his hand began to quiver, and he said, "What's that man?" Officer Holder said nothing. A few seconds passed and the officer lit a cigarette. Defendant asked for a cigarette and the officer gave him one. In the words of Officer Holder: "Few more seconds passed as we were smoking the cigarettes and before I started to leave the room he stated 'I liked to have been a free man.'" Shortly thereafter, at 8:15 a.m., Officer Holder read the warrant charging defendant with rape and advised defendant of

his constitutional rights. Defendant refused to sign a waiver. No interrogation thereafter took place.

Defendant challenged the competency of the foregoing testimony of Officer Holder. Upon a voir dire in the absence of the jury the State examined Officer Holder. Defendant offered no evidence on voir dire. The trial judge found as fact that defendant's statements were volunteered and were not in response to any *in-custody interrogation.* The court accordingly held that defendant's statements in the presence of Officer Holder were admissible in evidence.

Defendant testified before the jury as a witness in his own behalf. He said that on 30 April 1977 at about 12:45 a.m. he was driving his car down Oberlin Road, slowed down for a traffic signal, and Miss Gwen Walker, the State's witness, came up behind him in her car and struck his bumper. He stopped his car and thought at first that it was two fellows in the car that struck him. The car backed up and took off, hit a pole and kept going. He followed it thinking there were two men in the car. As the fleeing car pulled into the parking lot described by Miss Walker, he pulled in behind it and saw a blond-headed man jump out of it and ran away. An argument ensued between him and Miss Walker in which she denied striking his car, denied that any damage had been done and was concerned that she had hit a pole with her friend's car. Defendant said he got a tablet out of his car from which he took a white sheet of paper on which he wrote Miss Walker's name, license number and telephone number. He said she would not show her driver's license but spelled out her name for him and he wrote it down. He could tell she had been drinking because he smelled a heavy odor of alcohol on her breath and noticed Schlitz and Miller beer containers in her car. He emphatically denied that he knocked Miss Walker down or threatened her or assaulted her. He said: "I did not rape her. I did not have intercourse with her. When I left she looked normal but her eyes were a little red from regurgitating."

Defendant recalled that at one point he took out his driver's license and checkbook and thought he put them back in his pocket. He recognized the driver's license, the checkbook and check No. 110 (State's Exhibits, 11, 12 and 13) as his property but said he must have lost them the night of 30 April. He did not recognize the hat (State's Exhibit 10) and said it did not belong to

him. He did not know the whereabouts of the piece of paper on which he wrote Miss Walker's name and the other information—"I put it in my checkbook when I was behind the apartment house." He said when Officer Holder showed him the check he thought he had written a bad check and that the officer was bringing a bad check charge against him.

The jury returned a verdict of guilty of second degree rape as charged, and defendant was sentenced to life imprisonment. His appeal presents for determination the assignments of error discussed in the opinion.

*Rufus L. Edmisten, Attorney General, by Rudolph A. Ashton III, Associate Attorney, for the State.*

*Thomas P. McNamara, attorney for defendant appellant.*

HUSKINS, Justice.

**[1]** By his first assignment of error defendant contends the trial court improperly admitted into evidence the statements defendant made to Detective Holder. Defendant argues that at the time these statements were made he had not been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and accordingly the statements are inadmissible under *Miranda* rules.

*Miranda* held inadmissible only those statements made in response to "custodial interrogation" and not preceded by the requisite warnings. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 16 L.Ed. 2d at 706, 86 S.Ct. at 1612 (footnote omitted). The Supreme Court emphasized that only statements elicited by interrogation were affected by its holding: "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478, 16 L.Ed 2d at 726, 86 S.Ct. at 1630. Accordingly, the question presented for review is whether Detective Holder's conduct constitutes "interrogation."

Cases from other jurisdictions disclose a notable lack of consensus concerning what conduct constitutes interrogation. It has been held that officers may read a ballistics report to an accused (*Combs v. Commonwealth*, 438 S.W. 2d 82 (Ky. 1969)), escort an accused to a confrontation with a codefendant (*People v. Doss*, 44 Ill. 2d 541, 256 N.E. 2d 753 (1970); *see also Rosher v. State*, 319 So. 2d 150 (Fla. App. 1975)), tell a defendant what statements have been made by a codefendant (*Howell v. State*, 5 Md. App. 337, 247 A. 2d 291 (1968)), or ask a defendant about the origin of marijuana found in his car (*Santos v. Bayley*, 400 F. Supp. 784 (M.D. Pa. 1975)) without being engaged in interrogation within the meaning of *Miranda*. Other courts have shown less hesitancy in finding officers' conduct to be interrogatory in nature. *See, e.g., People v. Paulin*, 33 App. Div. 2d 105, 308 N.Y.S. 2d 883 (1969) (query concerning funeral arrangements is interrogation); *Commonwealth v. Mercier*, 451 Pa. 211, 302 A. 2d 337 (1973) (reading statement of codefendant to accused is interrogation). The United States Supreme Court has likewise had difficulty in determining what is meant by "interrogation." In *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S.Ct. 1232 (1977), that Court held that an officer's declaratory statements to defendant in absence of his counsel, avowedly made for the purpose of eliciting information from him, constituted interrogation. Justice Blackmun, in a dissent joined by Justices White and Rehnquist, contended otherwise, stating "not every attempt to elicit information should be regarded as 'tantamount to interrogation.' " 430 U.S. at 439, 51 L.Ed. 2d at 462, 97 S.Ct. at 1260.

Given such widespread disagreement, we formulate no all-inclusive definition of "custodial interrogation." Rather, we elect to follow the case-by-case approach advocated by some of the federal courts. See *United States v. Akin*, 435 F. 2d 1011 (5th Cir. 1970); *United States v. Charles*, 371 F. Supp. 204 (E.D.N.Y. 1973) (each discussing whether defendant was in custody and hence had been subjected to custodial interrogation).

Under the facts of the present case we hold that Detective Holder was not engaged in interrogation when defendant made the statements which were subsequently offered in evidence against him. Holder did not ask questions or engage in conduct which, in our view, is inquisitional in nature. *See State v. Burton*, 22 N.C. App. 559, 207 S.E. 2d 344, *cert. denied* 286 N.C. 212 (1974).

*See also People v. Leffew*, 58 Mich. App. 533, 228 N.W. 2d 449 (1975). Accordingly, the trial court's findings and conclusions that defendant's statements were volunteered and therefore admissible were correct. *See State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). In so deciding, however, we explicitly recognize that future cases may disclose acts or declarations, or both, which constitute "custodial interrogation" although no questions were asked. Defendant's first assignment of error is overruled.

**[2]** By his second assignment of error defendant contends the trial court erred in denying his request to examine the rape victim's handwritten statement made several days after she was assaulted. This statement had been given to the prosecuting attorney by Miss Walker, and she made mention of it during the course of her cross-examination. Defense counsel then specifically requested permission to inspect the statement. This request was denied. The trial court conducted no *in camera* inspection of the statement and made no findings of fact relating to the denial of defendant's request.

In *State v. Hardy*, 293 N.C. 105 at 127-28, 235 S.E. 2d 828 at 842 (1977), we held that "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, competent and not privileged." If the court then determines that such evidence is material and favorable to the defense, it must order that it be disclosed to defense counsel. As noted in the *Hardy* opinion, "The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious." *Id.* Accordingly, it was error for the trial court to deny summarily defendant's specific request for the prior written statement of State's witness Gwen Walker.

While defendant failed to move at trial that a sealed transcript of Miss Walker's statement be placed in the record for appellate review, prosecution and defense counsel did enter into a stipulation that the statement be made a part of the record on appeal. Accordingly, we now consider and determine whether the court's refusal to permit defense counsel to examine this statement at trial constitutes prejudicial error. *Compare State v. Hardy, supra*, at 128, 235 S.E. 2d at 842. In order to resolve this issue, we must address two questions. First, was Miss Walker's prior statement *favorable and material* to the defense? If so, the

trial court should have ordered that the statement be disclosed. If not, the trial court committed no prejudicial error, although the procedure followed by Judge McConnell was improper under the *Hardy* rule. Second, was the prior statement sufficiently favorable to the accused that it created "a reasonable doubt that did not otherwise exist" as to the guilt of the accused? *United States v. Agurs*, 427 U.S. 97, 112, 49 L.Ed. 2d 342, 355, 96 S.Ct. 2392, 2401 (1976). If the undisclosed statement does not create such a doubt, the error arising from its nondisclosure is harmless and does not necessitate a new trial. *Id.*

We are persuaded that Miss Walker's prior statement is weakly "favorable and material" to the defense in that she testified on cross-examination that she was knocked unconscious when defendant forced her to the ground but her prior written statement made no mention of unconsciousness. This discrepancy might have been exploited by defense counsel to question the accuracy of her recollection concerning her version of other events which transpired on the evening she was assaulted. The trial court, therefore, should have granted defendant's request to inspect the statement. Even so, the content of the statement falls woefully short of creating a reasonable doubt as to defendant's guilt. It corroborates Miss Walker's testimony in almost every respect and discloses nothing which calls into question her veracity or casts significant doubt on the accuracy of her testimony at trial. Under the harmless error standard set forth in *Agurs*, or any other standard for harmless error (*see, e.g., Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963)), Judge McConnell's error in refusing to order this statement disclosed to defense counsel is harmless and does not warrant a new trial. Accordingly, defendant's second assignment of error is overruled.

**[3]** During cross-examination of Miss Walker defense counsel asked whether the persons who responded when she banged on the door of her apartment after she had been assaulted were wearing any clothes. The trial court thereupon, on its own motion, excused the jury and instructed defense counsel that it regarded this question as an attempt to attack the character of Miss Walker's housemates by innuendo, and that such questioning was improper. Defendant's exception to this ruling constitutes his third assignment of error. He contends the trial court's ruling

improperly curtailed his right to develop facts relating to "the environment of sexual immorality and promiscuity in which the prosecutrix voluntarily chose to live" and precluded him from testing her recollection of events which transpired on the evening she was assaulted.

In this jurisdiction cross-examination may concern any subject which is relevant to the issues in the case. *State v. Huskins*, 209 N.C. 727, 184 S.E. 480 (1936). The cross-examination must, however, concern *relevant* matters. *Yadkin Valley Motor Co. v. Ins. Co.*, 220 N.C. 168, 16 S.E. 2d 847 (1941). And determination of the proper limit of cross-examination rests largely in the discretion of the trial judge. *See, e.g., State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971).

Whether Miss Walker lived in an "environment of sexual immorality" or in a cloistered convent has no relevance to the issues in a case such as this where defendant denies that any act of intercourse or other assault took place. *See, e.g., People v. Schafer*, 4 Cal. App. 3d 554, 84 Cal. Rptr. 464 (1970). (*See also* G.S. 8-58.6, not effective at the time of the assault on Miss Walker, which in future rape prosecutions will restrict the admissibility of evidence relating to a complainant's sexual behavior.) Furthermore, examinaton of the record shows that Judge McConnell only instructed defense counsel to avoid questions which attacked, by innuendo, the character of prospective prosecution witnesses. Such instruction did not significantly deprive defendant of the opportunity to test Miss Walker's recollection of the events which transpired on the evening she was assaulted. Under these circumstances we are of the opinion that Judge McConnell's ruling constituted a proper exercise of his discretion. Defendant's third assignment of error is overruled.

**[4]** By his fourth assignment of error defendant contends the evidence adduced at trial was insufficient to support a verdict of guilty of second degree rape. He argues, therefore, that his motions for nonsuit, for a new trial, and to set aside the verdict should have been allowed.

When the evidence is considered in the light most favorable to the State, taken as true, and the State is given the benefit of every reasonable inference to be drawn therefrom (*see State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971)), it is abundantly suffi-

cient to carry the case to the jury and to support the verdict. The motion for nonsuit was properly denied.

Defendant's motions to set aside the verdict and for a new trial are merely formal and require no discussion. These motions are addressed to the discretion of the trial court and refusal to grant them is not reviewable. *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960). These motions were properly denied. Defendant's fourth assignment of error is overruled.

**[5]** The fifth assignment of error relates to the manner in which the prosecutor cross-examined defendant. During cross-examination defendant admitted that he had been convicted of tampering with an automobile. The private prosecutor then asked:

> "Mr. McLean, the car that you tampered with, was a 1973 Plymouth Duster, blue in color and it was occupied by a female person named Joann Ellis, and you were tampering with it by pulling and pushing upon the door handle and latch, weren't you sir?"

Defendant objected and assigns as error the court's action in overruling his objection and denying his motion to strike. In his brief defendant contends there was no basis in fact for the prosecutor's assertion that the car was occupied by a female when defendant tampered with it. He further contends that the prosecutor's question was improper and highly prejudicial "since the jury in a case of this type no doubt was concerned about whether defendant had been a threat to other women."

In this jurisdiction a witness, including the defendant in a criminal case, may be impeached on cross-examination by questions concerning his conviction of prior unrelated criminal offenses. *E.g., State v. Neal*, 222 N.C. 546, 23 S.E. 2d 911 (1943). *See generally* 1 Stansbury's North Carolina Evidence § 112 (Brandis rev. 1973). Further, a witness may be impeached by cross-examination as to whether he has committed specific criminal acts or engaged in specified reprehensible conduct. *E.g., State v. Gainey*, 280 N.C. 366, 185 S.Ed, 2d 874 (1972). *See generally* 1 Stansbury's North Carolina Evidence, supra, § 111, § 112 at n. 29. Both types of questions are proper only if based on information and asked in good faith. *State v. Williams*, 279 N.C. 663, 185 S.E.

2d 174 (1971); *State v. Bell*, 249 N.C. 379, 106 S.E. 2d 495 (1959). *Compare State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954).

On the record before us it is impossible to determine whether the prosecutor acted on information and in good faith when he asked if the auto, with which defendant had been convicted of tampering, was occupied by a female. We have held that when a record contains no information from which it can be determined whether questions concerning prior criminal offenses were asked in good faith, the action of the trial court in permitting the questions will be presumed correct. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). We hold here, however, that even if the question were not based on information and not asked in good faith, which is not conceded, the trial court's error in permitting the question would not be of sufficient moment to warrant a new trial.

Defendant was afforded an opportunity to explain the circumstances surrounding his arrest and conviction. Defense counsel was entitled to pursue the matter further on redirect examination. Defendant was entitled, on request, to an instruction that the jury should consider evidence of prior crimes or acts of misconduct *only* for the purpose of determining the weight to be given defendant's testimony. *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967). Under the facts of this case these safeguards afforded defendant adequate opportunity to negate any likely prejudice flowing from the question, even assuming the prosecutor acted in bad faith when he asked about the presence of a woman in the car. Accordingly, we conclude that if any error was committed in this respect it was entirely harmless. Defendant's fifth assignment is overruled.

**[6]** By his sixth assignment of error defendant contends the trial court erred in denying his motion for mistrial when the prosecutor, in his cross-examination of defendant, asked: "Mr. McLean you were discharged [from the Army] for psychiatric reasons, weren't you?" Defendant's objection was sustained and the jury instructed to disregard the question. Defendant's motion for mistrial was denied.

Motions for mistrial in non-capital cases are addressed to the discretion of the trial judge, and his ruling thereupon will not be disturbed absent a showing of gross abuse of discretion. *E.g.*,

*State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). No abuse of discretion exists on the present record, and defendant's sixth assignment of error is therefore overruled.

Finally, defendant contends that the cumulative effect of the asserted errors heretofore complained of deprived him of a fair trial. As previously noted, defendant's trial was not entirely error free. Even so, we hold that the errors committed were not so material that a different result would likely have ensued had defendant been afforded the perfect trial for which our system of justice strives but seldom attains. We think defendant had a fair trial free from prejudicial error. Accordingly, the verdict and judgment must be upheld.

No error.

Justice EXUM dissenting.

I respectfully dissent and vote for a new trial. I believe prejudicial error was committed (1) when defendant's statements made to Detective Holder were admitted into evidence against him; (2) when the trial court denied defendant's motion to be allowed to examine the prosecuting witness' pre-trial statements; and (3) by the prosecutor's improper cross-examination of defendant.

The conduct of Detective Holder when he confronted defendant in jail on 13 May 1977 with a warrant in his pocket for defendant's arrest on this rape charge was an attempt to circumvent the requirements of *Miranda*, as transparently obvious as it was clever. His conduct was palpably designed to elicit inculpatory information and clearly placed the accused, however subtly, under a compulsion to speak. As such it constituted "interrogation" within the meaning of *Miranda*.

There are many forms of interrogation known to police science other than asking direct questions. A number of them are mentioned in the majority opinion. For others see the lengthy discussion in *Miranda*, 384 U.S. at 448-57 and the authorities therein cited. The Supreme Court in *Miranda* considered that an "interrogation" occurred, giving rise to the accused's privilege against self-incrimination about which he was then required to be

advised, whenever the police placed the accused under a "compulsion to speak." The Supreme Court, addressing this question in *Miranda*, said, 384 U.S. at 460-61:

> "The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation . . . .We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."

"It is implicit in *Miranda* that interrogation in this context need not be of the question and answer type." *State v. Godfrey*, 131 N.J. Super. 168, 178, 329 A. 2d 75, 80 (1974); *accord, Commonwealth v. Mercier*, 451 Pa. 211, 302 A. 2d 337 (1973). In *Godfrey* the New Jersey Appellate Division found an "interrogation" had occurred when the officers merely confronted the accused with the fact that he had failed a lie detector test and accused him of lying. In *Mercier* the Pennsylvania Supreme Court found an "interrogation" when the police read to the accused the written statement of an accomplice implicating the accused in the crime. No questions were directed toward the accused. In *Commonwealth v. Hamilton*, 445 Pa. 292, 285 A. 2d 172 (1971) the Pennsylvania Supreme Court held that confronting the defendant with an accomplice who accused defendant of committing the crime amounted to an interrogation within the meaning of *Miranda*. The Court said, 445 Pa. at 297, 285 A. 2d at 175:

> "To sanction this technique without proper warnings would be to place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda* that a suspect in-custody should be clearly advised of his rights before any attempt is made to induce him to speak."

In the celebrated case of *Brewer v. Williams*, 430 U.S. 387 (1977), the Supreme Court and all the lower state and federal courts which considered the case (it having arrived at the Supreme Court from the State of Iowa via federal habeas corpus) concluded that a declaratory statement, made by an officer in the presence of a murder suspect about the appropriateness of giving the victim a decent burial, constituted a form of interrogation which absent a waiver of his rights rendered inadmissible information later obtained through the response of the accused to the statement.

The conduct of Detective Holder was no less calculated to place and no less in fact placed the accused under a compulsion to speak than the "declaratory statement" held to be interrogation by a majority of the Supreme Court in *Brewer v. Williams, supra.* I believe this conduct must, therefore, have been preceded by the *Miranda* warnings before defendant's responses could be admitted in evidence against him.

I am unable to say, furthermore, that the trial court's error in failing to permit defendant to examine the prosecuting witness' pre-trial statement was harmless. As the majority notes, there was a discrepancy between his statement and her trial testimony and "[t]his discrepancy might have been exploited by defense counsel to question the accuracy of her recollection concerning her version of other events which transpired on the evening she was assaulted." Had defendant had an opportunity to exploit this discrepancy on cross-examination, it may well have altered in favor of defendant the delicate balance already inherent in the case. The jury's resolution of this case depended on whether they believed, not necessarily that the prosecuting witness was raped, but whether she was raped *by this defendant.* Defendant admitted having a confrontation with the prosecuting witness concerning an automobile accident at the place where Miss Walker testified the rape occurred. He also claims to have smelled on her breath "the heavy odor of alcoholic beverages" and "reefer or marijuana smoke in her car." He said she vomited during their conversation. He also testified that he observed a tall blond man running from Miss Walker's car when he pulled into the parking lot where she had stopped and as he left her after their discussion he last saw her going through some bushes. Defendant's defense was, then, that he did not rape nor have any sexual en-

counter with Miss Walker and that, if she had been raped as her testimony and that of other corroborating witnesses tended to show, someone else must have done it. This being the nature of his defense, that Miss Walker had said in a pre-trial statement that she was unconscious at some point during her encounter with defendant, would seem to be a crucial fact the benefit of which was denied to defendant by the trial court's error in not ordering that the statement be disclosed.

I do not understand the test for harmless error under these circumstances to be whether or not the content of the undisclosed statement creates, in itself, a reasonable doubt as to defendant's guilt. The majority relies on *United States v. Agurs*, 427 U.S. 97 (1976), for this proposition. *Agurs*, however, applied this test to so-called exculpatory information which the government under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963) might be required to disclose to a defendant even in the absence of defendant's request for such material. In *Agurs* the material not disclosed was the deceased's prior criminal record when the defense in a murder prosecution was self-defense. Noting the "incongruity" of the claim of self-defense in the first place and that the deceased's "prior record did not contradict any evidence offered by the prosecutor . . . and did not even arguably give rise to any inference of perjury," the Supreme Court held that "since after considering it [the prior record] in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial . . . . " 427 U.S. at 113-14.

Here, of course, defendant specifically asked for the prior out-of-court statement and his request was denied, a denial which the majority concedes was error. Furthermore, the question would seem to be not whether the content of the statement itself creates a reasonable doubt as to defendant's guilt but whether through skillful use of the statement on cross-examination such a reasonable doubt could have been created. I am unable to say, on this record, that it could not have been.

I also believe that the cross-examination of defendant by the state was not in good faith, improper and highly prejudicial to

defendant. On cross-examination defendant readily admitted having been convicted of tampering with an automobile and having been placed in custody for that offense on 3 May. The following cross-examination then occurred:

"Q. Mr. McLean, the car that you tampered with, was a 1973 Plymouth Duster, blue in color and it was occupied by a female person named Joann Ellis, and you were tampering with it by pulling and pushing upon the door handle and latch, weren't you sir?

"MR. MCNAMARA: Objection, motion to strike.

"COURT: Objection overruled, motion denied.

EXCEPTION NO. 8

"A. No sir.

"Q. Sir, isn't that what you did?

"A. No sir.

"Q. That's what you pled guilty to wasn't it, sir?

"A. No sir.

. . . .

"Q. You pled not guilty and you were found guilty, is that right?

"A. Yes sir.

. . . .

"COURT: What is the charge?

"Q. The charge that you were convicted of, that you did unlawfully and willfully, on the 7th day of April, 1977, tamper with a 1973 Plymouth Duster, blue in color, without consent of the owner, Joanne Ellis, and pulling upon the door handle and latch; what did you do on that occasion sir?

"MR. MCNAMARA: Objection.

"COURT: Objection overruled.

EXCEPTION NO. 9

"A. On the occasion on that night I wasn't tampering with the car. I was getting out going to the building looking for the income tax place. I dropped my keys, the guard came out, accused me—I went to another building looking for the income tax place and then the guards came and thought I was breaking in the place; brought me to court. He called me a liar. Then he put me in jail for nothing.

"Q. Mr. McLean do you have any military service?

"A. Yes sir.

"Q. What kind of discharge do you have?

"A. Honorable, sir.

"Q. Mr. McLean you were discharged for psychiatric reasons weren't you?

"MR. MCNAMARA: Objection, motion to strike.

"COURT: Sustained, motion to strike allowed.

"MR. MCNAMARA: Could I approach the bench?

"COURT: You will not consider the question about his discharge from the Army for psychiatric reasons. Disregard that. Come down Mr. McLean, and we will take a recess. Ladies and gentlemen of the jury, ya'll can go out. Don't discuss the case among yourselves or allow anyone to discuss it with you. Come back in fifteen minutes."

JURORS LEAVE COURTROOM.

"MR. MCNAMARA: Your Honor, I would like to move for a mistrial based on that also. I think that's very prejudicial.

"COURT: Motion denied.

EXCEPTION NO. 11"

On oral argument the state conceded that the warrant charging defendant with tampering with a motor vehicle was couched in the language with which the prosecutor framed his question as it appears above immediately before defendant's Exception No. 9, and that the prosecutor was undoubtedly reading from the warrant. The prosecutor, however, earlier inserted the notion that the vehicle "was occupied by a female person named

Joann Ellis." There was nothing in the warrant to indicate that the vehicle was occupied at the time defendant was alleged to have tampered with it. He was not convicted of tampering with an *occupied* vehicle, as the prosecutor must have known. The record thus reveals that the earlier question was asked in bad faith.

We have, furthermore, recently held in *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977) that it is not improper on cross-examination to ask a defendant-witness who admits a prior conviction the time and place of the conviction and the punishment imposed. We cautioned however, 293 N.C. at 141, 235 S.E. 2d at 824:

> "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."

It has also long been the rule with us that it is error warranting a new trial where the prosecutor "testifies" by injecting "into the trial of a cause to the prejudice of the accused by argument *or by insinuating questions* supposed facts of which there is no evidence." *State v. Phillips*, 240 N.C. 516, 524, 82 S.E. 2d 763, 767 (1954). (Emphasis supplied.)

The prosecutor here violated both of these principles when he asked whether in the automobile tampering case the car was not occupied by a female person. He violated the last mentioned principle when he asked whether defendant had been discharged from the army "for psychiatric reasons."

In a case such as this where the evidence is closely balanced and which involves a sexual assault upon a female person, these improper questions by the prosecutor bore too heavily to the prejudice of the defendant to be dismissed as harmless error or dealt with as a matter within the trial judge's discretion.

STATE OF NORTH CAROLINA v. GREGORY HUDSON JONES

No. 40

(Filed 17 April 1978)

1. **Criminal Law § 78— admission of evidence—tender of stipulation**

A party cannot control the admission of competent evidence by tendering stipulations deemed to be less damaging to his cause than the live testimony of the witness himself.

2. **Criminal Law § 46.1— shooting of officer during flight—admissibility—offer to stipulate shooting details**

Testimony by a highway patrolman that defendant shot him numerous times when he stopped defendant for speeding on the morning after commission of some of the crimes for which defendant was on trial at a point 110 miles from the crime scene was competent to show flight by defendant even though the testimony disclosed defendant's commission of a separate and distinct offense. Furthermore, the patrolman's testimony was not rendered inadmissible by defendant's offer to stipulate that when he was stopped for speeding, he shot the patrolman five times in the chest and once in the head, that he got out of his car and shot the patrolman two more times in the head, and that he continued to flee and was later apprehended.

3. **Homicide § 24.3— self-defense—instructions on burden of proof**

The charge of the court, when considered as a whole, unmistakably placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense in a murder and three felonious assaults, although isolated portions of the charge may have been subject to the interpretation that defendant had the burden of proving self-defense to the satisfaction of the jury.

4. **Criminal Law § 138.11— more severe sentences on retrial—cumulative sentences less on retrial**

Where defendant received more severe sentences upon three of the seven charges of which he was convicted after a retrial, but the record contains no reasons and no factual data for the increased sentences, the increased portions of the three sentences must be set aside, notwithstanding the totality of defendant's cumulative sentences after the second trial is substantially less than the totality of his sentences at his first trial.

5. **Kidnapping § 1.2— no variance between indictment and proof**

Defendant's contention that there was a fatal variance between indictment and proof because the indictment charged a kidnapping on 9 October for the purpose of facilitating an assault, burglary and murder and the evidence showed that defendant committed the assault, burglary and murder on 16 October is without merit where the evidence also showed that defendant committed a second degree burglary shortly after the victim was taken captive and removed from one place to another on 9 October.

6. **Criminal Law § 76.2— in-custody statement—no confession or inculpatory statement—voir dire not required**

The trial judge was not required to conduct a voir dire hearing before ruling on the admissibility of defendant's in-custody statement that "they beat the hell out of me when they arrested me" since the statement contained no acknowledgment of defendant's guilt of any of the charges against him or of any essential element thereof and was not a confession or inculpatory statement.

7. **Criminal Law § 86.6— in-custody statement—impeachment of testimony and written statement**

Where defendant's testimony in his trial for murder and two felonious assaults and a written statement defendant gave to officers both strongly indicated that bruises and cuts on his body and face were inflicted by the victims in a murderous assault upon him and that he shot the victims in self-defense, defendant's prior inconsistent statement to an officer that the cuts and bruises were received because "they beat the hell out of me when they arrested me" was competent to impeach his trial testimony and written statement.

DEFENDANT appeals from judgments of *Rouse, J.*, 15 August 1977 Session, NEW HANOVER Superior Court.

This is defendant's second appeal. He was initially convicted in 1976 and on appeal, granted a new trial. See 292 N.C. 513, 234 S.E. 2d 555 (1977).

Defendant was tried upon eight separate bills of indictment, consolidated for trial. The charges, the verdicts, and the sentences imposed are as follows:

1. Case No. 15634—first degree murder of Peter Fearing on 16 October 1975. Defendant was convicted on this charge and sentenced to life imprisonment. (At his first trial he was sentenced to death.)

2. Case No. 15635—first degree burglary of the dwelling house of Mrs. Donna Rowe (mother of Peter Fearing) on 16 October 1975. Defendant was convicted of first degree burglary and sentenced to life imprisonment, to run concurrently with the life sentence imposed in Case No. 15634. (At his first trial he was sentenced to life imprisonment to commence at the expiration of the death sentence in Case No. 15634.)

3. Case No. 15633—kidnapping Ronald Lee Elkins on 9 October 1975 for the purpose of facilitating the commission of the

felonies of assault with a deadly weapon inflicting serious injury, burglary and murder. Defendant was convicted of kidnapping and sentenced to 20-25 years to commence at the expiration of the life sentence imposed in Case No. 15635. (At his first trial he was sentenced to 20 years to commence at the expiration of the life sentence pronounced in Case No. 15635.)

4. Case No. 15636—assault with a deadly weapon with intent to kill inflicting serious injuries upon Ronald Elkins on 16 October 1975. Defendant was convicted as charged and sentenced to 19-20 years, to commence at the expiration of the life sentence pronounced in Case No. 15634. (At his first trial he was sentenced to 18-20 years to commence at the expiration of the 20-year sentence for kidnapping imposed at that time in Case No. 15633.)

5. Case No. 15637—assault with a deadly weapon with intent to kill inflicting serious injuries upon Brian Jones on 16 October 1975. Defendant was convicted of assault with a deadly weapon inflicting serious injury and sentenced to 9-10 years to commence at the expiration of the sentence imposed in Case No. 15636. (At his first trial he was sentenced to 8-10 years to commence at the expiration of the sentence imposed in Case No. 15640.)

6. Case No. 15639—breaking or entering a motor vehicle (1966 Oldsmobile owned by Donna Davis Rowe which contained the goods and valuables of Peter Fearing valued at $40.00) with the intent to commit larceny therein. Defendant was convicted as charged and sentenced to 4-5 years to commence at the expiration of the sentence for kidnapping imposed in Case No. 15633. (At his first trial he was sentenced to 4-5 years to commence at the expiration of the sentence imposed in Case No. 15637.)

7. Case No. 15638—felonious breaking and entering the residence of Marvin and Diane Herring with intent to commit felony larceny and larceny of property valued at more than $200. Defendant was convicted of non-felonious breaking or entering and misdemeanor larceny and sentenced to two years to run concurrently with the life sentence imposed in Case No. 15634. (At his first trial he was sentenced to two years to commence at the expiration of a 4-5 year sentence in Case No. 15639.)

8. Case No. 15640—assault with a deadly weapon with intent to kill inflicting serious injuries upon Clyde Melvin Herring on 9

October 1975. Defendant was acquitted on this charge. (At his first trial he was convicted of assault with a deadly weapon inflicting serious injury and sentenced to 8-10 years to commence at the expiration of a 18-20 year sentence in Case No. 15636.)

The State's evidence tends to show that on 8 October 1975 Ronald Elkins, age sixteen, and Peter Fearing, age nineteen, were hitchhiking and defendant picked them up in his light blue Volkswagen. The parties had never seen each other before that date. Elkins and Fearing had a joint of marijuana, and the three of them smoked it. Defendant inquired if the boys wanted to smoke some marijuana at his house and mentioned that he had some pot he wanted them to sell for him. They went to his house in Wilmington where they stayed for about an hour. Defendant gave Peter Fearing his phone number and then took the two boys home.

On 9 October 1975 Peter Fearing telephoned defendant and learned that he was going to the beach. Ronald Elkins, Peter Fearing and Butch Herring went to Wrightsville Beach that evening in Herring's car. In about fifteen minutes defendant arrived, took a little metal box containing marijuana from his blue Volkswagen, and walked to the beach with Peter Fearing. They were later joined by Butch Herring and Ronald Elkins. Defendant told Ronald Elkins privately that if anybody planned to "rip him off" he was going to collect "a little bit of interest." At defendant's invitation they all smoked two joints of marijuana while sitting on top of the dunes. It was dark at the time. Suddenly, Butch Herring yelled, "Look out, he's got a gun!" The gun fired, and Peter Fearing ran up the dunes with the box containing the marijuana but dropped it and ran away. Defendant pointed his gun at Elkins, cursed him, picked up the metal box, returned to his Volkswagen and left.

A short while later defendant saw Ronald Elkins walking across the bridge at Wrightsville Beach, drew his gun and ordered Elkins into the Volkswagen. He then drove back to the beach and forced Elkins to find defendant's flashlight which Elkins had attempted to steal. With Elkins as his captive, defendant drove to Butch Herring's parked car and forced Elkins to take a coat and some tapes from it and place them in defendant's Volkswagen. Defendant then drove to Peter Fearing's house, forc-

ing Elkins to show him the way. They parked and defendant forced Elkins to take a tape player and tapes, a speaker and some headphones out of Peter Fearing's car, a Coleman stove out of the garage, and put them in defendant's Volkswagen. Elkins was also forced to get some tires and place them in defendant's vehicle. Defendant then drove to Elkins' home at 1102 Browning Drive where he inspected the premises for things he might want to steal later. Defendant then told Elkins to take him to Butch Herring's house on Barnett Avenue, which he did. They knocked on the door, received no answer, opened the door and entered the Herring house, but found nobody home. The lights were turned on and defendant inspected the place. They left the house, drove down a road behind the courthouse, parked the Volkwagen, took a larger vehicle—an El Camino with pickup bed—and returned to the Herring house where defendant forced Elkins to take a stereo and tapes, a coffee table, a bar and bar stools, a black light bulb, and other articles and load them into defendant's vehicle. Defendant then drove to a spot on Market Street where he told Elkins to get out and consider himself lucky—that Elkins and Peter Fearing had better leave town because the next time defendant saw them he was going to kill them. Elkins jumped out, hitchhiked a ride, and arrived home about 4 a.m. on 10 October 1975.

Later the same morning, Elkins went to Peter Fearing's home, called the police, and he and Fearing told them what had happened the previous night.

On 15 October 1975 Elkins spent most of the day at Peter Fearing's home. That night they heard a noise in the back room that sounded like something had fallen, and they turned the lights off. Soon their friend Brian Jones arrived and joined them in the living room of the Fearing home. They then turned the lights on, and the three of them stood around smoking marijuana and playing music. Sometime after midnight a gun suddenly fired and Ronald Elkins was struck in the back by a bullet, which knocked him to the floor. Elkins turned his head and saw defendant in the hallway with gun in hand. No one knew defendant was in the house until that time. Elkins heard more shots in rapid succession. Defendant then shot Elkins in the head. After awhile Elkins arose and saw Peter Fearing lying between the sofa and the book shelves. Defendant was gone. Elkins stumbled to the house next door and someone there summoned the police and rescue squad.

Elkins was taken to the hospital where he spent seventeen days. Peter Fearing was taken to the hospital but died soon thereafter from a gunshot wound in his head.

The State's evidence further tends to show that after defendant shot Peter Fearing and Ronald Elkins, he shot Brian Jones in the leg, Jones fell, and defendant walked toward him, pointed the gun at Jones's head and pulled the trigger. The gun clicked but was out of ammunition. Defendant then ran away. Brian Jones was hospitalized for seven days.

Harry Stegall, a member of the State Highway Patrol, testified that on 17 October 1975 at approximately 8:15 a.m., he saw defendant driving west on U.S. 74 in an orange and red Volkswagen station wagon. At that time defendant was 110 miles from Wilmington and moving at 65 miles per hour in a 55-mile zone. Trooper Stegall pursued the vehicle and finally succeeded in stopping it. Defendant was the only occupant. Officer Stegall demanded and received defendant's operator's license, told him he had been clocked at 65 miles per hour in a 55-mile zone, and instructed defendant to follow him to Laurinburg to post bond. Defendant said nothing. As Trooper Stegall turned to go to his patrol car, defendant yelled "hey!" Defendant then raised a .380 automatic pistol and fired five shots into the officer's body. As the officer fell, defendant shot him in the side of the face. Then defendant got out of the Volkswagen, ran to where the officer lay and fired two more shots—one in the shoulder and the other in the leg. Trooper Stegall "played dead." Defendant then took the officer's gun and drove away. The weapon was recovered when defendant was later captured.

Defendant testified in his own behalf. He said he was born in Virginia, attended high school and college in New Jersey, spent two years in the Army, and came to Wilmington to attend Cape Fear Technical Institute in the fall of 1975. He met Peter Fearing and Ronald Elkins on 8 October 1975 when he picked them up. They smoked marijuana together, listened to music at his house, and he took them home.

On 9 October 1975 defendant went scuba diving at Wrightsville Beach about sundown. When he came out of the water it was dark. He met Peter Fearing and Ronald Elkins near the jetty at Masonboro Inlet, and they helped him carry some of his diving gear to his Volkswagen. On the way they passed a vehi-

cle in which Butch Herring, whom defendant had never met, was seated. While defendant changed clothing, Peter Fearing talked privately to Butch Herring, then returned and said Butch wanted to meet defendant and suggested they all meet at the Surf Club. Defendant took his pistol with him because he had become suspicious of Butch Herring. He asked Ronald Elkins if they were going to rob him, and Elkins said they were not.

With Peter Fearing giving directions, they went up the beach to a building which Fearing said was the Surf Club. Then they walked down to the dunes where they were joined by Ronald Elkins and Butch Herring. While they were smoking pot, Butch suddenly yanked defendant completely off the ground with a tire tool wrapped around defendant's throat. Peter Fearing took defendant's house keys and car keys from his belt loop and ran toward the berm with defendant's metal box, a depth gauge and scuba watch. Ronald Elkins grabbed the diver's light. Defendant took his gun from his back pocket and shot Butch Herring, firing over his shoulder. Butch dropped the tire tool from defendant's throat and ran toward the beach. Peter Fearing dropped everything and kept running when defendant pointed the pistol at him. Ronald Elkins tried to run but fell on his face at which time defendant said, "I ought to shoot you."

Defendant gathered most of his things together, drove home and attended classes the following day. On returning home he found his television and couch were missing, and things were scattered all over the floor. While delivering an item to his next-door neighbor, he noticed police officers at his door. Thinking perhaps Butch Herring had died from his "over-the-shoulder" shot, he hid under the house until the officers left. He then hitch-hiked to Carolina Beach and from there to Atlanta to visit friends. He returned to Wilmington to find out why the police were after him and to get $600 he had in a Wilmington bank account.

When he got to his house in Wilmington, he found everything gone except some pots and pans, box springs and the bed. He assumed that Peter Fearing and Ronald Elkins had "ripped him off." He went to Peter Fearing's house around midnight on 15 October 1975, entered the garage, but failed to see any of his furniture. He heard voices inside, knocked, and Brian Jones opened

the door. Peter Fearing was standing at the end of the couch and Ronald Elkins was in a chair near the stereo. Defendant had a .380 automatic in his pants pocket. Fearing and Elkins started cursing defendant. In the ensuing argument, defendant was kicked in the back by Brian Jones and fell to the floor. Peter then hit defendant in the face, and Elkins struck him with a large ashtray. Then all three began pounding and kicking defendant until his vision was blurred. Peter Fearing had a big knife—like a hunting knife—in his hand. Defendant shoved Fearing over the coffee table and saw Elkins coming at him again. At that point defendant took the pistol from his pocket and fired two rounds in Peter's direction. Brian Jones grabbed defendant by the throat, and Elkins tried to take the gun out of his hand. In the ensuing struggle the gun was fired four or five times. Elkins released his grip and fell to the floor. Defendant shot Brian Jones in the leg, went up the hall, reloaded his pistol, left the house through a window, and rode his motorcycle back to Carolina Beach.

Defendant further testified that he started hitchhiking toward Atlanta. The third ride he caught was with a man named "Denny" in a red Volkswagen. "Denny" requested defendant to drive. While driving down the highway, with Denny asleep in the back seat, he was stopped near Laurinburg by a highway patrolman. He thought the officer was stopping him for murder because he had heard on the radio that he was wanted for murder. The officer put his hand on his holster, and defendant thought he was going to be shot. He panicked and shot the officer. He did not intend to kill him but only to disarm him. After shooting Trooper Stegall, defendant drove a mile or two and abandoned the vehicle—just got out of the Volkswagen, leaving his baggage in it, and started walking through the woods. He was later apprehended and taken back to Wilmington.

Defendant offered several witnesses who testified to his good character.

Defendant appealed the life sentences directly to the Supreme Court, and we allowed motion to bypass the Court of Appeals in the remaining cases to the end that this Court provide initial appellate review in all cases.

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

*G. H. Sperry, Attorney for defendant appellant.*

HUSKINS, Justice.

**[1, 2]** Defendant contends the testimony of Patrolman Harry Stegall should have been excluded in that, by putting before the jury evidence of defendant's assault on Trooper Stegall, it showed defendant had committed a separate, distinct offense in violation of the rule discussed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Defendant argues that the State should have been required to accept a stipulation tendered by him to the effect that he fled New Hanover County and was apprehended by Officer Stegall for speeding; that he then shot the officer five times in the chest and once in the head; that he then got out of his car and shot the officer two more times in the head, after which he continued to flee and was later apprehended. Admission of Stegall's testimony and rejection of the stipulation constitutes defendant's first assignment of error.

The competency of Officer Stegall's testimony was fully discussed on defendant's first appeal. See *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977). The fact that the proffered stipulation at the second trial is more detailed than the stipulation tendered at the first trial is immaterial. The testimony of Officer Stegall was competent in the trial of these cases, and the prosecution was at liberty, at its option, to call the witness or accept and utilize the tendered stipulation. A party cannot control the admission of competent evidence by tendering stipulations deemed to be less damaging to his cause than the live testimony of the witness himself. *See, e.g., Alire v. United States*, 313 F. 2d 31 (10th Cir. 1962); *Parr v. United States*, 255 F. 2d 86 (5th Cir. 1958); *State v. Wilson*, 215 Kan. 28, 523 P. 2d 337 (1974); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971); *Commonwealth v. Evans*, 465 Pa. 12, 348 A. 2d 92 (1975). As stressed in our first opinion, the degree or nature of the flight is of great importance to the jury in weighing its probative force and the evidence must be viewed in its entire context to be of aid to the jury in the resolution of the case. The testimony of Trooper Stegall was properly admitted, and defendant's first assignment is overruled.

**[3]** Defendant's second assignment of error relates to the charge on self-defense. The court, while charging the jury with respect to the murder of Peter Fearing and the felonious assaults on Ronald Elkins and Brian Jones, charged, *inter alia*, as shown by the following excerpts:

1. "Now, members of the jury, under certain circumstances a killing may be excused. One of those circumstances is when the defendant is properly acting in his own self-defense. Thus, a killing would be excused entirely on the grounds of self-defense if, first, it appeared to the defendant and he believed it to be necessary to shoot Fearing in order to save himself from death or great bodily harm. (And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.)"

DEFENDANT'S EXCEPTION NO. 91

* * * *

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

DEFENDANT'S EXCEPTION NO. 92

"The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense."

* * * *

3. "That although you are satisfied beyond a reasonable doubt that the defendant did shoot Ronald Elkins with a pistol with or without the intent to kill Elkins and inflict serious injury, if you further find not beyond a reasonable doubt (but find to your satisfaction that at the time of the shooting [defendant] had reasonable grounds to believe and did believe that he was about to suffer death or serious bodi-

ly harm at the hands of Elkins or the combined hands of Fearing, Elkins and Brian Jones and under those circumstances he used only such force as reasonably appeared necessary, you, the jury, being the judge of such reasonableness, and you are also satisfied that the defendant was not the aggressor, then the shooting of Elkins would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty upon the charge of felonious assault upon Ronald Elkins)."

DEFENDANT'S EXCEPTION NO. 98

* * * *

4. "Again, Members of the Jury, one of the contentions of the defendant is that in the shooting of Brian Jones, if you should find that he did shoot him, that he was acting in self-defense. (Again, I refer you to my previous instructions with respect to the law of self-defense.)"

DEFENDANT'S EXCEPTION NO. 99

"And again, I instruct you that the burden is upon the State to establish beyond a reasonable doubt that the defendant was not acting in self-defense at the time of the alleged shooting of Brian Jones.

"Thus, although you are satisfied beyond a reasonable doubt that the defendant did shoot Brian Jones with a pistol and inflicting serious injury, if you further find, not beyond a reasonable doubt but (find to your satisfaction that at the time of the shooting [defendant] had reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of Brian Jones or the combined hands of Fearing, Elkins and Brian Jones and that under those circumstances he used only such force as reasonably appeared necessary, you, the jury, being the judge of such reasonableness and you are also satisfied that the defendant was not the aggressor, then the shooting of Brian Jones would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty of the charge of felonious assault upon Brian Jones)."

DEFENDANT'S EXCEPTION NO. 100

The record discloses that after charging with respect to the alleged assault upon Ronald Elkins and Brian Jones, the court again told the jury that the burden was upon the State to establish beyond a reasonable doubt that the defendant was not acting in self-defense.

Finally, it is noted that after the jury had retired to deliberate, the judge recalled it and gave the following instruction:

> "Members of the jury, I have previously charged you with respect to each of the self-defense instructions that I have given you, that the burden is upon the State to satisfy you that the defendant did not act in self-defense. I charge you further that the defendant does not have the burden of satisfying you that he acted in self-defense. And that instruction would apply to each of the self-defense situations that I have previously referred to in my instructions to you. Is that satisfactory Mr. Carriker and Mr. Sperry? —All right."

We think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that defendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense. Many decisions of this Court hold that "a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965). Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). *Accord, State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). Technical errors which are not substantial and which could not have affected the result will not be held prejudicial. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955). So it is here. The isolated expressions of the judge, shown in parentheses in the quoted portions of the charge, may not be detached from the charge as a whole and critically examined for an interpretation from which prejudice to defendant may be inferred. *State v. Gatling, supra; State v. Jones*, 67 N.C. 285 (1872).

We hold that the trial court unmistakably placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense in the murder of Peter Fearing and in the assaults upon Ronald Elkins, Brian Jones and Butch Herring. In fact, the jury acquitted defendant with respect to the alleged felonious assault on Butch Herring, a verdict obviously grounded on a finding that defendant, while being choked with a tire tool by Butch Herring, shot Herring in self-defense and did not use excessive force in doing so. Considered as a whole, the court's charge on self-defense meets the requirements of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), and *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575, *rev'd on other grounds* 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). Defendant's second assignment of error is overruled.

It is appropriate at this juncture, however, to point out that *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974), was decided prior to *Mullaney v. Wilbur*, supra, and at a time when an accused pleading self-defense had the burden of satisfying the jury—not beyond a reasonable doubt or by a preponderance of the evidence, but simply to satisfy the jury—that he acted in self-defense. Consequently, the approved form of instruction on self-defense appearing in *Dooley* at page 166, although still sound as a statement of the constituent elements of self-defense, should be restated in post-*Mullaney* language.

**[4]** Defendant next contends the trial court erred in pronouncing more severe sentences upon his reconviction for kidnapping (Case No. 15633), felonious assault upon Ronald Elkins (Case No. 15636), and felonious assault upon Brian Jones (Case No. 15637) without setting out in the record the reasons for the increased sentences as required under *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969). Defendant's third, fourth and fifth assignments of error are grounded on this contention.

In Case No. 15633, the kidnapping case, defendant was sentenced to 20 years at his first trial and to 20-25 years at his second trial. In Case No. 15636 involving a felonious assault upon Ronald Elkins, at his first trial defendant was sentenced to 18-20 years to commence at the expiration of the 20-year sentence for kidnapping. Upon his second conviction he was sentenced to 19-20

years to commence at the expiration of a life sentence in Case No. 15634. In Case No. 15637 involving a felonious assault upon Brian Jones, defendant was sentenced to 8-10 years at his first trial and to 9-10 years at his second trial to commence at the expiration of the sentence imposed in Case No. 15636.

In *North Carolina v. Pearce*, supra, defendant was convicted of an assault with intent to commit rape and sentenced to a term of 12-15 years. Several years later in a post conviction proceeding, his conviction was reversed by the Supreme Court of North Carolina on the ground that an involuntary confession had been unconstitutionally admitted into evidence against him. See *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966). Pearce was retried, convicted, and sentenced to a term of eight years which, when added to the time already served, amounted to a longer total sentence than that originally imposed. The conviction and sentence were upheld on appeal, *State v. Pearce*, 268 N.C. 707, 151 S.E. 2d 571 (1966). Pearce then commenced a habeas corpus proceeding in the United States District Court, and that Court held the longer sentence imposed on retrial "unconstitutional and void." That order was affirmed by the Fourth Circuit, 397 F. 2d 253 (1968). On certiorari, the United States Supreme Court affirmed, holding, *inter alia*: (1) Punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense; (2) neither the Equal Protection Clause of the Fourteenth Amendment nor the Double Jeopardy Clause of the Fifth Amendment imposes an absolute bar to a more severe sentence upon reconviction; (3) the Due Process Clause of the Fourteenth Amendment proscribes vindictiveness upon retrial against a defendant for having successfully upset his first conviction; and (4) to assure the absence of vindictive motivation when a judge imposes a more severe sentence after a new trial, the reasons for the more severe sentence must affirmatively appear of record, and the factual data upon which the increased sentence is based must be made part of the record, to the end that the constitutionality of the increased sentence may be reviewed.

Since the record before us contains no reasons and no factual data for the increased sentences here under attack, we hold that defendant's third, fourth and fifth assignments of error are well taken and must be sustained. Even so, the minimal increases in each of the three cases involved demonstrate inadvertance and

negate vindictiveness on the part of the conscientious trial judge who presided at defendant's second trial. In fact, as argued by the prosecution, the totality of defendant's cumulative sentences after the second trial is substantially less than the totality of his sentences at his first trial. Nevertheless, we hold the constitutional tests fashioned in *Pearce* must be applied separately—not collectively—to the sentence imposed in each case. Accordingly, the *excessive portions* of the sentences pronounced in Case Nos. 15633, 15636 and 15637 cannot stand.

**[5]** Denial of defendant's motion to dismiss the kidnapping charge constitutes his sixth assignment of error.

The bill of indictment upon which defendant was tried alleges he kidnapped Ronald Lee Elkins on 9 October 1975 "for the purpose of facilitating the commission of the felonies of assault with a deadly weapon inflicting serious bodily injury and burglary and murder." Defendant argues that any assault, burglary or murder committed by him occurred on 16 October 1975 and that, considering the evidence in the light most favorable to the State, it has not been shown that defendant took Elkins on 9 October 1975 to facilitate any assault, burglary or murder on 16 October 1975. Therefore, defendant argues, there is a fatal variance between the allegation and the proof.

For reasons which follow, this assignment has no merit:

To warrant a conviction for burglary it must be shown that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. *State v. Mumford*, 227 N.C. 132, 41 S.E. 2d 201 (1947). "Since 1889, burglary has been divided into two degrees by G.S. 14-51. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. [Citations omitted.] To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur in the nighttime, *State v. Whit*, 49 N.C. 349 (1857); and this common law requirement is still the law in North Carolina. G.S. 4-1." *State v. Cox*, 281 N.C. 131, 134-35, 187 S.E. 2d 785, 787 (1972).

Ronald Elkins testified that defendant took him captive at gunpoint and, after stealing various items at Peter Fearing's

house, directed Elkins to take him to Butch Herring's house on Barnett Avenue. There, at defendant's direction, Elkins opened the door and both of them went into the Herring house but found nobody home. After inspecting the place they left to exchange defendant's Volkswagen for a larger vehicle, returned to the Herring house, again opened the door and went inside. At that time numerous items of personal property were stolen, placed in defendant's vehicle, and carried away by him. This constituted burglary in the second degree, *State v. Cox*, supra, and was committed shortly after Ronald Elkins was unlawfully taken captive and removed from one place to another on the night of 9 October 1975.

G.S. 14-39(a), effective 1 July 1975, provides, in pertinent part, that any person who unlawfully confines, restrains or removes from one place to another, any other person 16 years of age or over, without the consent of such person, for the purpose of facilitating the commission of any felony shall be guilty of kidnapping. Burglary in the second degree is a felony. Therefore, defendant committed the crime of kidnapping, as defined in G.S. 14-39(a), on the night of 9 October 1975. It thus becomes unnecessary to discuss or decide the question whether the murder of Peter Fearing or the felonious assaults upon Ronald Lee Elkins and Brian Jones on the night of 16 October 1975 may legally constitute the "purpose," within the meaning of G.S. 14-39(a), for which Elkins was taken captive seven days earlier. The bill of indictment alleges that Elkins was taken for the purpose of facilitating the commission of the felony of burglary, and evidence to sustain that allegation shows that defendant committed a burglary on both 9 and 16 October. There is no fatal variance between the allegation and the proof. Defendant's motion to dismiss the kidnapping charge was properly denied. His sixth assignment of error is overruled.

After Sergeant Vallender had testified for the State and defendant had testified in his own behalf and rested, Officer Vallender was recalled by the prosecution. The officer testified, in rebuttal, that he saw defendant in the hospital in Laurinburg while defendant was being examined; that defendant had a bruise in the center of his belt line in the back, "some cuts on his face and he had a bruise by his right eye, a black and blue mark." The officer then read verbatim, without objection, a written statement

defendant had given on 21 October tending to show that Peter Fearing, Ronald Elkins and Brian Jones had feloniously assaulted him and he had shot them in self-defense. At this point, the following exchange occurred:

"Q. On the way back from Laurinburg did you have any conversations with Gregory Hudson Jones concerning any bruises or abrasion he might have?

MR. SPERRY [defense counsel]: Objection to any conversations he might have had coming from Laurinburg.

COURT: Overruled.

MR. SPERRY: Without the proper foundations I would like to make an objection specifically.

COURT: Well, overruled, as to the ground work.

DEFENDANT'S EXCEPTION NO. 86

A. Yes sir, I did.

MR. SPERRY: Motion to strike.

COURT: Denied.

DEFENDANT'S EXCEPTION NO. 87

A. I made him no threats. I gave him his rights as soon as we got into the vehicle, and he waived his rights at that time. I had a general conversation with him on the way back, but I didn't threaten him or coerce him in any way. I asked him what happened to him that was concerning the bruises I saw on his face.

Q. What, if anything, did he say to you?

MR. SPERRY: Objection.

COURT: Overruled.

DEFENDANT'S EXCEPTION NO. 88

MR. SPERRY: Motion for voir dire, please sir.

COURT: The request is denied.

DEFENDANT'S EXCEPTION NO. 89

A. He said, 'They beat the hell out of me when they arrested me.'

MR. SPERRY: Move to strike.

COURT: Denied.

DEFENDANT'S EXCEPTION NO. 90"

Defendant contends he was in custody while being transported from Laurinburg to New Hanover County by one of the arresting officers; that he made a specific request for a voir dire to determine whether any statements he made in transit were admissible for any purpose and that the court erred to his prejudice by admitting the evidence without first conducting a voir dire hearing. This constitutes his seventh assignment of error.

In a criminal trial when the State offers a confession, or any statement by the accused inculpatory in nature, and the defendant objects and requests a voir dire to determine the competency of the proffered evidence, the trial judge must conduct an inquiry in the absence of the jury at which he hears the evidence, observes the demeanor of the witnesses, and resolves the question by appropriate findings and conclusions. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968); *State v. Barber*, 268 N.C. 509, 151 S.E. 2d 51 (1966).

Dean Wigmore defines a confession as "an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it." Wigmore on Evidence (3d ed. 1940) § 821. *Accord, State v. Fox*, supra; *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193 (1954).

**[6, 7]** Here, defendant's statement that "they beat the hell out of me when they arrested me" is not a confession. It contains no acknowledgment of defendant's guilt of any of the charges against him or of any essential element thereof. Therefore, legal rules governing determination of the competency of inculpatory statements are not applicable. The presiding judge was not required to conduct a voir dire before ruling on the admissibility of defendant's statement. *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973). Moreover, the statement was properly admitted. Defendant's testimony from the witness stand and the written

statement he gave to officers on 21 October 1975 both strongly indicate that the bruises and cuts on defendant's body and face were inflicted by Peter Fearing, Ronald Elkins and Brian Jones in a murderous assault upon him as a result of which he feared death or great bodily harm and shot them in his own self-defense. His prior inconsistent statement that "they beat the hell out of me when they arrested me" was competent to impeach and contradict his 21 October statement and his testimony before the jury. *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972); *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971). Defendant's seventh assignment is overruled.

In Case No. 75CRS15633 the words "for the term of not less than twenty (20) nor more than twenty-five (25) years in the State Prison of North Carolina" are stricken from the judgment and commitment and the words "for the term of twenty (20) years in the State Prison of North Carolina" are inserted in lieu thereof.

In Case No. 75CRS15636 the words "for the term of not less than nineteen (19) nor more than twenty (20) years in the State Prison of North Carolina" are stricken from the judgment and commitment and the words "for the term of not less than eighteen (18) nor more than twenty (20) years in the State Prison of North Carolina" are inserted in lieu thereof.

In Case No. 75CRS15637 the words "for the term of not less than nine (9) nor more than ten (10) years in the State Prison of North Carolina" are stricken from the judgment and commitment and the words "for the term of not less than eight (8) nor more than ten (10) years in the State Prison of North Carolina" are inserted in lieu thereof.

The Clerk of the Superior Court of New Hanover County shall issue revised commitments in those three cases bearing the same date as the original commitments, to be substituted for the commitments heretofore issued. The effect will be, and it is so intended, that the sentences in these three cases shall be identical in length to the sentences imposed at the first trial, and defendant will receive credit upon the new commitment for all time heretofore served for the kidnapping and the two felonious assaults involved in the three cases. In all other respects, prejudice otherwise not having been shown, the verdicts and judgments must be upheld.

In Cases Nos. 15634, 15635, 15639 and 15638—No error.

In Cases Nos. 15633, 15636 and 15637—Sentences modified.

FRANK H. CONNER COMPANY v. SPANISH INNS CHARLOTTE, LIMITED, A NORTH CAROLINA LIMITED PARTNERSHIP, EMIL BALL, JERRY M. WHIPPERFURTH, RICHARD R. HOLCHEK, AND R. C. BENSON, INDIVIDUALLY AND AS GENERAL PARTNERS; ARCHIE C. WALKER, AS TRUSTEE AND WACHOVIA REALTY INVESTMENTS, AN UNINCORPORATED BUSINESS TRUST, WILLIAM W. TENNENT, III, TRUSTEE, AND UNITED LEASING CORPORATION, AND WACHOVIA MORTGAGE COMPANY

No. 19

(Filed 17 April 1978)

**1. Laborers' and Materialmen's Liens § 1— lien effective from date of surveying work**

A contractor's lien for the construction of a motel, arising under Article 2, Part 1, N.C. G.S. 44A-7 through -13, prior to its 1975 Amendment, related back and took effect from the date of the furnishing of services for the partial clearing and the on-site surveying and staking of the boundary lines of the building to be constructed by the contractor.

**2. Laborers' and Materialmen's Liens § 1— surveying and staking lines of building—"labor" subject to lien**

The partial clearing, surveying and staking of the lines of a building prior to its construction was "labor" under G.S. 44A-8 and thus was subject to a laborers' and materialmen's lien, and defendants' contention that "labor" in the statute must be construed to read "manual, unskilled work of an inferior and toilsome nature" is unacceptable, since the Supreme Court has previously defined a mechanic or laborer as "a person skilled in the practical use of tools; a workman who shapes and applies material in the building of houses or other structures mentioned in the law . . ."; the definition urged by defendants would eliminate from the scope of the statute much skilled construction work clearly intended by the 1969 enactment of G.S. 44A-8 to be within its range; and if defendants' definition of labor were accepted, an impermissible burden would be placed on the contractor to keep separate records regarding that work which is "labor" and that work which is not.

**3. Laborers' and Materialmen's Liens § 1— lien for surveying work—improvement of realty**

G.S. 44A-10, the accrual statute for laborers' and materialmen's liens, implies that there be a visible commencement of the improvement in question, and the partial clearing of the site and the staking of the outlines of the building constitute a visible commencement of an improvement sufficient to put a prudent man on notice that a possible improvement is underway and

that the property might be subject to a lien under G.S. 44A-8; therefore, plaintiff had a lien under G.S. 44A-8 for the balance due under its contract with defendant Spanish Inns for the construction of a motel, and the clearing and staking of building lines constituted the "first furnishing of labor . . . at the site," so that plaintiff's lien related back to and took effect from the date this labor was first performed.

**4. Arbitration and Award § 7— persons not parties in arbitration proceedings—award binding**

Defendants were bound by an arbitration award fixing the amount of plaintiff contractor's laborers' and materialmen's lien on defendant owner's motel, though defendants were not parties to the arbitration proceedings and the earlier civil action by plaintiff for the confirmation of the arbitration award, since defendants did have an opportunity to be heard in the present civil action to enforce the lien.

**5. Rules of Civil Procedure § 56.2— summary judgment—burden of proof**

The moving party has the burden of establishing that no genuine issue as to any material fact exists, and summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits and other documents submitted (1) when there are only latent doubts as to an affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

**6. Rules of Civil Procedure § 56.3— damages claim—when summary judgment is appropriate**

Summary judgment on a claim of damages is appropriate where the moving party sufficiently establishes by competent documents that a liquidated amount is owing him, and the opposing party fails to show facts which dispute that evidence.

**7. Laborers' and Materialmen's Liens § 8.1— motel builder—lien on property prior to construction lender's deed of trust—amount of lien—summary judgment proper**

Plaintiff was entitled to summary judgment in an action to have an arbitration award declared to be a specific lien on real property formerly belonging to defendant Spanish Inns superior to the deed of trust held by the construction lender where plaintiff, in support of its summary judgment motion, submitted affidavits and certified documents showing that it had duly perfected a lien on the property in question; this lien should relate back to the date of the first furnishing of labor, which occurred seven days before the construction loan deed of trust was recorded; the amount owing under the terms of the parties' contract was $195,936; defendants failed to controvert the above evidence or to show facts indicating that the alleged sum was not owing under the contract; and defendants did not indicate to the trial judge in any manner, pursuant to G.S. 1A-1, Rule 56(f), that they could not make a sufficient response to plaintiff's motion and supporting evidence of the amount of its claim.

APPEAL by defendants, Wachovia Realty Investments, Archie C. Walker, Trustee, and Wachovia Mortgage Company, pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, reported in 34 N.C. App. 341, 238 S.E. 2d 525, which affirmed summary judgment for plaintiff entered by *Snepp, J.*, at the 8 November 1976 Session of MECKLENBURG Superior Court.

In its complaint filed 26 June 1975, plaintiff, a North Carolina corporation, alleged three claims for relief against defendants—Spanish Inns Charlotte, Limited; Emil Ball, Jerry M. Whipperfurth, Richard R. Holchek, and R. C. Benson, individually and as general partners; Archie C. Walker as Trustee; Wachovia Realty Investments; William W. Tennent III, Trustee; United Leasing Corporation; and Wachovia Mortgage Company.

In its first claim for relief, the only claim involved on this appeal, plaintiff Frank H. Conner Company seeks to have an arbitration award declared to be a specific lien on real property formerly belonging to defendant Spanish Inns Charlotte, Limited, pursuant to the provisions of G.S. 44A-7 through -13, superior to the deed of trust held by the construction lender Wachovia Realty Investments.

The facts underlying this action, largely stipulated by the parties, are as follows:

On 4 October 1973, plaintiff and defendant Spanish Inns entered into a written contract under the terms of which plaintiff, as general contractor, agreed to construct a six-story motel upon real property owned by Spanish Inns for the sum of $1,664,465, to be paid by Spanish Inns in periodic installments as work progressed.

Pursuant to this contract, plaintiff began furnishing, as it contends, labor and material to the property of Spanish Inns on 17 October 1973. On this date, General Surveyors, Inc., a subcontractor of plaintiff, sent employees onto the site for the purpose of staking the building to be constructed by plaintiff. In performing this task, employees of General Surveyors cleared a portion of the building site and partially rough-staked the building. The rough-staking work consisted of locating and installing building-corner stakes at the west end of the building and building-line

stakes on the south side of the building. Such work was performed on 17, 18 and 22 October. The task of rough-staking the building and parking lot was completed on 1, 8, 20 and 21 November and on 7 December 1973, at a total job cost of $960, paid by plaintiff to General Surveyors. Of this amount, $345 was allocated for the services performed on 17, 18 and 22 October 1973.

On 29 October 1973, defendants Wachovia Realty Investments and Archie C. Walker, Trustee, caused to be filed with the Register of Deeds of Mecklenburg County a construction loan deed of trust upon said real property to secure a loan to defendant Spanish Inns not in excess of $2,320,000. Thereafter, Wachovia Realty Investments periodically advanced loan proceeds under said deed of trust as plaintiff performed construction work on the motel. The plaintiff, Conner Company, continued working on the project as general contractor and furnished or caused to be furnished labor and materials to the construction site until 6 May 1975, at which time the motel was substantially completed. However, due to a dispute between plaintiff and Spanish Inns, no payment was made to the plaintiff and no payments were advanced by defendant Wachovia Realty Investments to Spanish Inns for any of the work, labor or materials furnished after 1 January 1975.

On 6 May 1975, plaintiff filed a claim of lien under Chapter 44A of the General Statutes upon said real property in the amount of $543,919.58 due under the general contract. Pursuant to an arbitration clause in the construction agreement of 4 October 1973, a request for arbitration was made in early 1975 to settle disputes between plaintiff and defendant Spanish Inns as to the amount due. Proceedings for arbitration were held in August 1975 before a panel of three arbitrators selected in accordance with the rules of the American Arbitration Association. Prior to this time, on 26 June 1975, plaintiff instituted this separate action against Spanish Inns, Wachovia Realty Investments, et al., for the purpose of enforcing the lien filed on 6 May 1975. Under its first cause of action, the subject of the present appeal, plaintiff requested that its action be stayed pending the outcome of the arbitration proceedings. Thereafter, on 12 September 1975, the panel of arbitrators rendered an award in favor of plaintiff for the sum of $195,936 against Spanish Inns. Wachovia Realty In-

vestments, not a party to the arbitration proceedings, was immediately put on written notice of the award made in favor of plaintiff. This award rendered in favor of plaintiff against Spanish Inns was confirmed by an order and judgment of the Superior Court of Mecklenburg County on 23 February 1976. Wachovia Realty Investments, Archie Walker, Trustee, and Wachovia Mortgage Company, advisor to Wachovia Realty Investments, were neither parties to the arbitration proceedings nor to the separate civil action in which the arbitration award was confirmed.

On 9 August 1976, defendant Wachovia Realty Investments filed motion for summary judgment in the present case. On 23 September 1976, plaintiff Conner Company filed motion for summary judgment, moving that the arbitration committee's award against Spanish Inns in the sum of $195,936, with interest from 12 September 1975, be declared a lien on the Spanish Inns property, and that this lien be declared prior to the lien of Wachovia Realty Investments acquired by the deed of trust recorded 29 October 1973. On 5 November 1976, defendant Wachovia Mortgage Company filed a motion for summary judgment identical to that filed by defendant Wachovia Realty Investments on 9 August 1976.

Subsequent to the filing of this civil action on 26 June 1975, and prior to the hearing on the motions for summary judgment, defendant Wachovia Realty Investments foreclosed its deed of trust and purchased the Spanish Inns property at foreclosure sale for $2,320,000. On the date of the hearing on the motions for summary judgment, 12 November 1976, Wachovia Realty Investments was still the owner of said property.

After hearing the several motions for summary judgment, Judge Snepp entered an order dated 12 November 1976 denying defendants' motions for summary judgment, sustaining plaintiff's motion for summary judgment, and awarding judgment in favor of plaintiff in the sum of $195,936, with interest from 12 September 1975 plus costs. This order declared that amount to be a lien upon the Spanish Inns property, at that time owned by Wachovia Realty Investments, and found this lien to be superior to and ahead of the lien of Wachovia Realty Investments acquired by way of the construction loan deed of trust. From this order, defendants appealed to the Court of Appeals, and that court affirmed the order of the superior court in favor of plaintiff. De-

fendants appealed as of right by reason of a dissent by one member of the hearing panel.

*Connor, Lee, Connor, Reece & Bunn by David M. Connor and Cyrus F. Lee; Wade and Carmichael by J. J. Wade, Jr. for plaintiff appellee.*

*Berry, Bledsoe & Hogewood by Louis A. Bledsoe, Jr. and Dean Gibson; Womble, Carlyle, Sandridge & Rice by Kenneth A. Moser and Donald A. Donadio for defendant appellants.*

MOORE, Justice.

**[1]** The primary issue on this appeal is whether a contractor's lien for the construction of a motel, arising under Article 2, Part 1, N.C. G.S. 44A-7 through -13, prior to its 1975 amendment, may relate back to and take effect from the date of the furnishing of services for the partial clearing and the on-site surveying and staking of the boundary lines of the building to be constructed by the contractor. The trial judge answered this question in the affirmative when he adjudged that plaintiff's lien was superior to the deed of trust executed for the benefit of Wachovia Realty Investments. The Court of Appeals affirmed his ruling. We affirm the decision of the Court of Appeals.

G.S. 44A-8, prior to its 1975 amendment, granted a contractor dealing directly with the owner of real property a lien upon that real property to which the contractor furnished "labor" or "materials" for purposes of construction on the real property. Prior to 1 July 1975, the effective date of the amendment, G.S. 44A-8 said, in defining those persons entitled to a lien:

> "Any person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for labor done or material furnished pursuant to such contract."

G.S. 44A-7(2) defines "improvement" as follows: " 'Improvement' means all or any part of any building, structure, erection,

alteration, demolition, excavation, clearing, grading, filling, or landscaping . . . on real property."

The lien provided for by G.S. 44A-8 is inchoate until perfected by compliance with G.S. 44A-11 and -12, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. *See Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390 (1951). However, when a lien is validly perfected, and is subsequently enforced by bringing an action within the statutory period set forth in G.S. 44A-13(a), the lien will be held to relate back and become effective from the date of the first furnishing of labor or materials under the contract, and will be deemed perfected as of that time. G.S. 44A-10 (1969) codifies the established North Carolina case law doctrine of "relation back" as applied to mechanics', laborers' and materialmen's liens. That statute says:

> "*Effective date of liens.*—Liens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien."

By virtue of this statute, a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site. *See Heating Co. v. Realty Co.*, 263 N.C. 641, 140 S.E. 2d 330 (1965); *Assurance Society v. Basnight, supra.*

In present case, there is no question that, in constructing the motel, plaintiff furnished "labor" and "materials" to the Spanish Inns property, and thereby was entitled to a lien thereon under G.S. 44A-8. Nor is there any dispute as to whether plaintiff duly and timely filed and perfected the lien under G.S. 44A-12, within 120 days after the last furnishing of labor and materials at the site of the improvement. Finally, there is no question regarding the validity of plaintiff's action to enforce the lien under G.S. 44A-13, brought within 180 days after the last furnishing of labor or materials to the site. It is, rather, the defendant's contention that, under G.S. 44A-10, the plaintiff's statutory lien rights did not attach and take effect until some date *after* the recordation on 29 October 1973 of Wachovia Realty Investments' construction deed of trust on the Spanish Inns property.

Defendants argue that former G.S. 44A-8 does not purport to secure payment of *all* debts owing for *all* work done pursuant to the construction contract between the owner and the contractor. Rather, defendants insist, the statute only provides for a lien securing payment of all debts owing for "labor" or "materials"; and, that surveying services are *not* lienable under the former statute. Therefore, G.S. 44A-10 must be read to relate back only to that date when the contractor first provided "labor" or "materials" of the type protected by G.S. 44A-8 to the site. Since the only work furnished by plaintiff prior to 29 October 1973 (the date of defendants' recordation of the deed of trust) was, as defendants contend, "surveying services", plaintiff's lien cannot relate back to a date prior to 29 October and must therefore be subordinate to defendants' deed of trust.

Defendants base their argument on a comparison of former G.S. 44A-8, the controlling statute in this case, and amended G.S. 44A-8, effective 1 July 1975. The amended statute reads as follows:

> "*Mechanics', laborers' and materialmen's lien; persons entitled to lien.*—Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract."

Defendants cogently argue that, since the amended G.S. 44A-8 specifically provides for a lien for the furnishing of "surveying services", former G.S. 44A-8 did not contemplate that such work be lienable under its terms. Instead, defendants insist, former G.S. 44A-8 provided a person with a lien only if he performed "labor" or furnished "materials" to the improvement. Defendants further contend that "labor" under the former statute has been defined as "manual, unskilled work of an inferior and toilsome nature," *accord*, *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911), and that the work performed by General Surveyors,

Inc., for the plaintiff on 17, 18 and 22 October was not of this sort; therefore plaintiff's lien cannot relate back to those dates.

**[2]** Central to defendants' arguments is the assumption that prior to 1 July 1975 "labor" did not include the clearing, surveying and staking of the lines of a building prior to its construction. Assuming defendants' contention that surveying services were nonlienable under Article 2, Part 1, of G.S. 44A, prior to 1 July 1975 (and without deciding whether the 1975 additions amended or merely clarified the former provision), we must look to the actual nature of the work performed by General Surveyors, rather than to any title, to determine whether the work in this case was labor performed under the former statute.

The nature of the work performed by General Surveyors, Inc., for plaintiff on 17, 18 and 22 October is undisputed. The parties stipulated that ". . . General Surveyors, Inc., in performing the work cleared a portion of the building site and partially roughstaked the building site which consisted of locating and installing building corner stakes at the west end of the building, plus building line stakes on the south side of the building. . . ."

Plaintiff contends that this work performed by General Surveyors, Inc., and furnished by plaintiff, was "labor" under former G.S. 44A-8 and -10. Defendants contend that it was not "labor", but rather was nonlienable professional "surveying services".

The contract dated 4 October 1973 between the plaintiff, as general contractor, and Spanish Inns, as owner, was a construction contract and not a contract for the rendering of professional design or surveying services. The partial clearing and staking of the building on the site is the first overt essential on-site task in the actual construction of the improvement called for in the construction contract. Such work goes beyond the stage of the mere planning or preparation for the "making of the improvement." Rather, it is an integral part of the construction of the building itself, and thus is "labor" performed for the "making of an improvement."

It should be noted here that General Surveyors was not employed by the contractor to perform traditional surveying work unrelated to the construction contract. In fact, General Surveyors had already surveyed the property lines for Spanish

Inns, Wachovia Realty Investments and Lawyers Title in August of 1973.

We cannot accept defendants' argument that "labor" in the statute must be construed to read "manual, unskilled work of an inferior and toilsome nature."

In *Stephens v. Hicks, supra,* this Court defined a mechanic or laborer as "a person skilled in the practical use of tools; a workman who shapes and applies material in the building of houses or other structures mentioned in the law; 'one actually employed with his own hands in constructive work' . . . ." From this case it is clear that the term "labor" in former G.S. 44A-8 is not restricted to "unskilled work of an inferior and toilsome nature."

A further reason for rejecting defendants' proposed limited definition of "labor", and for broadening the definition offered by prior case law, is that the cases defining the term are over sixty years old, and were written at a time prior to the sophistication of construction methods. To limit the meaning of "labor" in the manner urged by defendant would now be unacceptable, for such a definition of the term would eliminate from the scope of the statute much skilled construction work clearly intended by the 1969 enactment of G.S. 44A-8 to be within its range (*e.g.*, the skilled operation of heavy excavation machinery, cranes, etc.; bricklaying and masonry work; plastering; electrical wiring and plumbing, all of which involve technical skill and expertise).

Finally, to so limit the definition of "labor" to that suggested by defendant would impose an impermissible burden on the contractor. The contractor has made an indivisible contract for construction with the owner, and we cannot demand of the contractor that it keep separate records regarding that work which is "labor" under a proposed restricted definition of that term, and that work which is not. As this Court has said, "The plaintiff having built a house for the defendant was entitled to his mechanic's lien therefor, not merely for the value of the labor expended but for the contract price of the house. . . . When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his 'mechanic's lien' embraces the entire outlay, whether in labor or material, being for 'work done on the premises,' [Rev., s. 2016] *i.e.* for the betterments on it. The

'laborer's lien' is solely for labor performed. The mechanic's lien is broader and includes the 'work done,' *i.e.* the 'building built' or superstructure placed on the premises. [Citations omitted.]" *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896). *See Isler v. Dixon*, 140 N.C. 529, 53 S.E. 348 (1906).

Hence, we hold that the partial clearing and staking of the building lines was "labor" under G.S. 44A-8.

**[3]** Having held that the partial clearing and staking of building lines is "labor" under G.S. 44A-8, we must next determine, under G.S. 44A-10, the date from which plaintiff's lien took effect. Defendants cite several cases from other jurisdictions, collected in 1 A.L.R. 3d 822, which hold that the staking of building lines does not amount to a "commencement of building" under the particular mechanics' lien statutes in those jurisdictions. These cases were determined under statutes which state, in effect, that mechanics' liens accrue from the time work on the building or improvement is "commenced". This State's accrual statute, G.S. 44A-10, is not stated in these terms, but rather provides that a lien shall accrue as of the time of the "first furnishing of labor or materials at the site." To this extent, our accrual statute is unique among the fifty states. Although the statute contains no express requirement that there be a "visible commencement" of the building or improvement, the authors of a Wake Forest Law Review article think this is an implied requirement:

> "[I]t should be noted that insofar as the lien rights of laborers and materialmen are concerned, the statutory definition of the term 'improve' [G.S. 44A-7(1)] includes undertakings, the commencement of which will likely be apparent upon an examination of the construction site. It was the intent of the draftsmen that persons interested in the subject lot or tract should be able to examine the property and ascertain the extent to which it was possibly encumbered." 12 Wake Forest L. Rev. 283, 321, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority. See also* Humphrey, *Position, Priorities and Protection of Parties and Statutory Liens* in N.C. Bar Ass'n Foundation Institute on Troubled Real Estate Ventures and New Use and Ownership Concepts, IV-1 through IV-23 (May 1975).

We agree that this is a reasonable interpretation of the statute, and accordingly hold that G.S. 44A-10 implies that there be a visible commencement of the improvement. But, with this added requirement we believe and so hold that the partial clearing of the site and the staking of the outlines of the building, the "first furnishing of labor" in this case, constitute a "visible commencement of an improvement" sufficient to put a prudent man on notice that a possible improvement is underway and that the property might be subject to a lien under G.S. 44A-8.

Thus, we hold that plaintiff has a lien under G.S. 44A-8 for the balance due under its contract with Spanish Inns for the construction of the motel and that the clearing and staking of building lines constituted the "first furnishing of labor . . . at the site," so that plaintiff's lien relates back to and takes effect from the date this labor was first performed.

**[4]** In their second assignment of error defendants Wachovia Realty Investments, Archie C. Walker, Trustee, and Wachovia Mortgage Company contend that the arbitration award of $195,936 against Spanish Inns and in favor of plaintiff is not binding on them in this action. Defendants reason that since they were not parties to the arbitration proceedings and the earlier civil action by plaintiff for the confirmation of the arbitration award (termed by defendants an action "to perfect its lien"), they were not given a right to be heard concerning the amount of the lien, and therefore they cannot be held liable for this specified amount.

Suffice it to say that defendants did have an opportunity to be heard, and that this opportunity was afforded them in the present civil action to enforce the lien. A mechanics' lien under Article 2, Part 1, of Chapter 44A, is perfected "upon filing of claim of lien pursuant to G.S. 44A-12," and is then deemed to relate back to the time of the first furnishing of labor or materials. *See* G.S. 44A-11. In the present action, the plaintiff filed its claim of lien for $543,919.58 on 6 May 1975 in accordance with G.S. 44A-12. Plaintiff's lien was then deemed perfected, and such lien related back to 17 October 1973, the date plaintiff first furnished labor to the site. On 26 June 1975, plaintiff instituted this action to enforce this lien in accordance with G.S. 44A-13. That statute, in part, provides:

"*Action to enforce lien.*—(a) 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. . . .

(b) Judgment.—Judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced."

G.S. 44A-13(b), Judgment, contemplates that a defendant has the right to contest the amount of plaintiff's lien during the enforcement proceedings, and not prior thereto. In *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E. 2d 287 (1951), the Court said that, in an action to enforce a materialmen's lien under former G.S. 44-6, ". . . it is material to ascertain and determine what amount, if any, was due by the owner . . . to the contractor. . . . [T]he owner may . . . set up, as a defense, any actual damages caused by the failure of the contractor to complete the building in accordance with the terms of the contract."

Defendant Wachovia Realty Investments was a proper party to this action at the time it was commenced, and a necessary party at the time of the hearing itself (because it then owned the property). *Childers v. Powell*, 243 N.C. 711, 92 S.E. 2d 65 (1956); *Assurance Society v. Basnight, supra.* As parties to this action, defendants had the right and the opportunity to be heard on the issue of the amount of the lien.

**[7]** The question remaining is whether summary judgment was properly granted the plaintiff, not only on the priority of plaintiff's lien, but also on the amount of that lien.

In present case, plaintiff submitted a motion for summary judgment on its first cause of action, alleging and offering the pleadings, affidavit and certified documents to show that it had duly perfected a mechanics' lien on the Spanish Inns property; that this lien should relate back to 17 October 1973, the date of the first furnishing of labor, and be deemed superior to the deed of trust held by defendant Wachovia Realty Investments; and

that the amount owing under the terms of the contract was $195,936, with interest from 12 September 1976. In support of this last point, plaintiff submitted the initial notice of claim of lien of 6 May 1975, the certified award of $195,936 of the arbitrators dated 4 September 1975, and the court order of confirmation of this award and judgment against Spanish Inns.

In their cross motions for summary judgment, defendants simply prayed for relief in their favor "in accordance with Rule 56 of the Rules of Procedure." Submitted with these motions were affidavits by the surveyors for General Surveyors; an affidavit by bank officer J. Wayne Roquemore; the complaint, answer and amended answer together with attached exhibits; and admissions and answers to written interrogatories filed by both plaintiff and defendants. The cross motion itself contains no response to plaintiff's allegations and evidence concerning the amount due under the contract. Among the documents submitted by defendants in support of their cross motion no affidavits or certified documents appear which set forth specific facts which would question plaintiff's evidence of the amount owed. The defendants raised no counterclaim in their answer to plaintiff's complaint, nor did they set up any affirmative defenses as regards the issue of damages. The only aspect of defendants' cross motions which addresses the issue of damages is the bare denial, contained in the answer to plaintiff's complaint, that the alleged sum was owing.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides, in pertinent part that, upon motion, summary judgment shall be rendered forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

Rule 56(e) provides *inter alia*: ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him." (Emphasis added.) *See also Nasco Equipment Co. v. Mason*, 291

N.C. 145, 229 S.E. 2d 278 (1976); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Rule 56(f) provides: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

A motion for summary judgment must be adequately supported. It must demonstrate, by affidavit, deposition, or otherwise, that there is no genuine issue of fact. *See* Rule 56(c). Rule 56(e) requires that if a defendant, opposing a plaintiff's motion, has a plausible defense as regards an issue, he must assert it, or he must utilize Rule 56(f) to show the court why he cannot oppose it. When the movant's affidavits do not adequately support the motion, there may be no reason to file opposing affidavits. *See Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). However, when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *See Nasco Equipment Co. v. Mason, supra.*

**[5]** The moving party has the burden of establishing that no genuine issue as to any material fact exists. This Court, in an opinion by Chief Justice Sharp, has held that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits and other documents submitted (1) when there are only latent doubts as to an affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early, supra.*

In present case, plaintiff supported his motion for summary judgment for a specified sum with a certified arbitration award for $195,936, and a court order of confirmation of that award and judgment against Spanish Inns. This amount was determined by a three-man board of arbitrators as due under the terms of the construction contract. Coupled with the confirmation order by the

superior court, the award amounts to an adjudication of the amount owing under the construction contract. Since defendants were not parties to the arbitration proceeding, the award is not binding on them. *See* 5 Am. Jur. 2d, Arbitration and Award § 149, p. 631. However, on a motion for summary judgment in this action to enforce the mechanics' lien, this arbitrated amount, approved by the superior court, will serve as factual evidence of the amount of the lien, and is adequate support for the claimed amount. This Court has held that, in ruling on a motion for summary judgment, the trial court may consider admissions, depositions, answers to interrogatories, affidavits, and, "any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Thus, the certified arbitration award and confirmation order may be considered by the trial judge in ruling on plaintiff's motion for summary judgment on the amount of its lien. Due to the nature of the evidence, there could only be latent doubts as to its credibility or correctness, and it would be incumbent on defendants to come forward with evidence disputing its correctness. Plaintiff's evidence, absent any evidence to the contrary, would be sufficient to show that there is no material issue of fact as regards the amount owing plaintiff under the contract.

Since the defendants failed to support their general denial of plaintiff's factually supported claim for the amount of the lien, and failed to utilize Rule 56(f) with regard to this issue, the remaining question in this case is whether summary judgment for the plaintiff was appropriate on the issue of damages—in this case the amount of the lien.

Rule 56(a) contemplates that summary judgment may be granted for any type of claim, counterclaim, or cross-claim, or for a declaratory judgment, so long as the issue to be determined is one which lends itself to summary adjudication. There is nothing inherent within the summary judgment procedure which might preclude a summary judgment for the damages or remedies sought, so long as the requirements of the procedure are met.

Under Rule 56(d) summary judgment may be granted, not only as to an issue of liability, but also as to "the amount of damages or other relief" where such issues are not in controver-

sy. Concerning this matter, 6 Moore, Federal Practice § 56.17[18] (2d Ed. 1976), says: "If all the material issues of fact underlying a claim, including the amount of damages, are established and on the basis of applicable substantive law the claimant is entitled to a judgment, a summary judgment including the award of damages may be appropriately awarded. But where, liability of the defendant being established as a matter of law, there is a genuine dispute as to the amount of damages, a summary judgment, interlocutory in character, may be rendered for the claimant solely on the issue of liability, and the amount of damages left for determination in the appropriate manner."

In *Golden Oil Co., Inc. v. Exxon Co.*, USA, 543 F. 2d 548 (5th Cir. 1976), the federal court held that summary judgment on an account is proper where the moving party sets out a detailed statement of account and the opposing party fails to adduce specific, legally cognizable items of debit or credit not included in the moving party's statement demonstrating that the amount claimed due is inaccurate. In *Douglass v. First National Realty Corp.*, 437 F. 2d 666 (App. D.C. 1970), the court held that it was proper to grant a motion for summary judgment for damages for breach of a contract for architectural services, where the defendant failed to contest whether plaintiff had suffered any damages, and where the damages were computable according to a formula within the contract. And, in *Freeman v. Continental Gin Company*, 381 F. 2d 459 (5th Cir. 1967), summary judgment was held proper for the amount owing a seller under a contract for the delivery of machinery where the terms of the contract were unambiguous. *See also*, *United States v. Natale*, 99 F. Supp. 102 (D. Conn. 1950); *Sloane v. Land*, 20 FR Serv. 761 (DCSDNY 1954); *United States v. Wood*, 61 F. Supp. 175 (D. Mass. 1954).

For cases in other jurisdictions holding summary judgment for damages appropriate, *see generally* 73 Am. Jur. 2d, Summary Judgment § 4, p. 727, and references therein; *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y. 2d 456, 161 N.Y.S. 2d 90, 141 N.E. 2d 590 (action to recover contract price); *E. J. Marco & Bros. v. Canfield*, 286 App. Div. 1059, 144 N.Y.S. 2d 771; *Petit v. Ervin Clark Constr. Co.*, 243 Iowa 118, 49 N.W. 2d 508.

In *Kessing v. Mortgage Corp., supra*, this Court, though it modified the lower court's award, approved a summary judgment

for damages due a borrower in an action to recover usurious interest paid to defendant.

In all of the above cases the moving parties established by means of affidavits or other admissible documents that an established sum was owing them as a matter of law. The opposing parties either failed to dispute such allegations, or else presented claims or defenses utterly baseless in fact.

**[6]** The granting of summary judgment is proper if affidavits and other papers in support of the moving party are sufficient to sustain a judgment in his favor, and his opponent does not, by affidavit or otherwise, show facts sufficient to present a triable issue of fact. Accordingly, we hold that summary judgment on a claim of damages is appropriate where the moving party sufficiently establishes by competent documents that a liquidated amount is owing him, and the opposing party fails to show facts which dispute that evidence. In such cases there is no triable issue of fact concerning damages due the moving party.

**[7]** In present case, plaintiff moved that it be entitled to a lien on the property of Spanish Inns in the amount of $195,936, with interest. In support of this motion, plaintiff submitted a certified document and a court order which provided sufficient factual support to plaintiff's claim that this sum was determined under the terms of the contract and was thereby due under the terms of the contract. This evidence, being credible, was sufficient to carry plaintiff's burden of proof on the issue of damages. The defendants, in their cross motion for summary judgment, failed to controvert this evidence or to show facts indicating that the alleged sum was not owing under the contract. Nor did they indicate to the trial judge in any manner, pursuant to Rule 56(f), that they could not make a sufficient response to plaintiff's motion and supporting evidence of the amount of its claim. Defendant not having contested plaintiff's allegations and evidence concerning damages, the trial judge, based on the particular evidence of indebtedness before him, could conclude that there was no genuine issue of material fact, and could therefore appropriately grant summary judgment for the amount of $195,936, with interest, in plaintiff's favor and against the land held by defendants. Rule 56(c); Rule 56(e); *Kidd v. Early, supra.*

Defendants' second assignment is overruled.

We have considered defendants' other assignment of error, but find it to be without merit.

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

Affirmed.

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N. J. GEORGE AND WIFE, MARY B. GEORGE; LORAINE BURNS; JOHN A. MITCHENER III; JAMES G. BLOUNT AND BYRON P. KEHAYES v. TOWN OF EDENTON; ROY L. HARRELL, MAYOR AND MEMBER OF THE TOWN COUNCIL OF THE TOWN OF EDENTON; AND JAMES C. DAIL, JESSIE L. HARRELL, W. H. HOLLOWELL, JR., HARRY A. SPRUILL, JR., LEO F. KATKAVECK, ERROL FLYNN, JAMES DARNELL AND J. H. CONGER, JR., MEMBERS OF THE TOWN COUNCIL OF THE TOWN OF EDENTON; W. B. GARDNER, ADMINISTRATOR; AND W. G. MATTHEWS, BUILDING INSPECTOR

No. 73

(Filed 17 April 1978)

1. **Municipal Corporations § 30.20— zoning change after denial of such change—time limit—proposal by town council—adoption of new zoning ordinance**

Provision of a town zoning ordinance prohibiting the town council, when it has denied an application for a zoning change, from accepting another application for the same change within six months following such denial precluded the town council from enacting a zoning change within six months after its denial of the owners' application for the same change even though the second proposal was initiated by the town council rather than by the owners and the zoning change was accomplished as part of the adoption of a new zoning ordinance.

2. **Municipal Corporations § 30.20— zoning ordinance—certification by planning board—statement in opinion of Court of Appeals not authoritative**

The statement in *George v. Town of Edenton*, 31 NC App 648, 653, that provisions of G.S. 160A-387 requiring certification of a zoning plan by the planning commission apply only to the municipality's initial exercise of zoning power should not be considered authoritative since such a restrictive construction of the statute by the Court of Appeals was not necessary to its decision, and certification by the planning board may also be required for subsequent comprehensive revisions of a zoning ordinance.

ON plaintiff's petition for further review (G.S. 7A-31) of the decision of the Court of Appeals (opinion by *Brock, C.J., Parker* and *Hedrick, JJ.*, concurring, 31 N. C. App. 648, 230 S.E. 2d 695 (1976)), insofar as the decision affirmed summary judgment of *Peel, J.*, for defendants, entered at the 29 March 1976 Civil Session of CHOWAN Superior Court. This case was argued as No. 110, Spring Term 1977.

*Twiford, Trimpi & Thompson, by John G. Trimpi and O. C. Abbott, Attorneys for plaintiffs.*

*White, Hall, Mullen & Brumsey, by Gerald F. White and John H. Hall, Jr., Attorneys for defendants.*

EXUM, Justice.

**[1]** The principal question before us is whether the Edenton Town Council violated the procedural provisions of the town's zoning ordinance in rezoning a tract of land less than six months after having denied an application for the same change. We hold that it did.

This is a declaratory judgment action by which plaintiffs seek to determine the validity of two actions of the Edenton Town Council which purported to rezone, respectively, two tracts of real property. Both tracts are approximately 10 acres. Tract One (hereinafter North Tract) is located on the north side and Tract Two (hereinafter South Tract) on the south side of N.C. Highway 32 at the proposed intersection of N.C. Highway 32 and U.S. Highway 17 By-pass, outside the town limits of Edenton but within the town's one-mile zoning jurisdiction. On 12 August 1975 the Town Council sought to rezone the North Tract from R-20 (Residential—Agricultural) to CH (Highway—Commercial). On 14 October 1975 the Council sought to rezone the South Tract from R-20 to CS (Shopping Center).

Plaintiffs, as residents of Chowan County within the jurisdiction of the zoning powers of defendants, challenge in their complaint the legality of both actions of the Town Council and ask the court to determine their validity. After defendants filed answer, both plaintiffs and defendants moved for summary judgment. Both motions came on for hearing before Judge Elbert S. Peel, presiding in Chowan Superior Court. Judge Peel allowed defend-

ants' motion for summary judgment and denied plaintiffs' motion for the same relief. The effect of his ruling was to declare the challenged actions of the Town Council legally valid.

Plaintiffs appealed to the Court of Appeals. That court determined that Council's action on 14 October 1975 purporting to rezone the South Tract was invalid because the required 15 days notice of hearing was not given. It determined, however, that Council's action on 12 August 1975 purporting to rezone the North Tract was a valid exercise of the town's zoning authority. The Court of Appeals, therefore, affirmed the ruling of Judge Peel as to the North Tract but reversed his ruling as to the South Tract.

We allowed plaintiffs' petition for discretionary review in order to consider the correctness of the Court of Appeals' decision with respect to the North Tract. We reverse that decision.

The facts are almost entirely undisputed. All occurred in 1975. On 2 January Rosa Ward conveyed the property in question to Bernard P. Burroughs and Wiley Earnhardt, Jr. On 14 March these owners applied to the Edenton Planning Board and Zoning Commission (hereinafter Planning Board) to rezone the North Tract from R-20 to CH. The Planning Board unanimously recommended this change to the Town Council, but after a public hearing on 13 May the Council denied the application. During the meeting at which this application was denied the Town Administrator presented to the Council for its consideration "an update of the Zoning Ordinance for the Town of Edenton" (hereinafter New Ordinance).[1]

On 26 May the Council and Planning Board met jointly to consider the New Ordinance. Minor changes were recommended to the Council by the Planning Board, but none of the changes recommended encompassed the North Tract. The Council determined to call a public hearing to discuss the New Ordinance "as soon as possible."

1. We have been provided only with the texts of the old and new zoning ordinances. While the Official Zoning Map is incorporated into the ordinance through Section 5-1, the Map itself has not been made a part of this record. It is not clear from the record what changes in the Official Zoning Map, if any, were contemplated by the New Ordinance. Our impression is that the New Ordinance was concerned only with various textual changes. It seems reasonably clear from the record that no change in the Zoning Map with reference to the North Tract was contemplated when the New Ordinance was proposed and that this property, under the New Ordinance as proposed, retained its R-20 designation.

On 10 June at a regular meeting of the Council, it set a public hearing for 8 July to consider the New Ordinance. On 12 June the owners applied to the Planning Board to rezone the North Tract from R-20 to CS (Shopping Center). The Planning Board recommended this change to the Council on 30 June.

On 8 July the Council met in regular session to conduct a public hearing for the purpose of considering the New Ordinance. A motion offered at this meeting that the Council rezone the North Tract from R-20 to CH was, after some discussion, withdrawn. The Council decided on motion to hold another public hearing at its next regular meeting on 12 August for the purpose of further considering both the New Ordinance and changing the North Tract from R-20 to CH. The Council also determined to hold a public hearing at its 12 August meeting on the owners' application to rezone the North Tract from R-20 to CS. This decision was made with the understanding that the owners would withdraw this application if the Council determined at its 12 August meeting to rezone the North Tract to CH.

At the 12 August regular meeting the Council adopted the New Ordinance. A majority of the Council also voted to rezone the North Tract from R-20 to CH. Plaintiffs contend this change was made subsequent to the adoption of the New Ordinance. Defendants contend the change was made, as the minutes reflect, "as a part of the adoption of" the New Ordinance.

Both the old and the new Edenton zoning ordinances contain Section 14-8, which prohibits the Council, when it has denied an application for a zoning change, from accepting another application for the same change within six months following such denial. Relying on the minutes of the 12 August Council meeting, the Court of Appeals concluded that the action rezoning the North Tract from R-20 to CH was done as a part of the adoption of the New Ordinance, rather than after its adoption. Therefore, it reasoned, Section 14-8 of the ordinance was not applicable to this change.[2] We disagree.

2. Much of the discussion in the Court of Appeals' opinion and much of the briefs and arguments before us were directed toward the questions: (1) Whether this action constituted a direct or collateral attack on the Council's minutes; (2) Whether Judge Peel erred in denying plaintiffs' motion to amend their complaint so as to challenge these minutes; and (3) Whether parol testimony was admissible to show the minutes did not correctly reflect what transpired at the meeting. Our resolution of the case makes it unnecessary to address these interesting questions.

Whether the North Tract was rezoned by adopting the change "as part of the New Ordinance," or whether it was rezoned after its adoption, we think the Council violated Section 14-8 of its zoning ordinance governing zoning changes. Both the old zoning ordinance and the New Ordinance adopted on 12 August contain Section Fourteen dealing with "Amendments." In both ordinances Section Fourteen is identical in every respect pertinent here. The following provisions in Section Fourteen govern the action taken by the Council with respect to the North Tract:

"14-1 *Who May Petition*

A petition for a zoning amendment may be initiated by the Town Council, the Planning Board, any department or agency of the Town, or the owner or renter of any property within the zoning jurisdiction of the Town of Edenton.

. . . .

14-5 *Proposed Amendments to be Submitted to Planning Board for Recommendation*

Unless initiated by the Planning Board, the Town Council shall submit all proposed amendments to the zoning ordinance to the Planning Board for review and recommendation. The Planning Board shall have one hundred eighty (180) days within which to submit a report within the above period. If the Planning Board does not submit a recommendation within this time period, it shall be deemed to have approved the proposed amendment.

. . . .

14-8 *Reconsideration*

When the Town Board shall have denied any application for the change of any zoning district, it shall not thereafter accept any other application for the same change of zoning amendment affecting the same property, or any portion thereof, until the expiration of six (6) months from the date of such previous denial."

In general municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature. The basic rule is to ascertain and effectuate the intention of the municipal legislative body. *Cogdell v. Taylor*, 264 N.C. 424, 142 S.E. 2d 36 (1965); *Bryan v. Wilson*, 259 N.C. 107, 130 S.E. 2d 68 (1963); 56 Am. Jur. 2d Municipal Corporations § 398 (1971). We must therefore consider this section of the ordinance as a whole, *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); and the provisions *in pari materia* must be construed together, *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975).

**[1]** So construing the provisions set out above, and assuming the correctness of defendants' version of the procedure by which the North Tract was rezoned, we hold the Council acted in violation of these provisions. The stipulated facts show that the owners' application to rezone the North Tract to CH was denied on 13 May; on 8 July the Council decided to consider at the 12 August meeting a proposal to rezone the tract to CH; and the change to CH was approved at the meeting on 12 August. It appears that the proposal for this change to CH originated on "motion by Councilman Conger, seconded by Councilman Spruill, unanimously carried that a public hearing be called for the August Council meeting . . . to consider a change in the zoning map on the ten acre tract on the North side of N.C. 32 from R-20 to Highway Commercial." Thus the action taken by the Council on 12 August, whatever its formal character, amounted in substance to a reversal of the 13 May decision not to rezone the North Tract to CH.

Such a reversal violated the procedure required by Section 14-8. This section prohibits the "Town Board," defined in Section 2-1.11 to mean the Edenton Town Council, once it has denied an application for a zoning change, from "accept[ing] any other application for the same change of zoning amendment" within the next six months. In view of the provision of Section 14-1 that an amendment may be initiated by the Council as well as by the property owner, the Council's 8 July decision to consider changing the North Tract to CH constituted, within the meaning of this section, its own petition or application for an amendment. Technically this proposal should have been submitted to the Planning Board under Section 14-5, but such a submission would have

been superfluous because the board had already recommended the change unanimously. Section 14-8, however, remained as a significant procedural requirement which the Council failed to observe. The wording of this section broadly prohibits the acceptance of "any other application for the same change" within the prescribed period. No distinction may validly be drawn between proposed amendments initiated by the property owner and those initiated by the Council or by the Planning Board. Thus Section 14-8, construed in context to effectuate the purpose apparent from its terms, prohibited the Town Council from enacting the zoning change within six months after its denial of the owners' application.

The Court of Appeals erroneously held Section 14-8 inapplicable because it saw the zoning change accomplished as part of the adoption of the New Ordinance rather than as an amendment thereto. On the record before us, this distinction does not render Section 14-8 inapplicable. Such a distinction would allow easy circumvention of the provision whenever an applicant can attach a proposed zoning amendment to some larger revision of the general ordinance. We therefore decline so to eviscerate a requirement the Council has established to regulate its own procedure. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972).

Our research has failed to disclose any North Carolina decision directly on point, and none has been cited to us. Other jurisdictions have generally been unwilling to permit what are perceived as circumventions of zoning provisions that require a waiting period, following denial of a rezoning application, before the change may be reconsidered.

In *Newman v. Smith*, 217 Ga. 465, 123 S.E. 2d 305 (1961), the Georgia Supreme Court considered a DeKalb County "Zoning Resolution" providing that "an owner of property or his authorized agent shall not initiate action for an amendment to the zoning map affecting the same parcel more often than once every twelve (12) months . . . . " The record there showed that an owner's application for rezoning was denied and that his attorney subsequently appeared before the county board seeking reconsideration. The board voted to resubmit an application to the

planning commission. Upon receiving an application modified as suggested by the commission, the board proceeded to grant the application less than twelve months after its original denial. Against the owner's contention that the second application was initiated by the board rather than the property owner, the court held that the board's action failed to comply with the twelve month waiting period and was void. 217 Ga. at 468-69, 123 S.E. 2d at 307-08. In *Tyrie v. Baltimore County*, 215 Md. 135, 137 A. 2d 156 (1957), the Maryland Court of Appeals considered a similar Baltimore County ordinance requiring a waiting period of eighteen months between successive applications. The original owners there had applied unsuccessfully for a zoning reclassification and thereafter sold the property to a corporation, which obtained a "special exception" within the prescribed period. The court held that this mode of changing the status of the property, though distinct from the reclassification procedure, was nevertheless within the eighteen month bar of the ordinance and the change was therefore invalid. The court doubted the ordinance "contemplated or intended that if, in a proceeding to change its status, a property was adjudged to be rightly zoned, that a different result could be achieved immediately by a new application in a different form." 215 Md. at 141, 137 A. 2d at 159. *Accord*, *DeLatour v. Morrison*, 213 La. 292, 34 So. 2d 783 (1948); *compare Stone Mountain Industries v. Wilhite*, 221 Ga. 269, 144 S.E. 2d 357 (1965); *Cosmopolitan Nat'l. Bank v. City of Chicago*, 27 Ill. 2d 578, 190 N.E. 2d 352 (1963); *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P. 2d 213 (1966); *Stephens v. Montgomery County Council*, 248 Md. 256, 235 A. 2d 701 (1967); *Follmer v. County of Lane*, 5 Or. App. 185, 480 P. 2d 722 (1971); *but see McNutt Oil & Refining Co. v. Brooks*, 244 S.W. 2d 872 (Tex. Civ. App. 1951); *see generally* Annot., 52 A.L.R. 3d 494 (1973).

We note especially the observation of the Maryland Court of Appeals in Stephens, *supra*, that the waiting period required by the ordinance was designed "to prevent an applicant from subjecting the residents of the area to the burden of having to protest and defend against a series of repetitious applications." 248 Md. at 258, 235 A. 2d at 702. Such purpose seems to underlie Section 14-8 of the Edenton zoning ordinance. This purpose would clearly be frustrated if the Edenton Town Council could at the 13 May 1975 public hearing consider and reject the owners' applica-

tion to rezone the North Tract, and then act on its own initiative to make the same change at the public hearing on 12 August, even if such a change was sought to be made as a part of the adoption of a new zoning ordinance.

This Court may not substitute its judgment for the legislative determination of the Council, but we may inquire whether the Council acted in violation of required procedures. *Blades v. City of Raleigh, supra,* 280 N.C. 531, 187 S.E. 2d 35 (1972). Having done so we conclude that, because of its violation of Section 14-8 of its own ordinance, the Council's purported rezoning of the North Tract must be set aside and the change considered, if at all, *de novo. Refining Co. v. Board of Aldermen, supra,* 284 N.C. 458, 202 S.E. 2d 129 (1974).

**[2]** In view of the foregoing holding, we need not consider the remaining challenges brought by plaintiffs against defendants' rezoning of the North Tract. One portion of the Court of Appeals' opinion, however, deserves comment. Plaintiffs have also argued that defendants in adopting the New Ordinance did not obtain certification from the Planning Board as required by General Statute 160A-387, which at the time in question provided:

> "§ 160A-387. *Planning agency; zoning plan; certification to city council.*—In order to exercise the powers conferred by this Part, a city council shall create or designate a planning agency under the provisions of this Article or of a special act of the General Assembly. The planning agency shall prepare a zoning plan, including both the full text of a zoning ordinance and maps showing proposed district boundaries. The planning agency may hold public hearings in the course of preparing the plan. *Upon completion, the planning agency shall certify the plan to the city council. The city council shall not hold its required public hearing or take action until it has received a certified plan from the planning agency.* Following its required public hearing, the city council may refer the plan back to the planning agency for any further recommendations that the agency may wish to make prior to final action by the city council in adopting, modifying and adopting, or rejecting the ordinance. (1923, c. 250, s. 6; C.S., s. 2776(w); 1967, c. 1208, s. 2; 1971, c. 698, s. 1; 1973, c. 426, s. 60.) (Emphasis supplied.)

The Court of Appeals rejected this argument, stating, 31 N.C. App. 653, 230 S.E. 2d 698:

> "The procedure in G.S. 160A-387 is, however, a prerequisite only to the municipality's initial exercise of zoning power. Thereafter, the planning agency, which was created at the initial stage, remains present to assist the legislative body in further zoning activity."

The Court of Appeals apparently grounded this construction of the statute on the nature of the planning agency as an advisory rather than a legislative body, citing *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971) and *In re Markham*, 259 N.C. 566, 131 S.E. 2d 239 (1963).

General Statute 160A-387 does not expressly restrict its application to a municipality's initial adoption of a comprehensive zoning ordinance. We think such certification may also be required for subsequent comprehensive revisions of an ordinance such as the New Ordinance enacted by defendants here in August, 1975.[3] The Court of Appeals' restrictive construction of the statute was not necessary to its decision, and considerable authority suggests such construction was error. *See Williams v. City of San Bruno*, 31 Cal. Rptr. 854 (Cal. App. 1963); *Johnson v. Board of County Com'rs.*, 34 Colo. App. 14, 523 P. 2d 159 (1974), *aff'd* 187 Colo. 443, 532 P. 2d 742 (1975); *Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights*, 15 N.J. 447, 105 A. 2d 521 (1954); *Milligan v. City of New Brunswick*, 83 N.J. Super. 185, 199 A. 2d 82 (1964); *but see* 1 Anderson American Law of Zoning §§ 4.09, 4.30 (2d ed. 1968), and cases cited. Moreover, while the statutes both in North Carolina and in other states generally track the Standard State Zoning Enabling Act, *reprinted in* 4 Anderson American Law of Zoning § 30.01 (2d ed. 1968), many of these statutes, including General Statute 160A-387, vary the language of the Standard Act so as to obscure their precise meaning on this point. *Compare* Section 6 of the Standard State Zoning Enabling Act; G.S. 160A-387; former G.S. 160-177 as originally enacted, Ch. 250 of the 1923 Session Laws, and as amended in Ch. 1208 of the 1967 Session Laws. The construction

3. Comprehensive revision should probably be distinguished from acts by which ordinances are "amended, supplemented or changed." The latter are clearly within the purview of General Statute 160A-384, which simply authorizes the local governing board to provide a system for making these kinds of changes.

of these enabling statutes might also involve a distinction between a "zoning commission" and a "planning commission"[4] under the various statutory schemes. *See* 1 Rathkopf The Law of Zoning and Planning § 10.02, p. 10-9 (4th ed. 1975); *Talbert v. Planning Commission*, 230 So. 2d 920 (La. App. 1970). Article 19 of Chapter 160A of the General Statutes is especially unclear as to the respective roles of these two entities.

Apart from General Statute 160A-387, submission to the Edenton Planning Board was clearly required by Section 14-5, *supra*, of both the old and new Edenton zoning ordinances. But as both the New Ordinance and the North Tract zoning change in fact received approval of the Planning Board, Section 14-5 was substantially complied with and the proper construction of General Statute 160A-387 is academic.

While we decline now to resolve this question of statutory construction, the above-quoted statement of the Court of Appeals should not be considered authoritative.

The Court of Appeals' decision affirming the judgment of the Chowan County Superior Court as to the North Tract is

Reversed.

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STATE OF NORTH CAROLINA v. LAMONT TINDALL

No. 32

(Filed 17 April 1978)

**1. Constitutional Law § 50— speedy trial—factors to be considered**

Factors to be considered in determining whether a defendant has been denied his right to a speedy trial include (1) the length of the delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right and (4) the extent to which defendant has been prejudiced.

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4. Section 2-1.10 of both the old and new Edenton ordinances provides: "The words 'Planning Board' shall mean the 'Town of Edenton Planning Board and Zoning Commission.'" Thus Edenton and perhaps many other North Carolina communities have designated the same body to serve as "zoning commission" and "planning commission."

2. **Constitutional Law § 51— four years between offense and trial—speedy trial not denied**

Defendant was not denied his right to a speedy trial where four years elapsed between the time of the alleged offense and defendant's trial, since (1) much of the delay was caused by defendant who fled the State of N. C. and lived under an assumed name in N. Y. and Pennsylvania until apprehended for violation of federal narcotics laws; (2) defendant made no demand for a final disposition of the murder charges against him until four months before trial; and (3) the evidence suggests that defendant suffered no significant prejudice as a result of the delay.

3. **Constitutional Law § 68; Witnesses § 10— nonresident witnesses—method for compelling attendance improper**

The General Assembly, in enacting G.S. 15A-803, did not seek to confer upon judges of this State the unconstitutional authority to issue material witness orders to compel the attendance of N. Y. residents who have no contact with this jurisdiction; therefore, the trial judge acted properly in denying defendant's motion for G.S. 15A-803 material witness orders, and this denial did not infringe upon defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his favor. Moreover, defendant could have sought to obtain the testimony of the nonresident witness under G.S. 15A-811 to -816, the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

4. **Criminal Law § 91.8— motion for continuance—time for making**

Defendant's motion for continuance made after the case was called for trial and a jury had been selected and empaneled was not made in apt time and was therefore deemed waived. G.S. 15A-952(b),(c), and (e).

DEFENDANT appeals from judgment of *Webb, J.*, 25 July 1977 Session, NEW HANOVER Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Donnie Dent on 11 July 1973 in the City of Wilmington, New Hanover County, North Carolina.

The State's evidence is narrated in the following numbered paragraphs.

1. On 11 July 1973 around 4 p.m. Sergeant T. E. McLaurin of the Wilmington Police Department saw defendant, whom he had known for six or seven years, near 8th and Dawson Streets.

2. James Butler and Donnie Dent were both selling drugs for defendant Lamont Tindall, and both owed defendant money. On 11 July 1973 Butler and Dent were standing in front of a home on

8th Street in Wilmington when defendant walked across the street with a gun in his hand, fired one shot which felled Dent and, when Butler ran, began chasing him. At the time of trial in this case Butler was in prison on charges of possession and sale of heroin but was brought into court and testified as a witness for the State.

3. On 11 July 1973 Cleveland Brown spoke to James Butler and Donnie Dent in the vicinity of 8th and Dawson Streets, passed defendant while walking toward the Dew Drop Inn and immediately thereafter heard a shot. Brown turned and saw Donnie Dent lying on the ground, but neither Butler nor defendant was anywhere in sight.

4. On the Saturday immediately prior to 11 July 1973 defendant told Annette Green that "there was some niggers he was going to kill" and that Donnie Dent and James Butler were among them because they owed him money. Defendant then showed Annette Green a list of names which included the names of Dent and Butler. Annette Green thereupon warned both Butler and Donnie Dent's brother of defendant's intentions. On 11 July 1973 she was sitting on a porch on 8th Street plaiting some people's hair when defendant approached and said, "Give me a gun, give me a gun—anybody got a gun." A man named Norman Green opened his car trunk and gave defendant a gun. Defendant took a few steps into 8th Street, fired the pistol at Donnie Dent and James Butler, hitting Dent, and then chased Butler down an alley.

5. Diane Brunson was with Annette Green on the Saturday prior to 11 July 1973 when defendant, whom she was dating at the time, stated that he was going to kill Donnie Dent and James Butler because they owed him money and further stated that if he did not kill them his contact in New York would do so.

6. Francis Dent Boyd saw defendant in Wilmington on 11 July 1973 when he came to her mother's house asking for her brother Donnie Dent who was not home at that time.

7. The State and defendant stipulated that Donnie Dent died on 11 July 1973 as the result of a single gunshot wound in the right chest.

Defendant testified as a witness in his own behalf. His testimony tends to show that he was born and reared in Wilmington, North Carolina, but had moved to New York and was living there in the summer of 1973. He was self-employed selling clothes and did not return to North Carolina at any time during that summer and did not kill Donnie Dent. In 1974 he moved to Philadelphia where he worked as a shipping clerk for two years. In September 1975 he was convicted of distributing cocaine and heroin and was serving a sentence at the federal prison in Lewisburg, Pennsylvania, at the time of this trial. Defendant further testified that he saw Sergeant W. C. Brown of the Wilmington Police Department in 1975 while he was in federal custody, at which time Sergeant Brown identified him as Lamont Tindall although he had been using the name Lamont Boney since 1971. He denied seeing Vivian Davis, Catherine Beatty, Patricia Graham or Joseph Dent on 11 July 1973 in Wilmington.

Norman Green, a defense witness, testified he did not see defendant on 11 July 1973, did not own a car on that date, and did not give defendant a pistol. He did hear a gunshot on 11 July 1973 and saw a man about six feet tall leaving the scene. This witness was serving time for manslaughter at the time of this trial.

Sidney Morgan of the Wilmington Police Department, a defense witness, testified he was on duty on 11 July 1973 and took a statement from Norman Green in which Green stated that he saw a black male about six feet tall shoot Donnie Dent and run south on 8th Street, after which Green and a friend took Dent to the hospital.

Defendant then called Moses Isler, Billy Smith and George Formey, all residents of New York City, but they were not in court. The following statement of Moses Isler, sworn to before a notary public on 8 July 1977, was read to the jury:

> "My name is Moses Isler. I'm 58 years old. I work as a manager of the Hot Shot Bar. I have been working there going on thirty-one years. I have lived in New York for the past thirty years. I was born in Wilson, North Carolina. I know Lamont Tindall. In the summer of 1973 I was in New York and I knew Lamont Tindall then. In the summer of 1973 he stayed at my house during that time. That is the same address as I now have. I did not know of him going down to

North Carolina at any time during the summer of 1973, because I used to see him every night. My son's birthday is on the 4th of July and on the 4th of July of 1973 I know Lamont Tindall was here in New York because he was in a room in my house and I know he didn't go down South nowhere."

In rebuttal, the State offered Vivian Davis, Catherine Beatty, Patricia Graham and Amos Bruce, all of whom testified that they saw Lamont Tindall in Wilmington on 11 July 1973. Amos Bruce further testified that he saw defendant with a pistol in his hand, heard a shot fired and saw Donnie Dent fall.

Officer McLaurin was recalled and testified, among other things, that after Donnie Dent was killed he attempted, without success, to locate Lamont Tindall and serve a murder warrant upon him.

The jury convicted defendant of murder in the first degree, and he was sentenced to life imprisonment. Defendant appealed to the Supreme Court assigning errors noted in the opinion.

*Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State.*

*E. Hilton Newman, Attorney for defendant appellant.*

HUSKINS, Justice.

On 24 June 1977 defendant moved to dismiss the murder charge against him on the ground that he had been denied a speedy trial in violation of his Sixth Amendment constitutional rights. Following a hearing before Rouse, J., at which defendant and the State offered evidence, the motion was denied. This constitutes defendant's first assignment of error.

**[1]** Every person formally accused of crime is guaranteed a speedy and impartial trial by Article I, section 18 of the Constitution of this State and the Sixth and Fourteenth Amendments of the Federal Constitution. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967); *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891 (1963). Prisoners confined for unrelated crimes are entitled to the benefits of this constitutional guaranty. *Smith v. Hooey*, 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969); *State v.*

*Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965). *See also Moore v. Arizona*, 414 U.S. 25, 38 L.Ed. 2d 183, 94 S.Ct. 188 (1973). No simple test has been developed for determining whether a criminal defendant has been denied a speedy trial. Accordingly, unless some fixed time limit is prescribed by statute (*see, e.g.*, G.S. 15-10.2; G.S. 15A-761, Art. III(a) and V(c)), speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right and (4) the extent to which defendant has been prejudiced. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

**[2]** In the present case the following chronology is relevant to the question of speedy trial.

1. Around 4 p.m. on 11 July 1973 Donnie Dent was shot and killed on 8th Street near Dawson in the City of Wilmington, North Carolina. Numerous eyewitnesses testified that defendant was the murderer.

2. On 12 July 1973 a warrant was obtained by Officer McLaurin charging defendant with the first degree murder of Donnie Dent. The murder warrant was not served upon defendant because he had fled the State and could not be found.

3. In October 1975 Detective W. C. Brown of the Wilmington Police Department, having received information from the FBI that defendant was in federal custody on drug charges, went to Philadelphia and identified defendant who was using the alias "Lamont Boney" at that time. Officer Brown informed defendant of the murder charge, and a detainer was duly filed against him.

4. On 12 July 1976 Vernell DeVane, an employee in the Office of Clerk Superior Court, New Hanover County, signed a receipt for an article of certified mail (certified No. 593029) but never opened the package and had no knowledge of its contents. She delivered it to Mrs. Romblad, the mail clerk. The record does not disclose what Mrs. Romblad did with it. At the hearing on defendant's motion to dismiss, defendant produced a document (Defendant's Exhibit 1) entitled "Motion to Quash and Dismiss Detainer

Warrant No. 26104" and testified that three copies thereof were sent by certified mail to the Office of Clerk Superior Court, New Hanover County, Wilmington, North Carolina. He further stated: "I did not send any notation with the three copies specifying who the three copies were to go to." These documents have never been located, and there is nothing of record to show that a copy ever came to the attention of the District Attorney's Office or the Police Department of the City of Wilmington.

5. On 31 March 1977, pursuant to the Interstate Agreement on Detainers, as the same appears in G.S. 15A-761, defendant requested a final disposition of the murder charge by causing to be delivered to the prosecuting officer of the Fifth Solicitorial District and to the New Hanover Superior Court a written notice of his place of imprisonment and a request for a final disposition of the murder charge pending against him, accompanied by a certificate of the federal warden who had defendant in custody. The notice, request and certificate fully complied with the requirements of G.S. 15-761, Art. III.

6. On 23 May 1977 a true bill of indictment charging defendant with the first degree murder of Donnie Dent was returned by the Grand Jury of New Hanover County.

7. On 24 June 1977, pursuant to G.S. 15A-954(a)(3), defendant filed written motion to dismiss the charges against him on the ground that he had been denied a speedy trial. This motion was heard and denied on 27 June 1977.

8. The case was initially calendared for trial on 12 July 1977 but continued on defendant's motion until 25 July 1977, without objection by the State, to enable defendant to secure the attendance of out-of-state witnesses.

Under these facts we hold defendant has not been deprived of his right to a speedy trial. Our holding is grounded on the following considerations:

First, much of the delay was caused by defendant, who fled the State of North Carolina and lived under an assumed name in New York and Pennsylvania until apprehended for violation of federal narcotics laws. A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle

in which to escape justice. *Barker v. Wingo, supra,* at 529, 33 L.Ed. 2d at 116, 92 S.Ct. at 2191; *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). Even the delay which occurred after defendant was taken into federal custody is, in slight part, chargeable to him, for it was his action in fleeing to New York and Pennsylvania and committing violations of federal law which complicated and obstructed the process of bringing him to trial in North Carolina. While the State must share responsibility for this delay, there is absolutely no evidence suggesting that the State acted purposefully or wilfully. *Compare State v. McKoy,* 294 N.C. 134, 240 S.E. 2d 383 (1978).

Second, defendant made no demand for a final disposition of the murder charge against him until 31 March 1977. The "Motion to Quash and Dismiss Detainer Warrant" which defendant apparently sent to the New Hanover County Clerk of Court in July 1976, made no request for a prompt trial on the murder charge. Further, this motion was not addressed or directed to the district attorney, and there is no evidence suggesting it ever came to his attention or to the attention of his staff. When, in March of 1977, defendant did request a final disposition of the charges against him, the district attorney moved promptly to secure an indictment and defendant was brought to trial within four months. The minimal delay which occurred after defendant's request is entirely lawful for "[t]he constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case." *State v. Johnson,* 275 N.C. 264, 273, 167 S.E. 2d 274, 280 (1969).

In *State v. McKoy,* 294 N.C. 134, 240 S.E. 2d 383 (1978), defendant McKoy's murder conviction was vacated and the charge dismissed for lack of a speedy trial when during a ten-month period defendant made eight or nine requests for a trial of the charges against him and these requests were ignored. The present case stands in strong contrast to *McKoy.* While the United States Supreme Court has not held that a defendant's failure to demand a speedy trial results in a waiver of his Sixth Amendment rights, that Court has stressed defendant's responsibility to assert his right to a prompt trial. "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker v. Wingo, supra,* at 532, 33 L.Ed. 2d at 117-18, 92 S.Ct. at 2193.

Third, the evidence suggests that defendant suffered no significant prejudice as a result of the delay. He did testify that one prospective alibi witness "died in the last of 1974 or 1975," but, as previously noted, defendant is solely responsible for the delay which occurred prior to October 1975, and at that time his witness was already dead. Until that date defendant was *avoiding* trial. His whereabouts were unknown to North Carolina authorities, he having fled this jurisdiction and assumed a new name.

We are not unmindful of the possibility that defendant may have suffered other kinds of prejudice as a result of the delay. *See Moore v. Arizona*, 414 U.S. 25, 38 L.Ed. 2d 183, 94 S.Ct. 188 (1973); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976). However, his failure to insist upon a prompt trial of the murder charge against him is strong circumstantial evidence that no great prejudice resulted.

"Whether and how a defendant asserts his right [to a speedy trial] is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker v. Wingo*, *supra*, at 531-32, 33 L.Ed. 2d at 117, 92 S.Ct. at 2192-93.

None of the foregoing considerations is conclusive. Speedy trial claims must be decided on a case-by-case basis and all relevant factors taken into account. After considering all facts of the present case, we hold defendant has not been deprived of his constitutional right to a speedy trial. *Compare, e.g., Dickey v. Florida*, 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). Accordingly, his first assignment of error is overruled.

**[3]** On 13 July 1977 defendant filed three verified motions for material witness orders authorized by G.S. 15A-803 in order to secure the attendance at trial of three New York City residents.

Two of these motions alleged that the persons named therein could testify "that the Defendant was in the State of New York during the month of July, 1973." The third motion made an identical allegation and further alleged that Moses Isler, the person named therein, could testify "that the defendant did not travel to the State of North Carolina during that month." Each of these motions was signed and sworn to by defendant. Each motion asked that the court treat the allegations set forth therein as an affidavit, and requested that the prospective witness named therein be taken into custody and held or released on bail.

By order entered on 18 July 1977, Judge Rouse denied defendant's motions for the material witness orders. Although defense counsel had caused subpoenas to be issued for each of the three witnesses (New York City Police were able to effect service only of the subpoena for Moses Isler), none of the three appeared at defendant's trial. However, defendant was permitted to read to the jury the affidavit of Moses Isler which appears in the preliminary statement of facts. Defendant contends the court should have compelled the attendance of his three prospective witnesses by granting his motions for G.S. 15A-803 material witness orders. Denial of these motions constitutes his second assignment of error.

G.S. 15A-803(a) provides that a judge "may" issue a material witness order when there are reasonable grounds to believe (1) that the prospective witness possesses information "material to the determination of the proceeding" and (2) that the prospective witness "may not be amenable or responsive to a subpoena at a time when his attendance will be sought." The use of the term "may" suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge. *See generally* 82 C.J.S. Statutes § 380a. (1953). *See also Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971). Such discretion must, however, be exercised in a manner not inconsistent with the Sixth Amendment's guaranty that a criminal defendant be afforded "compulsory process for obtaining witnesses in his favor." This guaranty applies to criminal proceedings in this State by reason of the Due Process Clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967); *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976).

Consideration of G.S. 15A-803 leads us to conclude that Judge Rouse correctly denied defendant's motion and that such denial deprived defendant of no constitutional right. There are well recognized limitations on the authority of a state court to compel the attendance of witnesses who are not residents of the state, not present therein and who lack any contact therewith. Such limitations have been recognized by this Court, *State v. Means*, 175 N.C. 820, 95 S.E. 912 (1918), *Stern & Co. v. Herren*, 101 N.C. 516, 8 S.E. 221 (1888), and by the Supreme Court of the United States. *Minder v. Georgia*, 183 U.S. 559, 46 L.Ed. 328, 22 S.Ct. 224 (1902). The courts of other states have likewise noted that they lack such power and have suggested that any attempted exercise thereof would be precluded by the Federal Constitution. *E.g.*, *State v. Blount*, 200 Or. 35, 264 P. 2d 419, 44 A.L.R. 2d 711 (1953); *State v. Breidenbach*, 246 Wis. 513, 17 N.W. 2d 554 (1945). That such limitations are of constitutional stature may be inferred from the Supreme Court's opinions in *Minder v. Georgia, supra*, and *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 21 L.Ed. 959 (1874).

In light of these well recognized limitations, we think the General Assembly, in enacting G.S. 15A-803, did not seek to confer upon judges of this State the novel and seemingly unconstitutional authority to issue material witness orders to compel the attendance of New York residents who have no contact with this jurisdiction. Accordingly, Judge Rouse acted properly in denying defendant's motions for G.S. 15A-803 material witness orders. Furthermore, this denial did not infringe upon defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his favor. A state court need not engage in the futile issuance of ineffectual process in order to satisfy the requirements of the Fourteenth Amendment. *Minder v. Georgia, supra; People v. Cavanaugh*, 69 Cal. 2d 262, 444 P. 2d 110, 70 Cal. Rptr. 438 (1968); *State v. Smith*, 87 N.J. Super. 98, 208 A. 2d 171 (1965). *Cf. United States v. Wolfson*, 322 F. Supp. 798, 819 (D.Del. 1971), and cases there cited.

Our Legislature has provided a means whereby nonresident witnesses may be compelled to attend and testify at criminal proceedings in this State. The Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings, G.S. 15A-811 to -816, has been enacted in fifty-three jurisdictions. 11 Uniform Laws Annotated 7 (1978 Supp.). This Act provides that,

upon presentation of a certificate executed by a court in which the nonresident witness's testimony is desired, an order may be issued *by a court of the jurisdiction in which the witness is found,* requiring the witness to attend a criminal proceeding in the former state and give testimony. The Act is constitutional, *New York v. O'Neill,* 359 U.S. 1, 3 L.Ed. 2d 585, 79 S.Ct. 564 (1959), and its provisions are available to the defense as well as the prosecution. *See State v. Tolley,* 290 N.C. 349, 226 S.E. 2d 353 (1976). Had defendant attempted to invoke the procedures of the Uniform Act, quite different questions would be presented to this Court—we would then have to determine whether defendant had made an adequate showing that the testimony of the prospective witnesses was material (*see State v. Tolley, supra; Glynn v. Donnelly,* 360 F. Supp. 214 (D.Mass. 1973)) and had adequately designated the location at which they could be found (*see Lancaster v. Green,* 175 Ohio St. 203, 192 N.E. 2d 776 (1963)). Significant Sixth Amendment questions might also be raised. *See Preston v. Blackledge,* 332 F. Supp. 681 (E.D.N.C. 1971). *Compare People v. Cavanaugh,* 69 Cal. 2d 262, 444 P. 2d 110, 70 Cal. Rptr. 438 (1968). However, since defendant requested a material witness order under G.S. 15A-803, and since Judge Rouse properly denied this request, no such questions need be decided. The court was under no duty to search our statutes and suggest to defense counsel that G.S. 15A-813 might provide a procedure for obtaining the result which he sought, but could not obtain, under G.S. 15A-803. "[An accused] may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense." *State v. Graves,* 251 N.C. 550, 558, 112 S.E. 2d 85, 92 (1960). *Accord, State v. Wells,* 290 N.C. 485, 226 S.E. 2d 325 (1976).

For the reasons given, we hold that Judge Rouse's denial of defendant's motions for material witness orders was correct. Defendant's second assignment of error is overruled.

**[4]** On 26 July 1977, after defendant's case was called for trial and a jury had been selected and empaneled, defendant made an oral motion for a continuance. This motion was based on defendant's fear that his alibi witnesses from New York might not be able to attend and testify at his trial. He stated, however, that he did expect these witnesses to attend. Court was recessed at 4 p.m. in order to give the witnesses time to arrive. When the

witnesses did not appear in court the following day, defendant's motion for a continuance, which the court had taken under advisement, was denied. Denial of this motion constitutes defendant's third assignment of error.

G.S. 15A-952(b) and (c) provide that motions for continuance must be made at or before the time of the defendant's arraignment unless arraignment is to be held at the session of court for which the trial is calendared, in which event the motion must be filed by 5 p.m. on the Wednesday prior to the session of court when trial is to begin. The Official Commentary to G.S. 15A-952 makes the following observation, which we think is deserving of emphasis:

> "Subsections (b) and (c) require the advance filing of certain listed motions. The presence of a motion for a continuance at the head of [this] list is noteworthy. One of the most common complaints of citizen witnesses is that they are commanded to take time from their own affairs to attend court—and often sit around for several hours, or even days, before being dismissed and told they must come back yet another time because the case is continued."

G.S. 15A-952(e) provides that motions not made within the permitted time are waived. While the record in this case does not indicate the date on which defendant was arraigned, the motion for continuance was required to be filed prior to commencement of the 25 July 1977 Session of New Hanover Superior Court. G.S. 15A-952(c). Defendant's motion for a continuance not having been made in apt time, it is deemed waived, and his third assignment of error is overruled.

While our decision is based on G.S. 15A-952, we note in passing that defendant's case had already been continued once, there was no indication defendant's alibi witnesses would be able to appear and testify at any future trial date, and defendant had not sought to obtain their attendance by means of G.S. 15A-813. Moreover, Moses Isler's deposition was read to the jury, and there is no evidence in the record that defendant's other alibi witnesses could testify concerning his whereabouts on 11 July 1973. Under such circumstances denial of his motion for continuance was not prejudicial error, even if G.S. 15A-952 were inapplicable to the present case. *See, e.g., State v. Tolley*, 290 N.C.

349, 226 S.E. 2d 353 (1976); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

By his fourth assignment of error defendant contends the trial court erred in denying his motion in arrest of judgment. This is a formal entry which incorporates by reference defendant's contention that he was denied a speedy trial. No error of law appears on the face of the record, and this assignment is overruled. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1975).

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

No error.

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STATE OF NORTH CAROLINA v. ERNEST MARTIN

No. 14

(Filed 17 April 1978)

1. **Criminal Law § 75.7— no custodial interrogation—statements admissible**

The trial court did not err in allowing into evidence statements made by defendant where his first statements were made at a time when defendant was not in custody and his freedom to depart was not restricted, and the later statement was made after defendant was given the *Miranda* warnings.

2. **Criminal Law § 73.1— search warrant and affidavit—exclusion as hearsay evidence**

It is ordinarily error for the trial judge to permit a search warrant together with the affidavit attached thereto to be introduced into evidence because the statements in the affidavit are hearsay evidence which deprives an accused of his right to confrontation and cross-examination; therefore, the trial court properly denied defense counsel's motion to allow the search warrant authorizing search of defendant's premises into evidence as an exhibit of the court or in the alternative to instruct the district attorney to present the warrant as a part of the State's case.

3. **Homicide § 20— shotgun shells—Clorox jug—admission not prejudicial**

In a prosecution for first degree murder and armed robbery, defendant was not prejudiced by the admission into evidence of .410 gauge shells and a Clorox jug bearing the odor of kerosene which were seized from defendant's premises.

4. **Bills of Discovery § 6— accomplice's statement made during trial—statement furnished defense counsel—no mistrial**

Defendant was not entitled to a mistrial where the district attorney learned, during trial, of a statement made by defendant's accomplice in the crime which implicated defendant and which differed from the accomplice's pretrial statement; as soon as the district attorney became aware of the new matter to which the witness would testify, he furnished defense counsel a copy of the additional evidence; defense counsel cross-examined the accomplice and clearly placed before the jury the differences in his pretrial statements and his in-court testimony; and defense counsel offered as witnesses the people who took the accomplice's statements.

5. **Criminal Law § 114.2— jury instructions—no expression of opinion**

In a prosecution for first degree murder and armed robbery, the trial judge did not express an opinion in violation of G.S. 1-180 during his recapitulation of the State's evidence when he stated, after summarizing the testimony of a certain witness, "There was also other corroborating evidence which I will not attempt to relate at this time," since there was in fact other testimony tending to corroborate the testimony of that witness.

6. **Homicide § 21.5; Robbery § 4.3— first degree murder—armed robbery—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder and armed robbery where it tended to show that defendant and an accomplice robbed an insurance collection agent at gunpoint; they forced the victim to drive to a wooded area where they shot her when she tried to run; they left her car behind an abandoned farmhouse; the victim's body had an odor of kerosene about it and it appeared that the back of her body had been burned; and a Clorox jug bearing the odor of kerosene and shotgun shells were found on defendant's premises.

APPEAL by defendant from *Cowper, J.*, 20 June 1977 Session of WAYNE Superior Court.

Defendant was charged with first degree murder and armed robbery.

The State's evidence tended to show that on 6 April 1977, Rose C. Blackwell, an insurance debit agent, left her home in Mt. Olive for the purpose of making collections. She was last seen at the residence of Mrs. Norma Carroll Vann, who lived a short distance from the home of defendant's mother. Mrs. Blackwell did not return to her office at the customary time, and the police were notified. A search was immediately instituted, and Mrs. Blackwell's body was located in the woods near an abandoned farmhouse. A rope had been tied around her neck, she had suffered gunshot wounds, there was an odor of kerosene about her

body, and it appeared that the back of her body had been burned. A jar having the odor of kerosene about it was found nearby, and a fingerprint later identified as being the right thumbprint of Don Zell Jones was lifted from this jar. An autopsy was performed upon Mrs. Blackwell's body, and the medical examiner testified that in his opinion her death was caused by multiple gunshot wounds.

Don Zell Jones, who was also charged with the murder of Mrs. Blackwell, testified for the State. He had previously entered a plea of guilty and had been sentenced to a term of life imprisonment. He stated that he was living with defendant's sister in the Martin home on 6 April 1977, and on that day, he and defendant were the only adult persons in the Martin residence when Mrs. Blackwell arrived. He and defendant knew that she was coming to collect for insurance, and they agreed that defendant would tell Mrs. Blackwell that his mother was in the back room and that she wanted to cash a check. When Mrs. Blackwell came into the back room, the witness pointed his gun toward her, and she ran to the front part of the house where defendant took about $200.00 from Mrs. Blackwell while Jones held a shotgun on her. The witness then forced Mrs. Blackwell to enter the driver's seat of her automobile. Defendant entered the back seat, and the witness sat in the front passenger seat. He ordered Mrs. Blackwell to drive to a wooded area where defendant got out of the automobile and took Mrs. Blackwell by the arm. She pulled away and started to run, and Jones shot her three times. They then left her car behind an abandoned farmhouse. As they were returning to the Martin home, they encountered four men in a pickup truck, one of whom asked where they were going. Jones later gave defendant $50.00 of the money taken from Mrs. Blackwell and kept about $150.00.

The State introduced a statement made by defendant to police officers which will be more fully discussed in the opinion. There was also other evidence concerning the search for and discovery of Mrs. Blackwell's body.

Defendant did not testify but offered police officers Goodman, Bryant, and Flowers, who testified that on 8 April 1977, Don Zell Jones made a statement to them which differed from Jones' in-court testimony in that Jones told the officers that defendant was not present when the killing occurred.

The jury returned verdicts of guilty of first degree murder in the perpetration of a felony and guilty of armed robbery. Judge Cowper imposed a sentence of life imprisonment in the murder case and continued prayer for judgment in the armed robbery case.

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

*Herbert B. Hulse, for defendant appellant.*

BRANCH, Justice.

**[1]** Defendant contends that the trial judge erred by admitting into evidence statements made by defendant before he was given the Miranda warnings.

Pursuant to the defendant's motion to suppress evidence of statements made by him to police officers, a *voir dire* hearing was held before the jury was empaneled. The State offered the testimony of S.B.I. Agent William Thompson and Officers Ronnie Thigpen and James L. Sasser which tended to show that upon receiving information that Don Zell Jones might be involved in the killing of Mrs. Blackwell they ascertained that he was residing at the home of Helen Martin. After obtaining Mrs. Martin's consent to search her home, they proceeded to the premises. Upon arrival, they encountered Ernest Martin, who told them that Don Zell Jones lived there and was his sister's boyfriend. Officer Flowers asked Ernest if he would go to the police car and talk with them. He agreed to do so and while sitting in the police car, he was asked if a lady in a red car came to his home on 6 April 1977. He replied in the negative. He was then asked if he was afraid of Don Zell Jones, and he replied that he was. The officers told him he would be protected from Jones, and defendant then stated that a woman in a red car drove up to the house on 6 April and he was asked to tell her that his mother was in the back room of the house and wanted to cash a check. He delivered the message, and the woman entered the house. Shortly thereafter, the woman ran out of the house with Don Zell Jones following her armed with a shotgun. Don Zell Jones and the woman entered her car and left. Ernest Martin was then advised that he was a witness and was requested to go to the city hall to make a

statement. He consented and they proceeded to the Mt. Olive City Hall, where Ernest made a statement similar to the one immediately above recited. The officers testified that at this point, they had not considered defendant a suspect and that he was not under arrest or restrained in any manner. However, when he had completed his statement, one of the officers inquired of him "if he had anything to do with the crime" and Ernest replied, "I went with him to ditch the car." After Ernest Martin made this reply, S.B.I. Agent Thompson immediately and fully advised Ernest Martin of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Defendant affirmatively waived his constitutional rights including his right to presence of counsel. He then, in substance, repeated the statement above summarized and further stated that he went with Jones to hide the car and later, at Jones' request, bought some kerosene. Jones took the kerosene and rode off on a bicycle.

After the interview ended, the officers took defendant home.

Defendant offered no evidence on the *voir dire* hearing.

At the conclusion of the hearing, Judge Cowper found facts consistent with those above stated and concluded that the first statement was non-custodial and, therefore, required no *Miranda* warnings. He further concluded that the second statement was voluntarily made after defendant understandingly and voluntarily waived his constitutional rights. Judge Cowper thereupon ruled that the statements were admissible into evidence.

We are of the opinion that the court correctly ruled. In *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977), a parolee voluntarily came to the police station and was advised that he was not under arrest. He was questioned about a burglary and was falsely told that his fingerprints were found at the scene of the burglary. He confessed to the burglary but then left the police station without any hindrance. At trial, his statement was admitted into evidence, and he was convicted of first degree burglary. The Oregon Court of Appeals affirmed, but upon his petition for review, the Supreme Court of Oregon reversed holding that the failure to give the *Miranda* warnings was reversible error. The State of Oregon petitioned the United States Supreme Court for review and the petition was allowed. In re-

versing the decision of the Supreme Court of Oregon, the United States Supreme Court, in part, stated:

> Our decision in Miranda set forth rules of police procedure applicable to "custodial interrogation." "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
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> * * *
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> . . . police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."* It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited. [Emphasis ours.] 429 U.S. at 494-495.

*Accord: State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977); *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974).

In instant case, all the evidence shows that defendant voluntarily went to the police station and at the time he made the statements he was not under arrest and his freedom to depart was not restricted. In fact, the police officers returned him to his home at the conclusion of the interview. We hold that defendant's first statement was not the product of "custodial interrogation" and, therefore, no *Miranda* warnings were required. Neither was the assurance by the officers that they would protect him from Don Zell Jones of such nature as to render the otherwise valid statement inadmissible. *See, State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928).

Defendant's contention that the statements made after the *Miranda* warnings were given were involuntary and inadmissible is without merit. Our holding that the original statement was properly admitted destroys his argument that the statement made after the warnings were given was tainted by the original

statement. Further, Judge Cowper's findings which support his conclusions and ruling were supported by the evidence and are, therefore, binding upon us. *State v. Biggs, supra.*

Defendant's assignment of error number 5 is as follows:

> The court erred in admitting testimony of evidence seized during the search of defendant's premises with a search warrant and in refusing to permit defense counsel to introduce the search warrant into evidence on cross examination of the State's witness.

On direct examination, S.B.I. Agent Thompson testified that he went to the Martin residence with Deputy Sheriffs Sasser, Uzzle, and others where Officer Jernigan served a search warrant on defendant. Over defendant's objection, Thompson testified that there they found a number of caps from .410 gauge shells and a plastic Clorox jug which smelled of kerosene. On cross-examination, he was shown defense exhibit 2 which he identified as a copy of the search warrant which authorized a search of the Martin home. The return of the search warrant shows:

> X on the 9 day of April, 1977, at 1:20 o'clock a.m., I made a search of within described premises as therein commanded. X I did not seize any items.

**[2]** At this point, in the absence of the jury, defense counsel moved that the court allow the search warrant into evidence as an exhibit of the court or in the alternative instruct the district attorney to present the warrant as a part of the State's case. In his argument on these motions, defense counsel, in part, stated:

> Your Honor, I am not moving to suppress. I am using the search warrant to impeach witnesses who have testified contrary to what they've sworn to in an affidavit.
>
> * * *
>
> I have not moved to quash the search warrant.

Judge Cowper overruled these motions and advised defense counsel that he could, at the proper time, offer the search warrant into evidence if he so desired.

The validity of a search warrant, and the admissibility of evidence obtained by a search warrant are matters of law to be determined by the trial judge. Further, it is ordinarily error for the trial judge to permit a search warrant together with the affidavit attached thereto to be introduced into evidence, because the statements in the affidavit are hearsay evidence which deprives an accused of his right to confrontation and cross-examination. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972).

Defendant's reliance on *State v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202 (1956), is misplaced. *McMilliam* stands for the proposition that when the State proposes to justify a search by the possession of a valid search warrant, the search warrant must be *produced.* Obviously, the production of the search warrant is necessary so that the trial judge may determine its regularity before ruling on the admissibility of the evidence seized under the warrant. In instant case, the search warrant was produced and was before the court. In fact, it was ultimately used by defense counsel in the cross-examination of certain witnesses. Further, defendant had no *right* to control the State's presentation of its evidence. His motions relating to the admission of the search warrant ran counter to the ordinary rules of trial procedure and deviation from the normal conduct or course of the trial is a matter which rests in the sound discretion of the trial judge. *Shute v. Fisher*, 270 N.C. 247, 154 S.E. 2d 75 (1967).

**[3]** Defendant's contention that the admission into evidence of the caps from .410 gauge shells and the admission of the Clorox jug bearing the odor of kerosene, over his general objection, was prejudicial error merits little discussion. We do not deem it necessary to discuss the questions of whether Mrs. Martin's consent to search was still viable at the time these items were seized or whether defendant's failure to timely move to suppress waived his objections to the admission of this evidence. Suffice it to say that the evidence simply was not prejudicial to defendant. The witness Don Zell Jones without objection testified that he killed Mrs. Blackwell with a .410 gauge shotgun and that defendant at his request brought kerosene to the Martin home in a Clorox jug. Defendant's statement which was admitted into evidence corroborated this portion of Jones' testimony.

For reasons stated, this assignment of error is overruled.

**[4]** By his assignment of error number 9, defendant contends that the court erred by denying his motion for a mistrial and by refusing to order the State to present for cross-examination the officers who obtained statements from the witness Jones.

Defense counsel lodged these motions at the close of the direct examination of Don Zell Jones, and Judge Cowper conducted a lengthy inquiry in the absence of the jury. At that inquiry, defense counsel pointed to the marked discrepancy between the statements made by Jones prior to the trial and his in-court testimony. The record shows that the statements taken prior to trial corroborated the statement given by defendant while the in-court testimony by Jones was much more damaging in that it placed defendant at the scene of the killing as an active participant. Defense counsel argued that the State deliberately conspired with law enforcement officers to change Jones' testimony. On the other hand, the record contains evidence tending to show that on 23 June, during the trial of the case, S.B.I. Agent Thompson, without the knowledge of the district attorney, obtained a statement from Jones which was consistent with his in-court testimony. When the district attorney was informed of this additional evidence, a copy of the statement obtained by Agent Thompson was promptly furnished to defense counsel. The prosecution had not previously known that Jones would so testify and, in fact, had not planned to use him as a witness. At the time Jones gave the last statement to Agent Thompson, he had already pled guilty to murder in the first degree and had received a sentence of life imprisonment.

At the conclusion of the inquiry, Judge Cowper denied defendant's motion for a mistrial and also denied his motion to order the State to submit the police officers as State's witnesses for cross-examination by defense counsel. However, Judge Cowper stated that he would permit defense counsel to examine these witnesses as hostile witnesses if he desired to offer them.

Whether a motion for mistrial shall be granted in criminal cases less than capital ordinarily rests in the sound discretion of the trial judge, and his ruling (without findings of fact) will not be disturbed absent a showing of gross abuse. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972).

In *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), it is stated:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Further, G.S. 15A-907 provides that when a party subject to compliance with an order of discovery "discovers prior to or during trial additional evidence or decides to use additional evidence . . . he must promptly notify the attorney or the other party of the existence of the additional evidence or the name of each additional witness."

In instant case, the record discloses that as soon as the district attorney became aware of the new matter to which the witness Jones would testify, he furnished defense counsel a copy of the additional evidence. These facts do not disclose prosecutorial misconduct. To the contrary, it appears that the conduct of the district attorney was within constitutional bounds and complied with the statutory mandate. Further, when defense counsel commenced his cross-examination of the witness Jones, he had been fully informed of all prior statements made by Jones. At that time, defense counsel conducted a knowledgeable and searching cross-examination which clearly placed before the jury the differences in Jones' pretrial statements and his in-court testimony. Defense counsel also had the opportunity to offer the witnesses who took Jones' statements. This he did. Under these circumstances, we are unable to say that Judge Cowper abused his discretion in denying defendant's motion for a mistrial or committed prejudicial error in denying his motion that the court order the State to present witnesses for cross-examination by defendant.

**[5]** Defendant contends that the trial judge expressed an opinion in violation of G.S. 1-180 during his recapitulation of the State's evidence.

After summarizing the testimony of the witness Jones, Judge Cowper stated, "There was also other corroborating evidence which I will not attempt to relate at this time." Defendant points

to this statement as an erroneous expression of opinion. Immediately following the challenged statement, the court instructed the jury:

> It is your duty to remember and consider all the evidence whether I call it to your attention or not and if I have neglected to state the evidence properly or if counsel neglected to state the evidence properly it's your duty to remember and consider all the evidence and use your own recollection and disregard anyone else's recollection.

"Slight inadvertencies in recapitulating the evidence or stating contentions must be called to the attention of the court in time for correction. Objection after verdict comes too late." *State v. Goines*, 273 N.C. 509, 514, 160 S.E. 2d 469, 472 (1968).

Defendant failed to call this alleged misstatement to the court's attention before verdict. Even had he done so, the record discloses that there was in fact other testimony tending to corroborate the testimony of the witness Jones, e.g., the testimony of John William Wilkins, II, corroborated Jones' testimony that he and defendant encountered two white men in a pickup truck as they were leaving the scene of the crime; the testimony of the persons who discovered Mrs. Blackwell's body tended to corroborate defendant's testimony as to how and where the killing took place. Under these circumstances, we find no expression of opinion on the part of the trial judge which violated the provisions of G.S. 1-180.

**[6]** Defendant assigns as error the court's denial of his motion for judgment as of nonsuit.

Upon a defendant's motion for judgment as of nonsuit in a criminal case, the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference deducible therefrom. When so considered, the motion for judgment as of nonsuit should be denied if there is substantial evidence of each element of the charged offense and when there is like evidence that defendant committed the offense. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973).

The State offered substantial evidence of every element of the crimes of murder in the first degree and armed robbery. There was also ample evidence of like quality presented which tended to show that defendant was one of the perpetrators of each of these crimes. Therefore, the trial judge correctly denied defendant's motion for judgment as of nonsuit.

The remaining assignments of error are formal and do not require discussion.

Defendant has failed to show prejudicial error in the trial of this case, and the verdict and judgment entered below will not be disturbed. Nevertheless, in view of this youthful defendant's cooperation with the police and the facts which suggest that the witness Don Zell Jones was the moving force in the planning and execution of these crimes, this may well be a case warranting early review by the executive branch of our government.

No error.

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THE PEOPLE OF THE STATE OF NORTH CAROLINA EX REL. RANDY D. DUNCAN v. BENJAMIN H. BEACH, L. OLIVER NOBLE, JR., THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE HONORABLE JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA

No. 22

(Filed 17 April 1978)

1. **Judges § 4; Elections § 10; Public Officers § 3— ineligibility of election winner to serve as judge—no right to office by losing candidate**

Votes cast for an ineligible candidate who received a majority of the votes in an election for district court judge, though not effective to give him legal entitlement to the office, were nonetheless legally effective to exclude his defeated opponent from entitlement to that office, and neither candidate, therefore, had *de jure* title to the office of district court judge by virtue of the election.

2. **Elections § 10; Public Officers § 3— ineligibility of majority candidate—knowledge of ineligibility by voters**

The ineligibility of a candidate receiving the majority of votes in an election does not elect the candidate receiving a minority of the votes regardless of whether the voting public had knowledge of the majority candidate's ineligibility.

**3. Public Officers § 7— ineligibility to serve as judge—de facto judge**

A person who received a majority of the votes in an election for district court judge, was sworn in and assumed the duties of that office, but who was ineligible to hold that office because of his age, did not hold the office *de jure* but was a *de facto* judge.

**4. Public Officers § 7— judge de jure**

A judge *de jure* exercises the office of judge as a matter of right and must satisfy three requirements: (1) he must possess the legal qualifications for the judicial office in question; (2) he must be lawfully chosen to such office; and (3) he must have qualified himself to perform the duties of such office according to the mode prescribed by law.

**5. Public Officers § 7— judge de facto**

A judge *de facto* is one who occupies a judicial office under some color of right and for a time performs its duties with public acquiescence though having no right in fact.

**6. Public Officers § 7— usurper in office**

A usurper in office is one who takes possession of an office and undertakes to act officially without any authority, either actual or apparent, and since he is not an officer at all or for any purpose, his acts are absolutely void and can be impeached at any time in any proceeding.

**7. Public Officers § 7.1— acts of de facto officer—validity of acts**

The acts of a *de facto* officer are valid as to the public and third persons.

**8. Judges § 4; Public Officers § 3— ineligibility of election winner to serve as judge—no right of loser to office—vacancy—appointment by Governor**

Where a candidate for district court judge who was ineligible under G.S. 7A-4.20(a) to hold that office because he had reached the age of 70 years before the election received a majority of the votes cast, was sworn in and assumed the duties of the office, and resigned upon the discovery of his ineligibility after having served as a *de facto* judge for over two years, the incumbent who was defeated in the election had no legal right to assume the office by virtue of the election and did not hold over in office by virtue of G.S. 128-7; therefore, the resignation of the ineligible judge created a vacancy in the office of district court judge which was properly filled by an appointment made by the Governor. Art. IV, § 19 of the N. C. Constitution.

ON plaintiff-relator's petition for discretionary review, prior to determination by the Court of Appeals, of summary judgment for defendants entered by *Godwin, J.*, at the 5 July 1977 Session of WAKE Superior Court.

This is an action in the nature of *quo warranto* to determine conflicting claims to the office of District Court Judge, Twenty-Fifth Judicial District of North Carolina.

Judge Godwin, after hearing on the motion of plaintiff-relator for summary judgment and cross motion of defendants for summary judgment, concluded, *inter alia*:

> "That the appointment by the Defendant Governor Hunt of Defendant L. Oliver Noble, to fill the vacancy created by the resignation of Defendant Beach was lawful and proper and constituted a regular appointment under the laws and Constitution of the State."

Thereupon, Judge Godwin entered summary judgment for defendants dismissing plaintiff's action. Plaintiff-relator gave notice of appeal to the Court of Appeals. We allowed plaintiff's petition for discretionary review under G.S. 7A-31, prior to determination by the Court of Appeals.

*Attorney General Rufus L. Edmisten by Assistant Attorney General James Wallace, Jr. for the State, appellee.*

*Isenhower and Long by David L. Isenhower and Samuel H. Long, III for plaintiff appellant.*

MOORE, Justice.

The uncontested facts of this case are as follows:

On 26 April 1973, the plaintiff-relator, Randy D. Duncan, was lawfully appointed to fill the office of Judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District of the State of North Carolina. He held said office until 30 November 1974 when he was replaced in office by defendant, Benjamin H. Beach.

In the General Election of 5 November 1974, the plaintiff was the duly qualified nominee of the Republican Party for the office of District Court Judge, Twenty-Fifth Judicial District. The defendant Benjamin H. Beach was the certified nominee of the Democratic Party for that judicial seat then held by plaintiff Duncan. There were no other candidates for the office.

Defendant Beach obtained a majority of the votes in that election, approximately 29,701 votes as opposed to the approximate 26,157 votes cast for plaintiff-relator. Plaintiff Duncan served until 30 November 1974, the end of his term, and on 2 December 1974 defendant Beach was sworn in and assumed the office of district court judge without objection from plaintiff.

Prior to this election, defendant Beach had attained the age of seventy (70) years, on 7 April 1974, and thus under G.S. 7A-4.20(a) was not eligible at the time of his election to hold the office of district court judge. This fact was not known by plaintiff-relator, nor was it called to the attention of the State Board of Elections or the general public. Defendant Beach was thus certified by the State Board of Elections as the nominee of his party, and, after the election, he was duly sworn into office. Beach served as district court judge until 31 March 1977, at which time he resigned at the request of the North Carolina Administrative Office of the Courts due to his ineligibility to hold office by virtue of his age. Thereafter, the defendant, Honorable James B. Hunt, Jr., as Governor of the State of North Carolina, appointed defendant L. Oliver Noble, Jr. to the judgeship vacated by defendant Beach. Judge Noble took the oath of office on 2 May 1977, and is presently serving in that capacity.

**[8]** The plaintiff-relator claims that, because defendant Beach was ineligible to hold office prior to and at the time of the 1974 election due to his age, he, Duncan, is entitled to that position. The relief he seeks is the ouster of Noble and his own installation in the office. Plaintiff-relator advances basically three arguments for his entitlement to the office. The arguments rest on his claim that he holds *de jure* title to the office.

Plaintiff's first argument for his claim of entitlement is as follows: G.S. 7A-4.20(a) provides that no judge of the superior or district courts may continue in office beyond the last day of the month in which he attains his seventieth birthday. Plaintiff contends that this statute implies that no person who has attained seventy years is legally qualified to serve as district court judge, and further implies that any person who is seventy years or older is not qualified to seek the office of district court judge by means of his election thereto. This being the case, plaintiff says, defendant Beach's nomination to the office was therefore a nullity, for he was not a legally qualified candidate. Plaintiff Duncan was thus the only legally qualified candidate for office. G.S. 163-110 holds that a sole candidate for a nomination is declared to be nominated. Plaintiff argues that, analogously, where there is only one qualified candidate for election, he should be declared elected—the choice of the voters.

Alternatively, plaintiff argues that, since defendant Beach was ineligible to hold office, and thus ineligible to seek office, the votes cast for him are a nullity and cannot be counted. The candidate receiving the next highest number of votes, in this case plaintiff, is therefore elected to office.

Plaintiff's final argument for his entitlement to office is based on his reading of G.S. 128-7. This statute says, "All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." Plaintiff argues that he, as the incumbent, had the statutory right to continue in office until his successor was *legally* elected and qualified. Since defendant Beach was not qualified to hold office, he could not be legally elected thereto. Thus, plaintiff insists that he continued to hold *de jure* title to the office.

The conclusion to all of these arguments advanced by plaintiff is that he continues to hold *de jure* title to the office of district court judge. Article IV, Section 19, of the North Carolina Constitution says that the Governor shall fill all vacancies of office by appointment. Plaintiff argues, however, that there has been no vacancy in the office. That is, since he either held over in office under G.S. 128-7 or was duly elected by virtue of his being the sole qualified candidate, he must still hold *de jure* title to the office; thus the resignation of defendant Beach in 1977, while a factual "vacating" of the office, did not create a legal "vacancy". Thus, plaintiff insists, the Governor's appointment of defendant Noble to fill the position vacated by Beach was unlawful, and this Court should order Noble removed from office and have plaintiff installed in his stead.

In his brief, plaintiff argues that "where there is only one qualified candidate for election, it is far more in keeping with the democratic process and with the general rule of law that the sole qualified candidate be declared elected pursuant to his receipt of a majority of the legal votes rather than the office to be declared vacant, leaving the selection of the public servant not to the people but to the executive. . . ." This appeal to "the democratic process" is a sword which cuts both ways. For the inescapable fact in this case is that defendant Beach received a majority of the votes in the General Election on 5 November 1975. Regardless of whether defendant Beach was qualified to run, the one clear

result of this election is that the plaintiff was rejected by the voters of the Twenty-Fifth Judicial District.

It has been said that "it is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried unless he or it receives a majority or a plurality of the legal votes cast in the election." 29 C.J.S., Elections § 243, and cases cited therein. *See also State ex rel. Spruill v. Bateman*, 162 N.C. 588, 77 S.E. 768 (1913). Accordingly, numerous courts have held that when a majority or plurality of votes are cast for an ineligible candidate, the fact that the winning candidate is ineligible and not qualified to take office does not entitle the runner-up to be declared elected to the contested office. *See generally* 29 C.J.S., Elections § 243, n. 93, and cases cited therein. The votes cast for an ineligible candidate, though not effective to entitle him to the office, are nonetheless not void; they are to be given effect in determining the result of the election as regards the other candidates. *Cf. Clark v. Porter*, 223 Ark. 682, 268 S.W. 2d 383; *State v. Stacy*, 263 Ala. 185, 82 So. 2d 264.

This Court, in *State ex rel. Spruill v. Bateman, supra*, has held accordingly. In that case the runner-up in the election, Spruill, alleged the winner's (Bateman's) ineligibility for office. The Court, in ruling on this objection, said:

> ". . . Bateman having received the largest number of votes, Spruill was not elected. If Bateman is disqualified to act, there must be a resort to the process of filling the office, in case of a vacancy. . . . When the candidate receiving the highest vote is ineligible, that cannot make his opponent, who has been rejected by them, the choice of the people.
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> * * *
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> "[A] candidate who receives fewer votes than are received by some other candidate cannot be said, under any circumstances, to be elected."

*See also Cole v. Sanders*, 174 N.C. 112, 115, 93 S.E. 476, 477 (1917).

**[1]** Applying these principles to the case at hand, the approximate 29,701 votes cast for defendant Beach, though not effective to give him legal entitlement to office because of his age, were nonetheless legally effective in excluding plaintiff Duncan from

entitlement to that office. Neither candidate, therefore, had *de jure* title to the office of district court judge by virtue of the November 1974 election.

**[2]** Plaintiff argues, however, that since defendant's birth certificate was on file in the Caldwell County Registry, the age of defendant was a matter of public knowledge; and, that it has been held that where the voters have knowledge of the ineligibility of a candidate, the votes cast for him must not be counted, and the candidate receiving the next highest number of votes is deemed selected (citing *State ex rel. Schmidt v. White*, 257 Wisc. 560, 44 N.W. 2d 523 (1950)). Here plaintiff argues the English rule, adopted by but a few jurisdictions in the United States. The American rule, adopted by a majority of jurisdictions, holds that knowledge by the public of a candidate's ineligibility is immaterial. *See generally* 26 Am. Jur. 2d, Elections § 294; 133 A.L.R. 319. Were this Court to adopt the English rule, plaintiff's position would not be improved. For those jurisdictions following the English rule hold that knowledge by the voters will not be presumed, but must be proven; notice of the disqualifying fact, and of the legal effect of it, must be given so directly to the voter that he can be charged with actual knowledge. *See generally* Annot. 133 A.L.R. at 346, and cases cited therein.

In any case, the clear implication of *State ex rel. Spruill v. Bateman, supra*, is that this State follows the American rule. In *Bateman*, the Court said, quoting Throop on Public Officers, Sec. 163: "In this country the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate. And this without reference to the question whether the voters knew of the ineligibility of the candidate for whom they voted. It is considered that in such a case the votes for the ineligible candidate are not void." 162 N.C. at 589-90. Thus, whether the public had knowledge of defendant Beach's ineligibility is immaterial.

**[3]** Defendant Beach assumed office on his being sworn in on 2 December 1974. Being ineligible to hold office by virtue of G.S. 7A-4.20(a), he did not hold office *de jure*. Judge Beach was, however, as plaintiff concedes, a judge *de facto*.

**[4]** A judge *de jure* exercises the office of judge as a matter of right. In order to become a judge *de jure* one must satisfy three

requirements: (1) He must possess the legal qualifications for the judicial office in question; (2) he must be lawfully chosen to such office; and (3) he must have qualified himself to perform the duties of such office according to the mode prescribed by law. *In re Wingler*, 231 N.C. 560, 58 S.E. 2d 372 (1950); *Norfleet v. Staton*, 73 N.C. 546 (1875).

**[5]** A judge *de facto* is defined as "one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact. . . ." *In re Wingler, supra*, at 563. In order for one to be deemed a judge *de facto*, he must have satisfied the following four conditions:

> "(1) He assumes to be the judge of a court which is established by law; (2) he is in possession of the judicial office in question, and is discharging its duties; (3) his incumbency of the judicial office is illegal in some respects; and (4) he has at least a fair color of right or title to the judicial office, or has acted as its occupant for so long a time and under such circumstances of reputation or acquiescence by the public generally as are calculated to afford a presumption of his right to act and to induce people, without inquiry, to submit to or invoke official action on his part on the supposition that he is the judge he assumes to be." *In re Wingler, supra*, at 563.

The General Assembly has conferred express approval on the judicial doctrine of *de facto* office by enacting G.S. 128-6, which provides that "Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."

**[6, 7]** A usurper in office is distinguished from a *de facto* officer in that a usurper takes possession of office and undertakes to act officially without any authority, either actual or apparent. Since he is not an officer at all or for any purpose, his acts are absolutely void, and they can be impeached at any time in any proceeding. *In re Wingler, supra; State v. Shuford*, 128 N.C. 588, 38 S.E. 808 (1901); *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891);

*Keeler v. Newbern*, 61 N.C. 505 (1868). The acts of a *de facto* officer are, however, valid as to the public and third persons. *Norfleet v. Staton, supra.* Thus, "So far as the public and third persons are concerned, a judge *de facto* is competent to do whatever may be done by a judge *de jure*. In consequence, acts done by a judge *de facto* in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge *de jure*. . . ." *In re Wingler, supra*, at 563. See cases cited therein. Judge Beach satisfied the requirements of a *de facto* judge and also the provisions of G.S. 128-6; accordingly, his judicial acts while in office are valid.

**[8]** After having served as a judge *de facto* for over two years, and upon the discovery of his legal infirmity, Judge Beach resigned from office on 31 March 1977. His resignation from office created an actual vacancy in that position. *See Atkins v. Fortner*, 236 N.C. 264, 72 S.E. 2d 594 (1952). Having been defeated in the November 1974 election, plaintiff had no legal right to assume office by virtue of the election. Furthermore, having vacated and surrendered the office to the defendant in 1974 without contesting defendant's right to it, plaintiff had no rights under G.S. 128-7, or under case law, to reassume office. *Cf. Williams v. Somers*, 18 N.C. 61 (1834). Hence, upon the resignation of Judge Beach, there was no one legally entitled to hold office by virtue of an election, nor under G.S. 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. Judge Beach's resignation, therefore, created a legal as well as an actual vacancy in office under Article IV, Section 19, of the North Carolina Constitution. When such vacancy occurred, it was the duty of the Governor, under this constitutional provision, to appoint someone to fill the vacancy. The Governor performed his duty by the appointment of L. Oliver Noble to the position of District Court Judge for the Twenty-Fifth Judicial District, and Judge Noble rightfully occupies that position at this time.

Hence, the summary judgment for defendants entered by the trial judge is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. FRANKLIN JUNIOR SAULTS

No. 29

(Filed 17 April 1978)

1. **Arson § 2; Criminal Law § 10.1— accessory before the fact to arson—sufficiency of indictment**

*In a prosecution for accessory before the fact to arson, the trial court did* not err in denying defendant's motion in arrest of judgment made on the ground that the bill of indictment failed to charge an essential element of the common law crime of arson, to wit, that the burning was done maliciously, since maliciousness is not an element of the crime of accessory before the fact and it was therefore not necessary to allege it in the indictment.

2. **Criminal Law § 113.1— jury instructions—"the evidence shows"—no error**

In a prosecution for accessory before the fact to arson, the trial court did not err in instructing the jury that "the evidence shows that Jackie Lee Parker was an accomplice," since the trial judge was careful to leave conclusions regarding the credibility of the evidence to the jury, and the judge did not lessen the State's burden of establishing beyond a reasonable doubt every element of the crime.

3. **Criminal Law § 117.4— principal called accomplice by court—instruction to scrutinize testimony—no error**

Though a person named by the trial judge as an accomplice was in fact the principal perpetrator of the offense of arson to which defendant was allegedly an accessory, the court's error, if any, was harmless, for the instructions showed that the intent of the judge's charge was to inform the jury that the person named had an interest in the outcome of the case and to urge them to examine and scrutinize the content of his testimony.

APPEAL by defendant from *Howell, J.*, at the 18 July 1977 Regular Criminal Session, MITCHELL Superior Court.

Defendant was tried and convicted of accessory before the fact to arson and was sentenced to life imprisonment. He appealed to this Court pursuant to G.S. 7A-27(a).

The State's evidence tends to show that on the morning of 29 November 1975 the defendant met with Jacky Lee Parker and told Parker that he wanted him to set a particular house on fire. Defendant then led Parker to the home of Ola Mae Yelton in the Glen Ayre Community, Mitchell County. Defendant gave Parker $20, a siphon hose, gloves and plastic containers. That evening, around 11:00 p.m., Parker drove with Judy and Doris Hoilman to a spot near the Yelton home. He walked up a trail to the home,

poured a gallon of gasoline on and about the front porch of the house, and set the porch afire. At the time the house was occupied by Ola Yelton, her son, Ballard, and her son, J. L., and his wife. Mrs. Yelton's sons extinguished the fire after the home was evacuated. One end of the porch was badly burned from the ground up, and the front door was charred. A week or two after the crime defendant again met with Parker and gave him approximately $100.

The defendant testified that he did not know Jacky Parker, that he had never paid him any money, and that he had never asked him to set fire to anyone's home.

Both defendant and defendant's wife testified that the defendant remained at home on 29 November 1975.

*Attorney General Rufus L. Edmisten by Associate Attorney Douglas A. Johnston for the State.*

*Bruce B. Briggs and Lloyd Hise, Jr. for defendant appellant.*

MOORE, Justice.

Defendant's conviction of accessory before the fact to arson is based upon the following bill of indictment:

> "[T]hat on or about the 29th day of November, 1975, in Mitchell County, Franklin Junior Saults unlawfully and willfully did feloniously be and become an accessory before the fact to the wanton and willful burning of the inhabited dwelling of Ola Mae Yelton, located in the Glen Ayre Community of Mitchell County, said dwelling then and there being actually occupied by the said Ola Mae Yelton. The Defendant committed said offense by counseling, procuring, and commanding Jacky Lee Parker to commit a felony, to wit; arson, and in confirmation of said counseling and procuring and commanding of the said Jacky Lee Parker, he, the said Jacky Lee Parker, on or about the 29th day of November, 1975, did unlawfully, willfully, wantonly, and feloniously burn the inhabited dwelling of Ola Mae Yelton, located in the Glen Ayre Community of Mitchell County, said dwelling then and there being actually occupied by Ola Mae Yelton, after he, the said Jacky Lee Parker, had been paid the sum of $20.00 in money

by the Defendant, Franklin Junior Saults, on the same day, to commit the felony of arson. . . ."

**[1]** After verdict, but before sentence was imposed, defendant filed a motion in arrest of judgment for that "the Bill of Indictment does not charge an essential element of the common law crime of arson in that it does not allege that the burning was done or caused maliciously and therefore is fatally defective."

G.S. 15A-924 codifies the requirements of a criminal pleading. A criminal pleading must contain, *inter alia*:

> "(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. . . ."

In *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953), in considering the validity of a bill of indictment, Parker, J. (later C.J.), stated:

> "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. [Citations omitted.]"

While it is true, as defendant contends, that an indictment for arson must charge that the burning be done or caused maliciously, *State v. Long*, 243 N.C. 393, 90 S.E. 2d 739 (1956), the fact remains that the indictment in the present case is not for arson, but rather charges defendant as being an accessory before the fact to arson. By statute, G.S. 14-5, the facts which formerly had been called "accessory before the fact" are made a substan-

tive felony. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967). To justify the conviction of one as an accessory before the fact, three elements must concur, namely, that (1) defendant counseled, procured, commanded, or encouraged the principal to commit the crime, (2) defendant was not present when the crime was committed, and (3) the principal committed the crime. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Maliciousness not being an element of the crime of accessory before the fact, it is not necessary to allege it in the indictment.

A similar situation was considered by this Court in *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976). In that case, a bill of indictment charged that the defendant "feloniously and burglariously broke and entered the dwelling house occupied by Susan Brogden 'with intent to kidnap the said Susan Brogden.' " There, Chief Justice Sharp, speaking for the Court, said: ". . . The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering. . . . However the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. It is enough to state the offense generally and to designate it by name. *See also* 12 C.J.S. *Burglary* § 32 (1938). Under these rules the burglary indictment here was clearly sufficient."

In the case at bar the indictment charged that defendant was an accessory before the fact to the willful and wanton burning of the inhabited dwelling of Ola Mae Yelton, and further sets out specifically the facts which made defendant an accessory before the fact, using the words of G.S. 14-5; that is, that defendant committed said offense by "counseling, procuring and commanding Jacky Lee Parker to commit a felony; to wit, arson," and that as a result Parker did unlawfully, willfully, wantonly, and feloniously burn the inhabited dwelling of Ola Mae Yelton after he had been paid the sum of $20 by defendant. Such allegations were sufficient to put the defendant on notice that he was to be tried as an accessory before the fact to the crime of *arson*. The word "arson" has a definite legal meaning. *Cf. State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). Since the indictment alleges that defendant procured Parker to commit arson and to burn the house of *another, viz*, Ola Mae Yelton, defendant could not have been led

to believe, as he contends, that he was being charged with accessory before the fact to the statutory offense set forth in G.S. 14-65, for the gravamen of that offense is the fraudulent burning of a house occupied by *the defendant himself.*

We believe, therefore, that this indictment charged the offense of accessory before the fact to arson with sufficient certainty to identify the offense; to protect the accused from being twice put in jeopardy for the same offense; to enable the accused to prepare for trial, and to enable the court, upon conviction, to pronounce sentence. Hence, we hold that the trial court did not err in overruling defendant's motion to arrest judgment. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Greer, supra.*

**[2]** Defendant also insists the court erred in instructing the jury that "the evidence shows that Jackie Lee Parker was an accomplice." The defendant contends that, by so stating, the court assumed a fact that was controverted by the defendant's plea of not guilty, namely, that the crime of arson was committed. In support of this argument, defendant cites *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99 (1958). In that case, defendant was charged with operating a motor vehicle under the influence of intoxicating liquor. The State had the burden of showing that defendant operated a motor vehicle on a public highway while under the influence of intoxicating liquor. The trial judge in that case stated: "Now in this case the defendant Swaringen was the driver of the vehicle. . . ." This clearly relieved the jury of finding one of the essential elements of the crime charged—that defendant was driving. In the present case we have an entirely different situation. After recapitulating the evidence and just before stating that portion of the charge to which defendant assigns error, the trial judge stated:

> ". . . Again, ladies and gentlemen of the jury, that is just a portion of what some of the evidence for the Defendant tends to show. What, if anything, it shows, is for you and you alone to say and determine.
>
> "The evidence has not been stated by me except to the extent necessary to explain the application of the law thereto, and I give no opinion whether a fact is fully or sufficiently proven, that being your true office and province. It is your duty to consider all evidence whether or not mentioned

by me using your own recollection of the evidence and ignoring any statement or testimony which I have stricken or excluded.

"[Now, ladies and gentlemen of the jury, in this case there is evidence which shows that the witness, Jackie Parker, was an accomplice in the commission of the crime charged in this case.]"

The trial judge then continued:

"An accomplice is a person who joins 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 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. [Now, the evidence shows that Jackie Lee Parker was an accomplice.]

"Therefore, I instruct you that you should examine every part of his testimony with the greatest care and caution. 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."

(Bracketed portions indicate those parts of the charge objected to by defendant.)

Unlike the instruction in Swaringen, *supra*, the trial judge in present case does not affirmatively state that Jacky Lee Parker was an accomplice, nor that Parker committed arson. Instead, the judge said that *the evidence shows* that Parker was an accomplice. As can be seen from the instruction, the trial judge was careful to leave conclusions regarding the credibility of the evidence to the jury. Thus, contrary to defendant's contentions, the trial judge did not lessen the State's burden of establishing beyond a reasonable doubt every element of the crime. Whether or not Parker actually did set fire to the Yelton residence was a question left for jury determination. See *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556 (1944).

**[3]** Defendant further objects that, by calling Parker an "accomplice" when he was in fact a principal, the trial judge lessened the degree of Parker's participation in the crime.

An accomplice "is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact. The generally accepted test as to whether a witness is an 'accomplice' is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony. [Citations omitted.]" *State v. Bailey*, 254 N.C. 380, 387, 119 S.E. 2d 165, 171 (1961). *See State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975).

Though Parker was not technically an accomplice to the substantive offense for which defendant was charged, namely, accessory before the fact to arson, he can be considered an accomplice to the crime of arson itself, being the principal perpetrator of the offense. *State v. White, supra; State v. Bailey, supra.* The error, if any, is harmless, for the instructions show that the intent of the judge's charge was to inform the jury that Parker had an interest in the outcome of the case and to urge them to examine and scrutinize the content of his testimony. Absent request, the trial judge was under no duty to instruct the jury with respect to Parker's testimony. *State v. Bailey, supra.* However, it was within his discretion to do so without request, and the instruction so given in this case was in substantial accord with our cases. *State v. Bailey, supra; State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Smith*, 267 N.C. 659, 148 S.E. 2d 573 (1966). This could only have worked to the benefit of defendant. This assignment is overruled.

Defendant's final assignment of error, *viz*, whether the trial court erred in denying defendant's motion for nonsuit, was not argued in his brief. ". . . Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. . . ." Rule 28(a), Rules of Appellate Procedure. We have, however, reviewed the record, and hold that there was sufficient evidence of defendant's guilt to warrant submission of the case to the jury.

Due to the severity of the sentence imposed, we have searched the record for errors other than those assigned and have found none. In the trial we find no error.

No error.

STATE OF NORTH CAROLINA v. JAMES WILLIAM PAGANO

No. 34

(Filed 17 April 1978)

1. **Criminal Law § 113.1— inaccuracy in recapitulating evidence—necessity for objection at trial**

An inaccuracy in the court's recapitulation of the testimony of a witness will not be considered on appeal where it was not called to the attention of the court before the jury retired so as to afford the court an opportunity to make a correction.

2. **Criminal Law §§ 75, 75.11— in-custody statements—waiver of counsel—statement not incriminating per se**

The evidence on voir dire supported the court's finding that defendant voluntarily and knowingly waived his right to counsel before making an in-custody statement to an officer, and the fact that defendant changed his mind during the interrogation and requested counsel, at which time the interrogation ceased and counsel was appointed, does not show that the waiver was not freely and voluntarily given. Furthermore, the admission of the statement was not erroneous in any event since it was not incriminating per se but could only have prejudiced defendant through its inherent implausibility.

3. **Criminal Law § 5— insanity—constitutionality of M'Naghten Rule**

The established test of insanity as a defense to a criminal charge under the law of this State, known as the M'Naghten Rule, does not violate the due process clause of the Fourteenth Amendment to the U. S. Constitution.

4. **Criminal Law §§ 5, 112.6— defense of insanity—burden of proof—instructions**

The trial judge properly placed upon the defendant the burden of proof on the question of his insanity.

APPEAL by defendant from *Webb, J.*, at the 21 August 1977 Criminal Session of NEW HANOVER.

Under indictments, each proper in form, the defendant was charged with and convicted of first degree burglary and first degree rape. He was sentenced on each count to life imprisonment, the sentences to run concurrently, the court recommending that the defendant be given psychiatric examination and treatment in the prison system.

The evidence for the State, uncontroverted except by the defendant's plea of not guilty, was ample to support the verdict as to each offense, being to the effect that, at 4:30 a.m., on 12 July 1977, a man broke and entered the home of the victim, wherein

she and her two small children were sleeping, with the intent to commit larceny and rape and did commit rape upon her with the use of a knife, and was also ample to identify the defendant as the perpetrator of these offenses. It is not necessary to the understanding of this appeal to recount the details of this evidence.

The defendant did not testify and all of his evidence was designed to establish his defense of insanity.

The defendant's mother testified to a long series of activities of the defendant, since infancy, indicating his violent temper and emotional instability and leading her to the opinion that he did not know right from wrong. On cross-examination, however, when asked if she was saying he did not know it was wrong to commit rape and to break into a house, she replied, as to each such inquiry, "No, I am not saying that."

Dr. Robert Weinstein, an expert in the field of psychiatry, and a witness for the defendant, testified that he examined the defendant and this examination led him to the conclusion that the defendant suffers from a mental disease or defect which he denominated, "borderline personality-organization." This, he said, is a medically recognized disease or defect of the mind which he characterized as "a stable instability." His examination of the defendant led him to the opinion that the defendant had been a "misfit" all of his life and never able to get along with people and, when his feelings were hurt or he became offended, he would become quite angry and tend to strike back at society in general. In the opinion of Dr. Weinstein, the defendant "knew while he was raping the person that what he was doing was wrong, but he didn't want to stop." The doctor testified he was not sure whether the defendant could or could not stop. In the opinion of Dr. Weinstein, the defendant "knew the quality of his actions and the nature of them, and he knew right from wrong." Specifically, the doctor testified that the defendant knew burglary and rape were wrong.

By stipulation, the defendant introduced in evidence a report of his examination and treatment, when he was 16 years of age, at the Portsmouth, Virginia, Psychiatric Center. This report stated that the defendant's "grip on reality" was shaky and, while he did not appear to be "blatantly psychotic or retarded," there were

definite indications of an incipient psychosis, so that the defendant then needed long-term therapy in a "structured institution." The report characterized him as "most difficult to manage at times," so that to confront him or make a demand upon him "would provoke a very stubborn or hostile or physically inappropriate reaction."

In rebuttal, the State offered the testimony of Dr. Robert Rollins, a member of the staff of Dorothea Dix Hospital and a specialist in psychiatry. Dr. Rollins testified, "As a result of my examination, I formed the opinion that James Pagano understood the nature and quality of his actions and knew right from wrong."

The court instructed the jury first to consider the following issue:

> "Was James William Pagano at the time of the alleged burglary and rape, by reason of a defect of reason or disease of the mind, incapable of knowing the nature and quality of the acts which he is charged with having committed, or, if he did know this, was he, by reason of such defect or disease, incapable of distinguishing between right and wrong in relation to such act?"

The jury answered this issue, "no," thus finding the defendant not insane, and then found him guilty of the two offenses charged. The defendant excepted to the submission of the above issue.

The defendant also excepted to that portion of the following instruction which is here enclosed in parentheses:

> "(I do charge you that a mental disease or defect is not sufficient. The disease or defect must have so impaired the defendant's mental capacity that he either did not know the nature and quality of his act or did not know it was wrong.) On the other hand, it need not be shown that the defendant lacked mental capacity with regard to all matters. Now, a person may be sane on every subject but one and yet, if his mental disease or defect with reference to that one subject rendered him unable to know the nature and quality of the act with which he is charged, or to know that the act was wrong, his defense is complete; that is, that his defense of insanity is complete."

*Rufus L. Edmisten, Attorney General, by David S. Crump, Special Deputy Attorney General, and Tiare Smiley Farris, Associate Attorney, for the State.*

*William G. Hussman, Jr., for defendant.*

LAKE, Justice.

**[1]** The defendant assigns as error that, in its review of the evidence in the charge to the jury, the trial court said the defendant's mother testified "that she didn't think he knew the difference between right and wrong, although she said he did know it was wrong to rape a woman." The record shows that this witness was asked, "Are you saying he didn't know it was wrong to rape?" The answer of the witness was: "No, I am not saying that. He has been told over the years that it was wrong to do these things and he would ask me why."

There is no indication in the record that this inaccuracy in the recapitulation of the testimony of this witness was called to the attention of the court before the jury retired so as to afford the court an opportunity to make a correction. In *State v. Virgil*, 276 N.C. 217, 230, 172 S.E. 2d 28 (1970), this Court, speaking through Justice Huskins, said, "[I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." To the same effect, *see*: *State v. Dietz*, 289 N.C. 488, 500, 223 S.E. 2d 357 (1976); *State v. Hunt*, 289 N.C. 403, 409, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 809 (1976); *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. den.*, 365 U.S. 830 (1961); *State v. Holder*, 252 N.C. 121, 113 S.E. 2d 15 (1960); *State v. Saunders*, 245 N.C. 338, 95 S.E. 2d 876 (1957). This assignment of error is, therefore, overruled.

**[2]** The defendant next contends that the trial court failed to make a finding with respect to whether the defendant voluntarily and knowingly waived his right to counsel before making a statement to the investigating officers, which statement was admitted in evidence. On the contrary, the record shows that the court, after conducting a voir dire examination of the officer in question, made the following findings of fact: "That Mr. Brown [the officer]

fully advised the defendant of his rights to have counsel present at any questioning, and his right to remain silent, and his right to have the State provide an attorney for him if he could not afford one himself.* * * [T]hat Mr. Brown furnished the defendant James William Pagano a form for a written waiver of his rights and Mr. Pagano signed this form, waiving his rights to remain silent, waiving his right to have a lawyer present during any questioning, and a few moments later during the interview * * * Mr. Pagano changed his mind, indicating that he did want an attorney, at which point Mr. Brown stopped questioning him and an attorney was appointed for Mr. Pagano. * * * [T]he defendant freely, voluntarily and understandingly waives his right to remain silent during that period and to have an attorney during that period."

These findings are supported by the uncontradicted evidence of the officer on the voir dire and are, therefore, conclusive. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. den., 386 U.S. 911 (1967). The defendant's contention that the fact that he soon changed his mind and requested counsel shows that the waiver was not freely and voluntarily given is without substance.

Furthermore, the statement so made by the defendant to the investigating officer was not per se incriminating. In it he said that he was in South Carolina at the time of the alleged offense and when he went to the home of the victim four nights thereafter, at which time he was arrested by a waiting police officer, he went there at the request of some man he did not know, but who resembled the defendant in appearance, and who paid him $20.00 to go to the victim's house and see if she was at home, the defendant riding to the vicinity of the victim's house in a taxicab. The investigating officer was unable to find a cab driver or anyone else who could corroborate this story. The State's evidence was that he went to the victim's home on the second occasion as a result of a telephone conversation with her, initiated by him, in which the victim, at the suggestion of the investigating police officer, encouraged him to come to her home where the officer was waiting. The defendant's statement, so admitted, could only have prejudiced the defendant through its inherent implausibility. We perceive no error in its admission into evidence which would justify the granting of a new trial. This assignment of error is, therefore, overruled.

**[3]** The defendant's final, and principal, contention is that the established test of insanity as a defense to a criminal charge under the law of this State, known as the M'Naghten Rule, is unconstitutional in that it is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution and that this Court should adopt the test proposed in the so-called "Model Penal Code" of the American Law Institute. Thus, he contends that the above quoted instruction of the trial court to the jury as to the test of insanity was error.

As recently as *State v. Jones*, 293 N.C. 413, 425, 238 S.E. 2d 482 (1977), we have reaffirmed our adherence to the M'Naghten Rule as the test of insanity as a defense to a criminal charge. We there said:

> "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)."

We continue to adhere to the views expressed in those cases concerning this matter.

**[4]** The trial judge properly placed upon the defendant the burden of proof on the question of his insanity. 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, eveyone is presumed to be sane until the contrary is made to appear." In *Patterson v. New York*, 432 U.S. 197, 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

to the Constitution of the United States. We find no error in the above quoted charge of the trial judge with reference to the defense of insanity or in any other portion of his instructions to the jury concerning this matter.

In his brief the defendant asserts that the law of this State, as above stated, is defective, for the reason that it makes the test of insanity to rest upon a single symptom or manifestitation of mental illness and ignores other symptoms of such illness, citing Sobeloff, "Insanity and the Criminal Law: From M'Naghten to Durham, and Beyond," 41 A.B.A.J. 793, 795 (1955). His argument and the authority cited in support thereof rest upon a misconception of the question to be determined in the trial court. The issue, there to be determined, is not whether the defendant has *a* mental disease or defect, but whether he has the *kind or degree* of mental defect which State policy recognizes as giving him immunity to punishment for an act, for which act others are commanded by the law of the State to be punished. This assignment of error is overruled.

No error.

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

COZART v. CHAPIN

No. 53 PC.

Case below: 35 N.C. App. 254.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 April 1978.

FAUCETTE v. GRIFFIN

No. 40 PC.

Case below: 35 N.C. App. 7.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 April 1978.

HUDSPETH v. BUNZEY

No. 56 PC.

Case below: 35 N.C. App. 231.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1978.

PITTS v. PIZZA, INC.

No. 48 PC.

Case below: 35 N.C. App. 270.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 April 1978.

SEARSEY v. CONSTRUCTION CO.

No. 50 PC.

Case below: 35 N.C. App. 78.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

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

STATE v. BERRY

No. 58 PC.

Case below: 35 N.C. App. 128.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

STATE v. CARRINGTON

No. 51 PC.

Case below: 35 N.C. App. 53.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1978.

STATE v. CLEMMONS

No. 70 PC.

Case below: 35 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

STATE v. EPLEE

No. 62 PC.

Case below: 35 N.C. App. 277.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1978.

STATE v. LEE

No. 55 PC.

Case below: 35 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

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

STATE v. McCALL

No. 80 PC.

Case below: 35 N.C. App. 412.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 April 1978.

STATE v. PINYAN

No. 77 PC.

Case below: 35 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1978.

STATE v. SCOTT

No. 60 PC.

Case below: 35 N.C. App. 277.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 March 1978.

STATE v. SHEPPARD

No. 63 PC.

Case below: 35 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

STATE v. SINGS

No. 42 PC.

Case below: 35 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 March 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 March 1978.

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

STATE v. SUMMERLIN

No. 92 PC.

Case below: 35 N.C. App. 522.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 April 1978.

STATE v. WILLIAMS

No. 69 PC.

Case below: 35 N.C. App. 216.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978.

STATE v. WRAY

No. 43 PC.

Case below: 35 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1978.

TAYLOR v. INSURANCE CO.

No. 47 PC.

Case below: 35 N.C. App. 150.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 April 1978.

**In re Hunoval**

IN THE MATTER OF: )
MATHIAS P. HUNOVAL, ) ORDER
ATTORNEY AT LAW )

THE facts giving rise to this order are not in dispute. They were found at an inquiry conducted at the Court's request by the NEW HANOVER Superior Court, *Robert D. Rouse, Jr., Judge* Presiding, on 31 May 1977 and Mr. Hunoval has agreed in writing to their accuracy. They are as follows:

1. One Larry Bernard was tried at the October 1974 Session of New Hanover Superior Court and convicted at that trial of rape, kidnapping, felonious larceny of an automobile, and armed robbery. He was sentenced to death in the rape case and terms of imprisonment were imposed in the remaining cases. He was represented at trial by Jay D. Hockenbury and Mathias P. Hunoval, both of whom were appointed by the court for that purpose.

2. The cases were appealed to the Supreme Court of North Carolina. By order entered 3 October 1974 Mathias P. Hunoval was appointed to perfect and argue the appeal. The appeal was argued by Mr. Hunoval at the Court's Fall Term 1975. The Court found no error in the trial in an opinion filed 7 October 1975 and reported at 288 N.C. 321. Bernard's execution was scheduled for 24 October 1975.

3. On 15 October 1975 Mr. Hunoval on behalf of his client petitioned this Court in writing for a stay of execution on the ground that: "The appellant intends to file a timely petition for writ of certiorari in the Supreme Court of the United States to seek review of his judgment and sentence." In response to this petition the Chief Justice of this Court on 20 October 1975 after reciting that "the defendant through his attorney, having stated his intention to file a petition for writ of certiorari in the United States Supreme Court," ordered that execution of the sentence be stayed.

4. By letter dated 3 December 1975 addressed to the Chief Justice, Mr. Hunoval requested that he be permitted to withdraw as counsel for Bernard. The letter stated that he was dissatisfied with the fee allowed him in prosecuting the appeal. The letter further stated:

"I am not an eleemosynary institution.

. . . .

"Unless an Order is entered by some judicial official in the State of North Carolina to compensate me, on a reasonable basis, for services to be rendered in perfecting Bernard's appeal to the United States Supreme Court, I cannot justify working for nothing or at a rate less than that received by a garage mechanic."

5. Mr. Bert M. Montague, Director of the Administrative Office of the Courts, replied to Mr. Hunoval's request on 15 December 1975 as follows:

"The Chief Justice has received your unusual letter and, after reviewing it with members of the Court, has directed me to respond. The Court regrets your disappointment at the amount of fee allowed. However, the members of the Court are of the opinion that the trial judge's award was quite adequate under all the circumstances. Investigation revealed that a considerable portion of the time you charged was expended because the case had to be returned to you for your failure to comply with the rules. It also appears that when you returned it you filed it in the Court of Appeals. As the Chief Justice has stated in the past, lawyers must be compensated on the basis of a reasonable time for the particular case.

"Your letter contained a request that you be permitted to withdraw as counsel in this case. The Chief Justice has instructed me to advise you that under no circumstances will you be relieved pending the filing of the petition for certiorari to the United States Supreme Court. You sought and were granted a stay of execution in the case upon the condition that you would file the petition for certiorari. In view of the uncertainty about the death penalty pending the decision in the *Fowler* case, the Court feels that counsel in each such case has the duty to file the petition for writ of certiorari to the United States Supreme Court in order to stay execution pending the decision in the *Fowler* case. The Court anticipates that this should and will be done irrespective of

compensation, and it has observed that all other lawyers in similar cases have cheerfully complied.

"If you have not previously filed a petition for certiorari with the United States Supreme Court, you might want to contact Mr. Sidney Eagles in the Attorney General's office. He has worked with a number of other lawyers in similar circumstances and I am sure he will be happy to provide you with a form adequate for the occasion.

"You indicate concern about receiving reasonable compensation from the State of North Carolina for services to be rendered in perfecting the appeal to the United States Supreme Court. We are concerned at present with the petition only, and there is no assurance that you will be prosecuting an appeal. If the petition is granted and you actually perfect the appeal, you will be looking to the Federal court for compensation because the North Carolina General Assembly has not authorized the payment of counsel for representation in the Federal courts."

6. Although Mr. Hunoval prepared a petition for certiorari and a supporting brief to be filed in the Supreme Court of the United States, he never, in fact, filed the petition. He was removed from the case as counsel by Judge Rouse on 19 May 1977 and other counsel was appointed to represent Bernard.

7. Mr. Hunoval refused to file the petition for certiorari in the Supreme Court of the United States on behalf of his client because he understood he would not be compensated for this service.

THIS COURT IS OF THE OPINION THAT:

1. It is the duty of an attorney to represent his client "zealously within the bounds of the law." Canon 7, North Carolina State Bar Code of Professional Responsibility, 283 N.C. 783, 824. (Hereinafter State Bar Code.)

2. Mr. Hunoval had a duty to both his client and this Court to file in the United States Supreme Court an application for writ of certiorari. This duty arises from the facts

that: (a) Mr. Hunoval's client was subject to being executed by virtue of a sentence of death imposed by the trial court and in the imposition of which this Court found no legal or constitutional error; (b) the United States Supreme Court at the time of this Court's ruling had before it for consideration the question of whether the North Carolina law by which Mr. Hunoval's client was sentenced to death was constitutional; (c) Mr. Hunoval obtained a stay of execution of the death sentence from the Chief Justice of this Court upon his representation that an application to the United States Supreme Court for a writ of certiorari to review our decision would be made; (d) Mr. Hunoval then requested and was denied leave to withdraw as counsel in the case; and (e) this Court suggested that Mr. Hunoval proceed to file the application.

3. That there was no provision for Mr. Hunoval to be compensated for filing the application for the writ in no way relieved him of the duty to file it, nor does it mitigate his failure to perform this duty. "[A]n attorney appointed by the court to defend cannot recover compensation from the public for his services in the absence of an enabling statute. The reason is that an attorney, being an officer of the Court . . . takes his office *cum onere*, and one of the burdens of office which custom has recognized is the gratuitous service rendered to a poor person at the suggestion of the court." *State v. Davis*, 270 N.C. 1, 11, 153 S.E. 2d 749, 756 (1967), *cert. denied*, 389 U.S. 828 (1970), quoting 7 Am. Jur. 2d, Attorneys at Law, § 207; *see generally*, Annot., "Right of Attorney Appointed by Court for Indigent Accused to, and Court's Power to Award, Compensation by Public, in Absence of Statute or Court Rule," 21 A.L.R. 3d 819 (1968). "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . ." State Bar Code, *supra* at 793.

4. Mr. Hunoval's refusal to file the application for writ of certiorari constitutes:

a. Dereliction of a clear duty owed to his client and, under the circumstances, this Court;

b. Unprofessional conduct;

c. Misconduct; and

d. Malpractice.

5. This Court has not only the inherent power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct. Canon 3B(3), N.C. Code of Judicial Conduct, 283 N.C. 771, 773. Unprofessional conduct subject to this power and duty includes "misconduct, malpractice, or deficiency in character," *State ex rel. Attorney General v. Herman Woodward Winburn, Attorney*, 206 N.C. 923, 925, 175 S.E. 498, 500 (1934), and "any dereliction of duty except mere negligence or mismanagement." *In re Burton*, 257 N.C. 534, 542, 126 S.E. 2d 581, 587 (1962).

6. Judicial disciplinary action may take the form of an order of disbarment or suspension for a time of the attorney's privilege to practice law. *In re Burton, supra; State ex rel. Attorney General v. Winburn, supra.*

7. Summary judicial disciplinary action is appropriate when the attorney's dereliction occurs in a matter then pending before the court and where the facts underlying the dereliction are not in dispute. *In re Brittain*, 214 N.C. 95, 197 S.E. 705 (1938); *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938); *see also, In re Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 33, *appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972).

8. Mr. Hunoval's dereliction occurred in a matter pending before this Court and the underlying facts constituting the dereliction are not in dispute and have, indeed, been admitted in writing by him.

NOW, THEREFORE, WE ORDER:

1. That the privilege of Mr. Hunoval to practice law in the Appellate Division of the North Carolina General Court of Justice be and it is hereby suspended for a period of twelve (12) months from the date of this order. Pursuant to this suspension neither the Court of Appeals nor this Court shall permit Mr. Hunoval to prosecute any appeal in which the notice of appeal is entered at a trial which begins after Mr. Hunoval has been duly notified of the terms of this order and before the expiration of twelve (12) months from the

date hereof. Mr. Hunoval may, however, continue to prosecute and appear in any appeal in which notice of appeal to the Appellate Division was given at a trial which began before he was so duly notified.

2. That the privilege of Mr. Hunoval to represent by court appointment indigent criminal defendants in the Trial Divisions of the North Carolina General Court of Justice be and it is hereby suspended for a period of twelve (12) months from the date of this order. Pursuant to this suspension no judicial officer of the General Court of Justice shall appoint Mr. Hunoval to represent any indigent criminal defendant after being duly notified of the terms of this order and before the expiration of the period of suspension, nor shall Mr. Hunoval accept any such appointment after he has been duly notified of the terms of this order and before the expiration of the period of suspension. Mr. Hunoval may, however, continue to appear in any case in which the order of appointment was entered at a time when neither the judicial officer nor Mr. Hunoval had been so duly notified.

Done by the Court in Conference this the 26 day of July, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

# APPENDIXES

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AMENDMENT TO RULES
OF APPELLATE PROCEDURE

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AMENDMENTS TO RULES RELATING TO
APPOINTMENT OF COUNSEL FOR
INDIGENT DEFENDANTS

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AMENDMENTS TO RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

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AMENDMENT TO CODE OF
PROFESSIONAL RESPONSIBILITY

## AMENDMENT TO RULES OF APPELLATE PROCEDURE

The second paragraph of Rule 27(c) of the Rules of Appellate Procedure, 287 N.C. 671, 740, shall be amended to read as follows. (New material appears in italics. The sentence now appearing in the rule which reads, "After the appeal is docketed in the appellate division such motions are made to the appellate court where docketed", has been deleted):

> A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. *No extension of time shall be granted by the trial tribunal which, if fully used, would preclude filing the appeal within 150 days from the taking of the appeal. If the appellate division extends the 150-day filing period, any subsequent motion for any extension of time shall be made to the appellate court where the case is to be docketed.* Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

This amendment to Rule 27(c) was adopted by the Court in Conference on 7 March 1978 to become effective immediately upon its adoption. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution of the amendment by mail to the Clerk of Court in each county of the State.

EXUM, J.
For the Court

# AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

## AMENDMENTS TO RULES RELATING TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

The Rules and Regulations of The North Carolina State Bar relating to appointment of counsel for indigent defendants have been amended by the Council of The North Carolina State Bar at its meeting on October 27, 1977 and further consideration was given by the Council at its meetings on January 13, 1978 and April 14, 1978 after advice and consultation with the North Carolina Supreme Court.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article VI, Section 5, g., Article IV, Section 4, Regulations Relating to Appointment of Counsel for Indigent Defendants as Provided by 7A-501 of Chapter 1013 of the Session Laws of 1969, as appear in 268 N.C. 734 and as amended in 275 N.C. 708, 710 be and the same are hereby amended by adding the following sections:

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

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 22nd day of May, 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 are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 26th day of May, 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 26 day of May, 1978.

EXUM, J.
For the Court

## AMENDMENTS TO RULES 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 April 14, 1978.

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 865 and as amended in 253 NC 820 and 288 NC 743 is hereby amended by inserting the italicized portion of section 14 (4); by inserting the italicized portion of section 14 (9); by adding the italicized portion designated (9.1) to section 14; by adding the italicized portion of section 14 (11); by inserting and adding the italicized portions of section 14 (17); by inserting the italicized portion of section 14 (18); and by inserting and adding the italicized portions of section 23 (A) and (1) to read as follows:

**§ 14. Formal Hearing.**

( 4) Within seven days of *return of service* of a complaint, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant.

**§ 14. Formal Hearing.**

( 9) At the discretion of the *Chairman of the* Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in

addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(a) the simplification of the issues.

(b) the exchange and acceptance of service of exhibits proposed to be offered in evidence.

(c) the obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(d) the limitation of the number of witnesses.

(e) the discovery or production of data.

(f) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

*(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.*

**§ 14. Formal Hearing.**

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; *provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.*

**§ 14. Formal Hearing.**

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the superior court of the State at the time of the hearing. The *Chairman of the* Hearing Committee shall rule on the admissibility of evidence, *subject to the right of any member of the Hearing Com-*

*mittee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.*

**§ 14. Formal Hearing.**

(18) If the Hearing Committee finds that the charges of misconduct are not established by the greater weight of the evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by the greater weight of the evidence, the Hearing Committee shall enter an order for discipline. In either instance the Committee shall file a separate *order* which shall include the Committee's findings of fact and conclusions of law *and which shall be accompanied by* a certified transcript of the testimony, all pleadings, exhibits and briefs.

**§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.**

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, *one of* the following actions shall be taken:

(1) reprimand. A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, *and shall be considered confidential.*

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 24th day of May, 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 are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of June, 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 6th day of June, 1978.

EXUM, J.
For the Court

## AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on April 14, 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; 251 NC 857; 253 NC 819; 261 NC 784; 275 NC 702; 281 NC 770; and 283 NC 783 as amended by the Supreme Court of North Carolina, 293 NC 767, and as appears in Vol. 25, No. 1 of THE NORTH CAROLINA STATE BAR QUARTERLY be and the same is hereby amended by adding the following section (5) after "following:" and before the word "scholastic":

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) (5) "one or more of the practice area designations or descriptions regularly used by the reputable law list or directory;"

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 and Regulations of The North Carolina State Bar has 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 amendment 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 10th day of May, 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 on April 14, 1978, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of June, 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 adopted on April 14, 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 6th day of June, 1978.

EXUM, J.
For the Court

# ANALYTICAL INDEX

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# WORD AND PHRASE INDEX

# ANALYTICAL INDEX

**Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N.C. Index 3d.**

## TOPICS COVERED IN THIS INDEX

## ACCOUNTANTS

**§ 1. Generally**

Rule of defendant Board of CPA Examiners that an applicant for certification as a CPA have two years' experience under the tutelage of an accountant engaged in the public practice of accountancy is constitutional. *Duggins v. Board of Examiners*, 120.

## ANIMALS

**§ 7. Criminal Sanctions for Killing or Cruelty to Animals**

Indictments charging defendants with possessing on 16 November 1974 a dead game animal, a bear, which was taken during closed season in Tyrrell County in violation of Chapter 103 of the 1973 Sessions Laws and G.S. 113-103 did not charge a crime. *S. v. Cole*, 304.

## APPEAL AND ERROR

**§ 6.2. Finality as Bearing on Appealability**

An order setting aside without prejudice a summary judgment on the ground of procedural irregularity is an interlocutory order which is not immediately appealable. *Waters v. Personnel, Inc.*, 200.

**§ 9. Moot Questions**

Order of the Commissioner of Insurance revising automobile collision insurance rates is dismissed as moot. *Comr. of Insurance v. Insurance Corp.*, 360.

## ARBITRATION AND AWARD

**§ 7. Conclusiveness of Award and Award as Bar to Action**

Defendants were bound by an arbitration award fixing the amount of plaintiff contractor's laborers' and materialmen's lien on defendant owner's motel, though defendants were not parties to the arbitration proceedings and the earlier civil action by plaintiff for the confirmation of the arbitration award, since defendants did have an opportunity to be heard in the present civil action to enforce the lien. *Conner v. Spanish Inns*, 661.

## ARSON

**§ 2. Indictment and Burden of Proof**

Indictment charging defendant with being an accessory before the fact to arson was not insufficient because it failed to charge maliciousness. *S. v. Saults*, 722.

## BILLS AND NOTES

**§ 18. Parties and Pleadings**

Agents for collection of a promissory note were not the real parties in interest in the case. *Booker v. Everhart*, 146.

The payee of a promissory note was a necessary party to an action on the note brought by assignors against the maker and guarantors. *Ibid.*

**§ 20. Presumptions and Burden of Proof, Sufficiency of Evidence**

In an action to recover on a promissory note, trial court erred in refusing to allow defendant guarantors to explain the maker's absence. *Booker v. Everhart*, 146.

## BILLS OF DISCOVERY

**§ 6. Discovery in Criminal Cases**

Trial court erred in summarily denying defendant's motion that the district attorney be required to disclose a statement given to police officers by a witness who testified at the trial, but such error was harmless. *S. v. Tate*, 189.

Evidence not disclosed to an adversary in accordance with a discovery order may be excluded in the trial court's discretion. *S. v. Braxton*, 446.

Trial court's error in denying defendant's motion to inspect a rape victim's pretrial statement was harmless. *S. v. McLean*, 623.

Defendant was not entitled to a mistrial where the district attorney learned of a statement made by defendant's accomplice during trial and the district attorney immediately furnished defense counsel with a copy of the additional evidence. *S. v. Martin*, 702.

## BURGLARY AND UNLAWFUL BREAKINGS

**§ 7. Instructions on Lesser Included Offenses**

There was no conflict in the evidence in a burglary case with reference to the time of defendant's intrusion into the victim's house which required submission of nonburglarious or felonious breaking or entering. *S. v. Garrison*, 270.

## CONSPIRACY

**§ 3. Nature and Elements of Criminal Conspiracy**

A person may lawfully be convicted for both a conspiracy to murder and for being an accessory before the fact of the same murder. *S. v. Looney*, 1.

**§ 5.1. Admissibility of Acts and Statements of Coconspirators**

The State's election not to try a conspiracy indictment naming a third person and defendant as conspirators did not bind the State to refrain from offering evidence of the third person's involvement in order to convict defendant. *S. v. Richards*, 474.

## CONSTITUTIONAL LAW

**§ 30. Discovery; Access to Evidence and Other Fruits of Investigation**

Trial court erred in summarily denying defendant's motion that the district attorney be required to disclose a statement given to police officers by a witness who testified at the trial, but such error was harmless. *S. v. Tate*, 189.

Trial court did not err in refusing to strike testimony by a witness that defendant had told her he had shot a 17-year-old boy that same morning, although the State did not disclose defendant's statement pursuant to a pretrial discovery order. *S. v. Hill*, 320.

Trial court's error in denying defendant's motion to inspect a rape victim's pretrial statement was harmless. *S. v. McLean*, 623.

**§ 40. Right to Counsel**

Trial court erred in failing to inform defendant of his right to counsel and to afford defendant the opportunity to exercise that right where defendant appeared at arraignment without counsel. *S. v. Sanders*, 337.

## CONSTITUTIONAL LAW — Continued

**§ 43. What is Critical Stage of Proceedings**

Defendant was not entitled to counsel at a lineup where he had not yet been arrested and had expressly waived his right to counsel. *S. v. Watson*, 159.

**§ 48. Effective Assistance of Counsel**

Defendant was not denied the effective assistance of counsel in his trial for rape because of the failure of his trial counsel to make additional objections or to make motions for judgment of nonsuit or other formal motions. *S. v. Hensley*, 231.

Defendant was not prejudiced by failure of his original court-appointed counsel to perfect his appeal to the Supreme Court where the Court allowed defendant's petition for certiorari filed by his present court-appointed counsel and fully reviewed the case. *Ibid.*

Defendant was not denied the effective assistance of counsel because his counsel lost 90% of the hearing in his left ear during the course of the trial. *S. v. Richards*, 474.

**§ 51. Delays Between Offense and Arraignment**

Defendant was not denied his right to a speedy trial where four years elapsed between the time of the offense and defendant's trial. *S. v. Tindall*, 689.

**§ 52. Requirement that Delay be Negligent or Wilful and Prejudicial**

Where defendant carries the burden of proof by offering evidence which tends to show prima facie that the delay in his trial is due to the wilful neglect of the prosecution, the State should offer evidence fully explaining the reasons for the delay and sufficient to rebut the prima facie showing or risk dismissal. *S. v. McKoy*, 134.

Defendant was denied his right to a speedy trial where there was a 22 month delay between his arrest and trial and delay of 10 of those months was due to the wilful neglect of the prosecution. *Ibid.*

**§ 68. Right to Call Witnesses**

The trial judge acted properly in denying defendant's motion for G.S. 15A-803 material witness orders for residents of N.Y. *S. v. Tindall*, 689.

**§ 77. Waiver**

Defendant's contention that at the time he made an admission he was represented by counsel and his attorney's presence was therefore a prerequisite to a valid waiver of his rights to remain silent and to have counsel present during any custodial interrogation is without merit. *S. v. Smith*, 465.

**§ 79. Sentence Within Maximum Fixed by Statutes**

Sentence of life imprisonment for armed robbery was not cruel and unusual punishment. *S. v. Watson*, 159.

## CONTEMPT OF COURT

**§ 8. Appeal and Review**

Plaintiff was entitled to appeal an order adjudging her in contempt for failure to obey a child custody order. *Clark v. Clark*, 554.

## CONTRACTS

**§ 14.2. Denial of Recovery to Third Party**

The Ports Authority was not a third party beneficiary of a contract between a general contractor and a roofing subcontractor. *Ports Authority v. Roofing Co.*, 73.

**§ 25.1. Sufficiency of Particular Allegations**

Where plaintiff alleged that defendant general contractor improperly installed roofing, the only basis for recovery against defendant alleged in the complaint was breach of contract. *Ports Authority v. Roofing Co.*, 73.

## CRIMINAL LAW

**§ 5. Mental Capacity in General; Insanity**

Defendant's contention that the trial judge erred by fully instructing on the commitment procedures applicable to a defendant acquitted by reason of insanity when defendant only requested that the court instruct on the existence of such procedures is untenable. *S. v. Bundridge*, 45.

The M'Naghten Rule as a test of insanity as a defense to a criminal charge is constitutional. *S. v. Pagano*, 729.

**§ 5.1. Determination of Issue of Insanity**

An order entered by the trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible on the question of his insanity, but the trial court's exclusion of this evidence was not prejudicial error. *S. v. Bundridge*, 45.

**§ 10. Accessory Before the Fact**

A person may lawfully be convicted for conspiracy to murder and for being an accessory before the fact of the same murder. *S. v. Looney*, 1.

**§ 15. Venue**

Trial court properly granted the State's motion for change of venue made on defendant's behalf. *S. v. Hood*, 30.

**§ 16.1 Exclusive and Concurrent Jurisdiction of Superior Court**

A charge in indictments for the misdemeanor of possessing a dead game animal, a bear, which was taken in closed season in Tyrrell County was initiated by presentment, although the presentment charged a different offense, since the language of the presentment and that contained in the indictments dealt with the same subject matter; therefore, the Superior Court had original jurisdiction of the misdemeanor charge. *S. v. Cole*, 304.

**§ 21.1. Preliminary Hearing**

G.S. 15A-606(a) requires a probable cause hearing only in those situations in which no indictment has been returned by a grand jury. *S. v. Lester*, 220.

Defendant's contention that equal protection is violated where a state affords preliminary hearings to some criminal defendants but not to others is without merit. *Ibid.*

**§ 26.5. Same Acts or Transaction Violating Different Statutes**

There was no violation of the constitutional provision against double jeopardy in the conviction and punishment of defendant for two crimes against nature and two crimes of kidnapping committed against two women during the same episode of events. *S. v. Fulcher*, 503.

## CRIMINAL LAW — Continued

**§ 33.1. Evidence as to Commission of Offense and Identity of Perpetrator**

In a first degree rape prosecution where the evidence tended to show that the victim was abducted by four men from a parking lot, transported over some distance to an abandoned house and raped, evidence of each rapist's acts was relevant and admissible. *S. v. Braxton*, 446.

**§ 34.5. Admissibility of Other Offenses to Show Identity of Defendant**

Defendant charged with first degree murder was not prejudiced by an officer's testimony concerning the physical condition of two assault victims when he questioned them at the hospital although defendant had stipulated as to the facts relating to defendant's commission of the assaults. *S. v. Hill*, 320.

**§ 34.7. Admissibility of Other Offenses to Show Intent**

Testimony by an assault victim that on an earlier occasion defendant came to her house with a pistol, forced her to have sexual relations with him and threatened to kill her if she called police was relevant as tending to prove defendant's intent at the time he assaulted the victim. *S. v. Tate*, 189.

Evidence of defendant's assault with intent to commit rape upon one victim was admissible in cases charging defendant with kidnapping and raping a second victim three hours later to show defendant's intent and plan to commit the crimes. *S. v. Greene*, 418.

**§ 42.2. Sufficiency of Foundation for Admission of Article Found at Crime Scene**

A butcher knife was sufficiently identified to permit its admission in a homicide case. *S. v. Thomas*, 105.

**§ 42.3. Clothing**

In an armed robbery and assault prosecution, the trial court properly allowed into evidence bloodstained clothing taken from defendant's residence. *S. v. Bundridge*, 45.

**§ 43.1. Photographs of Defendant**

Trial court properly allowed into evidence a photograph of defendant and four other people to show the exact set of photographs from which the two victims made their pre-arrest identification of their assailant. *S. v. Fulcher*, 503.

**§ 46.1. Competency and Sufficiency of Evidence of Flight**

A highway patrolman's testimony that defendant shot him numerous times when he stopped defendant for speeding on the morning after commission of the crimes for which defendant was on trial was competent to show flight by defendant and was not rendered inadmissible by defendant's offer to stipulate the facts of shooting. *S. v. Jones*, 642.

**§ 50.1. Admissibility of Opinion Testimony**

Testimony by a witness who had not observed the robbery that he telephoned the police anonymously and told them that defendant and two others had committed the robbery constituted inadmissible opinion evidence, but admission of the testimony was harmless. *S. v. Watson*, 159.

**§ 52. Examination of Experts**

The admission of a medical expert's opinion testimony that an alleged rape victim had been penetrated by a male organ was not prejudicial error although the State failed to lay a proper foundation for the opinion. *S. v. Hensley*, 231.

**CRIMINAL LAW — Continued**

**§ 57. Evidence in Regard to Firearms**

Defendant was not prejudiced by testimony of an expert in firearms identification that each gun leaves its individual characteristics peculiar to that weapon although the jury should have been informed that the testimony was only the opinion of the witness. *S. v. Hill*, 320.

A witness could properly express an opinion that damage to the inside of a car was caused by a bullet where defendant never questioned the witness's qualifications. *S. v. Braxton*, 446.

Trial court properly allowed a ballistics expert to give his opinion that a bullet was fired from defendant's pistol and could not have been fired from any other weapon. *S. v. Alston*, 577.

**§ 60.4. Testimony of Nonexpert**

Defendant was not prejudiced by testimony of a nonexpert identifying a fingerprint found on a cash register as belonging to deceased. *S. v. Hill*, 320.

**§ 65. Evidence as to Emotional State**

A witness was properly allowed to testify that a person's eyes "lit up," that is, "showed like he knew the man." *S. v. Looney*, 1.

**§ 66.1. Competency of Identification; Opportunity for Observation**

A witness was properly allowed to make an in-court identification of defendant where she observed defendant at the crime scene for 30 or 40 minutes, though defendant had on a ski mask, and the witness subsequently observed defendant when he removed the mask. *S. v. Davis*, 397.

A rape victim had sufficient opportunity to observe defendant at the crime scene to permit her in-court identification of him. *S. v. Braxton*, 446.

**§ 66.3. Pretrial Lineup**

It was unnecessary for police to follow the procedures provided in the Criminal Procedures Act relating to involuntary detention for nontestimonial identification where defendant voluntarily participated in a lineup. *S. v. Watson*, 159.

**§ 66.5. Right to Counsel at Lineup; Waiver of Counsel**

Defendant was not entitled to counsel at a lineup where he had not yet been arrested and had expressly waived his right to counsel. *S. v. Watson*, 159.

**§ 66.6. Suggestiveness of Lineup**

A lineup was not impermissibly suggestive because a robbery victim was instructed to view the lineup a second time to be absolutely sure he had picked the right person. *S. v. Watson*, 159.

**§ 66.9. Suggestiveness of Photographic Procedure**

In-court identification of defendant was not tainted by a pretrial photographic identification procedure. *S. v. Bundridge*, 45.

There was no inherent suggestiveness in a pretrial photographic procedure where only six of the 14 photographs used depicted men with grayish hair similar to defendant's and only the two photographs of defendant did not show a police department name plate. *S. v. Davis*, 397.

**CRIMINAL LAW — Continued**

**§ 66.12. Confrontation in Courtroom**

A witness's subsequent absolute confirmation of her zarlier photographic identification of defendant was not tainted because it occurred while defendant was in the courtroom during the preliminary hearing. *S. v. Davis*, 397.

**§ 66.18 When Voir Dire Required to Determine Admissibility of In-Court Identification**

Even if one defendant's general objection with no request for a voir dire was sufficient to require the court to conduct such an examination to determine the admissibility of identification testimony, the failure to conduct such voir dire was harmless. *S. v. Braxton*, 446.

**§ 69. Telephone Conversations**

There was sufficient circumstantial evidence to identify a telephone caller so as to permit a murder victim's wife to testify as to telephone conversations with the caller. *S. v. Richards*, 474.

**§ 73.1. Admission of Hearsay Statement**

A search warrant and its affidavit are not admissible in evidence because the statements in the affidavit are hearsay which deprives a defendant of his right of confrontation and cross-examination. *S. v. Martin*, 702.

**§ 73.2. Statements Not Within Hearsay Rule**

A witness's testimony as to what he had told police officers when they first questioned him was not inadmissible as hearsay where the testimony explained his action in originally making a false statement to the police. *S. v. Hampton*, 242.

**§ 73.4. Spontaneous Utterances**

Trial court in a first degree murder case properly admitted into evidence deceased's spontaneous statement to a witness who questioned him that he had been shot by a certain person. *S. v. Johnson*, 288.

Assault victim's statement, "That's Bill Chapman. He's going to kill us" was competent as a spontaneous declaration and as part of the res gestae. *S. v. Chapman*, 407.

A witness's testimony that immediately after a shooting defendant's sister-in-law "couldn't talk" but just sat there in the car screaming was competent as a narrative of observed conditions substantially contemporaneous with the shooting. *S. v. McKinney*, 432.

**§ 74.1. Divisibility of Confession**

Defendant's contention that his repudiation of his statement two hours after he gave it to police was such an integral part of the original statement as to require the admission of the repudiation along with the confession is without merit. *S. v. Smith*, 365.

**§ 74.3. Competency of Confession by, or Implicating, Codefendant**

A statement made by one defendant which had been edited to comply with the rule of Bruton v. U. S., 391 U.S. 123, by deleting references to other defendants was not inadmissible because it was not the complete statement originally signed by defendant. *S. v. Braxton*, 446.

**CRIMINAL LAW — Continued**

**§ 75. Admissibility of Confession in General**

Defendant's oral statement which was reduced to writing by police officers was properly admitted in a rape case. *S. v. Braxton*, 446.

**§ 75.3. Effect on Confession of Confronting Defendant with Evidence**

The fact that defendant volunteered a confession only after he had confronted the assault victims in the hospital did not amount to a subtle compulsion of defendant to waive his constitutional rights. *S. v. Hill*, 320.

**§ 75.4. Confessions Obtained in Absence of Counsel**

Defendant's contention that at the time he made an admission he was represented by counsel and his attorney's presence was therefore a prerequisite to a valid waiver of his rights to remain silent and to have counsel present during any custodial interrogation is without merit. *S. v. Smith*, 365.

Even if defendant requested counsel when first advised of his rights, this did not make his subsequent statements inadmissible where defendant expressly waived his right to have counsel present during the subsequent statements. *S. v. Hill*, 320.

**§ 75.7. When Constitutional Warnings are Required; "Custodial Interrogation"**

Incriminating statements made by defendant during a casual conversation with the sheriff did not result from in-custody interrogation and were not rendered inadmissible by the fact defendant had earlier indicated a desire to remain silent. *S. v. Hill*, 320.

Trial court did not err in allowing into evidence statements made by defendant where his first statements were made at a time when defendant was not in custody and his later statement was made after the Miranda warnings. *S. v. Martin*, 702.

**§ 75.8. Warning of Constitutional Rights Before Resumption of Interrogation**

It was not necessary for an officer again to give the Miranda warnings to defendant before questioning him in the bay area of the sheriff's office while on the way to the interrogation room where the Miranda warnings had been given to defendant by the officer at the home of defendant's mother-in-law less than one hour and fifteen minutes before defendant made the statements. *S. v. Garrison*, 270.

The fact that defendant on three occasions indicated a desire to remain silent did not render his subsequent confession inadmissible where his right to cut off questioning was scrupulously honored on those three occasions, and defendant thereafter volunteered his confession and was again read his rights before interrogation resumed. *S. v. Hill*, 320.

**§ 75.9. Volunteered and Spontaneous Statements**

Statements made to a police officer when defendant was in jail for an unrelated charge and made in response to an officer's conduct in placing in defendant's view items belonging to defendant which were found at the crime scene were not inadmissible because they were made without the benefit of Miranda warnings. *S. v. McLean*, 623.

**§ 75.11. Waiver of Constitutional Rights**

The fact that defendant changed his mind during interrogation and requested counsel does not show that his previous waiver of counsel was not freely and voluntarily given. *S. v. Pagano*, 729.

CRIMINAL LAW — Continued

**§ 76.2. Voir Dire Hearing; When Required**

The trial judge was not required to conduct a voir dire hearing before ruling on the admissibility of defendant's in-custody statement that "they beat the hell out of me when they arrested me" since the statement was not inculpatory. *S. v. Jones*, 642.

**§ 76.5. Findings of Fact; When Made**

Trial court did not err in entering supplemental findings of fact and conclusions of law concerning defendant's motion to suppress in-custody statements during the same term of court as the hearing on the motion and the original order. *S. v. Hill*, 320.

**§ 80. Books, Records and Other Writings**

Entries in records of a County Department of Social Services maintained under the direction of defendant were admissible against defendant in her trial for obtaining money by false pretense, embezzlement and misapplication of county funds. *S. v. Agnew*, 382.

In a prosecution for kidnapping and crime against nature which occurred at a motel where the victims were staying, trial court's error in allowing into evidence a motel registration card was harmless. *S. v. Fulcher*, 503.

**§ 82. Privileged Communications**

North Carolina does not recognize an accountant-client privilege. *S. v. Agnew*, 382.

**§ 82.1. Attorney-Client Privilege**

The fact that an attorney sent a letter to defendant on a certain day was not privileged information. *S. v. Tate*, 189.

Trial court properly ruled that defendant waived the attorney-client privilege with respect to the entire contents of a letter sent by the attorney to defendant if defendant elicited testimony from the attorney as to whether the letter contained a certain statement. *Ibid.*

**§ 83. Competency of Husband or Wife to Testify Against Spouse**

Testimony that a witness observed a roll of tape fall out of defendant's car on the day after the crimes while defendant's wife was removing her possessions from the car did not violate the husband-wife privilege of G.S. 8-57. *S. v. Fulcher*, 503.

**§ 85.1. Defendant's Character Evidence**

The manner in which defendant attempted to elicit character testimony from his witnesses was improper. *S. v. Denny*, 294.

**§ 85.2. State's Evidence Relating to Character**

Trial court erred in permitting the prosecutor to ask defendant's character witnesses if they were aware that defendant on another occasion "got his gun and went after some black people in Charlotte." *S. v. Chapman*, 407.

**§ 86.3. State's Cross-Examination of Defendant**

When defendant denied on cross-examination that he had broken into an automobile and stolen a CB radio, it was not improper for the district attorney to ask defendant whether he had told officers where he had sold the radio. *S. v. Garrison*, 270.

CRIMINAL LAW — Continued

**§ 86.5. Particular Questions and Evidence as to Specific Acts**

Prosecutor was properly permitted to cross-examine defendant about prior acts of misconduct. *S. v. Chapman*, 407.

**§ 86.6. Prior Statements of Defendant**

Where defendant testified that he had given certain testimony in a former trial, the prosecutor was properly permitted to impeach defendant by asking him to point out such testimony in the transcript of the former trial. *S. v. Alston*, 577.

Defendant's statement to an officer that he received cuts and bruises when "they beat the hell out of me when they arrested me" was competent to impeach his testimony that he received the cuts and bruises from the victims while acting in self-defense. *S. v. Jones*, 642.

**§ 86.7. Jury Instructions Limiting Consideration of Evidence Admitted for Impeachment Purposes**

Trial court did not err in failing to instruct the jury that evidence of defendant's prior convictions was admitted only for purposes of impeachment absent a request for such instruction. *S. v. Watson*, 159.

**§ 87. What Witnesses May be Called; List of Witnesses**

Defendant was given sufficient notice of the terms of an arrangement between a witness and the State whereby the witness was granted immunity. *S. v. Lester*, 220.

**§ 87.2. Leading Questions**

Trial court did not err in permitting the district attorney to ask leading questions of a 12-year-old rape victim and a female witness who could not read and write and did not know her own age. *S. v. Hensley*, 231.

**§ 87.4. Redirect Examination**

Where defense counsel elicited information that a witness had talked to the district attorney on the preceding day for five to ten minutes, the witness was properly permitted on redirect examination to state the nature of her conversation with the district attorney. *S. v. McKinney*, 432.

**§ 88.2. Questions Impermissible on Cross-Examination**

Trial court properly limited defendant's cross-examination of a rape victim which attempted to show that the victim lived in an environment of sexual promiscuity. *S. v. McLean*, 623.

**§ 88.4. Cross-Examination of Defendant**

Defendant was not prejudiced by an argumentative question asked him on cross-examination that was not designed to elicit competent evidence. *S. v. Alston*, 577.

**§ 89.7. Mental Capacity of Witness**

A trial judge in N. C. does not have the authority to order a psychiatric examination of a proposed witness on the question of credibility. *S. v. Looney*, 1.

**§ 91. Time of Trial**

Defendant was not entitled to dismissal because his trial was held more than 16 months after a detainer was filed against him since defendant failed to comply with G.S. 15-10.2 by failing to send to the district attorney a notice and request for trial by registered mail. *S. v. McKoy*, 134.

**CRIMINAL LAW — Continued**

**§ 91.6. Continuance on Ground Defendant Needs Additional Time to Obtain Evidence**

Trial court did not err in denying defendant's motion for a continuance so that defendant could undergo an EEG examination to determine whether defendant suffered from reduced impulse control. *S. v. Thomas*, 105.

**§ 91.8. Time for Motion for Continuance**

Defendant's motion for continuance made after the case was called for trial and a jury had been selected and empaneled was not made in apt time and was therefore deemed waived. *S. v. Tindall*, 689.

**§ 92.1. Consolidation Proper; Same Offense**

Cases against four defendants were properly consolidated for trial. *S. v. Braxton*, 446.

**§ 92.4. Consolidation Proper; Multiple Charges**

Joinder of three cases against defendant was proper where the three offenses occurred within a three hour period and the offenses were all similar in nature. *S. v. Greene*, 418.

**§ 96. Withdrawal of Evidence**

Trial court did not err in repeating excluded testimony that defendant had threatened to kill the investigating officer while readvising the jury that the testimony should not be considered and ascertaining that members of the jury would follow the court's instruction not to consider it. *S. v. McKinney*, 432.

**§ 99.2. Questions and Remarks of Court During Trial**

While the trial judge's private conversations with jurors who asked questions addressed to the court are disapproved, defendant waived objection to such procedure by failing to object thereto or to request disclosure of the conversations. *S. v. Tate*, 189.

In a felonious assault prosecution in which the evidence tended to show that the victims were assaulted by defendant for the purpose of killing them so they could not testify against him in another case, the trial court's statement to a prospective juror that "in many cases witnesses are eliminated, or—for reasons that they are witnesses" did not constitute an expression of opinion. *Ibid.*

Trial court did not express an opinion in violation of G.S. 1-180 when he asked the witness a question because he had not heard her earlier response. *S. v. Davis*, 397.

**§ 100. Permitting Counsel to Assist in Lieu of District Attorney**

While it is proper for a private prosecutor, with the consent of the district attorney and the court, to assist the State in a prosecution, the district attorney should remain in charge. *S. v. Chapman*, 407.

**§ 101.2. Exposure of Jurors to Publicity or Evidence Not Formally Introduced**

It was within the trial court's discretion to examine the jury en masse to determine whether they had read or been influenced by a newspaper article concerning defendant which was published during trial. *S. v. Denny*, 294.

Where evidence of defendant's prior conviction was improperly placed before the jury, trial court did not err in failing to examine the jury to determine if they were prejudiced by that evidence. *S. v. Taylor*, 347.

CRIMINAL LAW — Continued

**§ 101.3. Permitting Jury to View Scene or Evidence Outside Courtroom**

Trial court in an armed robbery case did not err in denying the jury's request that it be allowed to view the jail. *S. v. Watson*, 159.

**§ 102.3. Cure of Improper Jury Argument**

The district attorney's jury argument concerning promises which the State made in exchange for pretrial statements from two witnesses was cured by the court's instruction. *S. v. Martin*, 253.

**§ 102.5. Conduct in Examining Defendant and Other Witnesses; Improper Question**

District attorney's remarks to a witness that "you are lying through your teeth and you know you are playing with a perjury count" were grossly improper and should have been suppressed by the court ex mero motu. *S. v. Locklear*, 210.

Prosecutor's improper question to defendant as to what kind of business he was in "other than robbing and killing people" was cured by the court's instruction. *S. v. Martin*, 253.

Defendant was not prejudiced by the prosecutor's question as to whether defendant would know the truth if it stood right there in front of him. *S. v. Alston*, 577.

**§ 102.7. Comment on Character of Witness**

District attorney did not err in his jury argument by summarizing defendant's extensive criminal past. *S. v. Smith*, 365.

**§ 102.8. Comment of District Attorney on Failure to Testify**

District attorney's jury argument which questioned defendant's failure to get back on the stand and deny incriminating evidence did not amount to a comment on defendant's failure to testify in violation of G.S. 8-54. *S. v. Smith*, 365.

**§ 102.9. Comment on Defendant's Character and Credibility Generally**

The district attorney's jury argument concerning the testimony of a defendant as an interested witness was not prejudicial to defendant. *S. v. Martin*, 253

**§ 102.10. Comment on Defendant's Character and Credibility by Reference to Criminal Conduct**

Private prosecutor's characterization of defendant as a professional criminal during jury argument was not improper. *S. v. Martin*, 253.

**§ 102.12. Comment on Sentence or Punishment**

Trial court in a second degree murder case committed prejudicial error in denying defense counsel the right to inform the jury of the punishment prescribed by law for second degree murder, voluntary manslaughter, and involuntary manslaughter. *S. v. Walters*, 311.

**§ 111.1. Miscellaneous Instructions**

Trial court's instructions could not have led the jury to believe it could return a verdict of guilty in three larceny cases if satisfied in any one of the cases of defendant's guilt beyond a reasonable doubt. *S. v. Schultz*, 281.

**§112.1. Instructions on Reasonable Doubt**

The trial court did not err in omitting the words "to a moral certainty" from its charge on reasonable doubt. *S. v. Watson*, 159.

CRIMINAL LAW — Continued

**§ 113.1. Recapitulation or Summary of Evidence**

Trial court did not fail sufficiently to review the evidence solicited on cross-examination of two State's witnesses. *S. v. Looney*, 1.

Trial court did not err in instructing the jury that "the evidence shows" since the trial judge was careful to leave conclusions regarding credibility to the jury. *S. v. Saults*, 722.

**§ 113.3. Request for Special Instruction Required**

Trial court did not err in failing to recapitulate evidence pertaining to the weight or credibility of the victim's identification of defendant absent a request for such instructions. *S. v. Alston*, 577.

**§ 113.7. Charge as to "Acting in Concert"**

Trial court's instructions on acting in concert were proper. *S. v. Hood*, 30.

Trial court's instruction on acting in concert could not have misled the jury into believing that defendant's mere presence at the scene of a robbery would have been sufficient to render him guilty of the robbery. *S. v. Watson*, 159.

**§ 113.8. Error in Stating Evidence and Applying Law Thereto**

Defendant was not prejudiced by the trial court's erroneous instruction that the jury could possibly return a verdict of "guilty by reason of insanity." *S. v. Bundridge*, 45.

**§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions**

The trial judge did not express an opinion in violation of G.S. 1-180 during his recapitulation of the State's evidence when he stated, after summarizing the testimony of a certain witness, "There was also other corroborating evidence which I will not attempt to relate at this time." *S. v. Martin*, 702.

**§ 114.3. No Expression of Opinion in Other Instructions**

Trial court did not express an opinion in instructing the jury that certain details concerning the description of the automobile driven by defendant and the physical characteristics of defendant were not of themselves related to the factual elements of the charge and were not in issue in the case. *S. v. Alston*, 577.

**§ 116. Charge of Court on Failure of Defendant to Testify**

It is proper for the trial court to instruct on defendant's failure to testify upon defendant's request, and defendant is not prejudiced where the jury is made aware that the instruction is being given at the request of defense counsel. *S. v. Davis*, 397.

**§ 117.3. Charge on Credibility of State's Witnesses**

The trial court did not err in instructing that defendant was an interested witness without also instructing that an officer who testified for the State was an interested witness. *S. v. Thomas*, 105.

Though a person named by the trial judge as an accomplice was in fact the principal perpetrator of the offense of arson to which defendant was allegedly an accessory, the court's error, if any, was harmless, for the instructions showed that the intent of the judge's charge was to inform the jury that the person named had an interest in the outcome of the case and to urge them to examine and scrutinize the content of his testimony. *S. v. Saults*, 722.

Trial court's error in instructing the jury that evidence of a plea bargain by a prosecuting witness was immaterial was cured when the court later instructed that such testimony was material upon the question of the witness's credibility but not otherwise. *S. v. Looney*, 1.

**§ 119. Request for Instructions**

Defendant's request for instructions shortly before the court was to charge the jury were not tendered too late and should have been given by the court. *S. v. Agnew*, 382.

**§ 122.1. Jury's Request for Additional Instructions**

Trial court did not express an opinion in his comment made upon denial of the jury's request that the testimony of defendant's alibi witnesses be read back to it. *S. v. Fulcher*, 503.

**§ 122.2. Additional Instructions Upon Failure to Reach Verdict**

Trial court did not coerce a verdict by instructing the jury before it began deliberations that a disagreement would be "the first step toward deadlock" and that the jury "should not talk endlessly nor go over and over again the same point, nor put up with any juror who wants to." *S. v. Alston*, 577.

**§ 124.2. Whether Verdict is Ambiguous**

Trial court in a homicide case did not err in accepting a verdict of "guilty as charged in the first degree." *S. v. Hampton*, 242.

**§ 126.1. Manner of Polling Jury**

There is no merit in defendant's contention that the verdict was not unanimous because two of the jurors merely nodded their heads in response to inquiry of the clerk in polling the jury. *S. v. Hampton*, 242.

**§ 128.2. Particular Grounds for Mistrial**

Memorandum from the jury to the trial judge that "due to lack of sufficient evidence, the jury cannot come to the agreement that this defendant . . . is in fact the man that committed these crimes" did not amount to an acquittal of defendant, and the trial judge properly declared a mistrial when the entire jury panel unequivocally indicated they were deadlocked. *S. v. Alston*, 577.

**§ 138.11. Different Punishment on Second Trial**

Defendant was improperly given more severe sentences upon three of the seven charges of which he was convicted after a retrial, although the totality of defendant's cumulative sentences after the second trial was less than the totality of his sentences at his first trial. *S. v. Jones*, 642.

**§ 162.7. Ruling on Objection**

Trial judge's failure to rule on six of the objections made by defendant during the trial constituted harmless error. *S. v. Chapman*, 407.

**§ 169.2. Harmless Error Where Evidence Withdrawn**

Court's admonishment to a witness not to say "anything about that" sufficiently informed the jury that the witness's statement should not be considered as evidence. *S. v. Watson*, 159.

## CRIMINAL LAW — Continued

**§ 169.6. Exclusion of Evidence**

Trial judge's refusal to allow a witness's excluded answer to be placed in the record was not error where the witness had already answered the question sufficiently to demonstrate the immateriality of the inquiry. *S. v. Chapman*, 407.

## DIVORCE AND ALIMONY

**§ 6. Cross Actions**

Where the wife filed an action for alimony and divorce from bed and board, claiming the husband abandoned her, the husband's claim for divorce on the ground of one year's separation could be denominated a compulsory counterclaim. *Gardner v. Gardner*, 172.

Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13(a) may not be prosecuted during the pendency of the prior action but must be dismissed or stayed; however, the claim will not be barred by reason of Rule 13(a) if it is filed after final judgment has been entered in the prior action. *Ibid.*

**§ 21.6. Effect of Separation Agreements**

Where the trial court incorporated a separation agreement into a judgment of absolute divorce by reference, the provisions of the agreement, including the alimony provisions, were enforceable by contempt. *Levitch v. Levitch*, 437.

## ELECTIONS

**§ 10. Contested Elections; Sufficiency of Evidence**

The ineligibility of a candidate receiving the majority of votes in an election does not elect the candidate receiving a minority of the votes. *Duncan v. Beach*, 713.

## EMBEZZLEMENT

**§ 6. Sufficiency of Evidence**

Evidence was sufficient for the jury in a prosecution of a director of a county Department of Social Services for embezzlement in violation of G.S. 14-90. *S. v. Agnew*, 382.

## FALSE PRETENSE

**§ 3.1. Nonsuit**

Evidence was insufficient for the jury in a prosecution of a director of a county Department of Social Services for obtaining money from the county by false pretense. *S. v. Agnew*, 382.

## GAS

**§ 1. Regulation**

The Utilities Commission acted within its authority in establishing a rule permitting natural gas companies to adjust their rates to recover costs of approved gas exploration programs. *Utilities Comm. v. Edmisten*, 598.

## HOMICIDE

**§ 15. Relevancy and Competency of Evidence**

Error in admitting hearsay statement attributed to a three-year-old identifying defendant as deceased's assailant was not prejudicial. *S. v. Johnson*, 288.

Defendant charged with first degree murder was not prejudiced by an officer's testimony concerning the physical condition of two assault victims when he questioned them at the hospital although defendant had stipulated as to the facts relating to defendant's commission of the assaults. *S. v. Hill*, 320.

**§ 16. Dying Declarations; Apprehension of Death**

In a first degree murder case where the trial court made no specific findings that the victim knew there was no hope of her recovery, there was nevertheless no error in admitting the victim's dying declarations. *S. v. Lester*, 220.

**§ 17. Evidence of Intent and Motive**

Testimony regarding business dealings between the victim and another person was relevant to support the State's theory that such other person had a financial motive to murder the victim and hired defendant to do the job. *S. v. Richards*, 474.

**§ 20. Real and Demonstrative Evidence**

A butcher knife was sufficiently identified to permit its admission in a homicide case. *S. v. Thomas*, 105.

In a prosecution for first degree murder and armed robbery, defendant was not prejudiced by the admission into evidence of .410 gauge shells and a Clorox jug bearing the odor of kerosene which were seized from defendant's premises. *S. v. Martin*, 702.

**§ 20.1. Photographs**

Defendant's contention in a first degree murder case that his stipulation that death was caused by a stab wound should have precluded the admission of three photographs of deceased is without merit. *S. v. Lester*, 220.

A photograph of a butcher knife was properly admitted to illustrate the testimony of an SBI agent. *S. v. Thomas*, 105.

Trial court properly admitted for illustrative purposes photographs showing the bloodstained interior of the house where deceased was stabbed, photographs showing the exterior of the house and street where deceased was stabbed a second time, and photographs showing bruises and wounds on deceased's body. *Ibid.*

**§ 21.1. Sufficiency of Evidence Generally**

There was no merit in defendant's contention that his motion for nonsuit should have been allowed because there was no evidence that the body found in his apartment was the same body upon which the State's medical examiner performed an autopsy. *S. v. Moser*, 354.

**§ 21.4. Sufficiency of Evidence of Identity of Perpetrator**

Defendant's motion for nonsuit should have been allowed in a murder prosecution where there was no showing that defendant actually shot the victim. *S. v. Lee*, 299.

**§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder**

Testimony by defendant's coconspirators was sufficient for the jury in a first degree murder case. *S. v. Hood*, 30.

There was sufficient evidence of premeditation and deliberation to go to the

**HOMICIDE — Continued**

jury on the question of defendant's guilt of first degree murder of his wife. *S. v. Thomas*, 105.

There was sufficient evidence from which the jury could conclude that the use of a deadly weapon by defendant was intentional, and that defendant killed deceased after premeditation and deliberation. *S. v. Johnson*, 288.

There was sufficient evidence of premeditation and deliberation to go to the jury on the question of defendant's guilt of first degree murder of a service station attendant. *S. v. Hill*, 320.

Evidence was sufficient for the jury in a prosecution for murder committed during the perpetration of attempted robbery. *S. v. Taylor*, 347.

Evidence in a first degree murder case was sufficient for the jury where the evidence tended to show the shooting and robbery of an insurance agent. *S. v. Martin*, 702.

**§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder**

State's evidence was sufficient for the jury in a prosecution for second degree murder of the woman with whom defendant lived in an apartment. *S. v. Moser*, 354.

**§ 24.1. Instructions on Presumptions Arising From Use of Deadly Weapon**

Trial court's instructions on the mandatory presumption of malice were proper and constitutional where there was no evidence that the killing was committed in self-defense or in the heat of passion arising on sudden provocation. *S. v. Tate*, 189.

**§ 24.3. Instructions on Burden of Proof of Self-Defense**

The charge of the court, when considered as a whole, properly placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense in a murder and assault case. *S. v. Jones*, 642.

**§ 25.2. Instructions on Premeditation and Deliberation**

Trial court in a first degree murder case did not err in failing to include premeditation and deliberation in a portion of the charge in which the court instructed on the element of malice. *S. v. Hampton*, 242.

Trial court's instruction on two circumstances from which premeditation and deliberation could be inferred was supported by the evidence and did not constitute an expression of opinion that those circumstances were present. *S. v. Hill*, 320.

**§ 30. Submission of Lesser Degrees of the Crime Generally**

Trial judge in a homicide case did not err in instructing the jury that it could return only verdicts of first degree murder or not guilty. *S. v. Smith*, 365.

**§ 30.2. Submission of Question of Guilt of Manslaughter**

Trial court in a first degree murder case did not err in failing to instruct the jury on the lesser included offense of voluntary manslaughter. *S. v. Hampton*, 242.

**§ 31.1. Punishment for First Degree Murder**

Trial court in a first degree murder prosecution did not err in overruling defendant's motion to dismiss for the reason that the death penalty provided by G.S. 14-17 had been declared unconstitutional. *S. v. Hood*, 30.

## INDICTMENT AND WARRANT

**§ 7. Requisites and Sufficiency of Indictment and Presentment**

A charge in indictments for the misdemeanor of possessing a dead game animal, a bear, which was taken in closed season in Tyrrell County was initiated by presentment, although the presentment charged a different offense, since the language of the presentment and that contained in the indictments dealt with the same subject matter; therefore, the Superior Court had original jurisdiction of the misdemeanor charge. *S. v. Cole*, 304.

## INFANTS

**§ 6.2. Modification of Order Awarding Custody**

The Court of Appeals erred in concluding that defendant mother was not required to show change of conditions in order to secure a modification of her visitation privileges with her children. *Clark v. Clark*, 554.

**§ 6.4. Child's Wishes in Custody Award**

In determining the custody and visitation rights incident to the award of custody of children ages 15, 13 and 12, it is appropriate and desirable for the judge to ascertain and consider the children's wishes in respect to their custody. *Clark v. Clark*, 554.

**§ 6.7. Award of Visitation Rights**

Trial court erred in ordering visitations by the children in question with defendant mother without finding that the visits were in the children's best interest. *Clark v. Clark*, 554.

## INSURANCE

**§ 79.1. Approval or Disapproval by Commissioner of Insurance**

Order of the Commissioner of Insurance revising automobile collision insurance rates is dismissed as moot. *Comr. of Insurance v. Insurance Corp.*, 360.

**§ 79.3. Automobile Liability Insurance; Findings of Fact**

The Commissioner of Insurance exceeded his authority when he refused to apply classifications provided for in G.S. 58-30.4 to motorcycle liability insurance; however, the proceeding will not be remanded to the Commissioner for further action where it has been superseded by a new proceeding and new rates under subsequently enacted statutes. *Comr. of Insurance v. Automobile Rate Office*, 60.

## JUDGES

**§ 4. Judges of Courts Inferior to Superior Court**

Where a candidate for district court judge who was ineligible to hold that office because he had reached the age of 70 years before the election received a majority of the votes cast and served as de facto judge for two years, the incumbent who was defeated in the election had no legal right to assume the office by virtue of the election and did not hold over by virtue of G.S. 128-7. *Duncan v. Beach*, 713.

**§ 7. Misconduct in Office; Proceedings Before Judicial Standards Commission**

The Supreme Court may order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured. *In re Hardy*, 90.

## LABORERS' AND MATERIALMEN'S LIENS

**§ 1. Lien of Contractor**

The partial clearing, surveying and staking of the boundary lines of a building prior to its construction was "labor" under G.S. 44A-8 and thus subject to a laborers' and materialmen's lien. *Conner Co. v. Spanish Inns*, 661.

A contractor's lien for the construction of a motel related back and took effect from the date of the furnishing of services for the partial clearing and on-site surveying and staking of the boundary lines of the building to be constructed by the contractor. *Ibid.*

**§ 8.1. Actions Against Owner**

Plaintiff was entitled to summary judgment in an action to have an arbitration award declared to be a specific lien on real property formerly belonging to defendant Spanish Inns superior to the deed of trust held by the construction lender. *Conner Co. v. Spanish Inns*, 661.

## LARCENY

**§ 2. Property Subject to Larceny**

Bronze urns and vases which fit into a receptacle in a grave marker were not real property or chattels real but remained personal property which was the subject of common law larceny. *S. v. Schultz*, 281.

**§ 7.3. Ownership of Property Stolen**

There was no fatal variance between indictments charging larceny of urns and vases of a cemetery corporation and proof that the urns and vases were owned by purchasers of cemetery lots but were in the custody of the cemetery corporation. *S. v. Schultz*, 281.

## LIMITATION OF ACTIONS

**§ 4.3. Accrual of Cause of Action for Breach of Contract**

Where plaintiff brought action to recover for improper roofing installation, plaintiff's alleged cause of action for breach of contract accrued when construction of the building was completed rather than when the roofing work was completed. *Ports Authority v. Roofing Co.*, 73.

The statute extending the statute of limitations for hidden defects, G.S. 1-15(b), applies to an action for breach of contract. *Ibid.*

Trial court's judgment on the pleadings that plaintiff's cause of action for breach of contract was barred by the statute of limitations was erroneously entered where there was a question as to whether G.S. 1-15(b) applied to plaintiff's cause of action to enlarge the period of limitation. *Ibid.*

## MASTER AND SERVANT

**§ 74. Disfigurement**

An employee who had received compensation for permanent partial disability of his left hand was entitled to additional compensation for disfigurement because of surgical scars on his left forearm above the wrist. *Thompson v. Ix & Sons*, 358.

## MUNICIPAL CORPORATIONS

**§ 30.20. Procedure for Enactment or Amendment of Zoning Ordinance**

Provision of a zoning ordinance prohibiting the town council from accepting another application for a zoning change within six months following its denial of the same change precluded the town council from enacting a zoning change within six months after its denial of the owner's application for the same change even though the second proposal was initiated by the council itself and was accomplished as part of the adoption of a new zoning ordinance. *George v. Town of Edenton*, 679.

**§ 37.1. Regulations Relating to Health**

Fees charged for trash collections were validly imposed by defendant city, and plaintiff failed to show that the payments were made under coercion so as to render them invalid. *Big Bear v. City of High Point*, 262.

## NEGLIGENCE

**§ 26.1. Effect of Presumption Arising Under Res Ipsa Loquitur**

Trial court's instructions on res ipsa loquitur may have erroneously led the jury to believe that the inference of negligence was binding on them and that only the element of proximate cause remained for their consideration. *Lentz v. Gardin*, 425.

## PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

**§ 6. Revocation of Licenses**

A statute authorizing revocation of a license to practice medicine for "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," and an order of the Board of Medical Examiners suspending the revocation of a medical license upon the condition that the physician "conduct his practice of medicine in accordance with proper professional and ethical standards" are not unconstitutionally vague and overbroad. *In re Wilkins*, 528.

**§ 6.2. Evidence in Revocation of License Proceeding**

A physician's license to practice medicine was properly revoked for his conduct in prescribing controlled substances for complete strangers without making any examination of such patients or any inquiry as to their medical history or current symptoms. *In re Wilkins*, 528.

## PUBLIC OFFICERS

**§ 3. Nature of Public Office, Terms, and Dismissal**

Where a candidate for district court judge who was ineligible to hold that office because he had reached the age of 70 years before the election received a majority of the votes cast and served as a de facto judge for two years, the incumbent who was defeated in the election had no legal right to assume the office by virtue of the election and did not hold over by virtue of G.S. 128-7. *Duncan v. Beach*, 713.

**§ 11. Criminal Liability of Public Officers**

State's evidence was sufficient for the jury in a prosecution of the director of a county Department of Social Services for the willful and corrupt misapplication of county funds. *S. v. Agnew*, 382.

## RAPE

**§ 4.3. Character or Reputation of Prosecutrix**

Trial court properly limited defendant's cross-examination of a rape victim which attempted to show that the victim lived in an environment of sexual promiscuity. *S. v. McLean*, 623.

**§ 5. Sufficiency of Evidence**

State's evidence was sufficient for the jury in a prosecution for rape of a 12-year-old girl. *S. v. Hensley*, 231.

Evidence was sufficient for the jury in a first degree rape case where it tended to show that defendant was the driver of the vehicle in which the victim was abducted and defendant twice had sexual intercourse with the victim without her consent. *S. v. Braxton*, 446.

Evidence was sufficient to support a verdict of guilty of second degree rape where it tended to show that defendant followed the victim to her apartment parking lot where they had a discussion concerning the victim's hitting of defendant's car; defendant knocked the victim to the ground and had intercourse with her against her will; and items belonging to defendant were subsequently found at the crime scene. *S. v. McLean*, 623.

**§ 6. Instructions**

Trial court in a rape case did not err in failing to define the term "sexual intercourse." *S. v. Hensley*, 231.

## ROBBERY

**§ 4.3. Sufficiency of Evidence of Armed Robbery**

Evidence of the armed robbery of an insurance agent was sufficient for the jury. *S. v. Martin*, 702.

**§ 5. Instructions**

Defendant was not prejudiced by the trial court's erroneous instruction which failed to include a possible verdict of not guilty. *S. v. Bundridge*, 45.

**§ 6.1. Sentence**

Sentence of life imprisonment for armed robbery was not cruel and unusual punishment. *S. v. Watson*, 159.

## RULES OF CIVIL PROCEDURE

**§ 13. Counterclaim and Crossclaim**

Where the wife filed an action for alimony and divorce from bed and board, claiming the husband abandoned her, the husband's claim for divorce on the ground of one year's separation could be denominated a compulsory counterclaim. *Gardner v. Gardner*, 172.

Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13(a) may not be prosecuted during the pendency of the prior action but must be dismissed or stayed; however, the claim will not be barred by reason of Rule 13(a) if it is filed after final judgment has been entered in the prior action. *Ibid.*

## RULES OF CIVIL PROCEDURE — Continued

**§ 17. Parties Plaintiff; Capacity**

Agents for collection of a promissory note were not the real parties in interest in the case. *Booker v. Everhart,* 146.

**§ 19. Necessary Joinder of Parties**

Absence of necessary parties does not merit a nonsuit. *Booker v. Everhart,* 146.

## SEARCHES AND SEIZURES

**§ 7. Search and Seizure Incident to Arrest**

A pistol which an arresting officer observed in defendant's bedroom was properly seized incident to defendant's lawful arrest. *S. v. Richards,* 474.

**§ 18. Consent to Search Given by Owner of Vehicle**

The trial court properly allowed into evidence items found in a car allegedly used in the perpetration of a rape, since the owner of the car, who was the mother of one defendant, had consented to the search of the automobile by the officers. *S. v. Braxton,* 446.

**§ 24. Evidence Sufficient for Issuance of Warrant**

Probable cause existed for the issuance of a warrant to search defendant's apartment for the pistol used in a murder. *S. v. Richards,* 474.

**§ 40. Items Which May Be Seized**

Although a .38 caliber pistol and a .22 caliber sawed-off rifle were not named in a warrant to search an apartment for a .25 caliber pistol used in a murder, the .38 caliber pistol and the rifle were inadvertently and properly seized during the search pursuant to the warrant. *S. v. Richards,* 474.

**§ 45. Necessity for Hearing on Motion to Suppress**

Trial court in a homicide case did not err in failing to conduct a hearing on defendant's motion to suppress evidence obtained by a warrantless search where defendant made no motion to suppress within 10 working days after being given notice of the State's intention to introduce the evidence at trial. *S. v. Hill,* 320.

## UNIFORM COMMERCIAL CODE

**§ 28. Commercial Paper; Definitions and Execution**

A promissory note executed by defendant husband to his estranged wife was a nonnegotiable note since the note incorporated a prior deed of separation and property settlement entered into by the husband and wife. *Booker v. Everhart,* 146.

**§ 31. Rights of a Holder**

Plaintiff attorneys who had allegedly been assigned one-third of a promissory note could not be holders under the Uniform Commercial Code and thus could not argue that under G.S. 25-3-301 they had the power to enforce the note as collection agents for the owner. *Booker v. Everhart,* 146.

## UTILITIES COMMISSION

**§ 38. Rate Base; Operating Expenses**

The Utilities Commission acted within its authority in establishing a rule permitting natural gas companies to adjust their rates to recover costs of approved gas exploration programs. *Utilities Comm. v. Edmisten,* 598.

## UTILITIES COMMISSION — Continued

**§ 52. Right to Review**

Although no appeal was taken from the promulgation of a rule of the Utilities Commission, the Attorney General was not prohibited by the principle of res judicata from challenging the validity of the rule in an appeal from an order approving surcharges pursuant to the rule. *Utilities Comm. v. Edmisten*, 598.

## WEAPONS AND FIREARMS

State's evidence was insufficient for the jury in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Hewitt*, 316.

## WITNESSES

**§ 1.1. Competency of Witness; Mental Capacity**

A trial judge in N. C. does not have the authority to order a psychiatric examination of a proposed witness on the question of credibility. *S. v. Looney*, 1.

**§ 10. Attendance**

The trial judge acted properly in denying defendant's motion for G.S. 15A-803 material witness orders for residents of N.Y. *S. v. Tindall*, 689.

# WORD AND PHRASE INDEX

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