NORTH CAROLINA REPORTS

VOLUME 295

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1978

FALL TERM 1978

RALEIGH
1979

CITE THIS VOLUME

295 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

SUSIE SHARP

Associate Justices

JOSEPH BRANCH
J. FRANK HUSKINS
J. WILLIAM COPELAND
JAMES G. EXUM, JR.
DAVID M. BRITT[1]
WALTER E. BROCK[2]

Retired Chief Justice

WILLIAM H. BOBBITT

Retired Justices

J. WILL PLESS, JR.
CARLISLE W. HIGGINS
I. BEVERLY LAKE[3]
DAN K. MOORE[4]

Clerk

JOHN R. MORGAN

Librarian

FRANCES H. HALL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director

DALLAS A. CAMERON, JR.[5]

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

1. Appointed 31 August 1978 to fill the unexpired term of Associate Justice I. Beverly Lake. Elected to full term 7 November 1978.
2. Elected Associate Justice 7 November 1978 and took office 2 January 1979.
3. Retired 31 August 1978.
4. Retired 31 December 1978.
5. Appointed 1 January 1979 to succeed Franklin Freeman, Jr. who took office as District Attorney of the 17th District 3 January 1979.

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
	N. B. BAREFOOT[1]	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	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON[2]	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	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	CLIFTON E. JOHNSON	Charlotte
	ROBERT M. BURROUGHS[3]	Charlotte
27	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
28	ROBERT D. LEWIS	Asheville
	C WALTER ALLEN[4]	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
DONALD L. SMITH	Raleigh
RONALD BARBEE	Greensboro
WILLIAM THOMAS GRAHAM	Winston-Salem
DAVID I. SMITH	Burlington
H. L. RIDDLE, JR.	Morganton

1. Elected 7 November 1978 and took office 1 January 1979 to succeed Joshua S. James who retired 31 December 1978.
2. Elected 7 November 1978 and took office 1 January 1979 to succeed Walter E. Crissman who retired 31 December 1978.
3. Elected 7 November 1978 and took office 1 January 1979 to succeed Fred H. Hasty who retired 31 December 1978.
4. Appointed 29 September 1978 to succeed Harry C. Martin who was appointed to the Court of Appeals 1 September 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
	JOHN M. WALKER	Wilmington
	CHARLES E. RICE[1]	Wilmington
6	JOSEPH D. BLYTHE (Chief)	Harrellsville
	NICHOLAS LONG	Roanoke Rapids
	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	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
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
	RUSSELL G. SHERRILL III[2]	Raleigh
11	ELTON C. PRIDGEN (Chief)[3]	Smithfield
	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN[4]	Sanford
	KELLY EDWARD GREENE[5]	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	CHARLES LEE GUY	Fayetteville
	SOL G. CHERRY	Fayetteville
	LACY S. HAIR	Fayetteville
13	FRANK T. GRADY (Chief)	Elizabethtown
	J. WILTON HUNT, SR.	Whiteville
	WILLIAM E. WOOD	Whiteville
14	J. MILTON READ, JR. (Chief)	Durham
	WILLIAM G. PEARSON	Durham
	DAVID Q. LABARRE[6]	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	THOMAS D. COOPER, JR.	Burlington
	WILLIAM S. HARRIS	Graham
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. MCLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	PETER M. MCHUGH	Reidsville
	JERRY CASH MARTIN[7]	Mount Airy

DISTRICT	JUDGES	ADDRESS
18	ROBERT L. CECIL (Chief)[8]	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	JAMES SAMUEL PFAFF	Greensboro
	JOHN B. HATFIELD, JR.	Greensboro
	JOHN F. YEATTES	Greensboro
	JOSEPH ANDREW WILLIAMS	Greensboro
	FRANK ALLEN CAMPBELL[9]	Greensboro
19A[10]	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	L. FRANK FAGGART	Kannapolis
19B[10]	L. T. HAMMOND, JR. (Chief)[11]	Asheboro
	WILLIAM H. HEAFNER[12]	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD[13]	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	Jefferson
24	J. RAY BRASWELL (Chief)	Newland
	ROBERT HOWARD LACEY	Newland
25	LIVINGSTON VERNON (Chief)	Morganton
	BILL J. MARTIN	Hickory
	SAMUEL MCD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD J. CROTTY[14]	Hickory

DISTRICT	JUDGES	ADDRESS
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
	WALTER H. BENNETT, JR.	Charlotte
	DAPHENE L. CANTRELL	Charlotte
27A	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
27B	ARNOLD MAX HARRIS (Chief)	Ellenboro
	GEORGE HAMRICK	Shelby
28	JAMES O. ISRAEL, JR. (Chief)[15]	Candler
	WILLIAM MARION STYLES	Black Mountain
	GARY A. SLUDER	Asheville
	EARL JUSTICE FOWLER, JR.[16]	Arden
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. Elected 7 November 1978 and took office 1 January 1979 to succeed N. B. Barefoot who took office on Superior Court 1 January 1979.
2. Appointed 10 January 1979 to succeed S. Pretlow Winborne who retired 31 December 1978.
3. Appointed Chief Judge 18 September 1978.
4. Appointed 25 September 1978 to succeed Robert B. Morgan, Sr. who retired 31 August 1978.
5. Elected 7 November 1978 and took office 4 January 1979 to succeed Woodrow Hill who retired 31 December 1978.
6. Elected 7 November 1978 and took office 4 December 1978 to succeed Samuel F. Gantt whose term expired 3 December 1978.
7. Appointed 15 December 1978 to succeed Frank Freeman who retired 30 November 1978.
8. Appointed Chief Judge 1 January 1979.
9. Elected 7 November 1978 and took office 1 January 1979 to succeed Edward K. Washington who took office on Superior Court 1 January 1979.
10. District 19 divided into 19A and 19B effective 1 January 1979.
11. Appointed Chief Judge 1 January 1979.
12. Appointed 1 January 1979.
13. Retired 31 December 1978.
14. Elected 7 November 1978 and took office 4 December 1978 to succeed Joseph P. Edens, Jr. whose term expired 3 December 1978.
15. Appointed Chief Judge 29 September 1978.
16. Appointed 5 October 1978 to succeed Cary Walter Allen who resigned 28 September 1978 and took office on Superior Court 29 September 1978.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

HOWARD A. KRAMER

Special Assistant to the Attorney General

JOHN A. ELMORE

Senior Deputy Attorneys General

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

Deputy Attorneys General

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

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
EUGENE A. SMITH
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED DUNN
DAVID S. CRUMP
CHARLES J. MURRAY
DENNIS MYERS

Assistant Attorneys General

CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
RICHARD N. LEAGUE
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
H. AL COLE, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
WILLIAM W. WEBB
I. B. HUDSON, JR.
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
JAMES M. WALLACE, JR.
ARCHIE W. ANDERS
DANIEL C. OAKLEY
GEORGE J. OLIVER
ELIZABETH C. BUNTING
ELISHA H. BUNTING
ALAN S. HIRSCH
SANDRA M. KING
JOHN C. DANIEL, JR.
ACIE L. WARD
JOAN H. BYERS
J. MICHAEL CARPENTER
BEN G. IRONS II
AMOS C. DAWSON III
JAMES L. STUART
DONALD W. GRIMES
NONNIE F. MIDGETTE
ISAAC T. AVERY III
JO ANN SANFORD
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
MARY I. MURRILL
THOMAS F. MOFFITT
RUDOLPH A. ASHTON
LEIGH E. KOMAN
FRANK P. GRAHAM
PATRICIA B. HODULIK
GEORGE W. LENNON
MARILYN Y. RICH

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	DAVID WATERS	Oxford
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	FRANKLIN FREEMAN, JR.	Reidsville
18	MICHAEL A. SCHLOSSER	Greensboro
19A	JAMES E. ROBERTS	Kannapolis
19B	RUSSELL G. WALKER, JR.	Asheboro
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	RONALD C. BROWN	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED

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

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

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

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-180	State v Banks, 399
	State v. Hudson, 427
	State v. Berry, 534
1-362	Elmwood v. Elmwood, 168
1A-1	See Rules of Civil Procedure *infra*
7A-27(a)	State v. Silhan, 636
8-51.1	State v. Stevens, 21
9-21(b)	State v. Matthews, 265
14-21	State v. Lowe, 596
14-39	State v. Banks, 399
	State v. Williams, 655
14-39(a), (b)	State v. Williams, 655
14-202	In re Banks, 236
14-318.2	State v. Wilkerson, 559
15-144.1	State v. Lowe, 596
15-196.1 through -196.4	State v. Mason, 584
15A-223(b)	State v. Richardson, 309
15A-501	State v. Richardson, 309
15A-501(5)	State v. Curmon, 453
15A-611(b)	State v. Hudson, 427
15A-644(a) (5)	State v. House, 189
	State v. Richardson, 309
15A-761 et seq.	State v. McQueen, 96
15A-903	State v. Stevens, 21
	State v. Jones, 345
15A-904(a)	State v. Abernathy, 147
15A-910	State v. Stevens, 21
	State v. Jones, 345
15A-954(a) (4)	State v. Joyner, 55
15A-974(1), (2)	State v. Richardson, 309
15A-979(c)	State v. Silhan, 636

G.S.	
15A-1334(b)	State v. Williams, 655
15A-1443	State v. Hudson, 427
20-138	State v. Medley, 75
20-140(c)	State v. Snead, 615
55-1 et seq.	Blount v. Taft, 472
55-73(b)	Blount v. Taft, 472
62-3(23)	Utilities Comm. v. Simpson, 519
62-119(3)	Utilities Comm. v. Simpson, 519
97-17	Little v. Food Service, 527
97-29, 30	Little v. Food Service, 527
97-31(23)	Little v. Food Service, 527
97-84	Little v. Food Service, 527
110-136	Elmwood v. Elmwood, 168
113A-102	Adams v. Dept. of N.E.R., 683
113A-102(a)	Adams v. Dept. of N.E.R., 683
113A-113	Adams v. Dept. of N.E.R., 683
113A-126(d)(1)c	Adams v. Dept. of N.E.R., 683

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 19th day of August, 1978, and said persons have been issued certificates of this Board:

CONRAD ALPHONZO AIRALL ..... Durham
WILLIAM MCKINLEY ALEXANDER, JR. ..... Hendersonville
BENJAMIN GLENN ALFORD ..... Rocky Mount
FERDINAND AUGUSTUS SILCOX ANDERSON, JR. ..... Raleigh
JOHN CHARLES ARCHIE ..... Kinston
ROBERT MARKS ARNOLD ..... Enfield
THOMAS JOHNSON ASHCRAFT ..... Charlotte
RUSSELL ZACHERY ASTE ..... Miami, Florida
WILLIAM JOSEPH AUSTIN, JR. ..... Smithfield
WAYNE MARSHALL BACH ..... Louisville, Kentucky
NANCY HAWKINS BAILEY ..... Raleigh
GARZA BALDWIN III ..... Asheville
DANIEL NOLAN BALLARD ..... Greenville, S. C.
HUGH MARTIN BARRETT, JR. ..... Greensboro
JONATHAN ADAMS BARRETT ..... Chapel Hill
ROBERT CHARLES BARRETT ..... Pinehurst
MOLLY BARBER BARRY ..... Winston-Salem
JAMES DELMAR BARTON ..... Winston-Salem
DONA CORNELIA BASS ..... Wilson
GEORGE A. BEDSWORTH ..... Margarita, Canal Zone
LINDA SPELLMAN BEERMAN ..... Manhasset, N. Y.
SHEILA RUTH WESTON BENNINGER ..... East Haven, Connecticut
DAVID ALLEN BENNINGTON ..... Chapel Hill
MICHAEL L. BERGER ..... Athens, Georgia
ROY MARSHALL BICKETT, JR. ..... Spencer
OWEN H. BLACK ..... Raeford
EDWARD HENRY BLAIR, JR. ..... Lenoir
STEVEN FRANKLIN BLALOCK ..... Albemarle
DAVID HARRINGTON BLAND ..... Roxboro
MICHAEL DAVID BLAND ..... Winston-Salem
PAUL C. BLAND ..... Petersburg, Virginia
JAMES RAY BLEVINS ..... Lansing
DAVID CASTERTON BOGGS ..... Charlotte
FERRIS RIDGELY BOND ..... Jacksonville
TERESA GOODE BOWDEN ..... Henrietta
GEORGE CARL BOWER, JR. ..... Wingate
JOEL VICTOR BOWMAN ..... Bluefield, West Virginia
SALLY CRISP BOYETTE ..... Greenville
KAREN PADEN BOYLE ..... Wilmington
JAMES DONALD BRADSHER, JR. ..... Roxboro
EDWARD THOMAS BRADY ..... Fayetteville
HARRIET AMANDA BRANTLEY ..... Rocky Mount
EDWIN MAURICE BRASWELL, JR. ..... Fayetteville
LLOYD CLIFFORD BRISSON, JR. ..... Fayetteville
JOHN G. BRITT, JR. ..... Goldsboro

WALTER E. BROCK, JR. ..... Raleigh
JOYCE MURPHY BROOKS ..... Charlotte
TIMOTHY J. BROSNAN ..... Raleigh
CHARLES GORDON BROWN ..... Efland
RICHARD TOWNSEND BROWN ..... Laurinburg
JOHN STUART BRUCE ..... Raleigh
WALTER RICHARD BRUCE III ..... Durham
CLAY ALAN BRUMBAUGH ..... Jacksonville
DENNIS WATSON BRYAN ..... Durham
ROBERT MICHAEL BRYAN ..... Roanoke, Virginia
EDNA L. BRYAN-CUMMINS ..... Winston-Salem
JONATHAN EDWARD BUCHAN, JR. ..... Durham
CHARLES T. BUSBY ..... Salisbury
DAVID HAYES CAFFEY ..... Winston-Salem
MICHAEL DAVID CALHOUN ..... Pensacola, Florida
JAMES VINCENT CAMPBELL II ..... Belmont
GLEN EVERETTE CANNON ..... Winston-Salem
ROBERT EUGENE CANSLER ..... Franklin
E. RANDOLPH CARROLL ..... Charlotte
GARY DOUGLAS CHAMBLEE ..... Raleigh
GERARD MICHAEL CHAPMAN ..... Atlanta, Georgia
RONALD LYNN CHAPMAN ..... Parsippany, New Jersey
MARCUS WILKES CHESNUTT ..... Fayetteville
ERIC STEVEN CHOFNAS ..... Martinsburg, West Virginia
DONNA A. CHU ..... Forrest City, Arkansas
JOSEPHINE L. CITRIN ..... Thomasville
DUMONT CLARKE IV ..... Fairview
WILLIAM ALLEN COBB, JR. ..... Wrightsville Beach
STEPHEN DALTON COGGINS ..... Wilson
CORNELIUS WESLEY COGHILL III ..... Crofton, Maryland
JEFFREY LEE COHEN ..... Raleigh
REGINALD FARRELL COMBS ..... Winston-Salem
DWIGHT EDWARD COMPTON ..... Graham
ROBERT CLARENCE CONE ..... Greensboro
JOHN CRAWFORD COOKE ..... Raleigh
WILLIAM OWEN COOKE, JR. ..... Greensboro
SHARON JOYCE COSTNER ..... Greenville
BARBARA BITLER COUGHLIN ..... Chapel Hill
LEON ROBERT COXE III ..... Jacksonville
GUY W. CRABTREE ..... Durham
DAVID LEIGH CRAVEN ..... Clemmons
WILLIAM REID CULP, JR. ..... Gastonia
THEODORE FRANKLIN CUMMINGS III ..... Hickory
WILLIAM REID DALTON III ..... Burlington
JOHN PHILLIPS DANIEL ..... Pensacola, Florida
WILLIE SAMUEL DARBY ..... Oxford
EUGENE FRANCIS DAUCHERT, JR. ..... Kinston
DANIEL WILBORN DAVIS III ..... Goldsboro
ROSEMARY ANTIONETTE DAVIS ..... Laurinburg
WILLIAM BLOUNT RODMAN DAVIS ..... New Bern
ROBERT WILLIAM DETWILER ..... Winston-Salem

CLARENCE HARLEY DICKSON III ..... Charlotte
HUGH WILLIAM DIVINE ..... Winston-Salem
GUSTAVUS LATHAM DONNELLY, SR. ..... Winston-Salem
ANNE DUVOISIN ..... Carrboro
KEVIN OWEN EASLEY ..... Rocky Mount
SHELLEY TAGER EASON ..... Gastonia
JONATHAN ANDREW EDDY ..... Chapel Hill
BILLY GORDON EDWARDS ..... Greensboro
AUGUSTUS BURNS ELKINS II ..... Durham
JEFFREY B. ELLIS ..... Winston-Salem
RICHARD JAMES EPPS, JR. ..... Wilmington
LEOWEN EVANS ..... Raleigh
WILLIAM FRANCIS FAIRLEY ..... Southport
WILLIAM CHARLES FARRIS ..... Wilson
ARTHUR DALE FAULKNER ..... Henderson
CLAUD S. FERGUSON, JR. ..... Greensboro
JANE FLOWERS FINCH ..... Bailey
DAVID WARD FISHER ..... Kinston
EVANS WATKINS FISHER ..... Winston-Salem
THOMAS LEE FITZGERALD ..... Roxboro
JOHN BOYD FLEMING, JR. ..... Winston-Salem
GEORGE L. FLETCHER ..... Gainesville, Florida
DOLORES DYKE FOLLIN ..... Greensboro
MANLIN MAUREEN CHEE FORGAY ..... Greensboro
CARL RAYNARD FOX ..... Mount Olive
GARRY WILLIAM FRANK ..... Lexington
MARGOT DALE FREEMAN ..... Chapel Hill
GRADY LAWRENCE FRIDAY ..... Kissimmee, Florida
ROBERT HUTCHESON FRIEND ..... Winston-Salem
ISRAEL ALLAN FROM ..... Raleigh
ARCHIE WAYLAND FUTRELL III ..... Raleigh
THOMAS DRAKE GARLITZ ..... Chapel Hill
ROBERT FRANKLIN GARNER ..... Greensboro
MEL JOSEPH GAROFALO ..... Wantagh, N. Y.
AARON DOUGLAS GARRETT ..... San Diego, California
JOSEPH SAMUEL GENTRY, JR. ..... Dobson
ROBERT CHARLES GEORGIADE ..... Durham
RONALD LAVONNE GIBSON ..... Columbia, S. C.
WILLIAM BURNS GIBSON ..... Chapel Hill
REBECCA WEIANT GILES ..... Hillsborough
KATHY ANN GLEASON ..... Chapel Hill
JAMES WILLIAM GOCKE ..... Raleigh
DAVID RALPH GODFREY ..... Raleigh
BARBARA JEAN GODLEY ..... Washington
BYNUM LURA GRIFFIN ..... Monroe
ROBERT GREGORY GRIFFIN ..... Sanford
THOMAS HAYS GRISWOLD ..... Pineville
JAMES HANS GUTERMAN ..... Chapel Hill
JANET KAY RUTHVEN HAGAN ..... Lakeland, Florida
ALEXANDER MORTON HALL ..... Wilmington
RICHARD DARRELL HANCOCK ..... Salisbury

JO ANN TOWERY HARLLEE ..... Thomasville
DAVID KIT HARP ..... Hot Springs, Arkansas
HAL GENE HARRISON ..... Spruce Pine
WILLIAM P. HART ..... Rochester, N. Y.
SUSAN LEE HARTZOGE ..... Nashville, Tennessee
CORALYNN YOUNG HARWARD ..... Durham
JOHN HASNAS ..... Woodmere, N. Y.
SIDNEY JOHNSTON HASSELL, JR. ..... Roper
RANDELL FRANKLIN HASTINGS ..... Kannapolis
KENNETH BEDFORD HATCHER ..... Chapel Hill
CHARLES RUFUS HAYES ..... Wilkesboro
NANCY SNYDER HEERMANS ..... Chapel Hill
FREDERICK WILLIAM HEHRE III ..... Vineyard Haven, Massachusetts
CHRISTINE O'CONNOR HEINBERG ..... Hempstead, N. Y.
MICHAEL ETNA HELMS ..... North Wilkesboro
PAUL F. HENDERSON, JR. ..... Camp Lejeune
PAUL FRANCIS HENDERSON III ..... Danville, Kentucky
CAMILLA MARGARET HERLEVICH ..... Wilmington
DAVID FLOYD HERZIG ..... Durham
PAUL FREDERICK HERZOG ..... Wrightsville Beach
MICHAEL CARLAN HICKEY ..... Raleigh
THELMA MARIE HILL ..... Kinston
THOMAS MICHAEL HINDMARCH ..... Winston-Salem
LEMUEL WAYNE HINTON ..... Raleigh
WILLIAM RICHARD HITCHENS III ..... New Castle, Delaware
MARY ANN DIXON HOGUE ..... Wilmington
WILLIAM HAROLD HOLLOWS ..... Chapel Hill
JAMES MYRICK HOWARD ..... Durham
ORLANDO FRANK HUDSON, JR. ..... High Point
STEPHEN EDWARD HUFF ..... Mars Hill
CLAUDE L. HUGHES III ..... Newland
JAMES HAROLD HUGHES ..... Wilmington
PATRICIA STANFORD HUNT ..... Chapel Hill
PAMELA ANNE HUNTER ..... Charlotte
H. JAMES HUTCHESON ..... Greensboro
CHARLES MARSHALL INGRAM ..... Kenansville
CHARLES MARSHALL IVEY III ..... Greensboro
HARVEY DOUGLAS JACKSON ..... Henderson
JOHN WILLIAM JELICH III ..... Winston-Salem
CLARENCE GRAY JOHNSEY ..... Kinston
DAVID RICHARD JOHNSON ..... Raleigh
EDGAR MARVIN JOHNSON, JR. ..... Rose Hill
EMILY PERRY JOHNSON ..... Ahoskie
TONY C. JOHNSON ..... Charlotte
ALVIN MAYNARD JOHNSTON, JR. ..... Raleigh
DEWEY MICHAEL JONES ..... Smithfield
HENRY WELDON JONES, JR. ..... Raleigh
T. DOUGLASS JONES III ..... Durham
PAUL H. KAPLAN ..... Brooklyn, N. Y.
RALPH DOUGLAS KARPINOS ..... Wheaton, Maryland
WARREN EDWARD KASPER ..... Roanoke Rapids

JIMMIE R. KEEL ..... Tarboro
GRAYSON GORDON KELLEY ..... Raleigh
M. CHRISTOPHER KEMP ..... Lumberton
HAROLD LILLARD KENNEDY III ..... Winston-Salem
DAVID MEADE KERN ..... Winchester, Virginia
JOHN DANZEY KERSH, JR. ..... Gastonia
ROBERT RUFFIN KING IV ..... Greensboro
JOSEPH HAL KINLAW, JR. ..... St. Pauls
JOHN WOODS KISER, JR. ..... Statesville
GARY MICHAEL KLUKA ..... Chapel Hill
JAMES LEE KNIGHT ..... Greensboro
KARL EDWARD KNUDSEN ..... Raleigh
RICHARD MARTIN KOCH ..... Charlotte
STEPHEN GERARD KOZEY ..... Morrisville, Pennsylvania
RAYMOND DENNIS LARGE, JR. ..... Cosby, Tennessee
MARTHA MELINDA LAWRENCE ..... Raleigh
SCOTT EDWARD LEBENSBURGER ..... Greensboro
RACHEL VIRGINIA LEE ..... Wilson
RANDALL WALKER LEE ..... Waxhaw
DAVID ANDREW LEECH ..... Cary
ROBERT WILLIAM LEHRER ..... Sandusky, Ohio
MARGARET RYAN KENNY LEINBACH ..... Memphis, Tennessee
MILES STUART LEVINE ..... Charlotte
KARIN B. LITTLEJOHN ..... Winston-Salem
KATHLEEN NIX LOADHOLT ..... High Point
CLARENCE DICKINSON LONG III ..... Fayetteville
LAWRENCE DONALD LONG, JR. ..... Winston-Salem
ROBERT DENNIS LORANCE ..... Belmont
EDWIN FLEMING LUCAS III ..... Greensboro
ROBERT VERNON LUCAS ..... Raleigh
JAMES PARKER LUMPKIN II ..... Louisburg
LOWELL THOMAS LUNSFORD II ..... Chapel Hill
MOSES LUSKI ..... Charlotte
MICHAEL RANDY LYON ..... Wilkesboro
REGINA LUCILE MCBRYDE ..... Sumrall, Mississippi
CRAIG ALBERT MCCAUSLAND ..... Miami Beach, Florida
ROBERT DAVIS MCCLANAHAN ..... Chapel Hill
ROBERT L. MCCLELLAN ..... Greensboro
JEFFERSON CARY MCCONNAUGHEY ..... Chapel Hill
JOSEPH WARD MCGIRT, JR. ..... Charlotte
ARTHUR MERRILL MCGLAUFLIN ..... Raleigh
CHARLES WORDEN MCGRADY ..... Cashiers
MARVA CAMILLE LISTON MCKINNON ..... Greensboro
WAYNE BERTRAN MCLURKIN ..... Charlotte
LAWRENCE D. MCMAHON, JR. ..... Morganton
ELEANOR MACCORKLE ..... Hayesville
BRUCE TOWER MACDONALD ..... Hendersonville
ERIC GEOFFREY MACK ..... Greensboro
BRUCE ALBERT MACKINTOSH ..... Winston-Salem
EVELYN S. MADUZIA ..... Goldsboro
ROBERT MAGGIOLO ..... Greensboro

VIRGINIA G. MAHONEY ..... Winston-Salem
JERRY CARL MAILEY ..... Sacramento, California
GEORGE THEODORE MANN ..... Alexandria, Virginia
JOSEPH WARD MARION ..... Winston-Salem
RANDAL STEVEN MARSH ..... Boone
BENTFORD EUGENE MARTIN ..... Winston-Salem
DAVIDA WAGNER MARTIN ..... Winston-Salem
MARSHALL ALLEN MASON III ..... Durham
SUSAN WRIGHT MASON ..... Charlotte
RONALD ALBERT MATAMOROS ..... Lancaster, Pennsylvania
MARY SUSAN MATCHETT ..... Maysville, Kentucky
DAVID E. MATNEY III ..... Charlotte
BECKY IRENE MATTHEWS ..... Henderson
BARTON MATTHEW MENSER ..... Charlotte
DAVID DONOVAN MERRITT ..... Winston-Salem
RONALD WAYNE MERRITT ..... Chapel Hill
JOHN BOLING MEUSER ..... Durham
KATHERINE ANN MEWHINNEY ..... Armonk, New York
PAUL ERIC MEYER ..... Schenectady, New York
MICHAEL COLLINS MILLER ..... Asheboro
REGAN A. MILLER ..... Charlotte
GARY SAMUEL MILLS ..... Marion
HELEN JUANITA MITCHELL ..... Asheville
PAUL RUSH MITCHELL ..... Thomasville
RONNIE MONROE MITCHELL ..... Fayetteville
MICHAEL ROGER MITWOL ..... Akron, Ohio
LINDA CAROL MOBLEY ..... Chinquapin
VICKIE LOUISE MOIR ..... Mooresville
RENEE JEAN MONTGOMERY ..... Cary
DENNIS IAN MOORE ..... Chapel Hill
GILBERT HUGH MOORE, JR. ..... Roxboro
ROBERT MILTON MOOSE ..... Winston-Salem
DALE STUART MORRISON ..... Charlottesville, Virginia
DAVID GALVIN MORROW ..... Buffalo, New York
WILLIAM SEWELL MULLER ..... Winston-Salem
DONALD LANE MURPHY ..... Climax
ANDREW STEVEN NASON ..... Dayton, Ohio
LAWRENCE NESTLER ..... Bryson City
MICHAEL BYRON NIFONG ..... Wilmington
DAVID JOHN NOONAN ..... Boston, Massachusetts
RAYMOND EUGENE OWENS, JR. ..... Charlotte
WILLIAM ROBERT OWENS, JR. ..... Walhalla, S. C.
NANCY PALMER ..... Chapel Hill
JAMES H. PANNABECKER ..... Bluffton, Ohio
THOMAS RICHARD PARDUE, JR. ..... Mount Airy
DAVID MICHAEL PARKER ..... Hurdle Mills
MARIAN FAYE PARKER ..... Greensboro
TIMOTHY PARKER ..... Elon College
JOY RIDDLE PARKS ..... Monroe
STEPHEN EDWARD PARROTT ..... Lexington
ROBERT CUMMINGS PASCHAL ..... Raleigh

PICKENS ANDREW PATTERSON ..... Durham
WILLIAM M. PATTON ..... Cashiers
MICHAEL T. PAYNE ..... Chula Vista, California
PAMELA GRACE PEACOCK ..... Charlotte
HERBERT HOWARD PEARCE ..... Sanford
RONALD GERARD PENNY ..... Raleigh
ELIZABETH BLAINE PERRY ..... Kinston
BENJAMIN GIBBS PHILPOTT ..... Lexington
HUBERT JULIAN PHILPOTT, JR. ..... Lexington
WILLIAM WINSLOW PHIPPS ..... Loris, S. C.
ALVIN LEONARD PITTMAN ..... Whitakers
STEVEN PAYNE PIXLEY ..... Falls Church, Virginia
ARTIS PLUMMER, JR. ..... Durham
DAVID BRAM POLINSKY ..... Greensboro
BRENDA LEE KREBS POLLARD ..... Arden
HAROLD LEE POLLOCK ..... Clinton
JAMES EDWIN PONS ..... Greensboro
LEON EUGENE PORTER, JR. ..... Winston-Salem
WILLIAM FRANCIS POTTS, JR. ..... Charlotte
ROBERT JENNINGS POWELL ..... Summerfield
RICHARD GREENE PRATT ..... Charlotte
SARA LAURENS PRESSLY ..... Charlotte
EUGENE CONNELLY PRIDGEN ..... Troy
STEVEN PALMER RADER ..... Charlotte
GEORGE ARTHUR RAGLAND ..... Winston-Salem
CHRIS ANIGERON RALLIS ..... Jacksonville
DAVID LINDBERG RALLS ..... Charlotte
SUE BATSON RANKIN ..... Durham
EBEN TURNER RAWLS III ..... Durham
CHARLES ARTHUR RAY, JR. ..... Durham
MICHAEL EDWIN RAY ..... Charlotte
OWEN WALKER REAGAN III ..... Cary
JOSEPH GEORGE REED ..... Charlottesville, Virginia
GRAYSON LAWRENCE REEVES, JR. ..... Charlotte
DEBORAH MARGARET REYNOLDS ..... Raleigh
HOWARD FRANKLIN ROBBINS, JR. ..... Asheboro
RANDALL ELBERT ROBERTSON ..... High Point
JAMES GRAY ROBINSON ..... Winston-Salem
SCOTT EUGENE ROKELY ..... Bridgman, Michigan
MICHAEL THOMAS RUSSELL ..... Alexandria, Virginia
DAVID WILLIAM SAPP ..... Lumberton
ROBERT LEE SAUNDERS ..... Salisbury
ANN LASHLEY SAWYER ..... Greensboro
CHRISTOPHER GLENN SAWYER ..... Winston-Salem
RICHARD ALLEN SCHWARTZ ..... Syosset, New York
MORGAN RYAN SCOTT ..... Rocky Mount
ELLEN BRADSHAW SCOUTEN ..... Chapel Hill
LINDA ANN RUIZ SEDIVEC ..... Chapel Hill
DAVID SHAGAM ..... Hillsborough
MARGARET LAND SHARPE ..... Winston-Salem
ROBERT FRANCIS SHARPE, JR. ..... Dayton, Ohio

ROBERT HILL SHAW III ..... High Point
ROBERT E. SHEAHAN ..... Jamestown
WALTER LINCOLN SHEFFIELD III ..... Wrightsville Beach
LISA KAY SHEPHERD ..... Cassville, Missouri
RUSSELL JAMES SHOEMAKER ..... Charlotte
DEBRA FRAN SILBER ..... Teaneck, New Jersey
BRUCE MERLE SIMPSON ..... Monroe
WILLIAM LAWRENCE SITTON, JR. ..... Hickory
CHRISTOPHER JAMES SMALL ..... Winston-Salem
JAMES CARLOS SMITH ..... Weston, Massachusetts
LARRY CORNELL SMITH ..... Durham
MICHAEL ROLLAN SMITH ..... Cassopolis, Michigan
RONALD E. SNEED ..... Black Mountain
STERLING KNOX SPEIRN ..... Bloomfield Hills, Michigan
JAMES WILLIAM STANCIL ..... Charlotte
DONALD MCIVER STANFORD, JR. ..... Chapel Hill
JAMES MILLER STANLEY, JR. ..... Marietta, Georgia
JOHN JOSEPH STENGER ..... Charlottesville, Virginia
MARK ANDREW STERNLICHT ..... Chapel Hill
WILLIAM GARLAND STEWART ..... Fremont
DAVID MICHAEL STRICKLAND ..... Pine Level
NANCY ELLEN STROUD ..... Chapel Hill
WILLIAM COFIELD STUART III ..... Raleigh
WILLIAM HATHAWAY STURGES ..... Charlotte
DAN MORRIS SUMMEY ..... Charlotte
BARBARA JEAN SUTTON ..... Durham
MARSHALL ANTHONY SWANN ..... Upper Marlboro, Maryland
RAYMOND MAY SYKES, JR. ..... Enfield
STEVEN G. TATE ..... Hickory
DONNIE RAY TAYLOR ..... Stantonsburg
MICHAEL WILLIAM TAYLOR ..... Carrboro
SUSAN CHANDLER TAYLOR ..... Norwood
HENRY E. TEICH ..... San Francisco, California
MARK STANTON THOMAS ..... Greensboro
DOROTHY EILEEN THOMPSON ..... Easton, Maryland
ANDREA ANN TIMKO ..... Raleigh
RODNEY SHELTON TOTH ..... Squire, West Virginia
JOHN RICHARD TOWNSEND ..... Lumberton
JEFFREY MARK TREPEL ..... Chapel Hill
SHERRY ELIZABETH TUCKER ..... Reidsville
JEFFERY LYNN TUTTLE ..... Thomasville
MICHAEL JAMES TYDINGS ..... High Point
CHRISTOPHER LEE VARNER ..... Roanoke, Virginia
WILLIAM RUSSEL VASSAR, SR. ..... Charlotte
ALEXANDER HOLLOWAY VEAZEY III ..... Hendersonville
LESLIE CHARLES VESTAL ..... Yadkinville
FREDERICK WILMONT BLANTON VOGEL ..... Shelby
ANN BENNETT WALL ..... Carrboro
JOHN BOLDEN WALTERS ..... Charlotte
JULIE A. WALTZ ..... Chapel Hill
HENRY B. WANSKER ..... Charlotte

JAMES RANDOLPH WARD ..... Denton
THOMAS MONROE WARD ..... New Bern
THOMAS CLAIBORNE WATKINS ..... Wilmington
DOVEY EDWARD WATSON, JR. ..... Wilson
PATRICK ARTHUR WEINER ..... Greensboro
PAUL A. WEINMAN ..... Winston-Salem
WILLIAM EDWARD WEST, JR. ..... Winston-Salem
DESIREE MAGDALENA WHITE ..... Henderson
ROBERT EDWARD WHITFIELD ..... Durham
PHILIP LEROY WHITSON ..... Newell
DENNIS ALVIN WICKER ..... Sanford
STATEN LANGBOURNE WILCOX, JR. ..... Charlotte
ALBERT JEROME WILLIAMS, JR. ..... Charlotte
HERSCAL PEELE WILLIAMS, JR. ..... Elizabeth City
RICHARD ALEXANDER WILLIAMS, JR. ..... Maiden
FRANK LANE WILLIAMSON ..... Charlotte
HENRY HALL WILSON III ..... Monroe
JAMES BRADLEY WILSON ..... Raleigh
SCOTT ARNOLD WILSON ..... Lexington
JOHN MICHAEL WINESETTE ..... Carrboro
MICHAEL GLENN WINTERS ..... Cary
B. JEFFREY WOOD ..... Winston-Salem
THOMAS HENRY WRIGHT III ..... Wilmington
ARTHUR CHARLES ZEIDMAN ..... Durham
THOMAS JOSEPH ZIKO ..... Rumford, Maine

Given under my hand and seal, this the 7th day of September, 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 following named persons were duly admitted to the practice of law in the State of North Carolina by comity on the dates indicated:

On October 13, 1978, the following individuals were admitted:

MAYNARD ALEX HARRELL ..... Robersonville, applied from Mississippi
DONALD J. ENGLEMAN ..... Durham, applied from the District of Columbia
PATRICIA W. LEMLEY ..... Pittsboro, applied from Illinois
TIMOTHY BROWN HACKMAN ..... Raleigh, applied from New York
FRED CLAUSEN ..... Chapel Hill, applied from Colorado
DAVID FREDERICK ESHELMAN ..... Winston-Salem, applied from Ohio
BARRY NAKELL ..... Chapel Hill, applied from the District of Columbia

On October 19, 1978, the following individuals were admitted:

KENNETH N. FLAXMAN ..... Durham, applied from Illinois
PATRICK M. DONLEY ..... Jacksonville, applied from Illinois

Given under my hand and seal, this the 9th day of November, 1978.

FRED P. PARKER III
Executive Secretary

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons were duly admitted to the practice of law in the State of North Carolina by comity on the dates indicated:

On November 3, 1978, the following individual was admitted:

FRED R. GAMIN ..... Apex, applied from Illinois

On December 5, 1978, the following individuals were admitted:

RICHARD LEE WELLS ..... Winston-Salem, applied from Michigan
TIMOTHY WARD HOWARD ..... Clinton, applied from Tennessee
SUSIE R. POWELL ..... Durham, applied from Ohio
CHARLES HENRY ANDERTON, JR. ..... Raleigh, applied from D. C.
JOSEPH M. STRYKER ..... Carthage, applied from Oklahoma
BETTY J. PEARCE ..... Greensboro, applied from New York
ROLAND TOWLE ..... Tryon, applied from Illinois
DAVID STEVEN RUDOLF ..... Chapel Hill, applied from New York

On December 7, 1978, the following individuals were admitted:

GLENNIE M. MATTHEWSON II ..... Princeville, applied from Pennsylvania
TED NEUENSCHWANDER ..... Belhaven, applied from New York

Given under my hand and seal, this the 29th day of December, 1978.

FRED P. PARKER III
Executive Secretary

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1978

STATE OF NORTH CAROLINA v. RONNIE JAMES COBB AND THOMAS BARR

No. 25

(Filed 8 May 1978)

1. **Constitutional Law § 43— right to counsel at probable cause hearing**

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel.

2. **Constitutional Law § 44— effective assistance of counsel—time to prepare defense**

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, §§ 19 and 23 of the N.C. Constitution, is denied unless counsel has adequate time to investigate, prepare and present his client's defense, but unless counsel suggests the existence of material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself, constitute a denial of effective assistance of counsel.

3. **Constitutional Law § 44— counsel appointed on day of preliminary hearing—time to prepare defense**

The trial court did not err in failing to appoint counsel for defendant until the day of his preliminary hearing and in denying defense counsel's motion for a continuance where there was no suggestion that a continuance would have led to the discovery of material witnesses or material evidence; there was no showing that the court's ruling in any way adversely affected defendant's right to effective assistance of counsel; defendant had about six weeks to exercise his right of discovery and to otherwise investigate, prepare and present his defense; and defendant expressly waived his right to counsel.

4. **Criminal Law § 87.1— leading questions—child rape victim**

The general rule is that leading questions may not be asked on direct examination, but leading questions may be asked of a child, particularly when inquiry is directed to delicate matters of a sexual nature; therefore, the trial court did not abuse its discretion in permitting the district attorney to direct leading questions to an eleven year old girl concerning her kidnapping followed by a brutal rape.

5. **Criminal Law § 66— in-court identification of defendant—test for admissibility**

The test to be applied in determining the admissibility of an in-court identification which is preceded by a pretrial photographic identification is whether the pretrial procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

6. **Criminal Law § 66.9— photographic identification—defendants' photographs newer—no suggestiveness**

The fact that photographs of the two defendants were newer and had not been handled as much as other photographs shown to a rape victim in a pretrial photographic identification procedure did not suggest that defendants were involved in the crime or that the witness should select their photographs as depicting her assailants, and such distinction was not impermissibly suggestive.

7. **Criminal Law § 66.12— confrontation at preliminary hearing—in-court identification not tainted**

There was no evidence to suggest that the confrontation between defendants and the prosecuting witness at a preliminary hearing in any way affected her in-court identification testimony.

8. **Rape § 11— first degree rape—female under 12—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree rape where the victim testified without contradiction that she was eleven years old and that prior to the offense in question she had never had intercourse with anyone; she unequivocally identified defendants as the men who kidnapped and raped her; and the State, without contradiction, offered competent evidence tending to show that each defendant was over 16 years old.

9. **Kidnapping § 1.2— abduction to facilitate crime of rape—sufficiency of evidence of kidnapping**

Evidence was sufficient to be submitted to the jury in a prosecution for kidnapping where the evidence tended to show that defendants, who were over sixteen years old, unlawfully and without the consent of her parents or legal custodian removed the eleven year old victim from a restroom at a Hardee's restaurant located in New Hanover County and carried her to an apartment located in Wilmington for the purpose of facilitating the commission of the felony of rape upon her person.

10. **Criminal Law § 72— defendants' ages—opinion testimony admissible**

A police detective who was among the officers who apprehended defendants, who formally placed defendants under arrest and read them their rights, who was present when pubic hair samples were taken from each defendant,

and who was in the presence of one defendant during an apartment search had sufficient opportunity to observe defendants so as to form and express in a first degree rape trial an opinion as to their ages.

11. Criminal Law § 72— defendants' ages—opinion testimony admissible

In a prosecution for first degree rape, the trial court did not err in allowing a witness to state her opinion concerning defendants' ages, though the witness was relying on statements made by each defendant in her presence as well as on her observation of defendants, since any statement made by an accused which is relevant to the issue and not subject to some specific exclusionary rule may be received in evidence against him.

12. Criminal Law §§ 73, 92— joinder of charges against two defendants—hearsay testimony inadmissible

Defendant's contention that joinder of his trial with that of his codefendant and the subsequent rulings of the court limiting cross-examination of State's witnesses concerning statements made by his codefendant deprived him of his constitutional rights of cross-examination and confrontation is without merit, since the testimony defendant sought to elicit from the witnesses was hearsay and, though defendant showed that the joinder of his case with that of his codefendant created the "necessity" requirement for exceptions to the hearsay rule, he did not show circumstances under which the statements were made which would furnish the "circumstantial probability of trustworthiness" also required for an exception to the hearsay rule.

13. Searches and Seizures § 11— warrantless search of vehicle—probable cause

The trial court properly allowed into evidence items seized during a warrantless search of defendant's car at police headquarters the day after he had been taken into custody, since police officers had probable cause to stop defendant's car on the night the crimes in question were committed, the officers having heard a police dispatcher's broadcast accurately describing the car including its license number and identifying the vehicle as having possibly been used to facilitate a kidnapping and rape; and though officers had ample time to obtain a search warrant before seizing the items at the police station, there was no necessity for a warrant at that time because the probable cause which justified stopping the car and conducting a search on the day before had not dissipated and there was no unreasonable search and seizure as proscribed by the Fourth Amendment to the U.S. Constitution because the items seized were in plain view.

14. Searches and Seizures § 14— consent to search challenged—voir dire required

When the validity of a consent to search is challenged, the trial court must conduct a voir dire hearing to determine whether the consent was in fact given voluntarily and without compulsion.

15. Searches and Seizures § 14— consent to search challenged—evidence on voir dire uncontradicted—findings required

On a voir dire hearing to determine the voluntariness of a consent to search where the evidence is uncontradicted, a specific finding that a consent to search was voluntarily given is not required, and such finding is implicit in the court's denial of a motion to suppress, or overruling an objection to the introduction of, evidence seized as a result of a consent search.

16. Searches and Seizures § 14— consent to search—defendant under arrest—sufficiency of evidence of voluntariness

Where the State offered evidence that defendant was told why he had been arrested and the reason police wanted to search his apartment, that no threats or promises were made to defendant in order to secure his consent, and that defendant signed a consent form which contained acknowledgments that consent to search without a warrant could be refused and that consent was given voluntarily and without threats or promises of any kind, the fact that defendant was under arrest at the time the consent was given, standing alone, was insufficient to overcome an otherwise apparently voluntary consent.

17. Searches and Seizures § 7— search incident to arrest—admissibility of bloodstained underwear, pubic hair

In a prosecution for kidnapping and rape, the trial court did not err in allowing into evidence bloodstained underwear, pubic hair samples and a long blond hair taken from defendant after a search of his person on the night he was arrested, since the search of defendant occurred after he had been arrested upon probable cause and thus was not tainted by any unlawful arrest; it is not an unlawful search or seizure to take from an arrested person items of clothing worn by him, and the results of any examination of such clothing as well as the clothing itself are admissible at trial; the Fifth Amendment against self-incrimination does not preclude the taking of blood samples, hair samples, clothing and the like; and the Fourth Amendment precludes only those intrusions into the privacy of the body which are unreasonable under the circumstances.

18. Rape § 11.1— rape of female under 12—jury instructions proper

In a prosecution of defendant for the rape of a female under the age of 12, the trial court did not err in failing to instruct the jury that, in order to find defendant guilty of first degree rape, it must find that the victim's resistance was overcome by the use of deadly force or infliction of serious bodily injury, since those are not elements of the crime with which defendant was charged.

APPEAL by defendants from *Rouse, J.*, 20 June 1977 Session of NEW HANOVER Superior Court. Defendants were each charged in separate bills of indictment with kidnapping and rape.

At trial, the State offered evidence which tended to show that on the night of 22 April 1977 Rachel Sawyer, aged 11, went with her mother and two brothers to a Hardee's restaurant. As Rachel left the restroom in the restaurant, she was seized by a black man and carried "baby style" to the back seat of a nearby black and white car driven by another black man. The two men forcibly took Rachel to a bedroom on the second floor of a white frame house where they each had sexual intercourse with her. She was then taken to a place near her home and released. She walked to the home of a neighbor who observed that Rachel's

clothing was bloody and that she was still bleeding heavily. The neighbor called Rachel's mother and the police about 11:30 p.m. Rachel was taken to the hospital where it was determined that she had suffered severe lacerations of the vagina, requiring surgical repair and four days hospitalization. There was also medical testimony that spermatozoa was found in her vagina. Rachel identified defendants Cobb and Barr as her assailants.

John Harriott and Tella Ramsey were also at the same Hardee's restaurant on 22 April 1977. Harriott heard a scream and turned to see a black man coming from the restroom with a white child in his arms. The man entered the back seat of a black and white car driven by another black man. As the two men drove away, Harriott pursued the car and was able to determine that the license number on the car was JZL-171. He stopped at an armory and told a security guard what he had seen and asked him to call the police.

Between the hours of 11:00 p.m. and 12:00 p.m., police officers observed a black and white car bearing the license number JZL-171. When they pursued the car, two black men jumped from the car and ran. Both men were quickly apprehended and arrested. The two men who ran from the car were defendants Cobb and Barr. At the time of their apprehension, a police officer standing beside their car observed a gold hair barrette on the back seat. There was other testimony tending to show that each defendant was more than 16 years old.

The State offered other corroborative evidence, pertinent parts of which will be hereinafter set forth in the opinion.

Defendants offered no evidence.

The jury returned verdicts of guilty of kidnapping and guilty of first degree rape as to each defendant. Defendants were each sentenced to two consecutive life sentences.

Rufus L. Edmisten, Attorney General, Thomas P. Moffitt, Associate Attorney, for the State.

Mathias P. Hunoval, for defendant appellant Cobb.

H. P. Laing, for defendant appellant Barr.

BRANCH, Justice.

Defendant Barr assigns as error the failure of the court to appoint counsel until the day of his preliminary hearing on 5 May 1977.

On 25 April 1977, defendant Barr executed an affidavit of indigency, and, on 5 May 1977, when he appeared for preliminary hearing on the charges against him, District Court Judge Walker appointed attorney Harold P. Laing to represent defendant on the charges against him. Defense counsel then moved for continuance which motion was denied. Defendant contends that this ruling denied him effective assistance of counsel because appointed counsel did not have sufficient time to adequately prepare for trial.

[1, 2] A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. *Coleman v. Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970); *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633, *cert. denied*, 409 U.S. 888, 34 L.Ed. 2d 145, 93 S.Ct. 194 (1972). By statute it is provided that an indigent person is entitled to counsel in felony cases, G.S. 7A-451(a)(1), and such entitlement to counsel begins as soon as feasible after the initiation of criminal process including, specifically, the preliminary hearing. G.S. 7A-451(b)(4). Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23, of the North Carolina Constitution, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. *State v. Vick*, 283 N.C. 37, 213 S.E. 2d 335, *cert. denied*, 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975). Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself, constitute a denial of effective assistance of counsel. *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948).

[3] In instant case, there is no suggestion that a continuance would have led to the discovery of material witnesses or material evidence. Neither is there any showing that the court's ruling in

any way adversely affected defendant's right to effective assistance of counsel. To the contrary, the record reveals that defendant had a period of about six weeks to exercise his right of discovery and to otherwise investigate, prepare and present his defense. This assignment of error must also be overruled because defendant expressly waived his right to counsel.

A defendant in a criminal proceeding whether at trial or in pretrial proceedings may waive his right to counsel if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

G.S. 7A-457, as amended by the 1971 and 1973 Legislatures, in part provides:

> *Waiver of counsel; pleas of guilty.*—(a) An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged . . . . (c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel.

On 25 April 1977 at his first court appearance, defendant Barr executed a written waiver of counsel in which he stated that he had been informed of the nature of the charges against him, the punishment therefor, and of his right to assignment of counsel. Therein he stated that he did not desire the assignment of counsel and expressly waived his right to assignment of counsel. Pursuant to the execution of these waivers, Judge Walker thereupon certified for the record that defendant Barr executed the waivers in his presence after the meaning and effect of the waivers had been fully explained to him and after being fully informed of the nature of the proceedings against him and of his right to have counsel assigned by the court.

Under these circumstances, we find no error in the trial court's failure to appoint counsel for defendant Barr until the day of his preliminary hearing.

We find no merit in defendant Barr's contention that the trial judge erred by permittng the district attorney to ask the prosecuting witness leading questions.

[4] The general rule is that leading questions may not be asked on direct examination. However, leading questions may be asked of a child and particularly when inquiry is directed to "delicate matters of a sexual nature." The rulings of the trial judge on the use of leading questions are discretionary and will be disturbed only upon a showing of an abuse of discretion. *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116 (1971); 1 Stansbury's North Carolina Evidence, Section 31, (Brandis rev. 1973); (hereinafter referred to as Stansbury). Here the questions excepted to by defendant were directed to an 11 year old child concerning her kidnapping followed by a brutal rape. No abuse of discretion on the part of the trial judge is shown.

Defendant Barr assigns as error the admission of the testimony of Rachel Sawyer identifying him as one of the men who kidnapped and raped her. He contends that a pretrial photographic procedure and a confrontation between defendant and the prosecuting witness at a preliminary hearing were each so suggestive as to impermissibly taint the witness's in-court identification testimony.

[5] The test to be applied in determining the admissibility of an in-court identification which is preceded by a pretrial photographic identification is whether the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). *Accord: Stoval v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). This rule is equally applicable to all pretrial identification procedures.

[6] In instant case, defendant Cobb was identified by the prosecuting witness without any objection. However, defendant Barr's counsel objected when it became evident that Rachel

Sawyer was about to identify him as one of her assailants. When this objection was noted, the trial judge conducted a *voir dire* hearing.

On *voir dire*, Rachel Sawyer testified that Barr was the man who drove the automobile that carried her away from Hardee's on the night of 22 April 1977 and that he was the second man who had intercourse with her on that night. She was taken some distance across the city and into a second floor apartment located in a white house. She was in defendant's presence for more than an hour, and while they were in the apartment, there was a light beside the radio in the bedroom which permitted her to see their faces. She had an opportunity to observe defendant Cobb's face during the ride to the apartment.

On 23 April 1977, Detective Todd showed her a group of photographs, and she picked out the photographs of Cobb and Barr as the men who kidnapped and raped her. No one indicated which photograph she was to pick out. She stated, "My identification of Barr and Cobb is based on seeing them on the night of April 22, 1977, at Hardee's and in the apartment."

Officer Martha Lanier testified that she saw Rachel Sawyer at the hospital on the night of 22 April 1977, and Rachel told her that she could identify "the two men."

Detective Richard Todd testified that on 28 April, he carried seven photographs of black males of approximately the same age, build, and complexion to the home of Rachel Sawyer. He asked Rachel to see if she saw anyone in the group who had committed the offense against her. Rachel, without hesitation and without any prompting on his part, picked out the photographs of Barr and Cobb. On cross-examination, defense counsel elicited from the witness the fact that the photographs of Cobb and Barr were more recently made and had not been handled as much as the others.

Defendant offered no evidence on *voir dire*.

At the conclusion of the *voir dire*, the trial judge found facts consistent with the above-recited testimony, including a finding [denominated as a conclusion of law] "that the in-court identification of defendant is of independent origin based solely on what

the prosecuting witness saw at the time of the alleged crime and does not result from any out of court confrontation or from any photographs or from any other pretrial identification procedures suggestive or conducive to her statements of identification." The court thereupon ruled that the identification testimony was admissible.

We find nothing impermissibly suggestive in the pretrial photographic identification procedure. Defendant contends that the procedure was impermissibly suggestive in that the photographs of him and defendant Cobb were newer than the other photographs used. We disagree. Even assuming that the newness of defendant's photograph may have been noticed by the witness, such a distinction certainly does not suggest that he was involved in the crime or that the witness should select his photograph as depicting one of her assailants. *See, State v. Davis*, 294 N.C. 397, --- S.E. 2d --- (1978). The "suggestiveness" of the photographic procedures employed in instant case is so minimal as to be nonexistent.

[7] Neither does the record evidence support defendant's contention that the viewing of defendant by the prosecuting witness at a preliminary hearing tainted her in-court identification testimony. We have consistently held that "unrigged" courtroom confrontations are not violative of due process. *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1970). We find nothing in this record which suggests that the confrontation between defendants and the prosecuting witness at a preliminary hearing in any way affected her in-court identification testimony. Further, the court's finding, "That the in-court identification of the defendant is of independent origin based solely on what the prosecuting witness saw at the time of the alleged crime and does not result from any out of court confrontation or from any photographs or from any other pretrial identification procedures suggestive or conducive to her statement of identification.", was supported by plenary uncontradicted evidence and is, therefore, binding on us. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971).

The trial judge properly overruled defendant Barr's objections to the in-court identification testimony.

Defendant Barr contends that the trial judge erred by denying his motions for directed verdicts of not guilty.

[8] In a criminal action, a motion for a directed verdict and a motion for judgment as of nonsuit have the same legal effect. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). In passing upon such a motion, the evidence must be taken in the light most favorable to the State, and the State must be given the benefit of every inference reasonably flowing therefrom. Only evidence favorable to the State is considered and contradictions, even in the State's evidence, are for the jury and do not warrant a granting of the motion. When so considered, the motion should be denied when there is substantial evidence, direct, circumstantial or both from which the jury could find that the offense charged was committed and that the defendant perpetrated the offense or was one of its perpetrators. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). In support of his motion, defendant first argues that there was no sufficient evidence to carry the charge of first degree rape to the jury. We disagree.

G.S. 14-21, in part, provides:

> Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (1) First-Degree Rape—
>
> a. If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death . . . .

Rachel Sawyer testified, without contradiction that she was 11 years old and that prior to 22 April 1977 she had never had intercourse with anyone. She unequivocally identified defendants as the men who kidnapped and raped her. The State, without contradiction, offered competent evidence tending to show that each defendant was over 16 years old.

[9] We turn to defendant's argument that the evidence was not sufficient to repel his motion for a directed verdict of not guilty as to the charge of kidnapping. G.S. 14-39, *inter alia*, 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 custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

* * *

(2) Facilitating the commission of any felony . . . .

There was ample evidence tending to show that defendants Cobb and Barr, who were over 16 years of age, unlawfully and without the consent of her parents or legal custodian removed 11 year old Rachel Sawyer from a restroom at a Hardee's restaurant located on Carolina Beach Road in New Hanover County and carried her to an apartment located at 701 South Second Street in Wilmington, North Carolina, for the purpose of facilitating the commission of the felony of rape upon her person.

The trial judge did not commit error in refusing to grant defendant Barr's motions to direct verdicts of not guilty on the charges of first degree rape and kidnapping.

Defendant Barr argues that the trial judge erred by permitting opinion and hearsay testimony as to his age.

[10] Detective Richard Todd of the Wilmington Police Department testified that he was among the officers who apprehended defendants. He was the officer who formally placed defendants under arrest and informed them of their constitutional rights. He was present during the time that pubic hair samples were taken from each defendant and was also in the presence of defendant Cobb when the apartment was searched. Upon this background, the trial judge permitted Detective Todd to testify that in his opinion defendant Barr was 18 or 19 years old, and defendant Cobb was between the ages of 23 and 25 years old.

In a criminal case, the opinion of a lay witness concerning the age of an accused is admissible into evidence when the witness has had adequate opportunity to observe the accused and when the age of the accused is one of the essential elements of the crime for which he is being tried. *State v. Gray*, 292 N.C. 270, 233

S.E. 2d 905 (1977). Here the age of each defendant was an essential element of the charge of first degree rape. In our opinion, this trained police officer had sufficient opportunity to observe defendants so as to form and express an opinion as to the age of defendants.

[11] During the direct examination of State's witness Patricia Young, she stated she had known defendant Cobb for approximately eight months and had known defendant Barr for about a week and a half. Cobb had visited in her home on several occasions. She further testified that she saw both Barr and Cobb on 22 April 1977 when she executed a title to a 1968 Chrysler Imperial automobile to Barr and delivered possession of that automobile to him. The district attorney continued his direct examination of the witness as follows:

Q. Do you have an opinion as to the age of Thomas Barr?

MR. HUNOVAL: OBJECTION.

MR. LAING: OBJECTION.

COURT: OVERRULED.

Q. Do you?

A. Yes, and also, applying for insurance he told the lady, eighteen.

MR. LAING: OBJECTION. MOTION TO STRIKE.

COURT: The objection is overruled and the motion to strike is denied.

Q. Do you have an opinion as to the age of Ronnie James Cobb?

A. I do.

MR. HUNOVAL: OBJECTION.

COURT: OVERRULED.

A. I believe he told me at one time twenty-three, if I remember correctly.

Obviously, the witness Young, in addition to her observation of defendants, was relying on statements made by each of them in her presence.

Any statement made by an accused which is relevant to the issue and not subject to some specific exclusionary rule may be received in evidence against him. This is so even when the statements may have been made at a time when they were not against his interest. The basis for this rule is that the only possible reason which could be urged against such statement is that it is hearsay, and it would be irrational for a party to object to his own declarations on that ground. 2 Stansbury, Section 167.

We hold that the trial judge correctly admitted the testimony concerning the age of each defendant.

[12] Defendant Barr contends that the joinder of his trial with that of codefendant Cobb and the subsequent rulings of the court limiting cross-examination of State's witnesses concerning statements made by his codefendant deprived him of his constitutional rights of cross-examination and confrontation.

During the respective cross-examination of officers Prescott, Elledge and Norris, counsel for defendant Barr posed questions which, if the answers had been admitted, would have resulted in testimony that Cobb had said (1) that he (Cobb) had nothing to do with the crimes, (2) that Barr was involved in the crimes, (3) that he was not going to cover up for Barr and (4) that he had not seen Barr on the day the crimes were committed. The trial judge sustained objections to each of these questions.

In each instance, the question posed by defense counsel sought to obtain testimony concerning an extra-judicial statement made by defendant Cobb rather than the witness for the purpose of proving the truth of the matter asserted. This is hearsay evidence, and such evidence will ordinarily be excluded unless it falls within one of the many exceptions to that rule. 1 Stansbury, Section 138. We do not deem it necessary to here list and consider each exception. Suffice it to say that in our opinion, the evidence under consideration does not fall within any of the well-recognized exceptions to the rule. *See*, 1 Stansbury, Section 144, *et seq*. However, there are recent decisions which permit, and even require, creation of new reasonable exceptions to the hearsay rule under given circumstances.

In *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973), the defendant who was charged with murder offered a witness for the purpose of introducing the witness's written confession that he committed the crime for which the defend-

ant was being tried. On cross-examination, the witness repudiated the confession and asserted an alibi. Defendant thereafter offered three witnesses for the purpose of testifying that shortly after the murder, this third party orally confessed to them that he committed the crime. The trial court excluded this evidence as hearsay, and the defendant's conviction was affirmed by the Supreme Court of Mississippi. The United States Supreme Court reversed defendant's conviction holding that the testimony of the three witnesses as to the oral confessions was admissible. In so holding, the Court stated:

> . . . Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice. 410 U.S. at 302.

In *State v. Vestal*, 278 N.C. 561, 582, 180 S.E. 2d 755 (1971), Justice Lake, speaking for the Court, stated:

> The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of trustworthiness. As Professor Morgan has said in 31 *Yale Law Journal* 229, 231, "If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and cross-examination."

In instant case, we are of the opinion that the joinder of defendants' cases created the "necessity" requirement now recognized by the courts in that Cobb was made unavailable as a witness for Barr. However, unavailability of the declarant, alone, is not enough to make a hearsay statement admissible. *See, Improvement Co. v. Andrews*, 176 N.C. 280, 96 S.E. 1032 (1918).

There must also be a "reasonable probability of trustworthiness" to satisfy the function of the oath and examination.

The declarant's statements in the case *sub judice* were those of a prime suspect who was striving to direct the finger of suspicion from himself to another. The credibility of his declarations is not enhanced by a showing that they inculpated the declarant. Therefore, we find nothing in the circumstances under which these statements were made which would furnish the necessary "circumstantial probability of trustworthiness." 5 Wigmore on Evidence, Section 1422 (3d ed. 1974). Further, examination of the content of the excluded statements shows that the ruling benefited rather than prejudiced defendant Barr.

For reasons stated, this assignment of error is overruled.

By his next assignment of error, defendant Barr contends that the trial court committed reversible error by allowing the introduction of evidence seized as a result of (1) the warrantless search of his car at police headquarters the day after he had been taken into custody, (2) the warrantless search of the apartment he shared with defendant Cobb, and (3) the search of his person.

[13] Following a *voir dire* hearing to determine the admissibility of the evidence taken from the car, Judge Rouse found that after the car had been stopped by the police and defendants had fled, a gold barrette was observed on the back seat of the car. He also found that when the car was taken to the police station, Officer Caulk entered the car to remove the barrette and observed a green necklace on the back seat and blond hair on the floor. He took possession of all these items. The trial judge concluded that since the items seized were in plain view, no search warrant was required and overruled defendant's objection to the admission of this evidence.

Defendant contends, however, that the police did not have sufficient probable cause to stop the car on the night of 22 April 1977 and that after the car was taken to the police station, a warrant should have been obtained before it was searched. We do not agree.

The evidence presented shows that on the night of 22 April 1977, the police dispatcher had broadcast an accurate description of the car including its license number and identified the vehicle

as having possibly been used to facilitate a kidnapping and rape. Thus, police officers had probable cause to stop the car. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *State v. Leggette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*,---U.S.---(1977). Moreover, under these circumstances, the officers would have been justified in conducting a complete search of the car at the scene. *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Phifer, supra.*

Admittedly, the officers had ample time to obtain a search warrant before seizing the items at the police station. However, there was no necessity for a warrant at that time because (1) the probable cause which justified stopping the car and conducting a search on the day before had not dissipated, *Texas v. White*, 423 U.S. 67, 46 L.Ed. 2d 209, 96 S.Ct. 304 (1975); *Chambers v. Maroney, supra*, and (2) there was no unreasonable search and seizure as proscribed by the Fourth Amendment to the United States Constitution because the items seized were in "plain view." *U.S. v. Polk*, 433 F. 2d 644 (5th Cir. 1970); *People v. Lott*, 33 Ill. App. 3d 779, 338 N.E. 2d 434 (1975); *State v. King*, 191 N.W. 2d 650 (Iowa, 1971), *cert. denied*, 406 U.S. 908, 31 L.Ed. 2d 819, 92 S.Ct. 1617 (1972).

We hold that the trial judge correctly admitted the seized items into evidence.

By this same assignment of error, defendant Barr contends that the trial court erred by allowing into evidence certain items seized without a search warrant from the apartment which he shared with defendant Cobb. Defendant Barr argues that the circumstances surrounding the execution of the consent form which he signed indicated that he was reluctant to have the apartment searched and that he signed the consent form only because he was in custody.

[14] When the validity of a consent to search is challenged, the trial court must conduct a *voir dire* hearing to determine whether the consent was in fact given voluntarily and without compulsion. *State v. Vestal, supra.* Merely because a defendant is under arrest when consent is given does not render the consent involuntary. *See, Davis v. U.S.*, 328 U.S. 582, 90 L.Ed. 1453, 66 S.Ct. 1256, *reh. denied*, 329 U.S. 824, 91 L.Ed. 700, 67 S.Ct. 107 (1946).

It is, however, a factor which must be considered, *Hubbard v. Tinsley*, 350 F. 2d 397 (10th Cir. 1965); *State v. King*, 44 N.J. 346, 209 A. 2d 110 (1965), and places a greater burden upon the State to show voluntariness. *Greenwell v. U.S.*, 336 F. 2d 962 (D.C. Cir. 1964); *Barnes v. State*, 25 Wisc. 2d 116, 130 N.W. 2d 264 (1964).

[16] In instant case, the trial judge conducted a *voir dire* hearing to determine whether defendants had voluntarily signed consent forms. Detective Norris testified that he told defendants why they had been arrested and the reason police wanted to search their apartment. He further testified that he made no threats or promises to defendants in order to secure their consent. The State introduced the consent forms which contained acknowledgments that consent to search without a warrant could be refused and that consent was given voluntarily and without threats or promises of any kind. Barr signed the consent form. The State also offered other corroborative and cumulative evidence. Defendant Barr did not testify on *voir dire*.

Following presentation of evidence, the trial judge made the following findings of fact and conclusions of law:

> From the evidence offered on voir dire with respect to the entry and search of the premises occupied by the defendants, Cobb and Barr, at 701 South Second Street, the Court makes the following findings of fact:
>
> * * *
>
> 2. The defendant, Thomas Barr, gave consent to the entry and search in writing as indicated by State's Voir Dire Exhibit Number Nine.
>
> * * *
>
> 5. Since both the defendants gave consent to the search of the premises occupied by them at 701 South Second Street, the entry and search was lawful and any evidence procured pursuant to such search is admissible. The objection of both defendants is therefore OVERRULED.

[15] We note that the trial court's findings did not include a specific finding that Barr's consent was free and voluntary. *See, State v. Vestal, supra.* However, where the evidence is uncontradicted, a specific finding that a consent to search was volun-

tarily given is not required and such a finding is implicit in the court's denial of a motion to suppress, or overruling an objection to the introduction of, evidence seized as a result of a consent search. *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Little*, 270 N.C. 234, 154 S.E. 2d 61 (1967).

[16] Here, the State offered ample evidence demonstrating the voluntariness of Barr's consent "contradicted" only by the fact that he was under arrest at the time the consent was given. This fact, alone, is insufficient to overcome an otherwise apparently voluntary consent. Having voluntarily consented to the search of his apartment, the items seized therefrom were correctly admitted into evidence. *U.S. v. Matlock*, 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974). We, therefore, hold that the trial court properly overruled defendant Barr's objection.

[17] By this assignment of error, defendant Barr also contends that the trial court erred by allowing into evidence items taken from both defendants after a search of their persons on the night they were arrested. Shortly after defendants had been arrested, they were ordered to disrobe for the purposes of obtaining pubic hair samples. During this procedure, both men were observed to be wearing bloodstained underwear which was taken from them. A long blond hair was also found in the hair sample taken from defendant Barr. The underwear and blond hair were introduced at trial over defendant Barr's objection. While defendant Barr has preserved his exception, he has advanced no argument to support his contention that the introduction of this evidence was error.

The search of defendant occurred after he had been arrested upon probable cause and thus was not tainted by any unlawful arrest. Further, it is not an unlawful search or seizure to take from an arrested person items of clothing worn by him, and the results of any examination of such clothing as well as the clothing itself are admissible at trial. *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477 (1968); *State v. Ross*, 269 N.C. 739, 153 S.E. 2d 469 (1967); 5 Am. Jur. 2d, *Arrest*, Section 73 (1962). Moreover, the Fifth Amendment prohibition against self incrimination does not preclude the taking of blood samples, hair samples, clothing, and the like, *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975); *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *later appeal*, 275 N.C. 242, 166 S.E. 2d 681, *cert. denied*, 396 U.S. 934, 24 L.Ed. 2d

232, 90 S.Ct. 275 (1969), and the Fourth Amendment precludes only those intrusions into the privacy of the body which are unreasonable under the circumstances. *Brent v. White*, 398 F. 2d 503 (5th Cir. 1968), *cert. denied*, 393 U.S. 1123, 22 L.Ed. 2d 130, 89 S.Ct. 998 (1969); *State v. Sharpe*, 284 N.C. 157, 200 S.E. 2d 44 (1973).

Defendants were charged with rape, and we are of the opinion that the nature and extent of the search of their persons was reasonable under the circumstances and did not violate any of their constitutionally protected rights.

We find no error in the introduction of evidence seized during searches of the car, the apartment, and his person. This assignment of error is, therefore, overruled.

[18] Finally, defendant Barr argues that the trial judge erred by failing to instruct the jury that in order to find him guilty of first degree rape, it must find that the victim's resistance was overcome by the use of deadly force or infliction of serious bodily injury. This contention is without merit. The defendants were on trial for the rape of a female under the age of 12, and the use of deadly force or infliction of serious bodily injury is not an essential element of such crime. G.S. 14-21.

The only assignment of error presented by defendant Cobb is whether the trial judge erred in signing and entering the judgments.

This assignment of error presents the face of the record proper for review and such review is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Mallory*, 266 N.C. 31, 145 S.E. 2d 335 (1965), *cert. denied*, 384 U.S. 927, 16 L.Ed. 2d 531, 86 S.Ct. 1443 (1966). Here no error of law appears on the face of the record, and the judgments are regular in form.

We note, however, that defendant Barr's assignments of error adequately raised for our consideration all possible errors on the part of the trial judge and the facts of this case are such that if prejudicial error had been committed against defendant Barr, the same error would have been committed against defendant Cobb. Had prejudicial error been made to appear, we would have,

ex mero motu, granted the same relief to each defendant. Our careful examination of all the assignments of error and this entire record discloses no error as to either defendant which would warrant a new trial.

No error.

STATE OF NORTH CAROLINA v. BYRON JAMES STEVENS

No. 74

(Filed 8 May 1978)

1. Homicide § 16— dying declarations—effect of G.S. 8-51.1

The requirements of G.S. 8-51.1 for the admission of a dying declaration that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" do not change our case-law requirements that in order to be admissible the declarations of a decedent must have been "in present anticipation of death," that is, the declarant must have been "in actual danger of death" and have had "full apprehension of his danger."

2. Homicide § 16— dying declarations—consciousness of approaching death—belief of no hope of recovery

The evidence supported the court's finding that decedent was conscious of approaching death and believed there was no hope of recovery where it showed that decedent had burns over 99% of his body and most were third-degree burns; his attending physician had told him explicitly that while he might live three weeks, he would not live to leave the hospital; and decedent unequivocally communicated to a detective his knowledge that he was so badly burned he was going to die by nodding his head in answer to questions asked him by the detective.

3. Homicide § 16— dying declarations—leading questions by officer

Dying declarations were not inadmissible because they were made in response to an officer's leading questions where the decedent was unable to speak because of tubes in his nose and throat necessitated by his injuries; the declarations were made by decedent's nodding of his head in response to the officer's questions; and the qualifying questions were appropriate in light of decedent's severe injuries and inability to speak.

4. Homicide § 16— dying declarations—survival longer than anticipated

The fact that decedent survived one week longer than his physician told him he might live did not affect the admissibility of his dying declarations.

5. Homicide § 16— dying declarations—right of confrontation

The admission of dying declarations did not deny defendant the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Art. I, § 23 of the N.C. Constitution.

6. Homicide § 16.2— dying declarations—impeachment or corroboration—general reputation of decedent

A dying declaration is subject to impeachment or corroboration upon the same grounds and in the same manner as the testimony of a sworn witness; thus, evidence of the general character or reputation of the decedent is relevant to impeach or sustain the declaration.

7. Homicide § 16.2— impeachment of dying declarations—decedent's criminal and alcoholic treatment records

A dying declaration was not subject to impeachment by evidence of decedent's criminal record or his record as a patient at a treatment center for alcoholics.

8. Bills of Discovery § 6; Constitutional Law § 30— prosecutor's failure to comply with discovery order—sanctions

A district attorney's refusal to comply with a discovery order under G.S. 15A-903 does not automatically require the exclusion of undisclosed evidence, since a variety of sanctions is authorized by G.S. 15A-910, and the choice of which to apply, if any, rests entirely within the discretion of the trial judge.

9. Bills of Discovery § 6; Constitutional Law § 30— use of in-custody statements on rebuttal—failure to disclose—recess for inspection of statements

The trial court in a homicide case did not err in permitting the State to present on rebuttal defendant's oral statements to officers which were inconsistent with his trial testimony, but which had not been disclosed by the district attorney to defense counsel, where the court granted a recess to allow defense counsel an opportunity to inspect defendant's statements and to interview the officers and thus fully protected defendant's legitimate rights to know the full extent of the case against him and be protected from the use of surprise evidence. Defendant's assertion that defense counsel would have advised defendant not to testify if he had known of the prior contradictory statements did not render admission of the statements prejudicial error since the purpose of the statutory discovery procedure was not to protect a defendant from the consequences of perjury.

APPEAL by defendant from his conviction of first degree murder before *Barbee, S. J.*, at the 8 November 1976 Session of MECKLENBURG Superior Court, docketed and argued as Case No. 115 at the Spring Term 1977.

At the trial the State's evidence tended to show:

Around 10:30 p.m. on 6 June 1976 Mabel Kirkpatrick was sitting in the front yard of her Charlotte apartment when she heard

an explosion, the sound of breaking glass and screams coming from behind the building. She ran toward the sound and saw a black male, identified as the deceased, Amos Belk, walk out of the house at 325 East Tremont Street. He was on fire; "it was dripping from his legs." She called the police; firemen and an ambulance were also summoned.

Upon their arrival firemen found "several fires in the apartment at different places." The main fire was located in the first bedroom on the left and extended up the hallway into the bathroom. The worst involvement of fire and smoke was in the bedroom, concentrated on the mattress only three or four feet from the hall door. As soon as the firemen entered the house they immediately noticed the odor of a "petroleum product," and observed a "five gallon can of gasoline sittin' in the hallway." Fireman Maurice Williams immediately took the can outdoors because of the dangerous fumes it was emitting. The carpet around the can was scorched but the circle it occupied was clean. In the bathroom the firemen discovered the bathtub three-fourths full and the water still running. A man's shoes, shirt and pants were on the floor "like he'd stepped out of them." They were on fire.

When Fireman McAnulty arrived at the scene he saw a thin man, completely nude except for a band of elastic from his underwear, leaning against a car in the driveway. This man was severely burned, and McAnulty motioned to the ambulance, which took him away.

James O. Davis, a fire investigator for the Charlotte Fire Department and an expert in determining the cause and point of origin of a fire, testified as follows: When he entered the house on 325 Tremont on 6 June 1976, he too smelled a petroleum product in the bedroom. "The extent of damage was more or less in the bed area and the paint was scorched and the heat marks all on the wall. . . . In the bathroom area, there was a pair of trousers still smoldering slightly, a pair of shoes and another particle of clothing there. . . . and also, a rolled up torch piece of paper, half burned. I smelled a petroleum product in the bathroom. . . . I looked back up the hall. There was a scorched area on the carpet up the hall toward the bedroom. . . . The scorched area was darker looking up the hall than it was looking down the hall toward the

bathroom area. The dark scorched area indicates to me as a fire investigator that . . . the point of origin . . . was in the bathroom igniting the vapors leading back to the bedroom. The fire started in the bathroom. . . . The carpet I've talked about in this case was singed across the top, as if it were a vapor fire rather than a liquid gasoline fire in that carpet."

Davis explained that gasoline "puts off a vapor, . . . a gas that floats . . . and by this igniting, it goes back to the riches. In other words, where the gas is originally deposited, poured or whatever . . . no matter how long a trail is, the fire will go right straight back up this vapor trail to the richest part and ignite. So, if gasoline had been poured on a bed in the front bedroom and there was a vapor trail leading from that bed to the bathroom and there was an ignition in the bathroom, then the fire could travel back up the hallway to the bed."

Chemical analysis of the partially burned "torch piece of paper," and the trousers and the shoes found in the bathroom revealed that all contained gasoline. An analysis of a sample of liquid taken from the can found in the hall revealed it also to be gasoline.

Dr. James C. Stevens of the surgical staff at Charlotte Memorial Hospital testified that Amos Belk, who had just been severely burned, was admitted to the hospital "in the late evening hours" of 6 June 1976. Ninety-nine percent of his body was burned—"all but the soles of his feet." The burns were third-degree burns. Dr. Stevens treated Belk for six to eight consecutive hours that night. "If we had not performed those procedures, he would have lived probably no more than two hours." Within the first 45 to 60 minutes from the time Belk came into the emergency room Stevens told Belk that "he was quite critical, quite critically ill. That he would almost certainly not survive to leave the hospital, that his chances of living two or three weeks were fairly good, but his chances of surviving any more than that were practically nil." Thereafter Dr. Stevens told Belk the same thing several more times—at least two or three, the last time being around 8:00 a.m. on 7 June 1976. Dr. Stevens said he felt quite sure that Belk understood him for he gave intelligent answers to all his questions.

Charlotte Police Officer S. T. Wallace, who went to the emergency room of Charlotte Memorial Hospital around midnight on 6 June 1976 to interview Belk, testified as follows: "I asked him what happened. He told me that Byron poured gas on [him] and set [him] on fire. I asked him, Byron who. He said, 'Byron Stevens.' I asked him why. He told me that because he would not play around with Byron. I asked him what did he mean by playing around. He said, 'Sexually. He's a punk.' He then said, 'Get him. He's mean.' " (The court struck the remark "Get him. He's mean," and instructed the jury not to consider it.)

Detective D. L. Sharpe also spoke with Belk that night in the emergency room. Belk repeated in essential detail the accusations against defendant, his roommate, which he had made to Officer Wallace.

Sharpe returned to speak with Belk again the next morning about 9:45 o'clock. By this time Belk was so encumbered with nasal tubes that he could not speak. Nonetheless, he was able to answer Sharpe's questions either by nodding his head to indicate assent, or by shaking it to indicate a negative answer. Sharpe, testifying from notes, gave a verbatim account of the interview. The session began with the following questions and answers:

"SHARPE: Did you get burned last night?
Nod of head affirmative.

"SHARPE: Did you get burned at your house?
Nod of head affirmative.

"SHARPE: Do you know how bad you are burned?
Nod of head affirmative.

"SHARPE: Do you think that you're going to die?
Nod of head affirmative.

"SHARPE: Did he, the doctor, tell you that you were burned real bad? Nod of head affirmative.

"SHARPE: Did the doctor tell you you were going to die?
Nod of head affirmative.

Sharpe then proceeded to ask Belk leading questions as to how and why he had come to be burned. The following story emerged: Belk and Stevens were roommates in the house on East

Tremont. Earlier in the evening, about 8:00 a.m., he and Stevens had had an argument over $60 that Stevens allegedly owed Belk. No blows were passed. Both had been drinking wine and beer. Stevens and Belk had another argument over sex. Belk and defendant had had sex before, and defendant "got mad this time" because Belk would not. Belk went to bed between 9:00 and 10:00 p.m. with his clothes on and awoke to find Stevens pouring gasoline over him. Belk went into the bathroom, took off his clothes and began to draw a bath to wash off the gasoline. While Belk was in the bathroom, Stevens reappeared and threw a flaming torch into the bathroom. The room exploded and Belk ran out of the house. Defendant never came back into the house before Belk ran out. Defendant had never gotten mad at him like this before; nor had he ever poured gasoline on him before.

On 3 July 1976, four weeks after he was admitted to the hospital, Amos Belk died from severe body burns.

Defendant Stevens testified in his own behalf. He said that earlier in the day of the fire a friend of his had cut the grass around the house on Tremont. During that time, "Belk was out there with a stick, gas and paper, putting paper in the hole and pouring gasoline and lighting a match saying he was killing snakes. The lawn mowing lasted until we ran out of gas." Stevens then got more gasoline that he had stored in a five gallon container in his car.

Later Belk and the friend began to drink. Stevens said that he did not drink at all. Around 9:00 p.m. Belk began to draw a bath. At his request, Stevens left to buy some beer and wine. When he returned, Belk asked him to bring the gasoline can into the house. Belk was standing in his bedroom door, smoking a cigarette. When Stevens approached with the gasoline can, Belk moved toward him and grabbed the can, which had no lid. Stevens dropped the can, and it caught fire and exploded. Stevens immediately ran out of the house. He was burned on the hand, arm and leg. When he turned around he saw Belk was "wallowing in the floor on fire. . . . I ran back inside. I grabbed a spread that was on the door drying. I ran through the fire. . . . I grabbed him, throwed the spread around him and I brought him out." Defendant was about to carry Belk to the hospital in his car when the ambulance arrived and took them both to the hospital. Defendant,

however, took a taxi back home because he was concerned about the fire and he needed to change his clothes. His pants and shirt were torn, soiled and bloody. At his home he found firemen, newsmen and police. After defendant changed clothes one of them there told him he had better go back to the hospital or "that burn" would get infected. He then drove back to the hospital where he was treated.

Stevens, on cross-examination, specifically denied pouring gasoline on Belk and throwing a lighted torch into the bathroom. He also denied that he had wanted to have sexual relations with Belk. He denied speaking with Officer H. W. Richardson immediately after the fire and telling him that Belk had set the house on fire through smoking in bed. He denied telling Officer Hayes at the house that Belk had left the gas can in the house, gotten drunk and knocked it over and had then lit a cigarette and started the fire.

Four witnesses for defendant said his reputation in the community was good.

On rebuttal, over defendant's objection, the State introduced the testimony of Officers Richardson and Hayes. Richardson testified that he was the first officer on the scene at 326 East Tremont that evening. He said, "I saw Byron Stevens. He was standing behind an automobile in the driveway. He came out to the car when I pulled up requesting help for Mr. Belk. When I went up, I asked what had happened; mainly directed my question to Mr. Belk to try to determine his physical condition and I could get no answer from him." Stevens told him that Belk had taken a bath and then gone to bed; that Belk had caught himself on fire while smoking. Richardson said that Stevens also said that "he helped Mr. Belk get out of the house."

Officer Hayes then testified that while he was in the house that evening, Stevens came in about midnight. "He told me that his roommate had cut grass earlier and that the roommate had left gas cans in the house. He said that his roommate had gotten drunk, knocked over a gas can and lit a cigarette. He said a fire started, both of them were burned and they ran out of the house knocking out the front door glass in the process."

The jury returned a verdict of first-degree murder and from the sentence of life imprisonment defendant appealed.

Attorney General Rufus L. Edmisten and Associate Attorney Donald W. Grimes for the State.

Shelly Blum and Michael A. Sheely for defendant.

SHARP, Chief Justice.

Prior to trial defendant moved to exclude testimony by Officers Wallace and Sharpe with reference to any statements which Belk made to them in the hospital. The grounds assigned were: (1) that the statements failed to meet the requirements of N.C. G.S. 8-51.1 (Cum. Supp. 1977) and our case law for the admission of dying declarations; and (2) that the admission of a decedent's dying declaration denied defendant the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. After conducting a *voir dire* the court ruled that the challenged statements met the requirements for dying declaration and denied the motions to suppress. Assignment of error No. 3 challenges this ruling.

"Dying declarations" by the person whose death is an issue in the case have long been admissible in North Carolina provided (1) At the time they were made the declarant was in actual danger of death; (2) he had full apprehension of the danger; (3) death did in fact ensue; and (4) declarant, if living, would be a competent witness to testify to the matter. *See, e.g., State v. Poll*, 8 N.C. 442, 9 Am. Dec. 655 (1821); *State v. Thomason*, 46 N.C. 274 (1854); *State v. Jordan*, 216 N.C. 356, 5 S.E. 2d 156 (1939); *State v. Crump*, 277 N.C. 573, 178 S.E. 2d 366 (1971). In 1973, the General Assembly codified the essentials of those requirements in G.S. 8-51.1 which made the "dying declarations of a deceased person regarding the cause or circumstances of his death" admissible in all tribunals "subject to proof that: (1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery; (2) Such declaration was voluntarily made."

Defendant does not contend that Belk's statements were involuntary. Rather, his contention is that the evidence was insufficient to support the trial judge's finding that when Belk spoke with Officer Wallace and Detective Sharpe he was "conscious of approaching death and believed there was no hope of recovery." The admissibility of these declarations was a decision for the

trial judge, and our review is limited to the narrow question of whether there was any evidence tending to show the factual prerequisites to admissibility. *State v. Bowden*, 290 N.C. 702, 712, 228 S.E. 2d 414, 421 (1976); *State v. Gordon*, 241 N.C. 356, 362, 85 S.E. 2d 322, 326 (1955); *State v. Stewart*, 210 N.C. 362, 370, 186 S.E. 488, 492 (1936); 1 Stansbury's North Carolina Evidence § 146 (Brandis rev. 1973).

[1] In *State v. Bowden, supra,* and in *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976), we noted, without deciding, that the words "no hope of recovery" in the statute might make the statutory exception to the hearsay rule more restrictive than existing case law. We have now concluded that the statutory prerequisites that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" do not change our case-law requirements that in order to be admissible the declarations of a decedent must have been "in present anticipation of death." *State v. Brown*, 263 N.C. 327, 139 S.E. 2d 609 (1965). *See State v. Bowden*, 290 N.C. 702, 712, 228 S.E. 2d 414, 421 (1976). *See also* 1 Stansbury's North Carolina Evidence § 146 at 488, n. 17 (Brandis rev. Supp. 1976) where Professor Brandis expressed this view. As the rule is commonly stated in the opinions of the Court, declarant must have been "in actual danger of death" and have had "full apprehension of his danger." *State v. Jordan*, 216 N.C. 356, 362, 5 S.E. 2d 156, 159 (1939). Further, "[i]t is not necessary that the declarant should be in the very act of dying; it is enough if he be under the apprehension of impending dissolution." *State v. Dalton*, 206 N.C. 507, 513, 174 S.E. 422, 426 (1934). Stated in simpler terms, it is enough if he "believed he was going to die." *State v. Tate*, 161 N.C. 280, 282, 76 S.E. 713, 714 (1912). *Accord, State v. Bright*, 215 N.C. 537, 2 S.E. 2d 541 (1939); *State v. Boggan*, 133 N.C. 761, 763, 46 S.E. 111, 114 (1903). Obviously, if one believes he is going to die he believes there is "no hope of recovery." This common law and statutory requirement rests upon the tenent that when an individual believes death to be imminent, the ordinary motives for falsehood are absent and most powerful considerations impel him to speak the truth. The solemnity of approaching death "is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." *State v. Jordan, supra* at 363, 5 S.E. 2d at 160.

[2] Plenary evidence in the record supports the court's finding that Belk was conscious of approaching death and believed there was no hope of recovery. "This [consciousness] may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him." *Mattox v. United States*, 146 U.S. 140, 151, 36 L.Ed. 917, 921, 13 S.Ct. 50, 54 (1892). *See State v. Stewart*, 210 N.C. 362, 369, 186 S.E. 488, 492 (1936). *Accord, State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955); *State v. Rich*, 231 N.C. 696, 58 S.E. 2d 717 (1950). Belk had burns over 99 percent of his body and most were third-degree burns. His attending physician had told him explicitly that while he might live three weeks, he would not live to leave the hospital.

[3] The circumstances attending Belk's declarations were such that he must have known death was impending. Although the tubes in his nose and throat necessitated by his injuries prevented him from speaking, Belk clearly and unequivocally communicated to Detective Sharpe his knowledge that he was so badly burned he was going to die. Defendant, however, insists that Belk's declarations should have been excluded because they were made in response to leading questions. Ceratinly the questions which the detective propounded were leading. However, it is pertinent to note that could all the circumstances accompanying Belk's interrogation by the detective have been repeated at the trial below, the judge undoubtedly would have permitted the district attorney to examine Belk similarly. *See State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235-36 (1974). Further, the qualifying questions were not perfunctory to be used "in the event the injured man perchance took a turn for the worse." They were clearly appropriate in light of Belk's severe injuries and inability to speak. They were "as nearly spontaneous as declarations by one under the circumstances could be." *See State v. Gordon*, 241 N.C. at 362, 85 S.E. 2d at 326.

[4] Nor does the fact that Belk survived one week longer than Dr. Stevens had told him he might live affect the admissibility of his dying declarations. "The test is the declarant's belief in the

nearness of death when he made the statement, not the actual swiftness with which death ensued." C. McCormick, Evidence § 281, at 681 (2d Ed. 1972); *State v. Jordan*, 216 N.C. 356, 363-64, 5 S.E. 2d 156, 160 (1939).

[5] Defendant next contends that the admission of dying declarations violated that portion of U.S. Const. amend. VI which guarantees an accused "the right . . . to be confronted with the witnesses against him" and N.C. Const. art. I, § 23 (1971) (formerly § 7 of the Bill of Rights, N.C. Const. of 1776), which provides that "every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony. . . ." Albeit a dying declaration is indubitably hearsay and the declarant is, of course, not available for cross-examination, this contention has long since been decided against defendant.

In 1850, in the case of *State v. Tilghman*, 33 N.C. 513, the defendant contended that the confrontation clause of section 7 of the Bill of Rights excluded the admission of dying declarations in evidence. In rejecting this argument Justice Pearson, later Chief Justice, said: "This section of the Bill of Rights was aimed at the old practice, by which prisoners were not allowed to have witnesses *sworn* on their behalf, and the testimony came altogether on the part of the crown. Our ancestors did not intend to deny the rule of evidence as to dying declarations, but to assert that in criminal prosecutions prisoners ought to be allowed to have witnesses in their behalf, sworn and examined." *Id.* at 554.

Defendant argues that the rationale of this 128-year-old decision is no longer "viable precedent given the treatment of the right to confrontation/cross-examination by the United States Supreme Court" in its more recent decisions interpreting the sixth amendment. *E.g.*, *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965); *Douglas v. Alabama*, 380 U.S. 415, 13 L.Ed. 2d 934, 85 S.Ct. 1074 (1965); *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489, 90 S.Ct. 1930 (1970). We need not, however, compare these cases with *Tilghman*, *supra*, or discuss its rationale, for it is the federal constitution which controls the decision in this case.

The Confrontation Clause of the sixth amendment was made applicable to the states in *Douglas v. Alabama*, *supra*. However,

we find no conflict in our decisions and those of the United States Supreme Court with reference to the admission of dying declarations in evidence. The opinions of the Supreme Court, before and since *Douglas v. Alabama*, have made it clear that the constitutional guaranty of confrontation is not coextensive with the hearsay rule. *See California v. Green*, 399 U.S. 149, 154-56, 26 L.Ed. 2d 489, 495-96, 90 S.Ct. 1930, 1933-34 (1970); *Dutton v. Evans*, 400 U.S. 74, 80, 27 L.Ed. 2d 213, 222, 91 S.Ct. 210, 215 (1970). Further, the public necessity of preventing secret homicides from going unpunished requires the preservation of this uniquely valuable evidence notwithstanding the inability of the defendant to cross-examine his accuser.

In *Mattox v. United States*, 156 U.S. 237, 243-244, 39 L.Ed. 409, 411, 15 S.Ct. 337, 340 (1894), Mr. Justice Brown, speaking for the Court, said that many of the constitutional provisions "in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected." As one such exception he specifically mentioned the admission of dying declarations. "They are admitted," he said, "not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. . . . [T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath."

In *Kirby v. United States*, 174 U.S. 47, 61, 43 L.Ed. 890, 896, 19 S.Ct. 574, 579 (1899) (a case in which the thief's record of conviction was held inadmissible under the Confrontation Clause in the defendant's trial for receiving stolen property) the Court said: "It is scarcely necesary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath. . . ."

In writing the opinion in *Pointer v. Texas, supra,* a case which reached a result similar to *Kirby v. United States,* Mr. Justice Black was also careful to say: "This Court has recognized the admissibility against an accused of dying declarations, *Mattox v. United States.* . . . Nothing we hold here is to the contrary." 380 U.S. at 407, 13 L.Ed. 2d at 928, 85 S.Ct. at 1069. This statement was repeated in the Court's decision in *Dutton v. Evans,* 400 U.S. at 80, 27 L.Ed. 2d at 222, 91 S.Ct. at 215 (1970).

The rationale of *Mattox* and *Kirby* was reiterated by this Court in *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562 (1942) as follows:

"The theory on which dying declarations are excepted from the hearsay rule and admitted in evidence is that the declaration is made under the realization of approaching death, when there is no longer any motive for making a false statement, thus creating a sanction for truth equal to that of an oath. [Citations omitted.] Perhaps a more potent reason, one strong enough to supersede the right of confrontation, so strongly entrenched in our law, is the necessity of preserving important evidence, which often could come from no other source, of the identity of the killer and such circumstances of the killing as come within the range of the exception." *Id.* at 268-69, 22 S.E. 2d at 564.

Defendant's assignments of error Nos. 4 and 5 are overruled.

For the purpose of impeaching Belk's dying declaration, defendant attempted to introduce Belk's record of convictions—one of store breaking and larceny, one of assault with a deadly weapon, and numerous convictions of public drunkness. Defendant also attempted to prove by the testimony of the acting director of the Public Inebriate Program, a treatment center for alcoholics, that Belk was a frequent patient at the center. The court sustained the State's objection to this evidence and defendant's assignments 4 and 5 challenge this ruling.

[6] Once admitted into evidence, a dying declaration is no different from other testimony. The extent of its credibility is a matter for the jury and it is subject to impeachment or corroboration upon the same grounds and in the same manner as the testimony of a sworn witness. *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562 (1942); *State v. Thomason,* 46 N.C. 274 (1854); *State v. Tilghman,*

33 N.C. 513 (1850). *See also* 1 Stansbury's North Carolina Evidence § 146 (Brandis rev. 1973) (hereinafter cited as Stansbury). Thus, evidence of the *general* character or reputation of a decedent is relevant on the issue of his dying declaration and is admissible to impeach or to sustain the declaration. Stansbury §§ 107, 114. This is an exception to the usual rule that "evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide." *State v. Vestal*, 278 N.C. 561, 580, 180 S.E. 2d 755, 768 (1971), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973). *See* Stansbury § 106.

[7] Nevertheless, the impeachment of a dying declaration must proceed under the ordinary rules of evidence. Under these rules, for the purpose of impeachment, a party is entitled to introduce evidence only of the general reputation or character of the witness. "Therefore, our courts do not permit the witness to be impeached by independent evidence of particular misconduct." Specifically, this means that a witness may not "be impeached by record evidence of his conviction of crime, introduced either in contradiction of his denial thereof, or independently as evidence going to his credibility." *State v. King*, 224 N.C. 329, 331, 30 S.E. 2d 230, 231 (1944). *See State v. Adams*, 193 N.C. 581, 137 S.E. 657 (1927); *State v. Cathey*, 170 N.C. 794, 87 S.E. 532 (1916); *Edwards v. Price*, 162 N.C. 243, 78 S.E. 145 (1913); Stansbury § 111. Under the circumstances of this case, this same rule applies to Belk's records at the treatment center for alcoholics.

Defendant argues, however, that had Belk himself been able to testify he could have been cross-examined with reference to his convictions of crime (*See State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977); Stansbury § 112); and that, since such cross-examination is impossible in the case of dying declarations, Belk's criminal record should have been admitted in lieu of cross-examination. We do not agree. The same considerations which engendered the rule that the character of a witness testifying at the trial cannot be proven by specific acts apply to the character of a deceased declarant; another rule "would raise innumerable collateral issues." *State v. Canup*, 180 N.C. 739, 741, 105 S.E. 322, 324 (1920). *See* Stansbury § 111. It was, of course, open to defendant to offer evidence of Belk's general character and reputation just as he offered evidence of his own, but he did not do so. Assignments of error Nos. 4 and 5 are overruled.

Defendant's assignment of error No. 13 is that the trial judge erred in allowing the State to elicit as rebuttal evidence the testimony of Officers Hayes and Richardson as to oral statements which each said defendant had made to him on the night of the fire. These statements, as indicated in the preliminary resume of the facts, were inconsistent with defendant's testimony. When Officers Hayes and Richardson were called, and the import of their testimony ascertained, defendant objected on the grounds that (1) upon defendant's motion N.C. Gen. Stats. 15A-902 and 15A-903(a)(2) (1975) required the district attorney, before trial, to disclose to defendant the substance of these oral statements; (2) the district attorney had failed to make the disclosure; and (3) this failure required the exclusion of the statements. Upon this objection, in the absence of the jury, the judge conducted a *voir dire* during which both the district attorney and defense counsel made statements. Together they disclosed the following sequence of events:

Prior to the trial, pursuant to G.S. 15A-902, defense counsel requested the district attorney to make certain disclosures which, upon defendant's motion, would be required under G.S. 15A-903. Specifically, counsel requested "that the State make available: A, Statements made by the defendant under 15A-903(a)(1)," (*i.e.*, written or recorded statements made by defendant which are under the control of the State); B, Defendant's prior criminal record; and C, Certain documents and other tangible objects. Counsel did not request disclosure under G.S. 15A-903(a)(2) of "the substance of any oral statement made by defendant which the State intends to offer in evidence at the trial." In his reponse to counsel's request, on 9 August 1976 the district attorney wrote him that defendant had made no written or recorded statement and had made no oral statement which he intended to offer in evidence at the trial.

The district attorney made the following explanation to the court: He interpreted G.S. 15A-903(a)(2) as requiring him to divulge only those statements which he intended, before trial, to introduce during the presentation of his case in chief. Since defendant's statements were all exculpatory he could not use them in making out the State's case. Therefore, "because in preparation of the case [he] did not intend to offer those in the trial" he had decided not to disclose the statements to counsel.

Further, as late as the preceding afternoon, defense counsel had told him that defendant had not decided whether to testify in his own defense.

In answer to the court's specific inquiries, counsel admitted that he had asked defendant whether he had made any statements to the police; that defendant had told him he had talked to the police and he had taken his client at his word; that he had not moved the court to order the solicitor to divulge the substance of any oral statements made by defendant because he interpreted the solicitor's statement as meaning "there weren't any such statements, that he had given [him] everything."

At this point in the *voir dire* the district attorney produced the statements for counsel's inspection. The court then entered an order in which he found facts consistent with the foregoing summary and overruled defendant's objection to the rebuttal testimony of Officers Richardson and Hayes. The judge also found, *inter alia*: (1) that in developing its case the State did not offer any oral statements made by defendant; (2) that, only after defendant had decided to take the stand and had testified, did the State decide to offer defendant's oral statements; and (3) that the State "has not acted in bad faith in this matter and that at the time the State responded to the voluntary request, the State did not intend to offer into evidence any oral statements allegedly made by defendant."

The judge then recessed court to give defendant's counsel time to examine the statements and the officers' original notes. Counsel was also informed that after the recess he would be allowed to cross-examine the officers before they testified before the jury.

It is implicit in the district attorney's statement to the court that his intention not to offer the questioned evidence was conditional. Obviously, he did intend to use the statements on rebuttal if defendant took the stand and gave testimony inconsistent with them. It is equally obvious that the district attorney could not know whether defendant would take the stand until defendant either did so or rested his case without having testified. This uncertainty, however, differs little from that which surrounds many decisions the prosecutor must make with reference to the introduction of available evidence. To adopt the district attorney's

analysis of G.S. 15A-903(a)(2) would mean that a judge could rarely hold that a district attorney had intended to use a withheld statement at trial.

In view of the obvious intent of the legislature to permit broad pretrial discovery—as evidenced by the statute's sweeping language, "any oral statement made by the defendant which the State intends to offer in evidence at the trial"—prudent prosecutors will avoid the possibility of having their intent judicially second guessed by turning over all doubtful material to the defense upon request. Likewise, defense counsel would be well advised to specifically request the defendant's oral statements when, as here, the client informs him he has talked to the officers.

[8] In this case, however, we need not attempt to stake out the limits of G.S. 15A-903(a)(2) or decide whether the district attorney's reply to counsel's request obviated the necessity of a motion under that statute. A district attorney's refusal to comply with a discovery order under G.S. 15A-903 does not automatically require the exclusion of the undisclosed evidence. A variety of sanctions is authorized by G.S. 15A-910, and the choice of which to apply—if any—rests entirely within the discretion of the trial judge. His decision will not be reversed except for abuse of that discretion. *State v. Thomas*, 291 N.C. 687, 692, 231 S.E. 2d 585, 588 (1977). Clearly, this record shows no abuse of judicial discretion.

[9] Defendant concedes that the State's use of his oral statements to the officers did not violate any of his *Miranda* related rights. *See Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971); *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). In his brief, however, counsel does assert that defendant was irreparably prejudiced by the admission in evidence of his prior contradictory statements because, "[i]f counsel had known of these two statements, he would have advised the defendant to refrain from testifying." No doubt counsel would have so advised defendant. Notwithstanding, the purpose of the discovery procedure authorized by N.C. Gen. Stats., Ch. 15A, Art. 48 (1975) was not to protect a defendant from the consequences of perjury. It was intended only to protect him from the consequences of unfair surprise and to enable him to have available at the trial any evidence which he could legitimately offer in his defense. Analogous here is the statement of Chief Justice Burger in

Harris v. New York, *supra* at 225, 28 L.Ed 2d at 4-5, 91 S.Ct. at 645-46, a case in which the officers' failure to give the defendant the *Miranda* warning prevented the State from offering his statement in evidence on the question of his guilt:

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations omitted.] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements."

The trial court's order granting a recess to allow defendant an opportunity to inspect defendant's statements and to interview the officers, fully protected defendant's legitimate rights to know the full extent of the case against him and to be protected from the use of "surprise evidence." Defendant cannot complain that the order did not also protect him from the folly and crime of false testimony. Assignments of error Nos. 7 and 13 are overruled.

We have carefully examined defendant's remaining assignments of error. They are without merit and require no discussion. The record manifests that defendant received a fair trial, free from prejudicial error.

No error.

DOUGLAS B. GRANT v. EMMCO INSURANCE COMPANY

No. 85

(Filed 8 May 1978)

1. **Insurance § 6.1— construction of policy—meaning of words**

In the construction of an insurance policy, nontechnical words not defined in the policy are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise.

2. **Insurance § 6.2— construction of policy—liberal construction in favor of insured—limitation**

Where there is no ambiguity in the language used in an insurance policy, *the courts must enforce the contract as the parties have made it and may not* impose liability upon the company which it did not assume and for which the policyholder did not pay; however, a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

3. **Insurance § 72— collision insurance—leased vehicle—newly acquired vehicle covered under policy**

An International tractor leased by plaintiff was covered by a collision insurance policy on a Ford tractor owned by plaintiff where the policy provided coverage not only for the designated vehicle owned by the insured but also for a vehicle not so designated if "such vehicle is newly acquired by the named insured during the policy period," and if "it replaces a described covered vehicle, or as of the date of its delivery this insurance applies to all covered automobiles," and if "the named insured notifies the company within 30 days following such delivery date," since such ambiguous language must be construed in favor of insured; when so construed, a "newly acquired" vehicle is a "covered automobile," even though it does not replace a "described covered vehicle"; and the International tractor was an "acquired" motor vehicle within the meaning of the policy and, consequently, a "newly acquired" one, since plaintiff, by his agreement with lessor, acquired the legal, nonterminable right to use the vehicle as if he were its absolute owner for the specified period and the policy did not exclude leased vehicles.

4. **Insurance § 72— collision insurance—replacement vehicle—no distinction between temporary and permanent replacement**

Where a collision insurance policy made no distinction between a vehicle acquired as a permanent replacement and one acquired as a temporary replacement, the policyholder was entitled to give the word "replaces" its common and ordinary meaning and to assume that a vehicle leased for a specified period while the vehicle designated in the policy was being repaired replaced such vehicle.

5. **Insurance § 72— collision insurance—newly acquired automobile—replacement vehicle—operability of designated vehicle**

A "newly acquired" automobile does not "replace" the vehicle designated in the policy if the designated automobile continues to be owned by the policyholder, under his control and in operable condition.

6. **Insurance § 72— collision insurance—replacement vehicle—sufficiency of complaint**

Plaintiff's complaint was sufficient to show that a leased International tractor was a "replacement" vehicle within the purview of a collision insurance policy covering a Ford tractor owned by plaintiff and newly acquired vehicles "replacing" the covered vehicle where it appeared that at all times from the acquisition, by lease, of the International tractor, the Ford tractor was undergoing repairs and was not in operable condition.

APPEAL by the plaintiff from the decision of the Court of Appeals affirming the judgment of *Gavin, J.*, at the January 1977 Civil Session of HARNETT dismissing the action for failure of the complaint to state a claim upon which relief can be granted, Judge Webb dissenting.

The complaint, summarized, alleges:

The defendant issued to the plaintiff, on or about 2 April 1975, a policy of insurance, attached as an exhibit to the complaint, insuring the plaintiff against damage by collision to "a 1973 Ford tractor owned by the plaintiff and any substitute vehicle," the policy containing a definition of the term "covered automobile." On or about 9 June 1975, while the plaintiff was operating his 1973 Ford tractor, a malfunction therein occurred. As a result of such malfunction, the plaintiff leased a 1974 International tractor for the purpose of providing the plaintiff with a "substitute vehicle," a copy of the lease contract being attached to the complaint as an exhibit. The plaintiff did not procure additional insurance against collision damage to the leased vehicle, being of the opinion that such damage was covered by the above mentioned policy. On or about 16 June 1975, which was during the period of the lease and during the life of the above mentioned policy, the leased tractor was severely damaged by a collision. By the terms of the lease contract, the plaintiff is liable to the lessor for the damage to the leased vehicle. He has demanded payment of such damage from the defendant and the defendant has refused to pay the same.

The lease agreement, so made part of the complaint, leased the International tractor to the plaintiff for a period of 21 days, this apparently being the period which the plaintiff anticipated would be sufficient for the repair of the Ford tractor specifically designated in the insurance policy. The lease agreement, which was upon a printed form, bore upon its face a handwritten entry "*(replacing Ford)*." It contained an undertaking by the lessee to return the leased vehicle to the lessor "in the same condition," ordinary wear and tear excepted, and also excepting certain specified risks of loss, such as fire, theft and other "comprehensive type damages." The lease agreement expressly provided that the lessee would be liable for all collision damage up to $25,000. Thus, as the body of the complaint alleges, the plaintiff became liable to the lessor of the International tractor for the damage it sustained in the said collision.

The policy of insurance, on its first page, provided that as of its effective date, "As to covered automobiles (including newly acquired vehicles, subject to the provisions of paragraph (b) of the 'covered automobile' definition) * * * the insurance afforded is only with respect to such of the following coverages, and under each such coverage to such covered automobiles described in the Schedule of Covered Automobiles, as are indicated by specific premium charge or charges." The "COVERAGES" on this page showed coverage against collision, fire, lightning, theft and "Combined Additional" risks and described the insured vehicle as a "1973 Ford tractor X90TVR52259."

The second page of the policy contained the company's agreement to pay for loss to "covered automobiles" by collision or by the other above mentioned risks. This page of the policy states, "Such insurance as is afforded under each coverage applies separately to each covered automobile." A definition section of the policy then provides:

> " 'Covered automobile' means a land motor vehicle * * * which is either
>
> (a) designated in the declarations, by description, as a covered automobile to which this insurance applies and is owned by the named insured; *or*

(b) if not so designated, such vehicle is newly acquired by the named insured during the policy period provided, however, that:

(i) it replaces a described COVERED AUTOMOBILE *or* as of the date of its delivery this insurance applies to all covered automobiles, *and*

(ii) the named insured notifies the company within 30 days following such delivery date; * * *" (Emphasis added.)

Morgan, Bryan, Jones, Johnson, Hunter & Greene by K. Edward Greene for Plaintiff.

McLean, Stacy, Henry & McLean by Everett L. Henry for Defendant.

LAKE, Justice.

A motion to dismiss for failure of the complaint to state a claim upon which relief can be granted is the equivalent of a demurrer under the old practice for failure of the complaint to state a cause of action. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Consequently, in passing upon such a motion, the allegations of the complaint are deemed to be true and the motion should not be allowed unless the complaint affirmatively shows that the plaintiff has no cause of action. *Smith v. Ford Motor Co.*, 289 N.C. 71, 83, 221 S.E. 2d 282 (1976); *Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E. 2d 178 (1974); *Forrester v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 117, 184 S.E. 2d 858 (1971); *Sutton v. Duke, supra.* We turn, therefore, to the question of whether the Court of Appeals was correct in its conclusion that it clearly appears upon the face of the complaint, including the policy of insurance and the lease agreement incorporated therein, that no facts which could be proved, pursuant to these allegations, would entitle the plaintiff to any relief in this action.

[1, 2] It is firmly established law that, in the construction of an insurance policy, nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518 (1970); *Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49 (1959); *Powers v. In-*

surance Co., 186 N.C. 336, 119 S.E. 481 (1923); 11 Couch on Insurance 2d, § 42:191 (1963). Where there is no ambiguity in the language used in the policy, the courts must enforce the contract as the parties have made it and may not impose liability upon the company which it did not assume and for which the policyholder did not pay. *Trust Co. v. Insurance Co., supra; Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967); *Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538 (1951). However, a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language. *Trust Co. v. Insurance Co., supra; Williams v. Insurance Co., supra; Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966); *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586 (1964); 13 Appleman, Insurance Law and Practice, § 7465 (rev. ed. 1976); 7 Blashfield Automobile Law and Practice, §§ 292.6, 292.7 (3d ed. 1966); 11 Couch on Insurance 2d, § 42:191 (1963).

As we said in *Insurance Co. v. Insurance Co., supra:*

> "When an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it comtemplated, the fault lies in its own selection of the words by which it chose to be bound.
>
> "In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage."

[3] In the absence of a contrary provision therein, a policy of automobile insurance applies only to the vehicle specifically described therein as the insured vehicle. *Beck Motors, Inc. v. Federal Mutual Insurance Co.*, 443 S.W. 2d 200 (Mo. App., 1969); Annot., 127 A.L.R. 486 (1940). In the present case, had the policy contained no provision further extending its coverage, the only vehicle within the coverage of the policy would have been the 1973 Ford tractor owned by the plaintiff and the judgment of the trial court would have been correct. However, in order to make its policy more attractive to potential customers, the company extended the coverage of its policy to include, not only the designated vehicle owned by the insured, but also a vehicle not so designated if "such vehicle is *newly acquired* by the named insured during the policy period," and if "it *replaces* a described covered vehicle, *or* as of the date of its delivery *this insurance applies to all covered automobiles*," and if "the named insured notifies the company within 30 days following such delivery date." (Emphasis added.)

Thus, the policy provides that a "covered automobile" includes a "newly acquired" motor vehicle if "as of the date of its delivery this insurance applies to all *covered* automobiles." It is, obviously, not clear whether the date of delivery, contemplated in this provision of the policy, is the date of the delivery of the newly acquired vehicle or the date of the delivery of the policy. However, this term of the policy is even more obscure in its meaning than that. It states that the "newly acquired" vehicle is covered by the policy, even though it does not replace a described covered vehicle, if "this insurance applies to all covered automobiles." (Emphasis added.) The purpose of the company in inserting this alternative provision into the policy definition of a "covered automobile" is a baffling mystery for, obviously, the policy applies, at any given date, "to all covered automobiles."

We observe that the language in this policy varies, in several respects, including this alternative provision, from that used in the comparable provisions in policies of other companies which have come into courts for construction in cases hereinafter cited. It would seem plausible that the company here meant to say "owned automobiles," so as to extend the coverage to a "newly acquired automobile," provided, at the time the policy was issued, all vehicles *owned* by the named insured were insured by him

with this company. That is a provision frequently found in other such policies, but it is not what this policy says, and we cannot rewrite the policy by construction.

Certainly, we cannot construe this exceedingly ambiguous language in favor of the company. By hypothesis, this policy applied, both on the date the policy was delivered and also on the date the International tractor was leased, to "all covered automobiles," for a "covered automobile" is, necessarily, one to which the policy applies. Giving this provision its literal meaning, a "newly acquired" vehicle is a "covered automobile," even though it does not replace a "described covered vehicle."

Many of the policies involved in the cases hereinafter cited extended the coverage therein to a vehicle the "ownership" of which was "newly acquired." This policy does not so state. We are, therefore, not required in this case to determine whether the term "ownership," so used, would demand that the insured acquire the absolute ownership of, or the registered title to, the vehicle in order to bring it within the term "newly acquired," as used in this policy. The term here used is "newly acquired * * * during the policy period." The purpose of this provision is to limit the extension of the coverage to a vehicle acquired after the issuance of the policy. *Insurance Co. v. Shaffer, supra*; 7 Am. Jur. 2d, Automobile Insurance, § 101 (1963); Annot., 34 A.L.R. 2d 936, 940 (1954). Thus, it would not, in absence of the ambiguity above noted, apply to a retired vehicle still owned by the insured on the date the policy was issued and thereafter repaired by him and returned to service.

In the present case, if the International tractor was "acquired," within the meaning of this policy, it was "newly acquired." The complaint alleges that the International tractor was leased by the plaintiff from the owner thereof for a fixed period of 21 days, beginning after the issuance of the policy. By the express terms of the lease agreement, the plaintiff undertook to return this tractor to the lessor "in the same condition," ordinary wear and tear and certain specified risks excepted. The lease agreement did not authorize either party thereto to terminate it at will. Therefore, by this agreement, the plaintiff acquired the legal, non-terminable right to use the vehicle as if he were its absolute owner for the specified period. This cir-

cumstance distinguishes the present case from a mere temporary, gratuitous loan of a vehicle terminable at the will of the lender, or a mere gratuitous, temporary exchange of vehicles belonging to the insured and a friend, which was the case in *Clarno v. Gamble-Robinson Co.*, 190 Minn. 256, 251 N.W. 268 (1933). It is a matter of common knowledge, of which we may take judicial notice, that today it is not unusual for motor vehicles to be leased for specified periods. If the defendant company did not intend its policy to cover such a leased vehicle, it could easily have so stated. In the silence of the policy upon this question, we conclude that the International tractor was an "acquired" motor vehicle within the meaning of this policy, and, consequently, a "newly acquired" one.

Assuming, for the sake of argument, that the above mentioned, ambiguous, alternative provision in paragraph (b)(i) of the definition of "covered automobile" is not sufficient to bring this "newly acquired vehicle" within the coverage of the policy, we turn to the question of whether the International tractor is covered because it *replaced* the described covered vehicle. In our opinion, the allegations of the complaint, which we must presently take to be true, are sufficient to bring it within the definition of "covered automobile" contained in the policy, for the reason that it did replace the described covered vehicle.

[4] Not infrequently, automobile insurance policies contain specific provisions with reference to the coverage of a "temporary substitute" for the described vehicle. *See, Quaderer v. Integrity Mutual Insurance Co.*, 263 Minn. 383, 116 N.W. 2d 605 (1962); Annot., 34 A.L.R. 2d 936, 947 (1954). The present policy does not and, so, it makes no distinction between a vehicle acquired as a permanent replacement and one acquired as a temporary replacement.

In *Continental Casualty Co. v. Employers Mutual Casualty Co.*, 198 Kan. 93, 422 P. 2d 560 (1967), the question was which company was the primary and which the excess carrier of liability insurance. Its determination depended upon whether a 1962 Cheverolet station wagon had "replaced" a 1958 Cadillac, described in the appellee's policy, or was an additional automobile, in which latter event the appellee had not been given the notice required in its policy. The court said:

"In the absence of evidence that the word 'replacement' had a meaning peculiar to the insurance field or that the parties intended any different meaning in the automobile liability policy, the usual and ordinary meaning of the term, that is, to provide a substitute or equivalent in place of a person or thing, would govern." 198 Kan. at 96, 422 P. 2d at 562.

The same statement appears in *Nationwide Mutual Insurance Co. v. Mast*, 52 Del. 127, 153 A. 2d 893 (1959), and in *Brescoll v. Nationwide Mutual Insurance Co.*, 116 Ohio App. 537, 189 N.E. 2d 173 (1961).

In an athletic contest, for example, in ordinary speech, a substitute, sent into the game, "replaces" the starting player, whether the change be intended to continue for the remainder of the contest or only for a brief period to enable the starter to rest. He is a replacement for the starter because the number of participants in the game remains the same and, while the substitute is on the field, the starter does not participate in the contest. Similarly, the International tractor replaced the Ford tractor in the plaintiff's business for the 21 day lease period.

If the defendant insurance company had intended to limit its extension of the "covered automobile" to a permanent replacement for the described vehicle, it could easily have so provided in its policy. Not having done so, the policyholder is entitled to give the word "replaces" its common and ordinary meaning, which the complaint alleges he did.

Quite obviously, the policy provision here in question was not intended by the parties to enable the policyholder to purchase collision coverage on a designated vehicle and, without payment of a further premium, to extend that coverage to a second vehicle acquired by him as an additional vehicle and used contemporaneously with the designated vehicle. There is, however, in this respect, a clear distinction between an additional vehicle and a substitute vehicle which "replaces," even though temporarily, the vehicle designated in the policy.

Not infrequently, policies, containing a provision extending coverage to a newly acquired vehicle which replaces the designated vehicle, provide that the insurance upon the designated vehicle terminates when it is replaced. *See, Dean v.*

Niagra Fire Insurance Co., 24 Cal. App. 2d Supp. 762, 68 P. 2d 1021 (1937); *McKinney v. Calvert Fire Ins. Co.*, 274 S.W. 2d 891 (Tex. Civ. App., 1955). No such provision appears in the policy before us. It is, to be sure, conceivable that, while the designated vehicle is temporarily in a garage for repairs and the owner has substituted for it a leased vehicle, the designated vehicle may be damaged by someone's driving another vehicle into collision with it, but such risk is minimal, as compared with the risk of a collision to a vehicle in operation on the highway, the risk for which the company has been compensated by the premium paid, and from which, for all practical purposes, it is temporarily relieved. The company, in writing its policy form, can easily protect itself against this minimal double coverage, restoring coverage to the original, designated vehicle when it, repaired, replaces the leased vehicle. Here, the company did not attempt to do so. To construe its word, "replaces," as intended to give the company that protection is not consistent with the above mentioned rule that ambiguous terms must be construed in favor of the policyholder.

We think that the decision of this case is controlled by the principle announced by this Court in *Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49 (1959). There, the question for determination was which of two liability insurance companies provided coverage with respect to an accident involving a 1954 Ford registered in the name of Shaffer. The policy issued by State Farm Mutual covered a 1950 Ford. At the time of the accident, that vehicle was at Shaffer's home, in operable condition, registered in his name and under his control. Shaffer also obtained a Nationwide Insurance Company policy on a different 1950 Ford. That vehicle, called the Nationwide Ford, was used as a trade-in on the purchase of the 1954 Ford, which was involved in the accident. Each policy provided coverage for a "newly acquired automobile," which "replaces" an automobile owned by the insured and described in the policy. Neither company was notified of the transaction by which the Nationwide Ford was traded in on the purchase of the 1954 Ford. In holding that the 1954 Ford "replaced" the Nationwide Ford, so as to impose liability upon the Nationwide company, and did not "replace" the State Farm Ford, so as to impose liability upon the State Farm company, this Court, speaking through Justice Clifton Moore, said:

"It is our opinion that the replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of *or be incapable of further service at the time of replacement.* * * * On 11 August, 1957, date of the accident, the State Farm Ford was still owned by Shaffer and under his control, *in operating condition* and being driven by him and his son. It was then covered by the State Farm policy. Therefore, the 1954 Ford could not replace the State Farm Ford since Shaffer still retained the State Farm Ford *in operable condition.*" (Emphasis added.) 250 N.C. at 52, 108 S.E. 2d at 54.

[5] Our decision in the *Shaffer* case has been frequently cited, by the courts of other states, as establishing the proposition that a "newly acquired" automobile does not "replace" the vehicle designated in the policy if the designated automobile continues to be owned by the policyholder, under his control and *in operable condition. Fleming v. Nationwide Mutual Insurance Co.*, 383 F. 2d 145 (4th Cir., 1967); *Yenowine v. State Farm Mutual Automobile Insurance Co.*, 342 F. 2d 957 (6th Cir., 1965); *Mitcham v. Travelers Indemnity Co.*, 127 F. 2d 27 (4th Cir., 1942); *Quaderer v. Integrity Mutual Insurance Co., supra; Beck Motors, Inc. v. Federal Mutual Insurance Co., supra; McKinney v. Calvert Fire Insurance Co., supra; National Indemnity Co. v. Giampapa*, 65 Wash. 2d 627, 399 P. 2d 81 (1965).

In the Beck Motors case, *supra*, the plaintiff insured was an automobile dealer. It was his custom to furnish, from his used car stock, a car for use of his sales manager, replacing it with another car, from time to time, as the various vehicles were sold, and, as each such successive replacement occurred, making an appropriate change in the policy of insurance as to the vehicle covered. He had a similar agreement with his accountant. An opportunity arose to sell the car being used by the accountant, so the plaintiff picked up that car and left in its place a 1967 Plymouth which the sales manager had previously been driving, thus leaving the sales manager with no car furnished by the plaintiff. Some time thereafter, the plaintiff acquired in trade a 1966 Dodge which he immediately turned over to the sales manager for the latter's use, but there was no change in the insurance policy

so as to designate this as an insured car. On his way home that day, the sales manager had a wreck in the Dodge and was killed. At that time, the plaintiff owned approximately 200 to 250 automobiles, his stock in trade, but did not have a fleet insurance policy. The question was whether the Dodge so driven by the sales manager at the time of the accident replaced the Plymouth which was designated in the policy and which had been so taken from the sales manager and turned over to the accountant. Applying the rule laid down in our *Shaffer* decision, *supra*, the *Court* held the Dodge did not replace the Plymouth, the Plymouth being still owned by the plaintiff, still in operable condition and still actually in operation by the accountant. Furthermore, as the Missouri Court stated, the Dodge was not acquired by the plaintiff for the purpose of replacing the Plymouth but was acquired by him in his regular course of business as an automobile dealer. That decision is consistent with the one which we reach here.

In *Mitcham v. Travelers Indemnity Co.*, *supra*, the car described in the policy was a Buick owned by the insured. He then purchased a Lincoln which he was driving at the time of the accident. On the same day that he acquired the Lincoln, the insured delivered his Buick automobile to a motor company to be sold for him and requested the motor company to obtain insurance on the Buick to protect it against fire and theft, which insurance was taken in another company. The Buick was not traded in upon the purchase price of the Lincoln. The insured retained title to the Buick. No purchaser for the Buick was found and no one used it prior to the death of the insured in the accident, which occurred some 12 days after the purchase of the Lincoln. The Court of Appeals for the Fourth Circuit held the Lincoln did not, in fact, replace the Buick, since the insured still retained title to the Buick and full control over it and "at any time he could have taken it from the custody of the motor company and put it into use." Thus, at the time of the accident, the Buick, which was designated in the policy as the insured car, was still owned by the insured, was in an operable condition and was subject to his operation at will. This decision is also completely consistent with the one we here reach. In our opinion, the other cases above cited, denying coverage, are likewise consistent with our present decision.

In *Merchants Mutual Casualty Co. v. Lambert*, 90 N.H. 507, 11 A. 2d 361, 127 A.L.R. 483 (1940), the policy described a 1930 Pierce-Arrow as the insured vehicle. It provided coverage for a subsequently acquired vehicle "if it replaces an automobile described in this policy." From October to December 1, 1938, the described vehicle was not used by the insured in his business because it was "worn out, out of repair and not fit to be driven on the public highway." On December 1, 1938, the insured bought a 1935 Pierce-Arrow for the same use previously made of the vehicle described in the policy. On the day he purchased it, this car was involved in an accident. At the time of the accident, the insured still owned the 1930 Pierce-Arrow described in the policy, which was in his garage with valid license plates attached and registered in his name at the Motor Vehicle Department. The New Hampshire Court held the subsequently purchased Pierce-Arrow replaced the one described in the policy and so was covered thereby, saying:

> "We think it plain that any reasonable person in the position of the defendant Lambert [the insured] would have understood from the language set forth in the statement of facts, that when he purchased another automobile to replace the 1930 Pierce-Arrow, his insurance would automatically apply to the replacing automobile 'as of the date of its delivery to him.' The plaintiff, if it had seen fit, might have inserted a provision that the insurance should not attach to the replacing car until the insured had parted with the ownership and possession of the replaced car, but in the absence of any such provision in the policy, these factors of the situation were properly regarded by the trial court as indecisive." 90 N.H. at 510, 11 A. 2d at 362-363.

In accord with the holding of the *Lambert* case, *supra*, that to "replace" a vehicle described in the policy, it is not required that the insured dispose of that vehicle if it is not operable, are the following: *Hoffman v. Illinois National Casualty Co.*, 159 F. 2d 564 (7th Cir., 1947); *Maryland Indemnity & Fire Insurance Exchange v. Steers*, 221 Md. 380, 157 A. 2d 803 (1960); *Brescoll v. Nationwide Mutual Insurance Co., supra; Royer v. Shawnee Mutual Insurance Co.*, 91 Ohio App. 356, 106 N.E. 2d 784 (1950); *Filaseta v. Pennsylvania Threshermen & Farmers' Mutual Casualty In-*

surance Co., 209 Pa. Super. 322, 228 A. 2d 18 (1967); 11 Couch on Insurance 2d, § 42:201 (1963); Annot., 34 A.L.R. 2d 936, 945 (1954).

In the *Hoffman* case, *supra*, the vehicle described in the policy was a Ford tractor which was used by the plaintiff in his business of making daily trips to carry livestock to Chicago. This vehicle was involved in an accident. It was not completely wrecked, but was not thereafter used or operated by him. He filed a claim for the loss of this vehicle under his policy, but did not notify the company that he was purchasing a new vehicle. While that claim was pending, he purchased another Ford tractor and used it in his same business. One week later, the second tractor, while being so operated, was involved in the accident in question. The Court of Appeals for the Seventh Circuit said:

> "[I]t is clear that when the first tractor was wrecked and the second tractor was acquired and used in its place, a reasonable person in such a situation, from the language used, would have reasonably assumed that all coverage with respect to the first tractor was terminated and that the policy, without notice, was automatically transferred as of the date of the delivery of the second tractor for a period of 30 days [the time allowed in the policy for giving notice] to the newly acquired tractor." 159 F. 2d at 566.

In the *Filaseta* case, *supra*, the vehicle described in the policy was a 1949 Studebaker truck, used by the insured, a masonry contractor, for the purpose of hauling materials. While being so used, it broke down and had to be towed to a garage. The insured then *borrowed* (emphasis added) a 1953 Chevrolet truck in order to continue his business. This was used for the same purpose for which the Studebaker was used. Thereafter, the insured bought the previously borrowed Chevrolet truck and, three days later, it was involved in an accident. At the time of the second accident, the Studebaker truck was still undergoing repairs. After the completion of the repairs, the Studebaker truck was driven to a service station where it was advertised for sale and was sold some two months later. The court held the Chevrolet truck replaced the Studebaker within the meaning of the policy, saying:

> "In this case there was no factual risk of the insurance company covering two trucks at the same time as the listed vehicle was inoperative, or had been placed upon a lot for

resale where it was not subject to the risks run by the replacement vehicle. In such cases the courts have found in favor of the insured. Most certainly, a hard and fast rule that the car must be junked or sold before the replacement clause can go into effect would work in many cases a substantial injustice." 209 Pa. Super. at 328, 228 A. 2d at 22.

In the *Brescoll* case, *supra*, the designated automobile was a Ford. It was involved in a collision and was thereafter operable only in second and third gears but was continued in service for some months. It was then taken to a garage where repairs were undertaken in order to put it in condition for sale. The repairs were continued over a period of about one month, during which the Ford was entirely out of service. The insured, meanwhile, purchased a Lincoln with the intention of selling the Ford when the repairs were completed. When the repairs of the Ford were completed, it was delivered to the custody of the plaintiff in operable condition and was placed by the plaintiff on a car lot for sale. Efforts to sell it were not successful so the plaintiff removed it to her residence and there continued to advertise it for sale, using the Lincoln meanwhile. The Ford was used only to transport it to and from the place of repair or in demonstrations to prospective customers. The court held the Lincoln had replaced the Ford in "the ordinary meaning of the term," that is, a substitute or equivalent, saying:

"In the instant case, the Ford car was out of service from September 18th to the time of completion of its repair in the latter part of October. After its repair, the Ford was used only for transportation incident to its sale. From the date of its purchase, the Lincoln, instead of the Ford, was regularly and continuously used by the insured. In our opinion, to all intents and purposes, the Lincoln thus replaced the Ford." 116 Ohio App. at 542, 189 N.E. 2d at 176.

[6] The present case is substantially stronger for the insured than the *Brescoll* case, *supra*, for here, interpreting the complaint favorably for the plaintiff, as is proper upon the motion to dismiss, it would appear that at all times from the acquisition, by lease, of the International tractor, the Ford tractor, designated in the policy, was undergoing repairs and was not in an operable condition. Thus, we hold that, as of the time of the accident, the

Ford tractor had been replaced by the International tractor so that the policy covered the International tractor.

We are not required in this case to determine whether, during the period that the International tractor was so covered as a replacement vehicle, the defendant company would have been liable had the Ford tractor been struck while within the repair garage.

We think it clear that had the insured notified the company when he acquired the International tractor by lease that it was a replacement for the Ford, it would be so deemed within the meaning of this policy for that would have shown his intent so to replace the Ford. But, the policy did not require such notice until 30 days after the acquisition and the complaint clearly alleges his intent to bring the International tractor under the coverage of the policy. The provision in the policy that the "newly acquired" vehicle is a "covered vehicle," if the named insured notifies the company within 30 days, clearly sets up a condition subsequent, not a condition precedent, to the coverage of the "newly acquired" vehicle. Obviously, the company intended to insure the "newly acquired" vehicle during the grace period allowed for the giving of the notice. *See*: Annot., 34 A.L.R. 2d 936, 944 (1954).

We observe no basis for a distinction in this respect between liability insurance and collision insurance, suggested by the defendant in oral argument. It is true that the public has an interest in the maintenance of liability insurance as is evidenced by the enactment of our Financial Responsibility Law. For that reason, ambiguous provisions in liability insurance policies are construed against the insurer. However, for the reasons above set forth, ambiguous provisions in collision insurance policies are also construed against the insurer. Furthermore, we may take judicial notice of the well known fact that it is customary, though not universal, for collision coverage and liability coverage to be provided in the same insurance policy. It would be most confusing, and contrary to the probable intent of the parties, if the term "replace," with reference to a "newly acquired" vehicle, were to be given different meanings with reference to the different coverages in the same policy, in the absence of a clear expression therein of such intent.

We, therefore, conclude that it was error to allow the motion to dismiss the plaintiff's complaint on the theory that it fails to state a cause of action. In our opinion, the plaintiff has stated a cause of action, somewhat meagerly, but sufficiently under the present concept of "notice pleading." Whether he can, at trial, establish the facts alleged in the complaint, as elaborated by the documents thereto attached, is a matter not presently before us.

Reversed.

STATE OF NORTH CAROLINA v. SYLVESTER JOYNER

No. 3

(Filed 8 May 1978)

1. **Constitutional Law § 28— motion to dismiss—alleged violation of constitutional rights in obtaining confession**

The trial court did not err in the denial of defendant's motion under G.S. 15A-954(a)(4) to dismiss the charges against him because of alleged violations of his constitutional rights in obtaining a confession where the evidence on voir dire, though conflicting, supported the court's findings that defendant was advised of his rights, that he waived his right to have an attorney present, and that his confession was made voluntarily and freely.

2. **Constitutional Law § 28— motion to dismiss—violation of constitutional rights—prejudice to case preparation**

It is only when one can show that there has been a constitutional violation resulting in irreparable prejudice to the preparation of his case that a dismissal is warranted under G.S. 15A-954(a)(4).

3. **Constitutional Law § 28— motion to dismiss—alleged violation of constitutional rights—absence of specific order**

The trial court did not err in failing to enter a specific order denying defendant's motion to dismiss under G.S. 15A-954(a)(4) because of alleged violations of his constitutional rights in obtaining a confession where the trial court did find facts and enter conclusions of law in denying defendant's motion to suppress evidence of the confession, and by denying the motion to suppress, the motion to dismiss was denied *ipso facto*.

4. **Rape § 5— age of defendant—public record of birth**

The State sufficiently proved that a defendant on trial for first degree rape was more than sixteen years of age at the time of the crime where it introduced into evidence the certificate of birth record in the office of the Register of Deeds which showed that defendant was over nineteen years of age at the time of the offense.

5. Criminal Law §§ 72, 80— public record of birth—admissibility to show age

A certificate of birth which was an original public record and which was properly authenticated by the Register of Deeds who was the official custodian thereof was admissible into evidence, and the information contained in the document was competent evidence of the facts recorded, *viz*, the date of defendant's birth.

6. Robbery § 1.1— armed robbery—victim's fear irrelevant

The question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life.

7. Robbery § 4.3— continuing threat of use of firearm

Though defendant did not actually point a gun at the victim at the time she gave her ring to defendant's accomplice, where the State's evidence did tend to show that prior to the robbery of the ring a pistol had been pointed at the heads of the victim and her three-year-old daughter to force the victim to engage in sexual acts with defendant and his accomplices, and it had been made clear to the victim on several occasions prior to the taking of the ring that the pistol would be used against her if she failed to comply, the evidence was sufficient to show that the ring was taken from the victim by the "threatened use" of a firearm which "endangered or threatened" her life within the meaning of the armed robbery statute since the evidence showed that the victim was placed under a continuing threat with a firearm which extended to every subsequent act by her.

8. Assault and Battery § 14.3— thrusting drink bottle in rectum—deadly weapon—serious injury

There was sufficient evidence that a soft drink bottle, as used, was a deadly weapon and that the victim suffered serious bodily injury so as to support the court's submission to the jury of a charge of assault with a deadly weapon inflicting serious bodily injury where the State's evidence tended to show that the victim, a lone woman attacked by five males, was held down by defendant while an accomplice thrust a bottle into her rectum with such force as to cause excessive bleeding, dilation of the rectum, and the infliction of multiple cuts, some deep and long, about the rectum, and that the victim was examined by two physicians and had to visit a physician regularly for some two months thereafter for treatment.

9. Crime Against Nature §§ 1, 3— crime against nature—inclusion of cunnilingus

The crime against nature is not limited to penetration by the male sexual organ, and the State's evidence was sufficient to support defendant's conviction of the crime against nature where it tended to show that defendant penetrated the victim's female sexual organ with his tongue.

APPEAL by defendant from judgments entered by *Martin (Harry), J.*, at the 6 June 1977 Criminal Session of PITT Superior Court.

Defendant was tried and convicted upon bills of indictment, proper in form, of first degree rape, first degree burglary, armed robbery, assault with a deadly weapon inflicting serious injury, and crime against nature. The charges of first degree rape and first degree burglary were consolidated for judgment and defendant was sentenced to imprisonment for life. The armed robbery, assault, and crime against nature charges were consolidated for judgment and defendant was sentenced to a term of twenty years imprisonment, this sentence to take effect at the expiration of the life sentence imposed on the burglary and rape charges.

Defendant appealed to this Court from the sentence of life imprisonment, and defendant's convictions of armed robbery, assault, and crime against nature were certified for initial appellate review by this Court pursuant to G.S. 7A-31(a).

The facts in this case may be summarized as follows:

On the evening of 11 January 1977 Carolyn Lincoln was at home with her three-year-old daughter in rural Pitt County near Greenville. At about 7:00 p.m. she went to her front door in response to a knock. She asked who was there, and thought she heard a man say, "Red". Thinking this to be her next-door neighbor, she unlocked and opened the door. A black male, unknown to her, jerked open the screen door and pushed his way into her home. Ms. Lincoln attempted to get a .22-caliber pistol from atop her dresser, but before she could reach it a second man, identified as defendant, came through the door and knocked her down. Three other black males then entered the house. Ms. Lincoln was dragged screaming into the kitchen. Her clothes were torn off and the defendant proceeded to rape her. Thereafter, Ms. Lincoln was raped twice by each of the five men, and, additionally, was forced, at gunpoint, to engage in unnatural sexual acts with the men. At one point the defendant dragged Ms. Lincoln's daughter into the kitchen and held a gun to the child's head, telling Ms. Lincoln that if she did not do what the men ordered he would shoot her daughter. One of the men then took a Pepsi-Cola bottle and, while defendant held Ms. Lincoln by her leg, forced the bottle into her rectum.

We see nothing to be gained by describing in detail the acts of defendant and his companions. Suffice it to say that their conduct was savage, inhuman, degrading, and revolting. Defendant

admitted to the officers: "I raped her by having sexual intercourse with her while holding her down and against her will. Alton Ray Curman stuck a soft drink bottle in her rectum. I do not know for sure how far he stuck the bottle in her."

After a half hour of such treatment, the defendant told Ms. Lincoln that the men were going to leave, and ordered her to lie still. One of the men then noticed her diamond ring and unsuccessfully attempted to wrench it from her finger, whereupon Ms. Lincoln took the ring off and handed it to him. She was then dragged across the floor by two of the assailants, one of whom said he was going to take her with them. She started struggling with the men at the front door, at which time she was hit over the back of the head and knocked unconscious. On regaining consciousness, Ms. Lincoln discovered that the men had left. She found her child cowering behind a chair. She took the child with her to a neighbor's house and called the sheriff. When the officers arrived at Ms. Lincoln's home, they found the house to be in disarray, the telephone wires pulled from the receiver, and her clothes scattered around on the floor. A large pool of blood was found on the floor and there was evidence showing that the screen door had been forced open. Ms. Lincoln had blood over a large part of her body.

Ms. Lincoln lost a great deal of blood due to the injuries inflicted on her by her assailants. Dr. G. Howard Satterfield examined her after the crime, and testified that she had severe bruises and abrasions on her neck, thighs and knees. Her labia were swollen about twice the normal size and were severely cut. There were multiple cuts and bleeding around her rectum, and the rectum itself was grossly distended.

Defendant was arrested around 4:00 a.m. the following morning. At that time his trousers were bloodstained, and the diamond ring and .22-caliber pistol belonging to Ms. Lincoln were found in a green field jacket lying on the floor beside him. Shortly thereafter defendant confessed to his participation in the rape of and other crimes against Ms. Lincoln.

The defendant offered no evidence.

Other facts relevant to the case will be set forth in the opinion.

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

David T. Greer for defendant appellant.

MOORE, Justice.

[1] By his first assignment of error defendant alleges that the trial court committed error in failing to grant defendant's motion under G.S. 15A-954(a)(4) to dismiss the charges against the defendant. G.S. 15A-954(a) provides:

> "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> * * *
>
> "(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."

The provisions of G.S. 15A-954(a)(4) were intended to embody the holding of this Court in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971). *See* Official Commentary to G.S. 15A-954. As is indicated in the Official Commentary, since the provision contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly.

In *State v. Hill, supra*, the Court indicated that dismissal of charges of operating a vehicle under the influence of intoxicating liquor was appropriate where the evidence showed that the defendant was denied the right to confer with counsel and have witnesses present after his arrest. The Court held that, since defendant was categorically denied the right to have anyone see him and observe his actions after his arrest, the defendant was deprived of his only opportunity to obtain evidence which might prove his innocence.

In the present case we have a different situation. There has been no showing that defendant's rights were violated. In a *voir dire* hearing on defendant's motion to suppress evidence of a confession and on his motion to dismiss under G.S. 15A-954(a)(4), the State offered extensive evidence showing that shortly after arrest defendant was read his constitutional rights in accordance

with Miranda requirements, and that the defendant stated he understood his rights and did not want a lawyer during interrogation. He signed a written waiver of rights, and this, along with a second written waiver stemming from a second interrogation several hours later, was introduced into evidence. Officers further testified that the defendant did not appear to be under the influence of drugs or alcohol. Defendant testified during *voir dire* that he was not read his rights, that he had signed nothing, that he repeatedly told officers he wanted a lawyer, that he had not slept the evening before his arrest and interrogation, and that he had been drinking wine and gin and smoking marijuana on the day he was arrested. Following the *voir dire*, the court found facts, among these being the finding that defendant had been informed of his rights, that he had waived these rights, and that defendant had expressly waived his right to have an attorney present. The court therefore concluded that defendant's statements to officers at both interrogations were freely and voluntarily made, and that his confessions were admissible into evidence.

As this Court said in *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971): "The conflict in testimony on the *voir dire* raised a question of credibility of the witnesses, which was for the determination of the trial court. His findings of fact, supported by competent evidence, are conclusive. *State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966) . . . ." There was ample oral and written evidence in present case to support the judge's findings that defendant had been informed of his rights, and had waived these rights. These findings are conclusive. *State v. Blackmon, supra.*

[2] Unlike *State v. Hill, supra*, where the evidence showed that defendant had been denied his right to have counsel or anyone else present, the findings in present case indicate that defendant was afforded such rights but did not exercise them. The trial court therefore correctly denied defendant's motion to dismiss the prosecution, for his constitutional rights were *not* violated. It is only when one can show that there has been a constitutional violation resulting in irreparable prejudice to the preparation of his case that a dismissal is warranted under G.S. 15A-954(a)(4). Defendant has neither argued nor implied that his opportunity to

obtain evidence was in any way impaired by the facts surrounding his interrogation.

[3] Equally without merit is defendant's further contention that the court erred in failing to find facts and enter conclusions of law, and in failing to enter a specific order denying defendant's motion to dismiss under G.S. 15A-954(a)(4). The trial court actually did find facts and enter conclusions of law in denying defendant's motion to suppress evidence of defendant's confessions to police. By so denying the motion to suppress, the motion to dismiss was denied, *ipso facto*, for there was no showing of a constitutional violation by defendant upon which to base the motion. Thus the failure of the trial judge to enter an additional order specifically denying by name the motion to dismiss would be, at most, harmless error.

[4] Under his next assignment of error defendant argues that the trial court erred in failing to dismiss the charge of first degree rape against defendant. This argument is based on the contention that the State did not sufficiently prove one of the elements of the crime, namely, that defendant was more than sixteen years of age. At trial the Register of Deeds of Pitt County, Elvira T. Allred, testified that Volume 43 of the Vital Statistics—Birth Records, which was under her supervision, contained at page 1376 a certificate of live birth for "Silvester Joyner," the defendant. The State, after authentication by Mrs. Allred, introduced into evidence, as Exhibit X, page 1376 of Volume 43 of the Birth Records of Pitt County. This document indicates that defendant was born on 19 October 1957, making him over nineteen years of age at the time of the commission of the alleged crimes.

[5] Defendant contends that the admission of this official record into evidence was error, arguing that the State did not satisfy the requirements set forth in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). In that case the Court held it error for the trial court to admit a document, signed by a deputy registrar, purporting to be a certificate of birth, where the document was not in fact the original certificate of birth nor even a certified copy of that official record, but rather was merely a summary of information apparently contained in the defendant's birth certificate. As such, the document was double hearsay, and inadmissible.

Contrary to defendant's contentions, the document offered into evidence in the present case does satisfy the requirements of *State v. Gray*, insofar as that case is even relevant. The document in present case is an *original* public record—the certificate of live birth itself—which is on file in the Pitt County Register of Deeds Office. It has long been the law in this State that original official records are admissible into evidence, when properly authenticated, for purposes of proof of matters relevant to the information contained in the official record. *See generally* 1 Stansbury, N.C. Evidence § 153 (Brandis rev. 1973). In the early case of *Jacocks v. Gilliam*, 7 N.C. 47 (1819), the Court, in holding the official registry of marriages admissible to prove pedigree, said: ". . . A book kept by public authority, is necessarily evidence of the facts recorded in it. . . ." *See also State v. Melton*, 120 N.C. 591, 26 S.E. 933 (1897).

The admissibility of official writings of various sorts is now governed largely by several miscellaneous statutes which, collectively, cover a wide range. Stansbury, *ibid.*, p. 509. This doctrine of the official records exception to the hearsay rule has been expanded by statute to include the admission of certified *copies* of official records. *See* G.S. 8-34; G.S. 130-66. It is still, however, the case that "while certified copies of records are admitted in evidence, the originals are not thereby made incompetent." *Riley v. Carter*, 165 N.C. 334, 81 S.E. 414 (1914).

The certificate of birth introduced into evidence in the present case was an original public record which was properly authenticated by the official custodian of the document. The information contained in the document was therefore competent evidence of the facts recorded, *viz*, the date of defendant's birth. *Cf.* G.S. 8-34 and G.S. 130-66. The trial court correctly denied defendant's motion to dismiss the charge of first degree rape.

Defendant next assigns as error the denial of his motion for judgment as of nonsuit on the charge of armed robbery. Defendant contends that no evidence was presented which showed that at the time the victim removed the ring from her finger she was either endangered or threatened by the use of a firearm or other dangerous weapon. Nor, argues defendant, did the evidence for the State show that the victim was in fear for her life at the time she surrendered the ring to her assailants. This assignment is without merit.

G.S. 14-87 states, in part:

> "(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than seven years nor more than life imprisonment in the State's prison."

[6] The essential difference between armed robbery and common law robbery is that, to prove the former, the State must produce evidence sufficient to show that the victim was endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." G.S. 14-87(a); *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972); *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). The question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). As the Court held in *Moore*, the essentials of the offense set forth in G.S. 14-87 are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim.

Thus, in present case, though there was evidence sufficient to show that the victim was in fear for her life, the State did not have to prove such fear to overcome defendant's motion for nonsuit. Rather, the State could prove, at the least, that during the course of the robbery or attempted robbery, there was a *threatened use* of a dangerous weapon which endangered or threatened the life of the victim.

[7] That the State proved as much is clear from the record. Prior to the robbery itself, while Ms. Lincoln was being sexually

assaulted by defendant's accomplices, the defendant told Ms. Lincoln that if she wanted her daughter to stay alive, she would keep quiet and do what the men told her to do. Moments later one of the assailants held a gun to her head, and "said that if I didn't do what they said he would blow my brains out." Defendant later took the gun and pointed it toward the daughter's head, telling Ms. Lincoln that the same would happen to her if she did not cooperate. Ms. Lincoln testified that, "At the time the ring was removed from my finger, Mr. Joyner had the firearm there in the kitchen," and, finally, that defendant was in her presence the entire half hour.

It is clear from this evidence that Ms. Lincoln was placed under a continuing threat with a firearm. Though Ms. Lincoln did not testify that defendant actually pointed the gun at her at the time she gave her ring to his accomplice, earlier there had been such "use" of the firearm as to force her to commit certain acts, and it had been made clear to her on several occasions prior to the actual taking of her ring that the firearm would be used against her if she did not comply. This continuing threat extended to every subsequent act by her, and thus constituted a "threatened use" of a firearm which "endangered or threatened" her life within the terms of G.S. 14-87(a). *See also State v. Harris*, 281 N.C. 542, 189 S.E. 2d 249 (1972). The evidence presented by the State was, therefore, sufficient to overcome defendant's motion for nonsuit.

[8] Defendant next argues that the trial judge should not have submitted to the jury the charge of assault with a deadly weapon inflicting serious bodily injury, for the reason that there was no evidence that the Pepsi-Cola bottle, as used, was a deadly weapon or that Ms. Lincoln suffered serious bodily injury as a result of the assault.

An instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon. *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946). But where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly

character is one of fact to be determined by the jury. *State v. Perry, supra; State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931).

The term "inflicts serious injury," under G.S. 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious but it must fall short of causing death. *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). Evidence that the victim was hospitalized is not necessary for the proof of serious injury. *Cf. State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question which the jury must decide under proper instructions. *State v. Ferguson, supra; State v. Jones, supra.*

In instant case a lone woman, attacked by five males, was held down by defendant while an accomplice rammed a bottle into her rectum with such force as to cause excessive bleeding, dilation of the rectum, and the infliction of multiple cuts, some deep and long, about the rectum. Ms. Lincoln was examined by two physicians, and had to visit a physician regularly for some two months thereafter for treatment. Since the bottle used is an instrument which, depending on its use, may or may not be likely to produce great bodily harm, the trial judge properly submitted the question regarding its deadly character to the jury. Likewise, there being evidence of physical or bodily injury to the victim, the question of the nature of these injuries was also properly submitted to the jury. In both instances the State introduced evidence sufficient to overcome defendant's motion for nonsuit. Therefore the trial judge correctly submitted to the jury, under proper instructions, the questions whether the bottle involved was a deadly weapon and whether serious injury was inflicted. These were questions for the jury's determination from the evidence. This assignment is overruled.

[9] Finally, defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of crime against nature. At trial the victim testified that the defendant put his mouth on her vagina and inserted his tongue into her vagina. Defendant argues that such behavior does not constitute a crime against nature since an essential element of the crime is some penetration of or by the sexual organ of the male.

Contrary to defendant's contention, though penetration by or of a sexual organ is an essential element of the crime, *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961), the crime against nature is not limited to penetration by the *male* sexual organ. In *State v. Griffin*, 175 N.C. 767, 94 S.E. 678 (1917), the Court said "our statute [now G.S. 14-177] is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. . . ." The crime includes unnatural acts with animals, and acts between humans *per anum* and *per os*. *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965); *State v. Fenner*, 166 N.C. 247, 80 S.E. 970 (1914). In present case the State's evidence showed that the defendant penetrated the victim's female sexual organ with his tongue. This is sufficient evidence to overrule defendant's motion for nonsuit.

Other assignments of error not brought forward and discussed in defendant's brief are deemed abandoned. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 671, 741.

Our examination of the entire record discloses that defendant has had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOSEPH BARBOUR, JR., ALSO KNOWN AS ANDY BARBOUR

No. 36

(Filed 8 May 1978)

1. **Jury § 7.13— first degree murder—number of peremptory challenges**

The trial court in a first degree murder case properly limited defendant to six peremptory challenges of jurors rather than permitting him the fourteen challenges allowed in capital cases where the death penalty could not have been imposed on defendant because it had been declared unconstitutional and the act reinstating the death penalty did not apply at the time of defendant's crime.

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

The State's evidence was sufficient to support a finding that defendant shot deceased with premeditation and deliberation and was guilty of first

degree murder where it tended to show that defendant went to deceased's hotel room for the purpose of getting money owed to him and, when deceased refused to pay, that defendant intentionally shot him three times, once while he was on the floor and helpless.

3. **Homicide § 18.1— premeditation and deliberation—shot while deceased felled not fatal shot**

Evidence that defendant shot deceased in the back after he had been felled by two prior shots was competent to show premeditation and deliberation even though one of the prior shots was the fatal one.

4. **Homicide § 19.1— self-defense—character of deceased—act of violence in defendant's presence**

Where the defendant in a homicide prosecution testified that deceased produced a gun and threatened to kill him, and that the gun went off while he wrestled deceased for the gun, the trial court improperly limited defendant's efforts to show the character of deceased as a violent and dangerous fighting man by refusing to permit defendant to testify that once, while at a night spot, he saw deceased run out and hit a man passing by with a pair of brass knuckles.

5. **Homicide § 19.1— self-defense—character evidence based on personal experience—reputation in community**

In a homicide case in which defendant presented evidence that deceased was the first aggressor, the trial court properly struck testimony by deceased's wife that she knew deceased's character to be dangerous and violent when it was disclosed on cross-examination that she was speaking from personal experience; however, the court erred in refusing to allow deceased's wife to relate on redirect examination the deceased's reputation in the community for violence on the ground that her earlier testimony indicated that she did not know deceased's reputation from other persons, since the earlier question related only to deceased's character and not to his reputation in the community, and the witness stated that she knew what others in the community said about deceased's reputation for violence.

6. **Criminal Law § 113.9— summary of evidence—statement of material fact not in evidence**

The trial court in a homicide prosecution committed prejudicial error in instructing the jury that the State offered evidence that defendant had a pistol in his hand when he came into deceased's room where there was no evidence that defendant had a gun in his hand until after the deceased had been shot, and there was a conflict in the evidence as to whether deceased or defendant first had the gun and was the aggressor.

DEFENDANT appeals, pursuant to G.S. 7A-27(a), from a conviction of first degree murder and sentence of life imprisonment, *James, J.*, 22 August 1977 Term, WILSON County Superior Court.

The State's principal witness, Nancy Sessoms, testified to the following: Between December, 1976, and May, 1977, she and the deceased, Charles W. "Tommy" Gregory, had been dating and were planning to be married as soon as they were divorced from their then-current spouses. On 3 May 1977, she was working as a desk clerk in Wilson at the Cherry Hotel, where the deceased lived. The witness got off work on this date at 11:00 p.m. and went up to the deceased's room, where she observed the deceased and defendant arguing over $20.00 that the deceased allegedly owed defendant. The two men were drinking from a bottle of liquor in the room. The deceased, during the argument, told defendant to leave and the two of them went into the hall outside the room, where defendant said that he would be coming back after his $20.00.

The witness then went downstairs, got her television and returned to the deceased's room, at which time defendant was gone. Approximately thirty-five minutes later, there was a knock at the door and the person outside identified himself as "Andy." The witness glanced up and saw the deceased admit a man to the room and then resumed watching television. She heard the man tell the deceased that he needed his $20.00 to get a room for the night because his wife had thrown him out. The deceased responded that he didn't have the money.

The witness next heard a gunshot, whereupon she looked up and saw defendant standing over the deceased, who was lying on the floor. The witness grabbed a stick and began to beat defendant on the back with it until he pointed a pistol at her. She then dropped the stick and backed away and, when she looked again, saw defendant standing against the door to the room. The deceased at that time was in a semi-kneeling position with his arms around defendant's waist. At this point, there was a second shot and the witness moved over to the deceased and knelt beside him, placing her hands around his back. Defendant then went into the hall, pointed the gun at the deceased, who had not moved, and shot him in the back. A subsequent autopsy revealed an alcohol content in the deceased's blood of .31 milligrams percent.

Defendant, Joseph "Andy" Barbour, Jr., testified substantially as follows: He and the deceased met around noon on the day of the killing at Willie's Grill. While there, they discussed the sale of

a pistol by defendant to the deceased. Defendant subsequently went home, where he ate, took a drink of liquor and slept. Carrying the pistol he and the deceased had discussed, defendant returned to Willie's Grill at about 4:30 p.m., where he again met the deceased. The two of them remained at the Grill until approximately 6:45 p.m., during which time they drank five or six beers each. They then went to the deceased's room at the Cherry Hotel, where they drank two more beers each and some liquor that defendant had sent the deceased out to purchase. Upon his arrival at the room, defendant had removed the pistol from his pocket and placed it on the floor near the head of the bed. At about 11:00 p.m., defendant went home. He returned to the room later to get $20.00 he had won from the deceased in a gambling game they were playing.

When he reached the room, defendant was admitted by the deceased, stepped inside and closed the door behind him. He then asked the deceased if he was going to pay him his money. The deceased produced a pistol and told defendant that he was going to kill him. Defendant at this point grabbed the deceased's arm and hand in which he held the pistol and started wrestling with him, during which time Nancy Sessoms began beating defendant in the back with a stick. In the midst of this altercation, the pistol fired. The deceased slipped down and grabbed defendant around the waist. Defendant then backed toward the door, dragging the deceased with him, all the while being beaten by Nancy Sessoms. When he reached the door, Sessoms struck at his face with the stick and defendant threw up his arm as a shield, at which point the gun in his hand, which he had wrestled away from the deceased, fired again. The deceased then relaxed his hold and defendant opened the door and left. Defendant recalled hearing only two shots fired during this encounter.

Medical testimony revealed that the deceased had been shot three times.

Additional facts pertinent to the decision are related in the opinion.

Connor, Lee, Connor, Reece & Bunn, by Cyrus F. Lee and James F. Rogerson, for defendant-appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James L. Stuart, for the State.

COPELAND, Justice.

After careful examination of defendant's numerous assignments of error, we find that sufficient prejudicial error occurred below to warrant a new trial. Our initial discussion is directed to two assignments which are without merit but likely to be raised on retrial.

[1] Defendant argues that the trial court erred in limiting him to six peremptory challenges during jury selection. Under G.S. 9-21(a), each defendant is allowed fourteen peremptory challenges in *capital* cases but only six in all other cases. Because North Carolina's mandatory death penalty law was declared unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), and the act reinstating capital punishment here applies only to murders committed on or after 1 June 1977, 1977 N.C. Sess. Laws, c. 406, the death penalty could not have been imposed on this defendant. It is defendant's position, nonetheless, that the Legislature's intent in G.S. 9-21(a) was to provide a defendant with more peremptory challenges when he is on trial for the most serious crime recognized in our law, regardless of whether a conviction might subject him to the ultimate sanction.

The Court of Appeals previously has noted, however, that "A *capital* case has been defined as one in which the death penalty may, but need not necessarily, be imposed." *State v. Clark*, 18 N.C. App. 621, 624, 197 S.E. 2d 605, 607 (1973). If, therefore, it is determined during jury selection in a prosecution for a crime which formerly had been punishable by death that the death penalty may not be imposed upon conviction, the case loses its capital nature, thereby rendering statutes providing for an increased number of peremptory challenges in capital cases inapplicable. *United States v. McNally*, 485 F. 2d 398 (8th Cir., 1973), *cert. denied*, 415 U.S. 978, 39 L.Ed. 2d 874, 94 S.Ct. 1566 (1974); *Martin v. State*, 262 Ind. 232, 314 N.E. 2d 60 (1974), *cert. denied*, 420 U.S. 911, 42 L.Ed. 2d 841, 95 S.Ct. 833 (1975); *State v. Haga*, 13 Wash. App. 630, 536 P. 2d 648, *cert. denied*, 425 U.S. 959, 48 L.Ed. 2d 204, 96 S.Ct. 1740 (1976); *People v. Watkins*, 17 Ill. App. 3d 574, 308 N.E. 2d 180 (1974). This assignment of error is overruled.

Defendant next contends that his motions for a directed verdict of acquittal of first degree murder should have been allowed because there was insufficient evidence to support this charge. A motion for directed verdict challenges the sufficiency of the evidence to go to the jury and has the same legal effect as a motion for compulsory nonsuit. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). In ruling on a motion for nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every inference reasonably to be drawn in its favor. *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977).

A motion for nonsuit of a first degree murder charge must be denied if there is evidence tending to show an unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). Premeditation is " '. . . thought beforehand for some length of time, however short,' " while deliberation means " '. . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' " *State v. Reams*, 277 N.C. 391, 401-402, 178 S.E. 2d 65, 71 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971). Premeditation and deliberation usually must be established by circumstantial evidence, since there is seldom direct evidence of these elements. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973). "Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled." *Id.*, at 599, 197 S.E. 2d at 545.

[2] In the instant case, the State's evidence tended to show that: (1) defendant left the deceased's hotel room after an argument over $20.00 the deceased allegedly owed him; (2) before he departed, defendant told the deceased he was coming back after his $20.00; (3) while riding home in a taxi, defendant told the driver that he was going to "whup" somebody; (4) after defendant returned to the deceased's room and was admitted, he told the deceased he needed his $20.00 and the deceased replied that he

didn't have the money; (5) nothing further was said by the two men and the next sound of sufficient magnitude to divert the State's witness's attention from the television set was a gunshot; (6) after the deceased had been shot a second time, defendant allowed Nancy Sessoms to go to him and hold him up; (7) defendant then stepped into the hall and, while the deceased was on his knees being supported by Nancy Sessoms, shot him in the back. We conclude that this evidence was sufficient to allow the jury to infer that defendant went to the deceased's room for the purpose of getting money owed to him and, when the deceased refused to pay, that defendant intentionally shot him three times, once while he was on the floor and helpless.

[3] Defendant argues that premeditation and deliberation cannot be inferred from the third shot, fired while the deceased was down, because the evidence tended to show that one of the shots which entered the front of the deceased's body was the fatal wound and that the shot in the back was not mortal. Nonetheless, this was a blow from a deadly weapon, delivered while the victim was helpless and unarmed and we have not required that such blows be found to be fatal in order to support an inference of premeditation and deliberation. *See, State v. Baggett*, 293 N.C. 307, 237 S.E. 2d 827 (1977). We find that there was adequate evidence here to permit the jury to conclude that defendant shot and killed the deceased with premeditation and deliberation; therefore, this assignment of error is overruled.

[4] Defendant also contends that the trial court erred in unduly limiting his efforts to show the character of the deceased as a violent and dangerous fighting man. The first instance assigned as error involves the refusal of the court to allow defendant during direct examination to relate a specific act of violence committed in his presence by the deceased. Defendant, if permitted, would have stated that once, while at a night spot, he saw the deceased run out and hit a man passing by with a pair of brass knuckles.

Where the defendant in a homicide prosecution has offered evidence tending to show self-defense, testimony by him of specific acts of violence committed by the deceased in his presence or of which the defendant had knowledge prior to the homicide is admissible to show the deceased's character as a

violent and dangerous fighting man in order to permit the jury to determine whether the defendant acted under a reasonable apprehension of danger to his person or his life. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Defendant here testified that when he returned to the deceased's room and asked for his money, the deceased produced a pistol and told defendant that he was going to kill him. At this point, defendant maintained, he grabbed for the gun and began wrestling with the deceased and during this altercation the gun went off. Evidence of defendant's knowledge of the deceased's past history of violence would certainly assist the jury in assessing the reasonableness of defendant's actions to protect himself when faced with this threat on his life. Failure to admit this testimony was error.

[5] Defendant further excepts to the trial court's exclusion of testimony by the deceased's wife concerning the deceased's reputation in the community for being a dangerous and violent man. In the course of defendant's direct examination of this witness, she had stated that she knew the deceased's character to be dangerous and violent; however, on cross-examination it was disclosed that she was speaking from personal experience rather than relating what others in the community said about the deceased. Upon hearing this statement, the court intervened and instructed the jury to disregard the witness's entire reputation testimony up to that point because it was not based on what people in the community said about the deceased. Defense counsel then asked the witness on redirect examination if she knew what others in the community said about the deceased's reputation for being a dangerous and violent man. She replied that she did, but the court refused to allow her to relate this reputation, stating that her earlier response indicated that she did not know the deceased's reputation from other persons.

Evidence of the deceased's violent character, whether known to the defendant or not, is admissible in a homicide case where self-defense is in issue and the State's evidence is wholly circumstantial or the nature of the transaction is in doubt in order to shed light on the question of which party was the first aggressor. *State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913); Stansbury's N.C. Evidence (Brandis Rev., 1973), § 106; McCormick, Handbook of the Law of Evidence (2d ed., 1972), § 193. As noted earlier, defendant here testified that the deceased produced

the gun first and threatened to kill him, thus precipitating the altercation. The State's evidence raises contrary inferences and this conflict in turn presents the question of which party was the actual aggressor. Evidence of the deceased's violent character would be highly relevant in resolving this.

The trial court's actions in excluding this witness's testimony regarding specific acts of violence by the deceased which were not shown to be within defendant's knowledge prior to the homicide and striking her statements as to the deceased's violent character based solely on her personal experience were correct, since specific acts and a witness's personal opinion are not admissible to show another person's character as evidence of his conduct on a particular occasion. *Stansbury's N.C. Evidence, supra,* § *110.* Nonetheless, the court erred in refusing to allow her to relate on redirect examination the deceased's reputation in the community for violence. *State v. Blackwell, supra.* The exclusion of this testimony was apparently based on the court's conclusion that when the witness stated that her earlier character testimony was grounded on personal experience, this implied that she did not know his reputation in the community. An examination of the record discloses that such was not the case, however, because the witness had only been asked what the deceased's character for violence was and not his reputation in this respect. It thus seems that the witness merely misapprehended the nature of the question and, when this confusion was corrected, should have been allowed to answer the proper inquiry. The witness, if permitted to answer, would have stated that she had heard others in the community speak of the deceased's character as being dangerous, violent and mean.

[6] It is further argued that the trial court erred in summarizing the evidence in its charge by stating:

> "[T]hat when [defendant] came to the room, he knocked on the door and was admitted; *that he had a pistol in his hand;* that some words were used; . . . that after a short pause, a pistol shot was heard; that the deceased fell to the floor." (Emphasis added.)

This instruction tends to indicate that when defendant entered the room he had a pistol in his hand; yet, Nancy Sessoms, the only State's witness present at the time of the shooting,

nowhere testified that she saw a gun in defendant's hand when he first returned. Indeed, on cross-examination Sessoms stated that she did not see a gun until after she heard the first shot. Such an instruction is highly misleading and prejudicial in that it strongly reinforces the State's position that defendant came to the room armed and prepared to get his money or kill the deceased, when there was no evidence that defendant had a gun in his hand until after the deceased had been shot once.

Although the court ordinarily should be informed of an inaccuracy in the summary of the evidence in the charge during or at the conclusion of the instructions so that any error may be corrected, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921 (1952); *but cf.*, *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), (misstatements of collateral matters must be called to the court's attention before the case is submitted to the jury). This instruction, together with the previously noted erroneous exclusion of evidence of the deceased's character as a violent and dangerous fighting man, constitute manifest prejudice to this defendant; consequently, he must be afforded a new trial.

Since the events which form the basis of defendant's remaining assignments of error may not recur on retrial, we deem it unnecessary to discuss them.

For the reasons stated, defendant's conviction is set aside and the case remanded for

New trial.

STATE OF NORTH CAROLINA v. JOE CLEVEN MEDLEY

No. 4

(Filed 8 May 1978)

1. Criminal Law § 89.3— witnesses' prior written statements—admissibility for corroboration

Prior written statements of two witnesses in a homicide prosecution were properly admitted for corroborative purposes where the court specifically instructed the jury that the statements were to be considered by them for cor-

roboration only and any part which did not corroborate the witnesses' testimony should be disregarded by them; minor variances between the statement and the witnesses' testimony did not affect the admissibility of the statements but only the weight and credibility to be given them by the jury; and defendant's general objection was ineffective since he failed to specify any portion of the evidence which, standing alone, failed to corroborate the trial testimony.

2. **Criminal Law § 8.1— murder of police officer—intoxication as defense—instructions not required**

In a prosecution for the first degree murder of two police officers, testimony by defendant that he had had a few drinks before the murders but that he was not drunk, and evidence that he had a blood alcohol content of .12 percent was insufficient to require an instruction by the trial court on the law of intoxication as a defense since the breathalyzer test is applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide; a person may be under the influence of intoxicants in violation of the motor vehicle laws, G.S. 20-138, and yet be quite capable of forming and carrying out a specific intent to kill; and for intoxication to constitute a defense it must appear the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequences of his act.

DEFENDANT appeals from judgments of *Collier, J.*, entered at the 9 May 1977 Session, DAVIDSON Superior Court.

Defendant was tried upon bills of indictment charging him with the first degree murders of Officers Dennis F. Spinnett and Robert Crawford of the Thomasville Police Department.

The State's evidence tends to show that on 8 January 1977 Officers Spinnett and Crawford were summoned to a residence at 805 Douglas Drive in Thomasville where defendant had been threatening several people with a pistol. When the officers arrived, several people, including defendant, walked next door to defendant's residence at 807 Douglas Drive. The officers followed and there attempted to arrest Bobby Lindsay, one of defendant's friends. Defendant shot the officer attempting to effect the arrest, then shot the other officer when he came to the aid of his colleague.

The testimony of the State's witnesses concerning the details of the killings is not entirely consistent. Three witnesses testified that they actually saw defendant shoot the policemen. One of these witnesses said defendant drew the gun from his boot; another testified the gun was pulled from defendant's back

pocket. Two of the three witnesses stated the shooting occurred after the officers had wrestled Bobby Lindsay to the floor in an effort to subdue him; Bobby Lindsay testified he was peaceably submitting to the officers when defendant opened fire. All of these witnesses gave statements to police officers investigating these killings, and these prior statements were offered in corroboration of the eyewitness testimony at trial. Additionally, the State offered the testimony of several persons who saw defendant shoot a pistol into the foot of Willie Meaders of 805 Douglas Drive shortly before the officers arrived.

Expert testimony established that the shots which killed the police officers were fired from a .38 caliber revolver which defendant admitted owning.

Defendant offered the testimony of Mrs. Josephine Medlin, who stated that she saw Bobby Lindsay holding a gun at the time the first officer was shot. Defendant testifed that it was Lindsay who shot both policemen while resisting their attempts to arrest him. He further testifed that he slipped the .38 caliber pistol to Lindsay when they were leaving 805 Douglas Drive as the officers arrived. Defendant also presented testimony that an SBI agent investigating the killings had requested that warrants for first degree murder be drawn against both defendant and William Junior (Bobby) Lindsay.

The jury found defendant guilty of first degree murder in each case, and from two consecutive terms of life imprisonment, he appealed to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Patricia B. Hodulik, Associate Attorney, for the State of North Carolina.

G. Thompson Miller, Attorney for defendant appellant.

HUSKINS, Justice.

[1] After Willie James Meaders and Glossie Lee Carter had testified for the State, a prior statement made by each was admitted, over objection, for corroborative purposes. Defendant contends these prior statements do not corroborate the testimony of the witnesses and points to certain variances between the testimony and the prior statement of each witness. Admission of

the statements for corroborative purposes constitutes defendant's first assignment of error.

The admissibility of a prior consistent statement of a witness to corroborate his testimony is a long established rule of evidence in this jurisdiction. *See* 1 Stansbury's North Carolina Evidence § 51 (Brandis rev. 1973); *State v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708 (1946). Even so, the prior statement must in fact corroborate the testimony of the witness, *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975); and such statement is not admitted as substantive evidence of the facts stated but solely for the purpose of affirming the credibility of the witness. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960); 1 Stansbury's North Carolina Evidence § 52 (Brandis rev. 1973). Slight variations in corroborative evidence do not render it inadmissible. "If the previous statements offered in corroboration are generally consistent with the witness's statement, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Britt*, *surpa* at 535, 231 S.E. 2d at 650. *Accord*, *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965). Furthermore, if a portion of a prior statement is consistent with the testimony of the witness at trial and thus competent for corroborative purposes while other portions are not, a general objection will not suffice. "Rather, it is the duty of the objecting party to call to the attention of the trial court the objectionable part." *State v. Britt*, *supra* at 536, 231 S.E. 2d at 650. *Accord*, *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973); *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963); *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84 (1947).

Applying these principles to the challenged evidence in this case, we hold that the prior written statements of Willie James Meaders and Glossie Lee Carter were properly admitted for corroborative purposes. The trial judge reiterated for the jury's guidance that such evidence was admitted for corroborative purposes only and instructed the jury "if any portion of these statements does not tend to corroborate their testimony at this trial, you will disregard that portion of the statements completely and won't consider it in any way."

For the sake of brevity the testimony of these witnesses and the challenged written statement of each are not set out verbatim. It would serve no useful purpose to do so. When each prior statement is compared with the testimony of the witness who made it, no material variance appears. The substance of both the statement and the testimony describes a quarrel between defendant and Willie James Meaders in the course of which defendant shot Meaders in the foot. The minor variances complained of do not impair the admissibility of the prior statements for corroborative purposes, but affect only the weight and credibility which is always for the jury. *State v. Britt, supra.* Moreover, defendant's general objection was ineffective since he failed to specify any portion of the evidence which, standing alone, fails to corroborate the trial testimony. *State v. Tinsley, supra.*

For the reasons stated, defendant's first assignment is overruled.

[2] In his second assignment defendant contends the trial judge erred in failing to instruct the jury on the law of intoxication as a defense. However, it was conceded on oral argument that the assignment has no merit. The record as well as the law supports the concession.

Voluntary drunkenness is not a legal excuse for crime. *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075 (1911). Even so, where, as here, a specific intent to kill is an essential element of the offense charged, intoxication may negate the existence of the requisite intent. If at the time Officers Spinnett and Crawford were killed defendant Medley was so intoxicated that he was utterly incapable of forming a specific intent to kill, he could not be guilty of murder in the first degree. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton,* 164 N.C. 513, 79 S.E. 883 (1913). In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975). The question then, in this case, is whether there was evidence that defendant was intoxicated to such extent

that he was utterly incapable of forming a specific intent to kill so as to require an instruction on intoxication by the trial judge.

In his own testimony before the jury defendant stated: "I had had two or three drinks and beer when I went over there. I took a drink with some of my friends what was in there and with William Lindsay, who was in the kitchen. He had something to drink. He was drinking before I was. I knew he was drinking and he had a good bunch to drink. He was drunker than I was because I wasn't drunk; but he was drunker than I was."

Scott Washam, a forensic chemist with the State Bureau of Investigation, testified with respect to the blood alcohol content of the defendant and William Junior Lindsay in pertinent part as follows: ". . . Joe Cleven Medley had a blood alcohol content of .12 percent and William Junior Lindsay had a blood alcohol content of .22 percent. . . . Prima facie intoxication in North Carolina is considered to be .10."

For the reasons which follow, we hold that the foregoing evidence is insufficient to require a charge on intoxication.

In the first place, the chemical analysis (Breathalyzer) test authorized by G.S. 20-139.1 is, by its express terms, applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide. *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973). In the second place, a person may be "under the influence" of intoxicants in violation of the motor vehicle laws, G.S. 20-138, and yet be quite capable of forming and carrying out a specific intent to kill. "The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequences of his act." *State v. Cureton*, 218 N.C. 491, 494, 11 S.E. 2d 469, 470-71 (1940). *Accord, State v. Bunn, supra; State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972).

Thus it is apparent that the evidence with respect to defendant's intoxication is insufficient to support a finding that by reason of intoxication he was utterly unable to form a specific intent to kill, after premeditation and deliberation. Hence no charge

on the subject was necessary in this case. Defendant's second assignment is overruled.

Defendant's third and final assignment of error is based on denial of his motion for a new trial. Such motion is addressed to the discretion of the trial court and its denial is not reviewable absent abuse of discretion. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). Since no error was committed with respect to the admission of corroborative evidence or with respect to the judge's failure to charge on intoxication, denial of the motion for a new trial was entirely proper.

This record discloses a callous killing without provocation of two police officers in line of duty. For those crimes defendant has had a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

WILLIAM DAVID WILES AND WIFE, GLENDA LEE WILES v. WELPARNEL CONSTRUCTION COMPANY, INC.

No. 21

(Filed 8 May 1978)

Process § 12; Rules of Civil Procedure § 4— agent of corporation receiving service — when service of process is valid

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction. To the extent that it is inconsistent with this rule, the line of cases represented by *Russell v. Manufacturing Co.*, 266 N.C. 531; *Hassell v. Steamboat Co.*, 168 N.C. 296; *Plemmons v. Improvement Co.*, 108 N.C. 614; and *Ready Mix Concrete v. Sales Corp.*, 30 N.C. App. 526, is expressly overruled.

THIS case is before us on petition for discretionary review of the decision of the Court of Appeals, 34 N.C. App. 157, 237 S.E.

2d 297 (1977), (*Vaughn, J.*, concurred in by *Hedrick* and *Clark, JJ.*), reversing the order of *Seay, J.*, entered 9 November 1976, YADKIN County Superior Court, denying defendant's motion for summary judgment.

A complaint was filed and summons issued in this action on 15 March 1976. In their complaint, plaintiffs allege that they suffered injuries as a result of certain negligent acts committed by defendant through its agents and employees on or about 23 April 1973.

The caption of the summons here reads as follows:

"WILLIAM DAVID WILES and wife, GLENDA LEE WILES,
Plaintiffs

Against

WELPARNEL CONSTRUCTION COMPANY, INC.
Defendant"

The summons was directed to:

"Mr. T. T. Nelson, Registered Agent
Welparnel Construction Company, Inc.
211 N. Bridge St.
Jonesville, N. C."

Following service of copies of this summons and complaint on T. T. Nelson on 15 March 1976, attorneys for Welparnel Construction Company obtained stipulations from plaintiffs' attorney extending the time to answer through 14 May 1976. An answer was subsequently filed on 26 April 1976, some three days after the statute of limitations had apparently run, in which it was maintained that plaintiffs had failed to obtain valid in personam jurisdiction over defendant. On 3 September 1976, defendant filed a motion for summary judgment on the grounds that the statute of limitations had run and that defendant had not been subjected to valid in personam jurisdiction because the summons was directed to the corporate agent individually rather than to the defendant corporation. As noted above, this motion was denied by the trial court in an order issued on 9 November 1976, which was later reversed by the Court of Appeals.

Additional facts relevant to the decision are related in the opinion.

R. Lewis Ray & Associates, by R. Lewis Ray for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper for defendant appellee.

COPELAND, Justice.

The principal question presented by this appeal is whether service of a summons directed to a person described as the agent of a corporation, when the corporation is named in the complaint and the caption of the summons as the defendant, is sufficient service of process on the corporation. For the reasons set out below, we have determined that it is; therefore, the decision of the Court of Appeals must be reversed.

The long-standing rule in this state has been that when a summons directs service on a person as an agent or officer of a defendant corporation and is served on that person, it constitutes service of process only on that person individually and not on the corporate defendant. *Russell v. Bea Staple Manufacturing Company, Inc.*, 266 N.C. 531, 146 S.E. 2d 459 (1966); *Hassell & Co. v. Daniels' Roanoke River Line Steamboat Co.*, 168 N.C. 296, 84 S.E. 363 (1915); *Plemmons v. Southern Improvement Company*, 108 N.C. 614, 13 S.E. 188 (1891). This rule was amended somewhat by the enactment of G.S. 1A-1, Rule 4(b), (hereinafter N.C.R. Civ. P.), which provides that a summons shall be directed to the defendant rather than to a process officer ordering him to summon the defendant. Still, the strict requirement that the summons command the appearance of the defendant and not that of an individual designated an agent or officer of the defendant has been carried over in the interpretation of the sufficiency of summonses under Rule 4. *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corporation*, 30 N.C. App. 526, 227 S.E. 2d 301 (1976); *see also, Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974), (holding that a summons directed to the Commissioner of Motor Vehicles was defective process as against a nonresident defendant in an action arising out of operation of a motor vehicle in this state).

In reviewing the summons issued in this case, we find that in all likelihood it would indeed be defective when judged by the

standard previously exercised in determining questions of this sort. This summons is slightly distinguishable from those in earlier cases in that it is directed "To each of the defendants named below at the indicated addresses—GREETING: Mr. T. T. Nelson, Registered Agent, Welparnel Construction Company, Inc.," and Welparnel Construction Company was the only party named as a defendant in the complaint. Nonetheless, we agree with the Court of Appeals, which found the variation between this language and "Agent for" or "President of" a named corporation to be too precarious to form the basis of a valid distinction. It is our feeling, however, that the time has come to re-evaluate the considerations on which this narrow interpretation of sufficiency of process on corporate defendants is grounded.

It has been recognized that "The rationale of all rules for service of process on corporations is that service must be made on a representative so integrated with the corporation sued as to make it a priori supposable that he will realize his responsibilities and know what he should do with any legal papers served on him." *Goetz v. Interlake S.S. Co.*, 47 F. 2d 753, 757 (S.D.N.Y., 1931); *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Association of America*, 344 F. 2d 860 (9th Cir., 1965); 19 C.J.S., Corporations § 1312, p. 995. In addition, the primary purpose of Rule 4 of the Federal Rules of Civil Procedure, which is similar to our N.C.R. Civ. P. 4, is "to provide the mechanisms for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." Wright & Miller, Federal Practice and Procedure: Civil § 1063 p. 204 (1969).

In the instant case, Welparnel Construction Company, Inc. was properly named as the defendant in the complaint, as well as in the caption of the summons. The sole ground upon which the process here is asserted to be defective is the direction of the summons to the corporation's registered agent rather than to the corporation. While our Rule 4(b) does require that the summons be directed to the defendant, we feel constrained to agree with the statement of Judge John J. Parker in a similar context that "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is

meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *United States v. A. H. Fischer Lumber Co.*, 162 F. 2d 872, 873 (4th Cir., 1947).

This Court has always attached great importance to the doctrine of *stare decisis*, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application. *Bulova Watch Company, Inc. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). Nonetheless, *stare decisis* will not be applied when it results in perpetuation of error or grievous wrong, *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949), since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible. *Sidney Spitzer & Co. v. Commissioners of Franklin County*, 188 N.C. 30, 123 S.E. 636 (1924).

In the case *sub judice*, any confusion arising from the ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons which clearly indicate that the corporation and not the registered agent was the actual defendant in this action. Since, under Rule 4, a copy of the complaint must be served along with the summons, and the corporate representative who may be served is customarily one of sufficient discretion to know what should be done with legal papers served on him, *Goetz v. Interlake S.S. Co.*, *supra*, the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic. Under the circumstances, the spirit certainly, if not the letter, of N.C.R. Civ. P. 4(b) has been met. In view of this conclusion, we feel that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction. *See Clark v. Porcelain Manufacturing Company*, 8 S.C. 22 (1876); *Baldine v. Klee*, 10 Ohio Misc. 203, 224 N.E. 2d 544 (1965), *rev'd on other grounds*, 14 Ohio App. 2d 181, 237 N.E. 2d 905 (1968).

We hold, therefore, that to the extent it is inconsistent with this rule, the line of cases represented by *Russell v. Bea Staple Manufacturing Company, Inc., supra, Hassell & Co. v. Daniels' Roanoke River Line Steamboat Co., supra, Plemmons v. Southern Improvement Company, supra,* and *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corporation, supra,* is expressly overruled. We wish to point out at this juncture that a number of decisions citing the cases overruled above involved situations in which the complaint as well as the summons were directed to the corporate officers or agents. *See, e.g. McLean v. Matheny,* 240 N.C. 785, 84 S.E. 2d 190 (1954); *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789 (1938); *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867 (1931); *Young v. Barden,* 90 N.C. 424 (1884). Because the potential for confusion in such a situation is significantly greater, these latter holdings remain undisturbed by this decision.

Although consistent with our former rule, the well-considered decision of the Court of Appeals is at variance with the standard we announce today. For this reason, it is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROBERT L. CADY

No. 28

(Filed 8 May 1978)

DEFENDANT was charged in a bill of indictment, proper in form, with murder in the first degree. Upon conviction before *Judge Giles Clark,* 11 October 1976 Session, CUMBERLAND Superior Court, he was sentenced to life imprisonment.

The State's evidence tended to show the following:

The body of the deceased, Swindell Fletcher, was discovered about 3:15 p.m. on 26 May 1975 in the hallway of his home in Spring Lake, North Carolina. The body had twenty-five wounds and was cold and stiff. Blood was scattered about the living room

and dark red stains were found around the front and rear doors. Death resulted from loss of blood due to wounds through the heart. The blood ethanol content of the body of the deceased was .13 breathalyzer units.

Lula Mae Fletcher, wife of the deceased, and defendant, Robert L. Cady, had been living together at the deceased's home while the deceased was in Oklahoma attending a United States Army school. The deceased had been stationed at Fort Bragg. Approximately ten days before the deceased returned to his home in Spring Lake, defendant moved out of the house. The deceased had been out of the State for some three months prior to his return in May 1975, during which time defendant and Lula Mae Fletcher had discussed the $20,000.00 Army insurance on the deceased and his 1974 Cutlass Supreme automobile. During these discussions defendant questioned whether the insurance money would go directly to Lula Mae Fletcher. Methods of killing the deceased were also discussed.

On Saturday, 24 May 1975, defendant saw Lula Mae Fletcher at a social club at Fort Bragg known as the "Mule Barn," which military personnel and their guests attended. At that time, Lula Mae Fletcher had a black eye and told defendant that the deceased had hit her. Defendant then said that he would kill him and sought transportation to the home of the deceased; however, he did not go at that time.

The next day, Sunday, 25 May 1975, Lula Mae Fletcher told defendant at the Mule Barn that she and the deceased had had an argument and that she and her children were going to spend the night at the home of a friend, Brenda Johnson. At 8:50 p.m. on that day, defendant left the Mule Barn. He was again seen outside the club between 11:00 and 11:30 p.m. The driving time from the Mule Barn to the deceased's home was approximately five minutes.

Defendant at some point had offered Albert Span $1,000.00 to kill Swindell Fletcher, but was turned down. On Sunday, 25 May 1975, at approximately 10:00 to 10:30 p.m., Span saw defendant in the latrine in the barracks at Fort Bragg. At that time, he observed blood on defendant's shirt and pants. Defendant told Span that he had been in a fight. Defendant then showered and dressed and went with Span to the Mule Barn.

The next morning during formation at 7:00 a.m., defendant stated to Span that the deceased had jumped on him and that he had taken care of the situation. Later in the day defendant told Span that the deceased had been killed and that he understood they were going to try to put it on him and he wanted Span to say that he was with him on the previous night.

Later Span saw defendant driving around the base and elsewhere in the 1974 Cutlass Supreme owned by the deceased and Span asked where he got it. Defendant replied, "when he bumped that Nigger off." Defendant also said that the car was going to be put in his name by the widow of the deceased.

Defendant offered evidence essentially of an alibi nature, including his own testimony. He detailed his activities on the dates and times in question and denied all the inculpatory statements allegedly made by him that had been offered by the State.

Attorney General Rufus L. Edmisten by Assistant Attorney General Daniel C. Oakley for the State.

E. Lynn Johnson for the defendant.

PER CURIAM.

Defendant brings forward no assignments of error, merely requesting a review of the record to determine whether prejudicial error occurred in his trial and if so, whether he is entitled to a new trial.

We have reviewed the record in detail and find very few objections. Able defense counsel, with commendable frankness, has assigned no errors for the obvious reason that there were none. The case was well prepared and prosecuted by Assistant District Attorney Wade E. Byrd. An able trial judge, Giles Clark, presided. After a careful study of the record, we find that defendant has received a fair trial in which there was

No error.

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

ADVERTISING CO. v. DEPT. OF TRANSPORTATION

No. 85 PC.

Case below: 35 N.C. App. 226.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 May 1978.

AUTRY v. INSURANCE CO.

No. 94 PC.

Case below: 35 N.C. App. 628.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 May 1978.

BELL v. BRUEGGEMYER

No. 105 PC.

Case below: 35 N.C. App. 658.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

ERVIN v. TURNER

No. 61 PC.

Case below: 35 N.C. App. 265.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

FORTE v. PAPER CO.

No. 67 PC.

Case below: 35 N.C. App. 340.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 May 1978.

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

HARRIS, UPHAM & CO. v. PALIOURAS

No. 103 PC.

Case below: 35 N.C. App. 458.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

HARRISON v. HERBIN

No. 83 PC.

Case below: 35 N.C. App. 259.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 8 May 1978.

IN RE WORRELL

No. 68 PC.

Case below: 35 N.C. App. 278.

Petition by propounders for discretionary review under G.S. 7A-31 denied 8 May 1978.

INVESTMENTS, INC. v. ENTERPRISES, LTD.

No. 84 PC.

Case below: 35 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

JONES v. PRODUCTS, INC.

No. 65 PC.

Case below: 35 N.C. App. 170.

Petition by defendant Silver's Enterprises, Inc. for discretionary review under G.S. 7A-31 denied 8 May 1978.

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

MARTIN v. BONCLARKEN ASSEMBLY

No. 91 PC.

No. 26 (Fall Term).

Case below: 35 N.C. App. 489.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 8 May 1978.

MATTHEWS v. LINEBERRY

No. 75 PC.

Case below: 35 N.C. App. 527.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 May 1978.

NASH v. YOUNT

No. 86 PC.

Case below: 35 N.C. App. 661.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 May 1978.

NEIGHBORHOOD ASSOC. v. BD. OF ADJUSTMENT

No. 104 PC.

Case below: 35 N.C. App. 449.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 8 May 1978. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 8 May 1978.

O'GRADY v. BANK

No. 82 PC.

No. 25 (Fall Term).

Case below: 35 N.C. App. 315.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 8 May 1978.

PERRY v. FURNITURE CO.

No. 93 PC.

No. 27 (Fall Term).

Case below: 35 N.C. App. 518.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 8 May 1978.

ROGERS v. ROGERS

No. 106 PC.

Case below: 35 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978. Appeal by defendant dismissed ex mero motu 8 May 1978.

SMITH v. EXPRESS CO.

No. 22 PC.

Case below: 34 N.C. App. 694.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 8 May 1978. Judgment vacated and case remanded to Court of Appeals for further consideration in light of *Wiles v. Construction Co.*, 295 N.C. 81, 8 May 1978.

STATE v. ALLEN

No. 98 PC.

Case below: 35 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. BARNER

No. 89 PC.

Case below: 35 N.C. App. 412.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

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

STATE v. BORDERS

No. 71 PC.

Case below: 35 N.C. App. 277.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. DAVIS

No. 87 PC.

Case below: 35 N.C. App. 277.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 May 1978.

STATE v. FRUITT

No. 64 PC.

Case below: 35 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. HERRING

No. 72 PC.

Case below: 35 N.C. App. 277.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. McADOO

No. 81 PC.

Case below: 35 N.C. App. 364.

Petition by defendants Jones and Kirkpatrick for discretionary review under G.S. 7A-31 denied 8 May 1978.

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

STATE v. PARKER

No. 88 PC.

Case below: 35 N.C. App. 412.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. TURNAGE

No. 107 PC.

Case below: 35 N.C. App. 774.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. TWINE

No. 99 PC.

Case below: 35 N.C. App. 774.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE v. WARREN

No. 90 PC.

Case below: 35 N.C. App. 468.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

WARD v. G. E. CO. and INVESTMENT BUILDERS v. G. E. CO. and COLVIS CO. v. G. E. CO. and SUPER MARKETS v. G. E. CO.

No. 96 PC.

Case below: 35 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 May 1978.

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

WING v. TRUST CO.

No. 78 PC.

Case below: 35 N.C. App. 346.

Petitions by plaintiffs and defendant Alex B. Andrews III for discretionary review under G.S. 7A-31 denied 8 May 1978.

STATE OF NORTH CAROLINA v. ROGER LEE McQUEEN

No. 92

(Filed 6 June 1978)

1. Criminal Law § 91— prisoner in another state—request for trial—failure to comply with Interstate Agreement on Detainers

The trial court properly denied defendant's motion to dismiss murder indictments pending against him in Cumberland County in 1977 on the ground that the State failed to comply with the Interstate Agreement on Detainers Act, G.S. 15A-761 *et seq.*, where defendant testified that, while a prisoner in Missouri, he wrote and mailed a letter in 1972 to the Clerk of Superior Court of Cumberland County requesting disposition of the murder charges; the evidence for the State strongly suggested that no such letter was received by the Clerk or in his office; and there was no showing by defendant that he gave the required notice and request to the warden of the Missouri State Prison or that the warden of that prison forwarded the required certificate to the District Attorney of Cumberland County or to the Superior Court of Cumberland County "by registered or certified mail, return receipt requested," or otherwise.

2. Constitutional Law § 53— five-year delay between crimes and trial—defendant serving life sentence in another state—speedy trial

Defendant was not denied his Sixth Amendment right to a speedy trial by a delay of more than five years between two murders and defendant's trial in Cumberland County on those charges where, at the time of the murders, defendant was an escapee from a Missouri prison to which he had been sentenced to imprisonment for life; defendant fled from this State immediately after the murders; some two months later, defendant was arrested on an assault charge in Pennsylvania, was convicted, and was returned to Missouri to serve his life sentence; Cumberland County authorities promptly filed detainers against defendant in both Pennsylvania and Missouri; an Arkansas detainer on a murder charge had priority over the North Carolina detainer; when the Arkansas detainer was dropped in 1975 or 1976, Cumberland County authorities promptly sought temporary custody of defendant for trial and were prevented from trying him before 1977 by litigation instituted by defendant in the courts of Missouri; defendant's right to employment and social standing were not adversely affected by the delay since he was serving a life sentence in Missouri; the North Carolina detainer did not adversely affect his rights and privileges as an inmate in Missouri in view of the detainer filed by Arkansas; and defendant has shown no prejudice to his ability to call witnesses in his defense by virtue of the delay.

3. Criminal Law § 87; Witnesses § 7— memory of witness refreshed by hypnosis—competency of testimony

In this prosecution for first degree murder, a witness's testimony as to her present recollection of events which she saw and heard at the time of the murders was not rendered incompetent by the fact that her memory had

been refreshed by hypnosis, the credibility of such testimony, in view of prior uncertainty on the part of the witness, being a matter for the jury's consideration.

4. Homicide § 20.1— pictures of victims' bodies

Pictures of the bodies of two murder victims were properly admitted to illustrate the testimony of a witness.

5. Criminal Law § 34— evidence of other crimes

In the presentation of its case in chief the State may not offer evidence of the defendant's past criminal activities, unrelated to the offense for which he is on trial, if the only bearing of such evidence upon the issue before the jury is that it discloses his bad character and tendency to commit such offenses as that with which he is presently charged.

6. Criminal Law § 34.7— statements by defendant—other crimes—competency to show element of crime, intent to kill

In a prosecution for two murders committed during the perpetration of armed robbery, a witness's testimony concerning statements by defendant immediately prior to and at the time of the events with which he is charged that he was an escapee from the Missouri State Prison where he was serving a life sentence for murder and that he had killed several people on different occasions was competent to show that defendant took articles from the victims by putting them in fear of their lives, an element of the offense of armed robbery and of murder committed in the perpetration of such robbery, and to establish the mental state of defendant and his intent to kill.

7. Criminal Law § 86.5— cross-examination of defendant—crime for which defendant not convicted

The district attorney was properly permitted to ask defendant on cross-examination whether he remembered shooting a named girl in the head in Arkansas where there was no showing that the district attorney's questions were asked in bad faith.

8. Criminal Law § 97.2— refusal to permit defendant to reopen case

The trial court in a murder case did not abuse its discretion in denying the motion of defendant to recall the jury to the courtroom after it had begun its deliberations and to reopen the case in order to permit defendant to introduce in evidence certain letters written by a State's witness to defendant after the murders for the purpose of showing that the witness was not afraid of defendant.

APPEAL by defendant from *Clark, J.*, at the 26 September 1977 Criminal Session of CUMBERLAND.

Upon indictments, proper in form, the defendant was found guilty of the murder in the first degree of Wilma Grace Norris and of the murder in the first degree of Linda Louise Lingle. Upon each of these charges, he was sentenced to imprisonment

for life. He was also indicted for and found guilty of armed robbery. Judgment upon that charge was arrested, the robbery being an element in the charges of first degree murder.

Evidence for the State, summarized, tended to show:

Wilma Norris was the operator of a house of prostitution. Linda Lingle was one of her employees. In the late evening of 24 June 1972, the bodies of the two women were found lying on their stomachs upon a bed in the house. Both had been dead for a number of hours. A coiled rope lay on the bed. Each body lay in an unnatural position, indicating that the hands had been bound behind the back at the time of death and then released. The cause of death, in each instance, was a bullet wound in the back of the head. Wilma Norris' body also bore a bullet wound in the left chest and another, nonfatal wound in the head. Linda Lingle's body also bore a second bullet wound in the head.

The house was in unusual disorder. A strongbox, found in the closet of this bedroom, contained no money. A pocketbook lay opened on the bed, its contents being strewn about. A key to Room 265 at a Fayetteville motel was found in the house. The defendant, using the name of C. M. Hignight, was registered as the occupant of this room, having checked out on 23 June.

Wilma Norris habitually kept money in the strongbox and also had a number of pieces of jewelry containing diamonds. On 23 June, she had in the house a number of guns, including a .25 automatic beside her bedstand, a .32 automatic on the bedstand, a rifle and a pellet gun in a cedar closet in the hall. That afternoon, Linda Lingle had approximately $700 to $800 in her possession.

Five young boys were digging potatoes in a field near the Norris house in the late afternoon of 23 June. They observed a Pinto automobile, described by them, variously, as beige, gold or white, drive up to the side door of the Norris house. A white man got out of the car and went into the house. (The defendant is white.) He remained in the house about half an hour. One of the boys testified that a photograph of the defendant's car resembled this automobile, except that the car in the photograph had upon it a stripe which the one he had so seen at the Norris house did not have. Another of the boys testified that he heard a scream from the house and then heard three or four gunshots, following which

he saw a woman come out "real fast," put a suitcase in the car and go back into the house. The boys, being frightened, did not go to the house. They observed no other car come to the house until they stopped work about dark.

The State's principal witness, Barbara Kiser, testified to the following effect:

In 1972, she and her friend, Christine Stanton, went from Chicago to Bennettsville, South Carolina, to work as prostitutes in a house managed by the defendant, whom she then knew as Roger Hignight. The defendant and Christine Stanton were married shortly thereafter. The photograph of the Pinto automobile, above mentioned, is a photograph of the car owned by Christine Stanton Hignight McQueen, the stripe, above mentioned, being a "peel on" stripe. On 6 June 1972, the defendant brought the two women to North Carolina and Barbara Kiser began working at Wilma Norris' house and Christine Stanton Hignight McQueen began working at a similar establishment operated by Wiley Carrico near Pinehurst.

On 23 June, Barbara Kiser received a telephone call from the defendant who informed her that Christine had been arrested in Bennettsville on a charge of burglary and the defendant needed $1,000 for a bond to get her out of jail. The defendant came to the Norris house that afternoon. He was "yelling" and told Barbara Kiser to pack her clothes for she had to go to Bennettsville to get Christine out of jail. When she refused to go, he struck her. Thereupon, Wilma Norris came into the room and the defendant "smacked" her. Wilma Norris then went to telephone the sheriff and the defendant followed her down the hall. Barbara Kiser then heard a gunshot. She ran into Wilma Norris' room, finding her lying on the bed and the defendant with a "silver revolver" in his possession.

The defendant then began screaming at Barbara Kiser and Linda Lingle, saying that he was wanted by the F.B.I. for escaping from a Missouri prison, where he had been serving a life sentence for murder, that his real name was Roger McQueen and that he had killed several people on different occasions. The defendant was acting "like a madman." He yelled at Linda Lingle to get and bring to him all the money and jewelry. He told Barbara Kiser that if she did not do as he directed, he would shoot

her infant daughter who was in Bennettsville. He directed Barbara Kiser to pack her clothes so she started throwing them in her suitcase.

At that point, Wilma Norris sat up on the bed and the defendant told her he wanted any money, guns, jewelry, anything of value that she might have in the house. Wilma Norris did not tell him where any such items were but reached across the bed to the nightstand. The defendant ordered her to stop and directed Barbara Kiser to open the drawer of the nightstand to see what she was trying to get. Barbara Kiser did so and found a pistol, State's Exhibit No. 14, which she handed to the defendant. State's Exhibit No. 15 she identified as a pellet gun taken from the cedar chest in the hallway of the Norris house. Meanwhile, Linda Lingle had brought various articles of jewelry to the defendant and was trying to find the keys to the strongbox kept in Wilma Norris' closet. In that box there was then between $800 and $1,000, which Barbara Kiser observed the defendant counting later. Barbara Kiser put her clothes in a suitcase which she took out to the car and then went back into the house. The defendant was still yelling at the three women who were terrified and trying to do whatever he said. Among other things, he told them: "I'm not playing with you girls. I kill people."

The defendant then directed Linda Lingle, "Get the rope," saying that he would just tie them up and he and Barbara Kiser would go. He laid the two women on the bed with their hands behind their backs, stood over them and shot them in the head, firing four times. He was then "very, very calm." At the defendant's direction, Barbara Kiser got in the car with him and they left. At his direction, she threw the gun out of the car window after he had wiped it with a towel. They then drove to Wiley Carrico's place where he tried to sell the jewelry to Carrico.

Thereafter, the defendant and Barbara Kiser drove to Roanoke, Virginia, and telegraphed to Christine, in care of the jail in Bennettsville, $1,000 for her bond. The defendant told Barbara Kiser he was afraid to go to Bennettsville lest the police there fingerprint him and discover that he was wanted for escape from prison. From Roanoke they drove to the defendant's brother's home in Wolcott, Connecticut, and from there traveled about over the entire country, including Chicago, Utah, Nevada, Little Rock,

Dallas, and Knoxville. State's Exhibit No. 17 was identified by Barbara Kiser as a pistol which the defendant had with him during these travels.

In Logansport, Indiana, they met a friend who handed them a police "flier" bearing their pictures and a picture of the car. Thereupon, they separated and Barbara Kiser returned to her home and surrendered herself to the F.B.I. A few days thereafter, the Federal charges against her were dropped. She was released and came to North Carolina where she made a statement to the Cumberland County police with the understanding that she would not be prosecuted. She further testified:

> "During the five years from June 23, 1972 until September, 1977, I was having difficulty with one question in my mind; sometimes I knew I saw him kill them and sometimes I really knew I hadn't seen him; I just know, I couldn't remember. I read an article in a newspaper and as a result of that I made a request of Major Washburn [of the Cumberland County Sheriff's Department] before I came back to Fayetteville to have me hypnotized when I got here. I met a Mr. Joe Raynor after I got down here and he put me under hypnosis. When I was under hypnosis I was able to actually go back to that day five years ago and just relive the whole morning and see the whole day like it was right now, everything was fresh. I remember now that I saw those women being shot by Roger McQueen. One of the reasons I tried to block it out of my mind was I blamed myself for those girls getting killed because I believed if I had packed my clothes when he told me to he wouldn't have killed them."

[Statements by counsel to the court, in the absence of the jury, indicate that Barbara Kiser was placed under hypnosis, at her request, when she came to North Carolina to assist the District Attorney in preparing the case for trial "a few weeks" prior to the trial. Defense counsel were given a tape of the hypnosis procedure the day before she testified. This tape was not offered in evidence. Barbara Kiser was not cross-examined with reference to the hypnosis procedure. The hypnotist was not called as a witness either by the State or by the defendant. Nothing in the record indicates that he was not available. The record con-

tains no testimony as to the procedure followed by him or as to what, if anything, Barbara Kiser related while under hypnosis.]

Other evidence offered by the State is to the following effect:

Christine Stanton Hignight McQueen was arrested in Bennettsville, South Carolina, 22 June 1972 and remained in jail until 24 June, on which date she received a Western Union money order in the amount of $1,000 from some place in Virginia and, thereupon, was released on bond.

The bullets removed from the body of Wilma Norris were .32 Smith & Wesson bullets and were fired from the same weapon. The gun from which they were fired was not found. The bullets removed from the head of Linda Lingle were misplaced.

On 23 June 1972, at approximately 7:30 p.m., the defendant and Barbara Kiser drove to Wiley Carrico's house in a Pinto car. Barbara Kiser went into the cabin to change her clothing. The defendant made a telephone call and then produced a quantity of jewelry which he offered to sell to Carrico for $200, saying that he needed the money to raise bond for his wife who was in jail in Bennettsville, South Carolina. He told Carrico that the jewelry was "hot" and that he, himself, was wanted for armed robbery in the Fayetteville area.

In August 1972, Anthony Matassa, an officer of the Pennsylvania State Police, in consequence of a report received by him that a described truck had been involved in an attempt at armed robbery, stopped a truck, meeting that description, upon the Pennsylvania Turnpike. Observing the defendant, who had hitchhiked a ride, in the sleeper portion of the truck, Officer Matassa asked him to get out. As the defendant's feet reached the ground, he drew a gun and pointed it at the officer. Officer Matassa pushed the gun aside and it was fired. The officer subdued the defendant. State's Exhibit No. 14, above mentioned, was identified by Officer Matassa. He also identified State's Exhibit No. 17 as a pistol taken by him from the defendant's pants pocket. Officer Matassa also removed a watch from the defendant's wrist, a man's diamond cluster ring from his finger and, from the defendant's suitcase, an air pellet gun, a radio and a box of .32 caliber automatic ammunition. The watch, the ring and the pellet gun

were identified by George Hammond, a friend of Wilma Norris, as having been in Wilma Norris' house on 23 June 1972.

The defendant testified in his own behalf to the following effect:

He is 41 years old. He first went to jail at the age of 14 for stealing his uncle's car. While serving a sentence in the Missouri State Penitentiary for second degree murder, he escaped. Subsequently, this sentence was overturned on appeal.

On 4 or 5 June 1972, he went to Fayetteville for the first time and stayed at the Norris house. There he turned over to Wilma Norris a pistol which he was then carrying. He then registered at the Ambassador Motel in Fayetteville.

On 22 June, he went to the Public Health Center in Fayetteville where it was discovered that he had a venereal disease. He telephoned the Norris house and told Barbara Kiser he believed he had contracted the disease from her and asked her to meet him, promising to make an appointment for her so that she could be treated. He took her for this appointment on 23 June and from there back to the Norris house, she keeping the key to the room at the Ambassador Motel. He did not go into the Norris house, which he left about 11:30 a.m. He drove to Bennettsville, South Carolina, picking up two hitchhikers near Laurinburg and dropping them at the outskirts of Bennettsville. The name of one of these hitchhikers was "Roger."

Arriving at his home in Bennettsville, he found that his wife had gone to the office of Dr. Strauss for treatment, he having telephoned her from Fayetteville to advise her of his own infection. He then drove to Dr. Strauss' office and talked to him, discovering that he had missed his wife. On his way back to his house, he observed that his wife's car was stopped by police officers. Since he, himself, was an escaped prisoner, he did not stop but went to his house, packed some suitcases, got some money and left.

He telephoned Barbara Kiser at the Norris house and told her that his "cover had been blown." As the result of this conversation, they met in Laurinburg, she arriving with her luggage in "a big red car" driven by a man who put her luggage out and

drove on. Barbara Kiser had a suitcase, a makeup kit and a handkerchief full of jewelry. They drove to the Carrico house that afternoon. Barbara Kiser said that she had "some spots on her clothes" and went into the cabin to wash them off or change her clothing. While she was so engaged, he showed the jewelry to Wiley Carrico and tried to sell it to him so that he could make bail for his wife. Leaving the Carrico house, they went to Roanoke, Virginia, where they sent the bond money to his wife in Bennettsville.

The first time he discovered what had happened at the Norris house was on June 26. At that time, he told Barbara Kiser that they needed money since he had spent $1,000 plus the cost of the telegram transmitting it to Bennettsville and travel expense and was getting low on funds. She replied that he need not worry about money for they had plenty and showed him a large sum, saying she had killed Wilma Norris and gotten the money from her. He did not leave Barbara Kiser because he felt obligated to help her, she having previously helped him. They finally separated in August because he and his wife had made arrangements for him to turn himself in to the prison officials in Missouri, the police being after him. When arrested in Pennsylvania, he was heading back to Missouri. His car had broken down and he had hitchhiked a ride on the truck which was stopped by Officer Matassa. When he stepped down from the truck, having pistol on him, he started to hand the pistol to the officer who became excited and grabbed it.

On cross-examination, the defendant testified that he had spent a year in confinement, beginning at age 14, for stealing his uncle's car. Thereafter, he pled guilty to obtaining a narcotic under a false name. From that charge he was released due to a commutation of his sentence in 1963. In 1963, he killed a man in self-defense in Missouri and was convicted by the Missouri courts in 1964, which conviction was subsequently overturned by the Missouri Court of Appeals. Following his arrest in Pennsylvania, he entered a plea of guilty (apparently on a charge of assaulting the officer) and received a suspended sentence which permitted him to go back to Missouri to finish serving his life sentence there (the sentence subsequently vacated by the Missouri Court of Appeals).

In response to questions by the District Attorney concerning his associations with a woman named Bendell Kelley, beginning in Dallas, Texas, in the course of his travels with Barbara Kiser, and culminating with his shooting Bendell Kelley in the head as she lay on the ground in Millard County, Arkansas, the defendant replied to each question, "No, sir." While the record is not clear on this point, it would appear that his answer was intended as a denial that these things occurred.

[There was no testimony at the trial concerning any incident involving the defendant and Bendell Kelley, but the record discloses that while the defendant was an inmate of the Missouri State Prison, following his arrest in Pennsylvania, a detainer for the defendant had been filed by the State of Arkansas on a charge of murder.]

The Public Defender, appointed to represent the defendant on the charge against him in Pennsylvania, testified that, at the time (1972), the defendant told him he did not commit the offenses with which he was charged in North Carolina, that Barbara Kiser could have committed these offenses but he, himself, was nowhere in the area at the time. The defendant entered a plea of guilty in Pennsylvania to the charge of assault on Officer Matassa with intent to kill, it being the desire of the defendant to get the Pennsylvania charges resolved so that he could "get back in prison in Missouri."

Robert Joseph Nelson, an employee of the Cumberland County Health Department, testified that he was so employed on 22 June 1972 and, on that afternoon, treated Roger McQueen, then using the name of Claude M. Hignight, for a venereal disease. The next morning, the defendant brought Barbara Kiser in for like treatment.

Vera Hignight, another woman friend of the defendant, testified that the defendant, accompanied by Barbara Kiser, came to her in Chicago on 29 June 1972, at which time he told her that Barbara Kiser was in trouble with the police and he was assisting her to get away from the area. Barbara Kiser told this witness that she had killed a woman by shooting her in the back of the head because the woman was about to turn the defendant in as an escapee. During the conversation, this witness became angry with the defendant and attempted to slap him, whereupon Barbara

Kiser threatened that if she did so, Barbara Kiser would blow her brains out "just like I did to them." At that time, both the defendant and Barbara Kiser were carrying guns.

Prior to trial, the defendant moved to dismiss for failure of the State to comply with the Interstate Agreement on Detainers and for denial of his right to a speedy trial. With reference to these matters, the record shows:

On 12 October 1972, while in the Missouri State Penitentiary, the defendant was advised that detainers had been filed against him by several states, including North Carolina. He told the Missouri prison official that he wanted to get final disposition of these charges. On 10 November 1972, he wrote a letter addressed to "The Superior Court Clerk of Cumberland County." This letter, in addition to denying that he had killed anyone in Cumberland County, stated:

> "I have signed the Agreement of Detainers pact to go to your county for trial last month (October) but I would further like to serve notice on you that I want to be brought to trial before 180 days. Or in the alternate remove the detainer from me here in Missouri. I am serving a life sentence here."

The defendant never received a response to this letter. After the expiration of the 180 days, he was referred to Mr. Dale Irwin, Inmate Legal Aid in the Missouri Department of Corrections. On 26 February 1973, Mr. Irwin wrote the Clerk of the Superior Court of Cumberland County, stating that he represented the defendant who was then serving a life sentence in the Missouri State Penitentiary and that the existence of the North Carolina detainer "precludes Mr. McQueen from having certain privileges afforded other inmates." The Irwin letter also stated that, since the defendant was then serving a life sentence, it was highly unlikely that North Carolina would ever be able to obtain him for trial. Consequently, Mr. Irwin wished advice as to the feasibility of getting the detainer dropped.

On 6 March 1973, the then District Attorney of Cumberland County replied to the Irwin letter, stating that he was not interested in dropping the detainers and any further effort by Mr. Irwin toward that end would be wasted.

On 25 April 1973, Mr. Irwin wrote the defendant advising him that efforts to get the detainers dropped were unsuccessful and, in his opinion, any attempt "to enjoin Arkansas or North Carolina" from bringing the defendant to trial would be futile.

The Clerk of the Superior Court testified that he had no record of having received the defendant's alleged letter of 10 November 1972. He further testified that his records showed that a bill of indictment against the defendant was returned "a true bill" on 9 October 1972 and, on 1 March 1974, his office had received an application to file a motion to dismiss or quash and an affidavit in support thereof.

Mrs. Ann Hatch, originally an employee of the Clerk's office and thereafter secretary and administrative assistant to the District Attorney, testified that she was familiar with the charges against this defendant and had searched for his alleged letter of 10 November 1972 but had been unable to find any such document or any entry evidencing its receipt. She further testified that the original detainers were filed with the Pennsylvania authorities, in whose custody the defendant then was, and were transferred to Missouri when the defendant was sent back to that state.

In 1975, the certified copies of the warrants, sent along with the original request for detainer, were returned and a letter was received by the District Attorney from Mr. Harry Lauf, Records Officer of the Missouri State Penitentiary, stating that the original detainers against the defendant were being removed. Thereupon, on 1 April 1975, the District Attorney wrote Mr. Lauf, enclosing certified copies of the warrants and advising that the District Attorney desired a new detainer to be placed against the defendant on those charges, the District Attorney having no intention of removing the detainers.

Thereafter, a request for the temporary custody of the defendant was made and the authorities of the State of Missouri advised the District Attorney that the defendant could be picked up the latter part of September 1975. Arrangements so to pick him up were made and a plane was chartered and sent to Missouri for him. However, a restraining order, issued at the request of the defendant, was served on the Cumberland County officers in Missouri and they were compelled to return without him.

Ultimately, in June 1977, after appellate review in Missouri of the restraining order, the District Attorney was advised by the Missouri authorities that the defendant could be picked up and this was done.

The defendant filed a motion to dismiss the charges, which was denied in February 1974 by Judge Harry Canaday who found, due to misinformation, that there were no North Carolina detainers pending against the defendant.

The defendant signed a "speedy trial form" on 12 October 1975, having been advised by Mr. Lauf, the Missouri official above mentioned, that he must do so if he wanted a final disposition of the matter. The Cumberland County records do not show this form was ever received.

The defendant was brought back to North Carolina 29 June 1977 and was tried at the 26 September 1977 Criminal Session of the Superior Court of Cumberland County.

After the Supreme Court of Missouri ruled that North Carolina was entitled to bring the defendant back for trial, the defendant filed a petition for habeas corpus in the United States District Court for the Western District of Missouri, asserting that the North Carolina charges should be dismissed because of the denial of his right to a speedy trial. This proceeding was transferred to the United States Court for the Eastern District of North Carolina where it was dismissed, as premature, by the order of Judge Dupree "without prejudice to the petitioner's right to proceed anew should he be convicted on the said charges."

Upon the hearing of the defendant's pretrial motion to dismiss for denial of a speedy trial, it was stipulated that the files of the Clerk of the Superior Court of Cumberland County do not show any entry indicating the receipt of the defendant's alleged letter dated 10 November 1972.

At that hearing, Mrs. Hatch testified, as above shown, and further:

> "The letter written by Mr. McQueen was never received by the District Attorney's Office; as I have thoroughly searched my files looking for it in the District Attorney's office as well as the files of the Clerk of the Superior Court.

* * * [A]fter his arrest, * * * he was being held in Pennsylvania with some sort of assault charges lodged against him. Also at that time, it was my understanding that there were murder charges lodged against him by the State of Arkansas. I was also informed that he was going back to Missouri to complete serving a life sentence he had been serving for murder in that State.

"I did not receive any correspondence from Roger McQueen requesting a disposition or a trial. I did receive an inquiry requesting that the detainers be dismissed from a Mr. Dale Irwin. I prepared a letter for Mr. Jack Thompson [then the District Attorney] at his direction stating that the detainers would not be dropped. That letter did not mention anything concerning a speedy trial nor have I received any communication from Roger McQueen requesting a speedy trial. I was later informed that the detainers against Mr. McQueen from the State of Arkansas had been dropped.

"Shortly after Mr. Grannis [the present District Attorney] took office in 1975, efforts were made to get temporary custody of Roger McQueen after determining his status. A request for temporary custody was made, under the provisions of the Interstate Agreement on Detainers Act. * * * Arrangements were then made to pick Roger McQueen up in October of 1975. Officers were sent to Missouri to get Roger McQueen but returned without him because a temporary restraining order was placed on him.

"I was continuously aware of the status of Mr. McQueen and in May, 1977, I was informed that Mr. McQueen would be available for temporary custody to North Carolina. We returned him to North Carolina on June 30, 1977.

"As a member of the District Attorney's Office since June 23, 1972, I have been familiar with the number of serious crimes processed through the office, a substantial number of those cases being homicides or other serious felony crimes. I had several conversations with Mr. Jack Thompson [the former District Attorney] concerning bringing Roger McQueen back to North Carolina. In talking about the detainers, we learned the detainer in Arkansas had priority. I never was clear about the charges in Pennsylvania. The de-

tainer against Roger McQueen from the State of Arkansas had priority while Roger was in Missouri. After January 1, 1975, I had numerous discussions with the new District Attorney, Mr. Ed Grannis, concerning the feasibility of bringing Roger McQueen back. I also had several phone conversations with the authorities in Missouri.

"* * * The detainers from Arkansas were dropped against Roger McQueen sometime in 1975 or 1976, I don't know the exact date."

The motion to dismiss for failure to prosecute and accord the defendant a speedy trial was denied.

Rufus L. Edmisten, Attorney General, by Donald W. Grimes, Assistant Attorney General, for the State.

James R. Parish and Fred J. Williams for Defendant.

LAKE, Justice.

[1] The defendant's first contention is that the court committed reversible error in the overruling of his motion to dismiss the indictments for the reason that the State failed to comply with the Interstate Agreement on Detainers Act. G.S. 15A-761 *et seq.* Article III of this Act provides:

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment * * * on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered *to the prosecuting officer* and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment * * *. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole

eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden * * * having custody of him, who shall promptly forward it together with the certificate to the *appropriate prosecuting official* and court by registered or certified mail, return receipt requested.

* * *

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments * * * on the basis of which detainers have been lodged against the prisoner from the state to whose *prosecuting official* the request for final disposition is specifically directed. * * *

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradiction with respect to any charge or proceeding contemplated thereby * * * The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. * * *" (Emphasis added.)

Article IV of the Act then provides a procedure whereby the appropriate officer of the jurisdiction in which the indictment is pending may obtain temporary custody of the prisoner for trial. Article V of the Act provides in paragraph (c):

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment * * * is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment * * * has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

The record before us does not show compliance by the defendant with the procedures so outlined in the above quoted provisions of this Act. There is no showing by the defendant that he gave the specified notice and request to the warden of the Missouri State Prison or that the warden of that prison forwarded to the District Attorney of Cumberland County or to the Superior Court of Cumberland County "by registered or certified mail, return receipt requested," or otherwise, the specified certificate. All that the record before us shows is that when the detainers filed came to the attention of the prison officials of Missouri, they were brought by those officials to the attention of the defendant and, the defendant, himself, wrote a letter on 10 November 1972, which, he says, he mailed to the Clerk of the Superior Court of Cumberland County.

The defendant does not contend that he mailed to the District Attorney any such request for final disposition of the indictment. The evidence for the State strongly suggests that, if such request was in fact mailed to the Clerk of the Superior Court of Cumberland County, it was never received by the Clerk or in his office. In response to an inquiry subsequently directed to the Clerk of the Superior Court by a member of the Missouri Student Legal Aid Program concerning the possible dropping of the detainer, the then District Attorney promptly replied, "This office would not in any way be interested in dropping the detainers against Roger Lee McQueen."

The record indicates no further communication whatever from the defendant, or on his behalf, until 26 March 1975, when the Records Officer of the Missouri State Penitentiary wrote to the Sheriff of Cumberland County returning the warrants which had been filed with the original request for detainer. The then District Attorney promptly replied requesting the placing of a new detainer and enclosing certified copies of the warrants which had been issued against the defendant for the offenses here involved.

When the Cumberland County authorities requested temporary custody of the defendant from Missouri in September 1975, and dispatched officers to Missouri to bring him to North Carolina for trial, the defendant blocked that effort by obtaining from a Missouri court a restraining order. The record before us

indicates that this litigation in the courts of Missouri, including appellate procedures related thereto, continued until the Cumberland County authorities were finally notified in June 1977 that they could pick up the defendant for trial. This they did promptly and he was tried and convicted at the 26 September 1977 Session of the Superior Court of Cumberland County.

Thus, the record before us indicates no violation by the Cumberland County authorities of the Interstate Agreement on Detainers Act. Consequently, there was no error in the entry of the order denying the motion of the defendant to dismiss the indictments on account of such alleged violation. *State v. White*, 270 N.C. 78, 153 S.E. 2d 774 (1967).

[2] The defendant's next contention is that he has been denied his Sixth Amendment right to a speedy trial. The record before us shows that, at the time of the two murders in North Carolina, of which the defendant stands convicted, he was an escapee from the Missouri State Penitentiary to which he had been sentenced to imprisonment for life upon his conviction in that state for murder in the second degree. Immediately after the murders in this State, of which he stands convicted, the defendant and his companion fled from North Carolina and roamed at large throughout the United States until he was finally arrested in Pennsylvania on the charge of assault upon an officer of that state with intent to kill. The Cumberland County authorities promptly forwarded the appropriate papers for a detainer against the defendant to the Pennsylvania authorities. However, the defendant was returned to Missouri by Pennsylvania for the completion of the service of his Missouri sentence.

The record further shows that the State of Arkansas had previously filed with the Missouri or the Pennsylvania authorities its own request for a detainer of the defendant, which request the Missouri authorities gave priority over the North Carolina detainer. The first communication shown by the record before us to have been received by any of the Cumberland County authorities from Missouri, concerning the North Carolina detainer lodged against this defendant, was the letter from the defendant's Inmate Legal Aid, a member of the staff of the Missouri Department of Corrections. This letter stated, "[S]ince he [the defendant] is serving a life sentence, it is highly unlikely that the State of North Carolina will ever be able to obtain him for trial."

The Cumberland County authorities continued to insist upon the maintenance of the detainers filed by them with the Missouri authorities and, as soon as they were notified by the Missouri authorities that they could pick up the defendant, they endeavored to do so but were thwarted by court action instituted by him in Missouri.

We find in this record no evidence of wilful neglect or of abandonment of the cases against this defendant by the Cumberland County authorities.

The record before us shows that the Arkansas detainer, which the Missouri authorities gave priority over the North Carolina detainer, was based upon a charge of murder in that state. Although it is not clearly so shown in the record before us, this Arkansas charge, apparently, was based upon an alleged shooting in the head of a woman named Bendell Kelley, referred to in the above statement of facts. The Arkansas detainers appear to have been dropped in 1975 or 1976, for reasons not set forth in the record before us. When so advised by the Missouri prison authorities, the record before us indicates that the Cumberland County authorities promptly sought temporary custody of the defendant for trial and were prevented from trying him earlier by litigation instituted by the defendant in the courts of Missouri.

We find no error in the denial of the defendant's motion to dismiss the indictments against him for failure to accord him a speedy trial thereon.

The right to a speedy trial upon a criminal charge, guaranteed by the Sixth Amendment to the Constitution of the United States, is made applicable to the states by the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967). Long before those decisions it was established as part of the fundamental law of this State. *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891 (1963). The criteria for determining whether such right has been denied are set forth by the Supreme Court of the United States in *Barker v. Wingo*, *supra*. There, the Court said:

> "We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of

the factors to be considered in an inquiry into the deprivation of the right. * * * The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.

"A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

* * *

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of 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." 407 U.S. at 528, 530, 533.

In *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978), we recently applied these criteria and ordered dismissal of charges for denial of the defendant's right to a speedy trial. Speaking through Justice Huskins, we there said:

"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).

* * *

"[T]he 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.

* * *

"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." 294 N.C. at 140, 141, 143; 240 S.E. 2d at 387, 388, 390.

In *State v. Spencer*, 281 N.C. 121, 124, 187 S.E. 2d 779, 781 (1972), speaking through Justice Branch, we said:

"The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time. Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. The accused has the burden of showing that the delay was due to the State's wilfulness or neglect."

In the present case, a bit more than five years elapsed between the alleged offenses and the trial of the defendant therefor. Nothing else appearing, this would be an unreasonable delay. However, nothing in the record indicates that this was a purposeful delay by the State, in order to prejudice or harass the defendant. For the first two months the defendant was an armed fugitive, moving secretly from state to state throughout the country. While it is true that for approximately five years preceding his trial on these charges he was kept in prison, that imprison-

ment had no relation to the present charges and was in the prison of another state pursuant to his prior conviction in the courts of that state. Thus, no action which the authorities of Cumberland County could have taken with reference to the present matter could have terminated that imprisonment. It is not the type of pretrial imprisonment to which the decisions on the subject of speedy trial refer. In view of the detainers filed against him by the State of Arkansas, we find nothing in the record which indicates that the detainers filed by the Cumberland County authorities, in connection with the present charges, adversely affected his rights or privileges as an inmate of the Missouri State Penitentiary. Since he was so confined, and his confinement in Missouri would have continued irrespective of any action which the Cumberland County authorities might have taken to bring him to trial, it cannot be found that his right to employment, or his social standing in the community, was adversely affected by the delay in bringing him to trial on these charges.

The only possible prejudice to the defendant by reason of the delay in the prosecution of these cases, appearing upon this record, would be a loss of witnesses favorable to his defense of alibi. An analysis of the record shows no such prejudice. The defendant, himself, testified that he left the Norris house at about 11:30 a.m. on the day the two murders occurred. The evidence for the State was that the murders occurred after 3:30 p.m., at which time the State's witness, James Edward Pleasant, testified that he was at the Norris house attempting to sell an automobile to Wilma Norris and she and two other women were then in the house.

The defendant's testimony, designed to establish his alibi, was that he, observing the arrest of his wife on the streets of Bennettsville, South Carolina, immediately telephoned Barbara Kiser and, as a result of that conversation, he drove to Laurinburg to wait for her, arriving at approximately 2:15 p.m. Laurinburg is but 42 miles from Fayetteville, near which the Norris house was located. Thus, by his own testimony, the defendant, after his interview with Dr. Strauss in Bennettsville, had ample time to reach the Norris house near Fayetteville before the murders were committed therein. The distance from Fayetteville to Bennettsville is 74 miles. The defendant's testimony is clearly to the effect that he tarried only briefly in the office of Dr.

Strauss in Bennettsville and, immediately thereafter, fled from that city. It would be an easy matter for him to have traveled from Fayetteville to Bennettsville and return between 11:30 a.m. and the time the two women were murdered in the Norris house.

The defendant testified that, en route to Bennettsville, he picked up two hitchhikers near Laurinburg and let them out on the outskirts of Bennettsville. One of these hitchhikers was "Roger," it not appearing what his last name or his address, or his hitchhiking destination, was. The Cumberland County authorities did not know the whereabouts of the defendant for at least two months after the killings were discovered. Had he been placed on trial immediately after his arrest, which, of course, was impossible, it is utterly unrealistic to suppose that he could have then located this alleged hitchhiker. Thus the delay in bringing him to trial has not deprived him of this witness.

According to the defendant's testimony, it was his wife, not the defendant himself, who was the patient of Dr. Strauss on 23 June 1972. Conceivably, Dr. Strauss might have remembered for a reasonable time, or even have made some record of his conversation with the defendant in the doctor's office. Dr. Strauss was not called as a witness at the defendant's trial. In oral argument in this Court, we were informed that Dr. Strauss is now deceased. Nothing in the record so indicates. Assuming, as we do, that Dr. Strauss died prior to the trial of the defendant on these charges and after the Cumberland County authorities learned of the defendant's whereabouts, the defendant has not been prejudiced by the unavailability of Dr. Strauss as a witness to corroborate his alleged alibi. The reason for this conclusion is that the record clearly shows, through the testimony of police officers of the City of Bennettsville, that the defendant's wife was not arrested on 23 June, the date of the murders in question, but about noon on 22 June and she remained in jail until 24 June when she received the $1,000 telegraphed to her by the defendant and Barbara Kiser and used this to post bond and obtain her release. Thus, the defendant could not have visited Dr. Strauss' office immediately after his wife's departure therefrom on the afternoon the murders here involved were committed. Consequently, the defendant has shown no prejudice whatever to his ability to call witnesses in his defense by virtue of the delay in the trial of these charges.

It follows that the defendant has, in no way, been prejudiced in the trial of this matter by reason of the delay of such trial and his constitutional right to a speedy trial has not been violated.

[3] We turn next to the defendant's contention that it was error to admit the testimony of Barbara Kiser for the reason that it was the result of her hypnosis prior to trial. In this contention, we find no merit. The circumstance that this witness was hypnotized prior to trial would bear upon the credibility of her testimony concerning the occurrences at the Norris house at the time the two women were killed, but would not render her testimony incompetent. As above shown, the jury was fully advised that the witness had been so hypnotized. Her credibility, as a result of this circumstance, and of other matters bearing thereon, was for the jury. 1 Stansbury, North Carolina Evidence, § 8 (Brandis Rev. 1973); Strong, N.C. Index 3d, Trial, § 18 (1978). Since the charge of the court is not included in the record before us and there is no exception thereto by the defendant, it is presumed that the court correctly instructed the jury on this matter.

It is to be observed that nothing in the record indicates that this witness was under hypnosis at the time of her testimony in court; it is also to be observed that we do not have before us any question as to the admissibility of any pretrial statement by this witness while under hypnosis. We express herein no opinion as to the admissibility of such a statement.

The witness testified that, following the events in question, she endeavored to blot them from her memory and her recollection of them because uncertain but, thereafter, prior to the trial, she was hypnotized, at her request, and, as a result, as of the time of her testimony, she clearly remembered what she had seen and heard at the time of the events to which her testimony relates. According to her testimony, her memory of these events was refreshed by the hypnotic procedure which she underwent some time prior to the trial. The fact that the memory of a witness concerning events, distant in time, has been refreshed, prior to trial, as by the reading of documents or by conversation with another, does not render the witness incompetent to testify concerning his or her present recollection. The credibility of such testimony, in view of prior uncertainty on the part of the witness, is a matter for the jury's consideration. So it is when the witness

has, in the meantime, undergone some psychiatric or other medical treatment by which memory is said to have been refreshed or restored. So it is when the intervening experience has been hypnosis.

In the present case, the defendant did not seek to cross-examine Barbara Kiser concerning the hypnosis procedure or to call the hypnotist, who appears to have been available, for examination concerning the procedures used by him, so as to determine the reliability of the refreshed recollection. We need not consider whether the immunity from prosecution granted to this witness had more to do with refreshing her recollection than did the hypnosis. The defendant does not attack either the admissibility or the credibility of her testimony on that account.

The record discloses that, prior to trial, the defendant's counsel had access to a tape recording of the entire hypnosis procedure. The silence of the record concerning this procedure permits the inference that nothing thereon indicated the planting by the hypnotist into the mind of the witness of any suggestion as to what occurred in the Norris house at the time the two women were murdered, or as to what the testimony of the witness at the trial would be.

The testimony of the witness was, "I remember *now* that I saw those women being shot by Roger McQueen." (Emphasis added.) Evidently, the jury believed this testimony. Corroborating circumstances developed through the testimony of other witnesses include the obvious falsity of the defendant's purported alibi testimony, the testimony of the young boys working in the nearby potato field, the defendant's possession immediately after the murders of jewelry and weapons taken from the scene, his attempt only an hour or two thereafter to sell the jewelry and his motive for robbery in order to post bond for his wife.

In *Kline v. Ford Motor Co., Inc.*, 523 F. 2d 1067, 1069-1070 (9th Cir., 1975), in holding testimony following hypnosis to be competent, the Court said:

> "She [the witness] was present and personally saw and heard the occurrences at the time of the accident. She was testifying about her present recollection of events that she had witnessed. That her present memory depends upon

refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness. Although the device, by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document."

In *Wyller v. Fairchild Hiller Corp.*, 503 F. 2d 506, 509 (9th Cir., 1974), the Court said:

"We cannot accept Fairchild's argument that Wyller's testimony was rendered inherently untrustworthy by his having undergone hypnosis. Wyller testified from his present recollection, refreshed by the treatments. His credibility and the weight to be given such testimony were for the jury to determine. Fairchild was entitled to, and did, challenge the reliability of both the remembered facts and the hypnosis procedure itself by extensive and thorough cross-examination of Wyller and the hypnotist."

In *State v. Jorgensen*, 8 Or. App. 1, 9, 492 P. 2d 312, 315 (1971), the Court said:

"Since both of these witnesses gave their testimony concerning the issues of the case in open court and were subjected to prolonged and rigorous cross-examination by defendant's counsel before the jury, we do not believe that the fact they had been subjected to certain psychiatric and medical examinations and procedures prior to testifying, which were fully exposed in the evidence, would be a basis for disallowing their testimony."

To the same effect is *Harding v. State*, 5 Md. App. 230, 246 A. 2d 302 (1968). In this respect, we perceive no basis for a different rule in criminal actions from that which prevails in civil suits.

The defendant relies upon our decision in *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961), to the effect that it is error to admit in evidence in a criminal action the results of lie detector tests. *See also*, Annot., 23 A.L.R. 2d 1306 (1952), "Physiological or Psychological Truth and Deception Tests." That is an entirely different question from the one with which we are here confronted.

There, the purpose of the proposed evidence was to invade the province of the jury with evidence designed to show the credibility or lack of credibility of other testimony. This Court concluded that the accuracy of the results attained by the use of such scientific device had not been sufficiently established to justify its use for that purpose. Here, we are concerned with the admissibility of testimony which the witness says is her present recollection of events which she saw and heard, the credibility of her testimony being left for the jury's appraisal.

The defendant also relies upon cases such as *State v. Pierce*, 263 S.C. 23, 207 S.E. 2d 414 (1974), and *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E. 2d 414 (1974), which hold that testimony of a hypnotist as to what his subject stated while in a hypnotic trance is incompetent to prove the truth or falsity of such statement. These cases are, obviously, distinguishable from the question confronting us. Here, the testimony in question is not concerning extra-judicial statements made by a person under hypnosis. We are here concerned with the testimony of the witness as to what the witness presently remembers about events which the witness saw and heard.

In *State v. Peacock*, 236 N.C. 137, 139, 72 S.E. 2d 612, 615 (1952), this Court, approving the use of memoranda previously prepared by the witness for the purpose of refreshing his recollection while on the witness stand, quoted with approval *Jewett v. United States*, 15 F. 2d 955 (9th Cir., 1926), as follows:

> "It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however, mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause."

We, therefore, find no error in the ruling of the trial court permitting Barbara Kiser to testify concerning matters observed and heard by her at the time of the murders by reason of the fact that, in the meanwhile, she had been subjected to hypnosis.

There is, likewise, no merit in the defendant's contention that it was error to deny his motion for the sequestration of witnesses at the trial, this being a matter in the discretion of the trial court,

and there being no indication of abuse of discretion in the present instance. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 641, 157 S.E. 2d 386 (1967); 1 Stansbury, North Carolina Evidence, § 20 (Brandis Rev. 1973).

[4] There is also no merit in the defendant's contention that there was error in the admission of pictures of the bodies of the deceased women. It is well established that pictures which aid the witness in illustrating his testimony, though gruesome, are admissible in evidence for the purpose of so aiding the witness. *State v. Dollar*, 292 N.C. 344, 355, 233 S.E. 2d 521 (1977); *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Atkinson*, 275 N.C. 283, 311, 167 S.E. 2d 241 (1969), *reversed as to death sentence only*, 403 U.S. 948 (1971); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948); 1 Stansbury, North Carolina Evidence, § 34 (Brandis Rev. 1973). The record does not indicate excessive use of photographs in the present case. This is, largely, a matter in the discretion of the trial judge. *State v. Dollar, supra.*

[5, 6] It is well settled in this State that in the presentation of its case in chief the State may not offer evidence of the defendant's past criminal activities, unrelated to the offense for which he is on trial, if the only bearing of such evidence upon the issue before the jury is that it discloses his bad character and tendency to commit such offenses as that with which he is presently charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Nevertheless, there was no error in the admission of the testimony of Barbara Kiser concerning statements by the defendant at the Norris house immediately prior to and at the time of the events with which he is charged, those statements being to the effect that he was an escapee from the Missouri State Prison where he was serving a life sentence for murder, that he was a killer and had killed several people on different occasions. This testimony was relevant to the charge of armed robbery and, therefore, to the charge of murder in the perpetration of such robbery. It was part of the *res gestae* and established the setting in which the other events at the Norris house, narrated by Barbara Kiser, occurred. It clearly tended to show that the defendant took from the possession of Wilma Norris and Linda Lingle articles of value by putting them in fear of their lives, an element of

the offense of armed robbery and of the offense of murder committed in the perpetration of such robbery. It was also relevant to establish the mental state of the defendant and his intent to kill. Thus, the admission of this evidence falls within exceptions to the general rule set forth in the McClain case itself.

In *State v. Stegmann*, 286 N.C. 638, 652, 213 S.E. 2d 262 (1975), death sentence vacated, 428 U.S. 902 (1976), speaking through Justice Huskins, we quoted with approval the following statement in Stansbury, North Carolina Evidence, § 91 (Brandis Rev. 1973):

> "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."

Other testimony by this witness concerning an offense committed by the defendant while the defendant and the witness were traveling together in Nevada, following the alleged murders, and a statement made by the defendant to her during their travels to the effect that he had killed several people was stricken by the court upon motion of the defendant. The jury was instructed not to consider such testimony. It is presumed that the jury complied with such instruction by the court. *State v. Moore*, 276 N.C. 142, 149, 171 S.E. 2d 453 (1970).

[7] Upon cross-examination of the defendant who had taken the stand in his own behalf, the District Attorney asked a series of questions concerning the defendant's actions with reference to Mrs. Bendell Kelley. The first question was, "Do you recall at that time a woman by the name of Bendell Kelley telling you about the problems she —?" Defendant's counsel objected "to this line of questioning." The objection was overruled. Obviously, that specific question was merely introductory. It was neither completed nor answered. There then followed fourteen questions with reference to the defendant's actions concerning Mrs. Kelley, each of which began, "Do you remember." No specific objections were interposed to these further questions. In each instance, the defendant answered, "No, sir." The ultimate question in this series was, "Do you remember * * * shooting her in the head?"

Again, the answer was, "No, sir." The State, being bound by the answer of the defendant, offered no evidence of such shooting. There is nothing, however, in the record to indicate that the question was not asked in good faith. On the contrary, the record with reference to the above mentioned pretrial motions shows that a detainer for the defendant was filed by the State of Arkansas for murder. The questions so propounded by the District Attorney to the defendant relate to the State of Arkansas.

It is clearly permissible for the State, in cross-examining a defendant charged with crime, to ask him about his own past criminal actions whether or not he has been convicted thereof. *State v. Gainey*, 280 N.C. 366, 373, 185 S.E. 2d 874 (1972). There being no showing that the questions directed to the defendant in this connection were asked in bad faith, there was no error in overruling the defendant's objection "to this line of questions."

[8] There was, likewise, no error in denying the motion of the defendant to recall the jury to the courtroom after it had begun its deliberations and to reopen the case in order to permit the defendant to introduce in evidence certain letters said to have been written by Barbara Kiser to the defendant, while they were temporarily apart, between the events at the Norris house and the defendant's arrest in Pennsylvania. The purpose of such evidence, according to the defendant, was to show that Barbara Kiser was not afraid of him. As the defendant's counsel concedes in his brief, this is a matter in the discretion of the trial court. *State v. Shutt*, 279 N.C. 689, 695, 185 S.E. 2d 206 (1971), cert. den., 406 U.S. 928 (1972); 4 Strong, N.C. Index 3d, Criminal Law, § 97 (1976). There was no abuse of discretion in the ruling of the court in the present instance.

Each other assignment of error by the defendant has been carefully considered and we find no merit therein. It would serve no useful purpose to discuss these in detail.

No error.

STATE OF NORTH CAROLINA v. JOHN DENVER POTTER

No. 58

(Filed 6 June 1978)

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

In a prosecution for first degree murder, evidence of defendant's earlier threats against deceased, evidence of his statements made shortly after the killing to the effect that he hoped the victim was dead, and evidence of the manner of the killing which occurred during an affray initiated by defendant who was armed against the deceased who was unarmed was sufficient to permit legitimate inferences of premeditation and deliberation to be drawn, and the trial court therefore properly denied defendant's motion for nonsuit made at the close of all the evidence.

2. **Homicide § 17.2— evidence of threats—admissibility unaffected by remoteness**

In a first degree murder prosecution, evidence of threats by defendant to deceased was not inadmissible on the ground that the threats were too remote, since remoteness in time of the threat does not render the evidence incompetent but goes only to its weight.

3. **Homicide § 17.2— evidence of threats—no hearsay testimony**

In a first degree murder prosecution, testimony by the victim's widow that she had heard that defendant had made threats against her husband was not inadmissible as hearsay, since under the facts in this case it appears such testimony was offered, not to prove that the threats were made, but simply to show the widow's knowledge of them and why she called the sheriff upon learning of defendant's presence near her home.

4. **Criminal Law § 76.5— pretrial statements—voir dire to determine admissibility—necessity for findings**

Where all the evidence on a voir dire to determine the admissibility of defendant's pretrial statements tended to show the appropriate waivers and that defendant was sober findings of fact were not required, although it would have been the better practice to make them.

5. **Criminal Law § 86.6— defendant's pretrial statements—use for impeachment—requirements for admissibility**

Where defendant's pretrial statement was offered, not as a part of the State's case in chief, but in rebuttal for the purpose of impeaching defendant's trial testimony, it was not incumbent upon the State to demonstrate that the requirements of *Miranda* were met as a prerequisite to admitting the statement.

6. **Criminal Law § 74— defendant's pretrial statement—method of introducing**

Even if defendant's pretrial statement was admitted in improper form when a deputy was permitted to read the jury a typewritten version, in question and answer form, of an interrogation of defendant which occurred shortly after his arrest, and this transcript was neither signed nor acknowledged in

any way by defendant, the admission of such evidence was not prejudicial to defendant, since it was offered to impeach defendant's trial testimony, and since defendant admitted during his trial testimony that his pretrial statements were false.

7. Criminal Law § 89.8— plea bargain arrangement—evidence properly admitted

In a prosecution for first degree murder, the trial court did not err in allowing one defendant who withdrew his not guilty plea during trial and entered a plea of guilty to accessory after the fact to murder to testify concerning his plea bargain arrangement, since defendant was afforded full opportunity to cross-examine his codefendant with respect to his plea, and it was defendant and not the State who first introduced the fact of his codefendant's plea before the jury.

8. Criminal Law § 120— instruction on punishment—no error

The trial court did not abuse its discretion in instructing the jury that a life sentence would be imposed if they found defendant guilty of first degree murder.

9. Homicide § 25.2— first degree murder—jury instructions proper

In a first degree murder prosecution, the trial court properly instructed, in effect, that, so long as the killing was the product of premeditation and deliberation, it was murder in the first degree notwithstanding that the execution thereof might have been done while the defendant was in a state of anger, passion, or emotional excitement.

10. Homicide § 28.2— deceased as dangerous man—jury instruction favorable to defendant

In a first degree murder prosecution, any error of the trial court in instructing on the reputation of the deceased as a dangerous and violent man in the absence of evidence to this effect was favorable to defendant.

11. Homicide § 28.3— first degree murder—self-defense—defendant as aggressor—instruction harmless error

In a first degree murder prosecution, the trial court erred in instructing the jury with respect to self-defense that it must find beyond a reasonable doubt "that the defendant was not the aggressor," but such error was not prejudicial where the jury was told to consider the question whether defendant was the aggressor only insofar as this fact might render him guilty of manslaughter, and the jury found defendant guilty of murder in the first degree and therefore never reached the question whether defendant was the aggressor.

BEFORE *Gaines, J.*, at the February, 1977 Session of WATAUGA Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of first degree murder and sentenced to life imprisonment. He appeals under General Statute 7A-27(a). This case was argued as No. 32 at the Fall Term 1977.

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

Holshouser & Lamm, by Charles C. Lamm, Jr., and J. E. Holshouser, Jr., for defendant.

EXUM, Justice.

The state's evidence was that Ferd Snyder died as a result of a gunshot wound in his chest inflicted at close range on 25 September 1976. Its evidence also was, as defendant testifying in his own behalf admitted, that defendant intentionally inflicted this wound with a deadly weapon, to wit, a pistol. The defense was self-defense.

Defendant seeks a new trial for various errors he contends were committed below: (1) the denial of his motion for nonsuit as to murder in the first degree made at the close of all the evidence; (2) the admission of evidence of threats made by defendant against the deceased; (3) the admission of defendant's pre-trial statement made to investigating law enforcement officers shortly after his arrest; (4) the admission of a plea of guilty by his codefendant; and (5) various errors in the jury instructions, the most important of which relates to the law of self-defense. We find no error entitling defendant to a new trial.

Giving the state the benefit of every reasonable inference in its favor, as we are required to do, we find the evidence sufficient to support the submission to the jury of murder in the first degree as a possible verdict. In view of defendant's testimony in which he admitted shooting the deceased, there is no need to give in detail the state's evidence in its case in chief much of which was offered to prove, circumstantially, that defendant did in fact shoot the deceased.

Some of this evidence, however, does deserve to be considered on the question of whether there was sufficient evidence in the case to permit a jury to find that defendant shot the deceased after premeditation and deliberation. State's witness Ervin Potter, a relative of defendant, testified that in the summer of 1975 he was at defendant's residence and Ferd Snyder was at a sawmill about a half mile away sawing lumber. Defendant took a .22 caliber rifle off his wall and "said he was going to shoot Ferd

Snyder." The witness said he talked defendant "out of it," left and "told Ferd." State's witness Terry Greer, a relative by marriage of the deceased, testified that he was in defendant's residence in February or March of 1976 when he heard defendant say "a couple of times" that "he'd kill [Ferd Snyder] if he got in his way." State's witness Catherine Ellison testified that immediately after the shooting defendant came to her home with her husband, David, and told her he had shot Ferd Snyder. When she asked if he were dead, defendant said, "that he hoped that the God damned son of a bitch was dead" and that Ferd had "been giving him trouble for a long time."

Defendant testified that on 25 September 1976 he had been riding and drinking beer with David Ellison in Ellison's car since about 12:00 noon. Late in the afternoon they drove by Ferd Snyder's house, then turned around and went back by the house. There was room on the road for just one car. Ferd Snyder approached driving a pickup truck. Snyder stopped his truck blocking the path of the Ellison car. Ellison had to stop his car. Ferd Snyder got out of his truck and came quickly toward the Ellison car, jerked the passenger door open, and began cursing and calling defendant vulgar names. Snyder punched at defendant through the window. Defendant became angry, "grabbed at David's pistol" and left the car. Snyder began wrestling with him, "trying to choke me, hit me and everyting." They continued to scuffle and Snyder was getting the best of defendant. Snyder had his hands around defendant's throat and was choking him. Defendant could not breathe and became scared. Snyder "was much stronger than I was and he was getting me down on the ground and I didn't have no other choice. I tried to get him off of me for the length of David's car plumb down past his pickup, to the rear end, he had me that long. I hit him with the gun, that didn't faze him. I shot him, went back and got in David's car and went down to his house. I say I shot Ferd. I shot him in the chest, best I remember. At the time I shot him he still had a-hold of me and he was still choking me and he had me down on one knee. When I pulled the trigger on the gun, I was scared and upset." Defendant said he was five feet nine inches tall and weighed 135 to 140 pounds and was 50 years old but that he had health problems and had been operated on for ulcers in 1964. (The deceased, according to the state's medical witness who performed the autopsy, was five feet seven inches tall, weighed 146 pounds, and was an elder-

ly man.) Defendant admitted that the deceased was "substantially older than I am."

The state, in rebuttal, called David Ellison, an eye witness to the shooting.[1] Ellison testified that he stopped his car in Ferd Snyder's driveway where the driveway intersects with a rural unpaved road before he ever observed Ferd Snyder approaching. While stopped there he observed Snyder approaching in Snyder's pickup truck. Snyder stopped roughly 20 feet in front of Ellison's car. Defendant then took the pistol "off of my car seat. As he got out of the vehicle, he discharged a shot into the dash of the car." Ellison testified that the defendant "then started walking toward the Ferd Snyder truck. When he approached the truck very near it, Mr. Snyder got out, grabbed Denver by the neck, and they scuffled there for some minutes or something like that and Mr. Potter shot him." Ellison testified that at no time did Snyder approach his car. On cross-examination Ellison testified that Snyder was "choking Denver" and that "John had the gun this entire time but it was only after Ferd started choking him that he shot him." The state, also in rebuttal, recalled the witness Jerry Vaughn, a Watauga County Deputy Sheriff, who assisted in the investigation of this homicide. Vaughn testified that when defendant was questioned after his arrest regarding the homicide he denied shooting Snyder, replied that he didn't know whether or not David Ellison had shot him, that he didn't know where the pistol was but that he had told Ellison "to get rid of it."

I

[1] There is in all of this testimony ample evidence from which the jury could find that defendant killed the deceased after premeditation and deliberation. Defendant cites no authority in support of his argument to the contrary. Since premeditation and deliberation refer to processes of the mind, they must almost always be proved, if at all, by circumstantial evidence. Among circumstances which may tend to prove these elements are (1) want of provocation on the part of the deceased, (2) conduct and statments of the defendant both before and after the killing, *State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978), and (3) threats made against the deceased by the defendant, *State v.*

1. Ellison had been indicted for the murder of Snyder and was placed on trial with defendant. During the state's case in chief in the absence of the jury he entered a plea of guilty to accessory after the fact of murder.

Stewart, 292 N.C. 219, 232 S.E. 2d 443 (1977). Here the evidence of defendant's earlier threats against deceased, his statements made shortly after the killing, *see State v. Johnson*, *supra*, and the manner of the killing as described by the witness David Ellison, are enough to permit legitimate inferences of premeditation and deliberation to be drawn.

Defendant's contention on the nonsuit question seems to be essentially that the testimony of Ellison during the state's rebuttal, that Snyder was choking defendant and they were scuffling before the fatal shot was fired, negatives conclusively the existence of premeditation and deliberation. Again defendant fails to furnish us with any authority for this argument. We find it totally without merit. The thrust of Ellison's testimony was that the affray during which the deceased was shot was initiated by the defendant who, prior to entering it, armed himself with a deadly weapon. The deceased was not armed with any weapon. While other inferences may be drawn, permissible inferences from David Ellison's testimony are: defendant was looking for Ferd Snyder and waited, blocking Snyder's driveway, for Snyder to return; when Snyder returned, defendant armed himself and approached Snyder with an intention already long formed to kill him. Defendant proceeded to do just that. Defendant, of course, claimed that Snyder's truck blocked the pathway of Ellison's car in which defendant was riding. If so, his earlier threat that he would kill Snyder "if he got in his way" becomes peculiarly prophetic. *See*, for a similar prophesy fulfilled, *State v. Shook*, 224 N.C. 728, 32 S.E. 2d 329 (1944).

In short there is no merit to defendant's nonsuit argument. The charge of first degree murder was properly submitted to the jury.

II

[2] Defendant next argues that evidence of the threats to which Ervin Potter and Terry Greer testified was inadmissible, apparently on the ground that the threats were too remote. Defendant cites no authority to support this argument. "In homicide cases, threats by the accused have always been freely admitted either to identify him as the killer or to disprove accident or justification, or to show premeditation and deliberation." 1 Stansbury's North Carolina Evidence 547-48 (Brandis rev. 1973).

Remoteness in time of the threat does not render the evidence incompetent but goes only to its weight. *State v. Shook*, *supra* (nine months); *State v. Bright*, 215 N.C. 537, 2 S.E. 2d 541 (1939) (two years); *State v. Hawkins*, 214 N.C. 326, 199 S.E. 284 (1938) (almost three years).

[3] Defendant further contends there was error in the admission of the deceased's widow's testimony that she had heard that defendant had made threats against her husband. Defendant says this was hearsay. Mrs. Snyder testified that around 6:00 p.m. on the day of the killing she observed David Ellison and defendant in an automobile go by her house in one direction and then come back by in the other direction. She then ran next door to her son's house to call the sheriff. When asked why she did this she replied, "because I had heard threats that Denver [the defendant] was going to kill Ferd . . . ." Defendant objected and moved to strike this testimony. His motion was denied. Had this testimony been offered to prove the fact that defendant had made threats against the deceased, defendant's argument would be well taken. It seems clear from her testimony that Mrs. Snyder herself had not heard defendant make threats but that she had been told by others that he had made threats. We do not perceive, however, that this was the purpose for which Mrs. Snyder's testimony was offered. There was other testimony in the case, already discussed, of witnesses who had heard defendant make threats. In view of the existence of this evidence, Mrs. Snyder's testimony was offered not to prove that the threats were made but simply to show her knowledge of them and why she called the sheriff upon learning of defendant's presence near her home. As it turned out, her cause for concern was not misplaced. Offered for this purpose, the testimony was not hearsay and it was not error to admit it.

III

Defendant next contends that certain pre-trial statements allegedly made by him to investigating officers shortly after his arrest were inadmissible because (1) the trial judge made insufficient findings regarding whether defendant had waived his privilege against self-incrimination and his right to counsel; (2) the trial court made insufficient findings regarding the defendant's mental condition on the question of the voluntariness of these

statements; and (3) the deputy sheriff who testified regarding these statements was improperly permitted to read from a typewritten transcript.

[4] During the state's case in chief, the trial judge conducted a voir dire to determine the admissibility of the pre-trial statements. There was evidence on the voir dire that full *Miranda* warnings were given the defendant after his arrest and before he was interrogated. Defendant was asked if he understood his rights and he replied that he did. He was asked whether he wanted a lawyer, and he answered negatively. There was evidence that he was not under the influence of alcohol or drugs at the time of his interrogation and that no threats were made against him. There was also evidence brought out on cross-examination of the interrogating officer that he smelled alcohol on defendant's breath. There was no evidence, however, that defendant was at that time intoxicated or under the influence of alcohol. The trial judge failed to find expressly that defendant had waived his privilege against self-incrimination and his right to counsel and failed to make any finding as to defendant's sobriety. Inasmuch as all the evidence tended to show the appropriate waivers and that defendant was sober, such findings were not required, although the better practice is to make them. *State v. Lynch*, 279 N.C. 1, 15, 181 S.E. 2d 561, 570 (1971).

[5] We note, further, that in this trial defendant's statement was offered, not as a part of the state's case in chief, but in rebuttal for the purpose of impeaching defendant's trial testimony. So offered, it was not incumbent upon the state to demonstrate that the requirements of *Miranda* were met as a prerequisite to admitting the statement. *Harris v. New York*, 401 U.S. 222 (1971).

[6] The more difficult problem is the manner in which defendant's pre-trial statement was offered and arises from the following: The record shows that Deputy Sheriff Vaughn, testifying on rebuttal, read for the jury a typewritten version, in question and answer form, of an interrogation of defendant which occurred shortly after his arrest. This transcript was neither signed nor acknowledged in any way by defendant. Defendant's counsel had been furnished a copy of it prior to trial. Defendant's answers to the questions were essentially exculpatory in the sense that he consistently denied shooting Ferd Snyder. Insofar

as these pre-trial statements are inconsistent with the defendant's trial testimony they tend, of course, to impeach his credibility as a witness. His pre-trial statements, though, do not amount to a confession.

Nevertheless a witness should not be permitted to read from a written transcript unless the transcript itself is admissible as an exhibit. *State v. Walker*, 269 N.C. 135, 139, 152 S.E. 2d 133, 137 (1967). Under circumstances similar to but distinguishable from those here, the state in *Walker* put up investigating officers who purported to read verbatim from a pre-trial statement made by the defendant which had been reduced to writing but which the defendant, according to all the evidence, had signed but never read. The Court said, 269 N.C. at 140, 152 S.E. 2d at 137-38:

> "Although it would be permissible for Sergeant Melton or Detective Belvin to refer to a memorandum prepared by him for the purpose of refreshing his recollection as to statements made by defendant, their personal sworn testimony would be the only competent substantive evidence. Under the circumstances, the verbatim reading to the jury of the typed statements was not competent substantive evidence of the matters set forth therein."

Compare, however, *State v. Cole*, 293 N.C. 328, 334, 237 S.E. 2d 814, 818 (1977), which distinguished *Walker* on the grounds that the transcript of defendant's pre-trial statements in *Cole* purported to be the actual words of the accused. A similar distinction was made in *State v. Fox*, 277 N.C. 1, 25, 175 S.E. 2d 561, 576 (1970), where the Court said, "[T]here is no requirement that an oral confession be reduced to writing or that the oral statement, after transcription by another, be signed by the accused."

Whether the transcript from which Deputy Sheriff Vaughn read purported to be a *verbatim* rendering of defendant's statements was explored to some extent at trial. Vaughn testified on cross-examination that the transcript was typed by a secretary from his longhand notes which in turn were prepared the day after the interview from more cryptic notes which he had made while the interview was in progress. The deputy said, "It's entirely possibly that this is by no means word for word."

Even if the reading of this transcript by Vaughn was error, it was not prejudicial to defendant. In *Walker* the statement erroneously read into evidence was characterized by this Court as a

"devastating confession" relied on by the state "as substantive evidence of the crucial element of [defendant's] guilty knowledge." Here defendant's statements were not a confession. In essence they were exculpatory. They were introduced by the state for the purpose of impeaching defendant's trial testimony. Most importantly defendant himself during his trial testimony, while denying some of the statements attributed to him, admitted that when he was questioned by Deputy Vaughn and others he did not tell them the truth about what happened. He said:

> "I told these officers on the night I was arrested that I hadn't even been near the Ferd Snyder house because I didn't tell them the truth. I did not tell them that I had urged those four people if they got any interference to kill Ferd Snyder. I told this officer that I didn't shoot Ferd Snyder. I was not telling him the truth when I told him that I did not shoot Ferd Snyder, I was wanting to talk to a lawyer before I told him everything I knowed. I didn't tell him the truth when I said we haven't been about Ferd Snyder's house today. I told you a time or two I told it wrong."

Defendant having admitted not telling the truth to the officers when they questioned him, Deputy Vaughn's testimony essentially to the same effect, even if offered in improper form, was not prejudicial.

IV

Both defendant and David Ellison were indicted separately for the murder of Ferd Snyder. The state's motion to consolidate the case for trial was allowed over defendant's objection. During the course of the trial against both men and about midway through the state's case in chief, in the absence of the jury, David Ellison withdrew his not guilty plea and entered a plea of guilty to accessory after the fact to murder. The plea was accepted and the court forthwith entered judgment placing David Ellison on probation for five years.

David Ellison, as previously noted, then became a key witness for the state. On cross-examination of this witenss defendant, through counsel, elicited this testimony:

> "I was in this trial as a defendant up until yesterday and I made a deal with the state yesterday and I entered a plea to a lesser offense on a plea bargain arrangement."

The nature and terms of the suspended sentence were then described in detail by the witness, still under cross-examination. On redirect under questioning by the state the witness, over objection, was permitted to testify:

> "I, in fact, have pled guilty to the crime of accessory after the fact of murder by assisting John Denver Potter, driving him away and by disposing of a .38 caliber pistol that he had used."

Defendant assigns as error the admission of this last statement by Ellison and the consolidation of the cases for trial.

There is clearly no error in the consolidation. Both defendant and Ellison were indicted for the same offense. The cases against them were joinable for trial pursuant to General Statute 15A-926(b)(2).

[7] Neither do we find error in admitting the testimony of Ellison. Defendant on cross-examination brought out that Ellison had been treated leniently by the court in return for his plea of guilty "to a lesser offense" and, defendant sought to imply, for his testimony against defendant. It was proper then for the state to place before the jury in bolder relief that crime to which Ellison had pleaded and for which he had been sentenced in order to show, or at least to be in a position to argue that, under the circumstances, the sentence imposed did fit the crime.

Further, defendant had ample opportunity by cross-examination of Ellison to test the factual basis for his plea. This case is thus unlike *State v. Kerley*, 246 N.C. 157, 97 S.E. 2d 876 (1957), where a nontestifying codefendant entered a plea of *nolo contendere* during the trial and the prosecuting attorney argued this fact to the jury against the defendant, who maintained his not guilty plea. This Court in *Kerley*, recognizing the rule that a codefendant's plea of guilty is not competent against a defendant then on trial, held the prosecutor's argument to be prejudicial error. The present case is more like *State v. Bryant*, 236 N.C. 745, 73 S.E. 2d 791 (1953), and *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973). In *Bryant* an accomplice named Ransom, who was not on trial, testified against defendant. After the trial court's instructions to the jury but while they were still in the box, the district attorney announced that the accomplice, in the case

against him, had entered a plea of guilty. Defendant immediately moved for mistrial. The trial court instructed the jurors that if they had heard the announcement of the district attorney they should disregard it. He denied the motion for mistrial. This Court held the denial was not error saying, "Ransom had just been on the witness stand and testified to facts which clearly disclosed his participation in the crime for the commission of which the defendant was then on trial. The jury was already fully apprized of his guilt." 236 N.C. at 747, 73 S.E. 2d at 792. In *Cameron* an accomplice who was not on trial testified against defendant. During his testimony the state brought out on redirect examination that the witness intended to plead guilty to the charges against him. This Court found no error, saying, 284 N.C. at 170, 200 S.E. 2d at 190:

> "In instant case, defendant was not deprived of his constitutional rights of confrontation and cross-examination. The record does not reflect any argument to the jury by the Solicitor concerning the witness' intent to enter a plea of guilty. Further, in view of the witness' sworn testimony, which amounted to a detailed and unequivocal admission of his guilt, we are unable to perceive how a statement of his intention to confirm this sworn, public confession by a subsequent plea of guilty could be prejudicial error."

In the case at bar Ellison, while initially on trial as a codefendant, did in his testimony given after his plea was entered detail his participation, such as it was, in the shooting. Defendant was afforded full opportunity to cross-examine him; and it was defendant, not the state, who first introduced the fact of Ellison's plea before the jury.

V

[8] The defendant assigns various errors to the jury instructions given by the trial court. The first is to the instruction that, "You may find the defendant guilty of murder in the first degree *in which event a life sentence would be imposed.*" (Emphasis supplied.) The court made this statement in the course of giving the jury the four possible verdicts it could return. Defendant complains of the italicized portion. We see no error prejudicial to defendant in this statement. *See State v. McMorris*, 290 N.C. 286, 291, 225 S.E. 2d 553, 556 (1976), where we said, "it could hardly be

error" for a trial judge to so inform the jury in a case in which a guilty verdict mandated a life sentence. Normally defendants complain when juries are not so informed. *See State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). In *Wilson*, 293 N.C. at 58, 235 S.E. 2d at 225, we said:

> "The trial judge is *not required* to instruct the jury that upon conviction a sentence of life imprisonment will be imposed. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. McMorris*, *supra; State v. Rhodes*, *supra*. Such an instruction may be given or withheld in his discretion and the exercise of that discretion will not, absent abuse, be disturbed on appeal. *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969); *Welch v. Kearns*, 261 N.C. 171, 134 S.E. 2d 155 (1964)." (Emphasis original.)

No abuse of discretion is shown here.

Next defendant complains about certain alleged misstatements of fact by the judge when he recapitulated the evidence. We have examined these closely. Not all are misstatements. Those which are misstatements are not material but constitute at most slight inaccuracies. None were called to the attention of the trial judge. An example of the kind of misstatement relied on was this instruction: "The state also offered Mr. Main and Mr. Ervin Potter and Mr. Larry Greer who testified as to prior threats which the defendant, Potter, had made against Mr. Ferd Snyder." Only the witnesses Potter and Greer testified about such threats. We are satisfied that the adjective phrase beginning with "who" was intended to refer only to these two witnesses. Even if it were understood by the jury to refer to all three witnesses, this is the kind of inaccuracy which must be called to the trial court's attention in time for a correction to be made in order to take advantage of it on appeal. *Compare State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds* 432 U.S. 233 (1977); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases there cited, holding similar inaccuracies to be unavailing on appeal where not objected to at trial, with *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978) (No. 36, Spring Term 1978, filed 8 May 1978); *State v. Frizzelle*, 254 N.C. 457, 119 S.E. 2d 176 (1961); and *State v. Revis*, 253 N.C. 50, 116

S.E. 2d 171 (1960), holding misstatements of fact to be material and prejudicial even though not called to the judge's attention at trial.

[9] Defendant next assigns as error the following instruction which the court gave in explaining the element of deliberation:

> "Fifth, that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose not under the influence of some suddenly aroused violent passion it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect."

We believe this to be a correct statement of the law. It means that so long as the killing was the product of premeditation and deliberation it is murder in the first degree notwithstanding that the execution thereof might have been done while the defendant was in a state of anger, passion, or emotional excitement. This Court in *State v. Faust*, 254 N.C. 101, 108, 118 S.E. 2d 769, 773 (1961), quoted with approval from 40 C.J.S. Homicide § 33(d) (1944) as follows: "If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect." *See also* N.C.P.I.—Crim. 206.10.

Defendant's challenges to other instructions, essentially those relating to self-defense, arise in the following context. Briefly, the trial judge told the jury it could return one of four possible verdicts: guilty of first degree murder, second degree murder, voluntary manslaughter, or not guilty. He defined each degree of homicide and the elements thereof. He told the jury that in order to convict the defendant of first degree murder, the state must prove five things beyond a reasonable doubt: (1) defendant "intentionally and without just cause or excuse and with malice shot Ferd Snyder with a deadly weapon," correctly thereafter defining the term malice; (2) the shooting was a proximate cause of Ferd Snyder's death; (3) defendant intended to kill Ferd Snyder; (4) defendant acted "after premeditation," correctly defining this term; and (5) defendant acted "with deliberation," correctly defin-

ing this term. He then properly explained second degree murder, voluntary manslaughter and the difference between these degrees of homicide.

Going then to the elements of self-defense the trial judge said in part (defendant assigns as error the italicized portions):

"It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him, and in making this determination you should consider the circumstances as you found them to have existed from the evidence including the size, age, and strength of the defendant as compared to Ferd Snyder. The fierceness of the assault, if any, upon the defendant by Ferd Snyder, and whether or not Ferd Snyder had a weapon in his possession. *You may also, ladies and gentlemen of the jury, consider the reputation of Ferd Snyder for danger and violence in making this consideration.*

"*Third, ladies and gentlemen of the jury, you must find by the evidence and beyond a reasonable doubt and to a moral certainty that the defendant was not the aggressor . . . .*"

"*Fourth, ladies and gentlemen of the jury, the defendant did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time.*

"Again, ladies and gentlemen of the jury, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him, that is, to the defendant, John Denver Potter, at the time."

"Ladies and gentlemen of the jury, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, used excessive force or was the aggressor though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary

manslaughter. If you do not find the defendant guilty of murder or voluntary manslaughter, you must find the defendant not guilty."

The trial judge concluded his substantive instructions as follows (defendant assigns as error the italicized portions):

"*Ladies and gentlemen of the jury, I charge you that if you find from the evidence beyond a reasonable doubt that on or about the 25th day of September, 1976 John Denver Potter intentionally and without justification or excuse shot Ferd Snyder with a .38 caliber pistol thereby proximately causing Ferd Snyder's death, and that John Denver Potter intended to kill Ferd Snyder, and that he acted with malice after premeditation and after deliberation, it would be your duty to return a verdict of guilty of first degree murder.*

"However, if you do not so find or after considering and weighing all of the evidence you have a reasonable doubt as to one or more of these things you will not return a verdict of first degree murder. If you do not find the defendant guilty of first degree murder you must determine whether he is guilty of second degree murder.

"I charge you, ladies and gentlemen of the jury, if you find from the evidence beyond a reasonable doubt that on or about the 25th day of September, 1976 John Denver Potter intentionally and with malice and without justification or excuse shot Ferd Snyder with a deadly weapon, to wit, a .38 caliber pistol thereby proximately causing Ferd Snyder's death, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder. If you do not find the defendant guilty of second degree murder you must consider whether he is guilty of voluntary manslaughter.

"*If you find from the evidence, ladies and gentlemen of the jury, and beyond a reasonable doubt and to a moral certainty that on the 25th day of September, 1976 John Denver Potter intentionally and without justification or excuse shot Ferd Snyder with a .38 caliber pistol, a deadly weapon,*

thereby proximately causing Ferd Snyder's death, but the State has failed to satisfy you beyond a reasonable doubt that the defendant killed with malice because of the heat of passion or that he was the aggressor although without murderous intent in bringing on the dispute with Ferd Snyder, or that while exerting the right of self-defense he used excessive force, then in that event it would be your duty to return a verdict of guilty of voluntary manslaughter.

"However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter. On the other hand, ladies and gentlemen of the jury, the Court charges you and instructs you that the killing would be justified on the grounds of self-defense, and it would be your duty to return a verdict of not guilty if, under the circumstances as they existed at the time of the killing, the State has failed to satisfy you beyond a reasonable doubt of the absence on the part of John Denver Potter of a reasonable belief that he was about to suffer death or serious bodily harm at the hands of Ferd Synder, or that John Denver Potter used more force than reasonably appeared to him to be necessary, or that John Denver Potter was the aggressor.

"If you do not find the defendant guilty of either murder as I have charged you, that is, either first degree murder or second degree murder, and if you do not find the defendant guilty of voluntary manslaughter, it would be your duty then, ladies and gentlemen of the jury, to return a verdict of not guilty."

[10] Defendant contends there was no evidence regarding the reputation of Ferd Snyder for being a dangerous and violent man; therefore it was error to instruct the jury to consider this reputation in determining whether defendant acted in self-defense. If so, we hardly see how the statement could have prejudiced defendant. If error, it is favorable to defendant.

[11] We concede it was error to tell the jury it must find beyond a reasonable doubt "that the defendant was not the aggressor." It would have been proper, as we think the trial judge was trying to

do in this portion of his instructions, to tell the jury that the killing of Ferd Snyder would be excused altogether as being in self-defense if:

> (1) it appeared to defendant and he believed it to be necessary to shoot Ferd Snyder in order to save himself from death or great bodily harm, *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); *and*
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944); *and*
>
> (3) defendant was not the aggressor in bringing on the affray, defining what is meant by this term, *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *and*
>
> (4) defendant did not use excessive force, defining what is meant by this term. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971).

There is no error, consequently, in the judge's instructions on the fourth element of the doctrine of self-defense. None of these elements, however, must be found to exist beyond a reasonable doubt. Indeed, as the trial judge correctly stated immediately following the instructions complained of, the burden was on the state to prove beyond a reasonable doubt that defendant did *not* act in self-defense, there being evidence in the case that he did. *State v. Hankerson, supra*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds* 432 U.S. 233 (1977).

This means that defendant is to be found not guilty unless the state proves beyond a reasonable doubt:

> (1) Defendant did not believe it to be necessary to shoot Ferd Snyder in order to save himself from death or great bodily harm, *or*
>
> (2) If he did believe this, his belief under the circumstances as they appeared to him at the time was unreasonable, *or*

(3) The defendant was the aggressor, *or*

(4) The defendant used excessive force.

Such in essence was correctly given by the judge as his concluding substantive instruction.

While the instruction on the third element of the doctrine of self-defense relating to whether defendant was the aggressor was erroneous, we believe it to be harmless beyond a reasonable doubt inasmuch as defendant was convicted of murder in the first degree. The jury never reached the question whether defendant was the aggressor or, if it did, the answer would have been immaterial. It would have reached this question or the question would have been material only in determining whether defendant was guilty of voluntary manslaughter or not guilty. One who kills under a reasonable belief that it is necessary to do so to save himself from death or great bodily harm will not be entirely excused on the ground of self-defense if he is the aggressor, that is, if he "aggressively and willingly enters into a fight without legal excuse or provocation." *State v. Wynn*, *supra*, 278 N.C. at 519, 180 S.E. 2d at 139. An accused who, though otherwise acting in self-defense, is the aggressor in bringing on the affray is guilty at least of voluntary manslaughter. The defendant, under such circumstances, "loses the benefit of perfect self-defense." *State v. Watson*, 287 N.C. 147, 154, 214 S.E. 2d 85, 90 (1975). "[A] defendant, prosecuted for homicide in a difficulty which he has himself wrongfully provoked, may not maintain the position of perfect self-defense unless, at a time prior to the killing, he had quitted the combat . . . ." *State v. Crisp*, 170 N.C. 785, 790, 87 S.E. 511, 513 (1916).[2]

2. A person is considered to be an aggressor under this rule whenever he "has wrongfully assaulted another or committed a battery upon him" or when he has "provoked a present difficulty by language or conduct towards another that is calculated and intended to bring it about." *State v. Crisp*, cited in text. If, of course, one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. "[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter." *State v. Crisp*, cited in text, 170 N.C. at 793, 87 S.E. 2d at 515. In this case the trial judge never instructed the jury on the theory that defendant may have been the aggressor with murderous intent in bringing on this affray although the evidence would have supported such an instruction. This omission was in favor of defendant. Had such an instruction been given, however, the error committed here might have been prejudicial. The jury here was told to consider the question whether defendant was the aggressor only insofar as this fact might render him guilty of manslaughter rather than not guilty.

Under the instructions here given the jury was told to find defendant guilty of voluntary manslaughter if it found that, although he otherwise acted in self-defense, i.e., under a reasonable belief that it was necessary to kill in order to save himself from death or great bodily harm, he was the aggressor in bringing on the affray.

The jury was told to consider first whether defendant was guilty of first degree murder. Only if it could not so find was it to consider his guilt of second degree murder, or in turn, manslaughter. Having found defendant guilty of first degree murder, it must have found beyond a reasonable doubt that defendant killed without just cause or excuse, with malice, specifically intending to kill the deceased, after premeditation, and with deliberation. Without justification or excuse, as an essential element of first degree murder means the absence of either of the first two elements of self-defense. Malice, likewise, not only means ill will, hatred or spite, sometimes called "express malice," but also "exists as a matter of law 'whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance.' *State v. Baldwin*, 152 N.C. 822, 829, 68 S.E. 148, 151 (1910)." *State v. Patterson*, 288 N.C. 553, 559, 220 S.E. 2d 600, 606 (1975), *death penalty vacated* 428 U.S. 904 (1976). The judge here, in essence, so instructed the jury saying:

> "Now, ladies and gentlemen of the jury, malice means 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 or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification."

Thus by finding both that the killing was without just cause or excuse and with malice beyond a reasonable doubt the jury must have found either that the defendant did not believe it was necessary to kill Ferd Snyder in order to save himself from death or great bodily harm, or, if he did, such a belief was not reasonable under the circumstances. Having so found they never under the instructions as given reached the question whether defendant was the aggressor in bringing on the affray, or if they did reach it, the answer became immaterial. Any error in the instruction on the aggressor issue must perforce have been

harmless. For analogous holdings *see State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Lipscomb*, 134 N.C. 689, 47 S.E. 44 (1904); *State v. Munn*, 134 N.C. 680, 47 S.E. 15 (1904).

We find no error in the fourth italicized portion of the complained of instructions dealing with murder in the first degree. It is a correct statement of the law. *See State v. Davis*, 289 N.C. 500, 510, 223 S.E. 2d 296, 302 (1976), *death penalty vacated* 429 U.S. 809 (1976); *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968).

The last italicized portion of the instructions complained of deals with circumstances under which the jury could find defendant guilty of manslaughter. The instruction does seem confusing. Does it mean that, the state having failed to prove malice but having proved the absence of justification or excuse, the jury would find defendant guilty of manslaughter if the state also failed to prove that defendant was the aggressor or that he used excessive force? If so, the instruction is nonsensical. What the trial judge was apparently trying to say is that the jury would return a verdict of guilty of manslaughter if: (1) the state, having proved an intentional killing without justification or excuse, nevertheless failed to prove malice because it failed to prove that defendant did not act in the heat of passion on adequate provocation; or (2) the state failed to prove that defendant was not acting in self-defense, but proved he was the aggressor or used excessive force. Because the jury convicted defendant of murder in the first degree, whatever confusion might have resulted because of these instructions relating to manslaughter was harmless beyond a reasonable doubt for the reasons we have already given.

In summary, we find defendant has had a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DAVID WESLEY ABERNATHY AND JACK JAYNES

No. 11

(Filed 6 June 1978)

1. Criminal Law § 89.8— cross-examination of accomplice—promise of leniency

A defendant is entitled to cross-examine an accomplice who has testified against him as to whether he has been promised immunity or leniency in return for his testimony.

2. Criminal Law § 89.8— cross-examination of accomplice—improper questions

The trial court properly sustained the State's objections to defendants' improper questions to an accomplice concerning whether the accomplice had entered a guilty plea in another county and got off light and whether he knew that a deal could be worked out when one is charged with a crime.

3. Criminal Law § 117.4— instruction on accomplice testimony—request

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized.

4. Criminal Law § 117.4— instruction on accomplice testimony

The trial court's charge on accomplice testimony was not insufficient in failing to include defendant's requested instruction that "an accomplice may be motivated to falsify his testimony in whole or in part because of his own self-interest in obtaining leniency in his own prosecution" where the court's charge was substantially in accord with the requested instruction and was in accord with instructions on accomplice testimony approved by the Supreme Court in prior decisions.

5. Bills of Discovery § 6; Constitutional Law § 30— pre-trial discovery—oral statements of witness—list of State's witnesses

Defendants were not entitled under G.S. 15A-904(a) to the pre-trial discovery of a written copy of the oral statements made by a State's witness to an SBI agent, and they were not entitled by statute or the common law to a list of the names and addresses of the State's witnesses.

6. Constitutional Law § 30— denial of pre-trial discovery—due process

Defendants were not denied due process by the court's refusal to permit pretrial discovery of a witness's statement to an SBI agent where (1) the statement was disclosed to defendants at trial in the form of the agent's testimony and notes, and (2) the witness's statement was not material and favorable to either defendant.

7. Criminal Law § 113.6— two defendants—instructions—separate verdicts as to each

The trial court's instructions that the crime of burglary would have become complete "if the defendants or either of them broke and entered the

dwelling . . . in the nighttime while the dwelling was occupied with the intent to commit larceny therein" was not susceptible to the construction that if the jury found one defendant guilty of first degree burglary it would then convict both defendants where the court was merely stating the elements necessary to constitute first degree burglary, and the court carefully instructed the jury in other portions of the charge that it should return separate verdicts as to each defendant.

8. Criminal Law § 91.7; Constitutional Law § 68— denial of continuance to obtain fingerprint expert—right of confrontation

Defendant was not denied his constitutional right to confrontation by the court's refusal to allow his motion, made when his case was called for trial, for a continuance to obtain an expert witness to testify regarding fingerprint evidence offered by the State against defendant where defendant had knowledge of the fingerprint evidence more than seven weeks prior to the trial; defendant waited more than a month before presenting to the court his motion for discovery of evidence; and when the motion was allowed, defendant still had four days before trial to locate an admittedly available expert to perform the relatively simple fingerprint comparison test.

9. Criminal Law § 60— fingerprint testimony—chain of custody

The State made a sufficient showing of the chain of custody of batteries found in a flashlight at the crime scene to permit a fingerprint expert to testify as to a comparison of a fingerprint found on one of the batteries where three witnesses testified that the flashlight and batteries were the same objects received, processed and delivered by each of them.

10. Criminal Law § 118.4— fingerprint testimony—instructions—chain of custody

Absent a request by defendant, the trial court was not required to instruct the jury that, before it could consider fingerprint evidence against defendant, it had to find that a flashlight battery from which defendant's fingerprint was lifted was the same battery as that found in a flashlight at the crime scene.

11. Criminal Law § 60— fingerprint testimony—foundation—process of comparison not required

Prior to giving his opinion a fingerprint expert is not required to explain the method of testing used and the specific manner in which he identified the prints in question. Instead, when the facts upon which a fingerprint expert bases his opinion are all within the expert's own knowledge, he may relate them himself and give his opinion, or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination.

12. Criminal Law § 118.4— failure to charge on contention—absence of request

By failing to object at the trial, defendant waived objection to the court's failure to state defendant's contention that his fingerprint was placed on a battery found in a flashlight at the crime scene while he made a sale at his uncle's store. Furthermore, defendant was not prejudiced by the court's failure to state such contention where the court extensively explained defendant's con-

tentions regarding his presence in another city on the day of the crime, the contentions stated by the court were all correct, and defendant's contention was presumably argued by his counsel to the jury.

13. Conspiracy § 3.1— criminal conspiracy—implied agreement

To constitute a conspiracy it was not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding was sufficient to constitute the offense of conspiracy.

14. Conspiracy § 6— conspiracy to commit armed robbery—sufficiency of evidence

While there was no direct evidence in this prosecution for conspiracy to commit armed robbery that defendant expressly agreed to commit the crime, the State's evidence was sufficient for the jury where the circumstantial evidence was sufficient to create an inference that defendant knew of an agreement to commit the robbery and that there was an implied understanding between him and the others to accomplish this purpose, and where the evidence tended to show that defendant participated in the crime by driving the other parties to the scene of the crime and by waiting for the actual robbers in order to assist them in escaping after the robbery.

15. Criminal Law § 89.1— testimony as to bad character

The trial court properly permitted a deputy sheriff and an SBI agent to testify as to defendant's bad character where both witnesses first stated that they knew defendant's general character and reputation in the community where he lived. Furthermore, the trial court did not err in failing to strike each witness's testimony as to defendant's character upon the conclusion of defendant's cross-examination of the witness since the cross-examination did not elicit such facts as would disqualify either witness from testifying.

16. Criminal Law § 114.2— instruction—no expression of opinion

In a prosecution for burglary and armed robbery, the court's instruction that "the State contends that he is guilty, even though under all the evidence there is— [defendant] never entered the house of the Rectors" did not constitute an expression of opinion that defendant was present at the scene in an automobile where the court was simply recounting the State's contention that defendant was an aider and abettor to the crimes.

APPEAL by defendants from *Fountain, J.*, 6 June 1977 Session of MCDOWELL Superior Court.

Defendants were tried and convicted upon bills of indictment, proper in form, of first degree burglary, armed robbery, and conspiracy to commit armed robbery. Each defendant was sentenced to life imprisonment on the charge of first degree burglary, thirty years imprisonment on the charge of armed robbery, and ten years on the charge of conspiracy, these sentences to run concurrently.

Defendants appealed to this Court on the sentence of life imprisonment, and defendants' convictions of armed robbery and conspiracy were certified for initial appellate review by this Court pursuant to G.S. 7A-31(a).

The State offered evidence tending to show that on 8 May 1973, at about 9:00 p.m., Eddie Joe Rector, his wife and stepdaughter were at their home in the Zion Hill community of McDowell County. Three men wearing masks and gloves entered through the back door of the home, stuck a pistol to Rector's head, and demanded money. The men then tied the feet of the occupants of the house, taped their eyes, and ransacked the house for about thirty minutes. They took some $700 in cash and three watches, and then departed, leaving a flashlight on the couch. None of the victims were able to identify their assailants and none of the property taken from the Rector home has been recovered. A fingerprint taken from the battery in the flashlight matched the fingerprint of defendant Abernathy.

Ronald Clark testified for the State. His testimony tends to show that, at the request of defendant Abernathy, Clark, Abernathy, Jaynes and a man called "Cherokee" went to the Rector home for the purpose of robbing Mr. Rector. Abernathy had told Clark that the man who lived there had sold some land and had the sale money in his house because he did not believe in banks. The four men went to a cemetery near Rector's home in a car driven by defendant Jaynes. Clark, Abernathy and "Cherokee" took masks, tape, shotguns, and a .38-caliber pistol from the trunk of the car and walked to Rector's house. Jaynes remained in the car. The other three men then entered the house, tied up the occupants, taped their eyes, and searched the house for about thirty minutes. They left with a box full of stolen articles. On the way out Clark tore the distributor cap out of Rector's car.

Defendant Jaynes offered evidence tending to show that on 8 May 1973 he was at work at the Wamsutta plant in Morganton, that the payroll records of the company showed that he punched in at 2:56 p.m. and punched out at 11:05 p.m., and that he knew nothing about the robbery and had no part in it.

Defendant Abernathy offered evidence tending to show that he was not present when the robbery occurred and knew nothing about it. On the day of the crime he was in Fayetteville deliver-

ing a mobile home, and stayed overnight in that city. He testified that the flashlight found at the Rector's home did not belong to him, and that he had worked at his uncle's store where batteries similar to those found in the flashlight were sold.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Ralf F. Haskell for the State.

Louis L. Lesesne, Jr. for David W. Abernathy, defendant appellant.

C. Frank Goldsmith, Jr. for Jack Jaynes, defendant appellant.

MOORE, Justice.

Defendants file separate briefs. Some of the same or similar assignments of error are brought forward in each brief, while other assignments of error pertain only to each individual's appeal. We will first consider those questions presented jointly by defendants.

Abernathy's and Jaynes' Joint Appeal

Defendants first insist that the trial court erred in refusing to allow them to cross-examine the State's witness Ronald Clark, an admitted accomplice, concerning his expectation of leniency as a result of his testimony; this, defendants argue, was necessary to establish Clark's bias and interest in the case.

[1] This Court has held that a defendant is entitled to cross-examine an accomplice who has testified against him as to whether he has been promised immunity or leniency in return for his testimony, and that the denial of this right would constitute prejudicial error. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974); *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277 (1939). The scope and duration of cross-examination rest, however, largely in the discretion of the trial judge, and he may limit cross-examination when it becomes mere-

ly repetitious. *State v. Harris*, *supra*; *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958).

Defendants strongly rely on the cases of *State v. Carey*, *supra*, and *State v. Roberson*, *supra*, to support their position. These cases are distinguishable from the instant case in that in both *Roberson* and *Carey* the trial judge's limitation on cross-examination totally precluded inquiry into the subject matter to which the respective defendant's cross-examination was directed.

In the case before us, Clark had entered a plea of guilty but had not been sentenced. The defendants were permitted to cross-examine Clark at length concerning the circumstances and reasons surrounding his testifying as a witness for the prosecution, and as to whether he made any deals with the State in exchange for his testimony. They further cross-examined Clark extensively about his criminal record and prior confrontations with the law, including prior instances in which he had been charged with various crimes and had been allowed to plead guilty to lesser offenses.

[2] The specific questions to which defendants except are as follows:

Counsel for defendant Abernathy

"Q. Well, you know how to maneuver to save your own skin, because you did that in Burke County, didn't you —

MR. LOWE: OBJECTION.

Q. You entered a plea of guilty and got off very light?

MR. LOWE: OBJECTION.

THE COURT: OBJECTION SUSTAINED."

Counsel for defendant Jaynes

"Q. You knew what a deal was, didn't you?

A. Yes sir.

Q. You knew they could be worked out when you're charged with a crime, didn't you?

MR. LOWE: OBJECTION.

THE COURT: SUSTAINED."

The record indicates that the same or similar questions had previously been asked of and answered by the witness Clark. The witness testified that he had been promised nothing for his testimony; that he had pled guilty to the charges against him but had "made no deals, no nothing"; that he had pled guilty to other offenses during his criminal career in order to receive a lighter sentence; and that his prior counsel had worked out deals for him for these unrelated offenses so that he might receive lighter sentences.

In addition to being repetitive, the question asked by counsel for defendant Abernathy was objectionable for lack of proper foundation—prior to asking this question counsel failed to inquire as to the specific Burke County offense and its eventual disposition. The question asked by counsel for defendant Jaynes is objectionable in that it calls for his knowledge of a supposed fact not in evidence and of questionable validity. Counsel for defendants made no efforts to rephrase their questions and make proper inquiry. We hold, therefore, that the trial judge did not abuse his discretion by sustaining the objections to these improper questions.

[4] Prior to the court's charge to the jury, counsel for defendant Jaynes filed a written request for jury instructions concerning the consideration to be given the testimony of the State's witness Ronald Clark, an admitted accomplice. (The record fails to show that counsel for Abernathy made a similar request for instructions.) Pursuant to this request, the court instructed the jury concerning the consideration to be given to Clark's testimony. Defendants, however, contend that the court's charge was insufficient in that it failed to include in this instruction the contention that "an accomplice may be motivated to falsify his testimony in whole or in part because of his own self-interest in obtaining leniency in his own prosecution."

[3] An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. *State v. Harris*, *supra*; *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v.*

Bailey, 254 N.C. 380, 119 S.E. 2d 165 (1961). Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Roux*, 266 N.C. 555, 146 S.E. 2d 654 (1966); *State v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909 (1943). But when a defendant makes a request in writing and before argument to the jury for an instruction on accomplice testimony, the court should give such instruction. *State v. White*, *supra*. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977); *State v. Hale*, 231 N.C. 412, 57 S.E. 2d 322 (1950). The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance. *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974); *State v. Hooker*, 243 N.C. 429, 90 S.E. 2d 690 (1956); *State v. Pennell*, 232 N.C. 573, 61 S.E. 2d 593 (1950).

In the present case, concerning Clark, the trial judge instructed the jury:

> "Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.
>
> "So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony."

[4] The instruction as given by the trial judge is substantially in accord with the request made by the defendant Jaynes and is in

accord with instructions on accomplice testimony approved by this Court in *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977), and *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972). This assignment of error is overruled.

[5] On 3 May 1977 defendant Abernathy filed a pre-trial motion for discovery pursuant to G.S. 15A-903 in which he sought, among other things, the following:

> "(2) Written or recorded statements by any witness implicating this defendant in any of the crimes for which he is charged. . . .
>
> * * *
>
> (7) Copies of any written statements made by any witness intended to be used by the State.
>
> (8) Names and addresses of all witnesses intended to be used by the State."

On 17 May 1977 defendant Jaynes filed a similar motion requesting, in pertinent part, the following:

> "(4) Any documents, photographs, tangible objects, or other items enumerated in G.S. 15A-903(d) which are within the possession, custody or control of the State and are to be used as evidence at trial, or were obtained from or belonged to the defendant, including any physical evidence whatsoever found at the scene of the alleged crime;
>
> * * *
>
> (7) Any information, materials, or evidence which may be favorable to the accused or exculpatory in nature. *Giles v. Maryland*, 386 U.S. 66 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963)."

In response to these motions, the district attorney filed a motion for protective order together with supporting affidavits pursuant to G.S. 15A-908 requesting that defendants' motions be denied. On 31 May 1977, after considering the above motions and record and after hearing arguments of counsel for defendants, the court entered an order granting defendants' motions for discovery in part, but denying each of the items set out above.

Defendants did not renew their requests for the above requested information at their trial on 6 June nor did they seek to exclude or otherwise try to limit the testimony of the State's witness Clark or make any other motion relative thereto at trial.

The State's witness, Clark, did not make a written or recorded statement to anyone concerning this case. He did, however, make an oral statement to S.B.I. Agent Bruce Jarvis, who took written notes. Defendants contend that the trial court erred in refusing to allow their request for pre-trial disclosure of the information requested as this refusal denied them their statutory right to discovery of such information.

G.S. 15A-904(a) provides, in part:

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

In the recent case of *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), we held that under G.S. 15A-904(a) the State is not required to provide a defendant with statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State. We further held that neither statute nor common law requires the State to furnish a defendant with a list of the names and addresses of witnesses the State intends to call. *See also State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). Therefore, defendants in this case were not entitled to receive a written copy of the oral statement made by Clark to S.B.I. Agent Jarvis or a list of the State's witnesses. This assignment is without merit.

[6] Defendants also contend, citing *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), that they had a constitutional right to the material sought, and that the court's refusal to permit discovery of the witness's statement denied them due process. *Brady, supra*, held 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." 373 U.S. at 87, 10 L.Ed. 2d at 218.

The Supreme Court has not clearly indicated the time at which the disclosure of material and favorable evidence must be made; but, since *Brady* and *Agurs* were decided on grounds of the due process right to a fair trial (and not on grounds of the right to adequately prepare for one's defense), it appears that the prosecutor is required to disclose only *at trial* evidence that is material and favorable to the defense. *See State v. Hardy, supra. Cf. United States v. Wolfson*, 289 F. Supp. 903 (S.D.N.Y. 1968); *United States v. Armantrout*, 278 F. Supp. 517 (S.D.N.Y. 1968), *aff'd* 411 F. 2d 60 (2d Cir. 1969). In present case the evidence requested by the defendants in their pre-trial discovery motions was, in fact, disclosed to them at trial in the form of the corroborative testimony of Agent Bruce Jarvis, and counsel for defendants were permitted to see the notes transcribed at Clark's interrogation and from which Agent Jarvis testified. More importantly, however, the *Brady* principle is limited to evidence that is both material and exculpatory or favorable to the defendant, and in present case there has been no showing that there was suppression of any evidence material or favorable to either defendant. Therefore, defendants' constitutional rights were not violated.

[7] Defendants next assign as error the following portion of the trial judge's instruction to the jury:

> "So, if the defendants or either of them broke and entered the dwelling of Mr. Rector in the nighttime while the dwelling was occupied with the intent to commit larceny therein at the time of the breaking and entering, then the crime of burglary would have, at that point, become complete."

Defendants contend that this portion of the court's instructions to the jury was susceptible to the erroneous interpretation by the jury that they could convict both defendants if they found one guilty. This Court has held on numerous occasions that where two or more defendants are jointly tried for the same offense a charge which is susceptible to the instruction that the jury must convict all if it finds one guilty is reversible error. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Williford*, 275 N.C. 575, 169 S.E. 2d 851 (1969); *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969). The Court has further held, however, that the charge must be construed "as a whole in the same connective

way in which it was given," and if it fairly and correctly presents the law when thus considered, it affords no ground for reversing the judgment. *State v. Tomblin, supra; State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). The question here, therefore, is whether the court's charge is susceptible to an interpretation that if the jury found one defendant guilty of first degree burglary they would then convict both defendants without considering individually whether each was guilty. We think not.

In the portion of the charge to which defendants except, the trial judge was simply stating the elements necessary to constitute burglary in the first degree. He was careful to instruct the jury that it should return separate verdicts as to each defendant. In doing so, the trial judge first stated:

> "So, Members of the Jury, it is for you to determine the guilt or innocence of each defendant. Each defendant has three cases pending against him. They are tried jointly merely as a matter of convenience and each is entitled to separate consideration of your verdict as to each charge against each defendant. Nothing that I've said or done or any ruling that I have made during the progress of the trial should be considered by you as an expression or intended expression of what your verdict should or should not be. That's a matter entirely for you."

In the final mandate to the jury concerning the defendant Abernathy on the charge of first degree burglary, the trial judge said:

> "Therefore, Members of the Jury, on the charge of first-degree burglary, as to the defendant Abernathy, if you find from the evidence and beyond a reasonable doubt that he broke and entered the dwelling house of Mr. and Mrs. Rector on the date alleged, in the nighttime, while—and that it was their dwelling, and that it was occupied by them at the time and that he did so with the intent to commit larceny therein, then it would be your duty to return a verdict of guilty as charged in that case. That is guilty of burglary in the first degree. If the State has failed to so satisfy you or if upon consideration of all the evidence you have a reasonable doubt as to his guilt of that, you would acquit him of that."

The trial judge then gave a similar separate mandate as to defendant Jaynes on the burglary charge. Considering the charge as a whole we are convinced that the jury was not misled by that portion of the charge to which defendants except. This assignment of error is overruled.

We next consider the questions presented by the individual appeals.

Abernathy's Appeal

[8] Defendant Abernathy first contends that the trial court erred in failing to allow his motion for continuance made by him when his case was called for trial. This motion was made specifically for the purpose of obtaining an expert witness to give opinion testimony regarding fingerprint evidence offered by the State against defendant Abernathy. Defendant argues that he was not given sufficient time to investigate this fingerprint information and that the denial of his motion for continuance is a denial of his rights under the Sixth Amendment and Article I, Section 23, of the State Constitution to confront witnesses against him and to adequately prepare for his own defense. We disagree.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and the trial court's 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). 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, surpa; State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976); *State v. Lane*, 258 N.C. 349, 128 S.E. 2d 389 (1962). Since defendant's motion for continuance is based on a right guaranteed by the Federal and State Constitutions, the decision of the trial judge is reviewable as a question of law. Thus, the question to be answered is: Did the refusal of the trial court to grant the prisoner's motion for a continuance impinge upon his constitutional right of confrontation, in that it denied him a reasonable time within which to prepare and present his defense? *State v. Farrell*, 223 N.C. 321, 328, 26 S.E. 2d 322, 326 (1943).

Defendant had knowledge of this fingerprint evidence as early as 15 April, more than seven weeks prior to trial. He filed motion by 2 May for an order requiring the State to deliver this evidence to him. Counsel for defendant waited until 31 May to present this motion to the court. The information he sought was given to him by the State on 2 June, four days prior to trial, and defendant knew prior to this time that the State would proceed to trial on 6 June. In spite of this, he apparently made no effort to contact an expert in fingerprint comparisons, even though he knew a police scientist inside the county who was either qualified to perform such service or who knew where an expert could be found. Finally, counsel for defendant admitted at the hearing on his motion for continuance that a comparison of the fingerprint information in his hands involved a process which required but a few minutes work.

The fact that defendant waited almost a month before presenting his motion for discovery to the court, plus the fact that, when said motion was allowed, defendant still had four days to locate an admittedly available expert who would perform the rather simple comparison test, indicate that defendant was afforded a reasonable opportunity to adequately prepare his defense. This being the case, his right of confrontation guaranteed him by the Sixth Amendment to the United States Constitution and Article I, Section 23, of the North Carolina Constitution has not been violated. This assignment of error is without merit.

[9] Defendant Abernathy next argues that the trial judge committed prejudicial error in allowing S. R. Jones to testify that he compared one print on a fingerprint card of defendant taken in 1968 and identified this with a print on chrome paper containing fingerprint lifts from the flashlight battery found at the scene of the crime. Defendant argues that the State failed to lay a proper foundation for Jones's testimony in that it failed to show a proper chain of custody for the flashlight and battery. Defendant argues that the State made no showing that the flashlight and batteries found at the scene of the crime were the same as those from which the prints were lifted. He grounds this argument on the contention that the State failed to show who in the S.B.I. had handled the box containing the flashlight prior to its reaching Mr. Jones, and failed to show who had custody of the flashlight and

batteries between their receipt by Jones and the lifting of the impressions onto the chrome paper.

Of the authentication of real evidence, this Court has said: "There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. . . . Consequently, the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition. [Citations omitted.]" *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). *See also* McCormick, Evidence § 212 (2d Ed. 1972).

In the present case three witnesses testified that State's Exhibit 7, the flashlight and batteries found at the scene of the crime, was the same object received, processed and delivered by each of them. This testimony points without question to the conclusion that the latent print examined by Mr. Jones was the same print lifted by Mr. Simpson from the flashlight battery found by Deputy Sturgill in the Rector home. *Cf. State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). This assignment is without merit.

[10] Under this same assignment of error defendant argues that the trial court committed prejudicial error in failing to instruct the jury regarding the chain of custody. The defendant contends that the trial judge was under a duty to instruct the jury that they had to find that the battery from which defendant's print was lifted was the same battery as that found in the flashlight in the Rector home, and that such finding had to be made before the jury could consider the fingerprint evidence against defendant. Suffice it to say here that a trial judge is not under a duty to instruct the jury that, before it can consider a certain item of evidence against a party, it must find that said evidence is what the presenting party contends it is. A party desiring elaboration on a subordinate feature of the case must aptly tender a request for special instructions. 4 Strong, N.C. Index 3d, Criminal Law § 113.3, and cases cited therein. Since defendant failed to tender a request for special instructions regarding the probative force of the fingerprint evidence, he has no cause to complain. This assignment is overruled.

Under his next assignment of error defendant Abernathy contends that it was error for the court to permit the fingerprint expert, S. R. Jones, to express his opinion that the lift taken from the battery was identical with a print on defendant's fingerprint card, where the expert failed to support his opinion by testimony regarding the scientific process by which the fingerprint comparison was made. Defendant contends that, in laying the foundation for testimony regarding fingerprints, the offering party must not only qualify the witness as an expert in the field and trace and identify the objects and specimens analyzed and compared, but also the expert must explain the manner in which the test or comparison is made and explain the scientific process at the basis of his conclusion.

In their briefs, counsel for both defendant and the State admit that they have found no cases in this State directly on point. In *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935), the defendant objected to that which the defendant in present case argues is required. There the witness, at the request of the solicitor, demonstrated his method of taking fingerprints and explained how he identified them. The Court, in holding that such testimony was admissible, in no manner indicated that it was a necessary step in the laying of the foundation for expert testimony regarding fingerprints.

[11] Accordingly, we hold that prior to giving his opinion a fingerprint expert is not required to explain the method of testing used and the specific manner in which he identified the prints in question. Instead, as is the rule concerning other forms of expert testimony, when the facts upon which a fingerprint expert bases his opinion "are all within the expert's own knowledge, he may relate them himself and give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination. . . ." 1 Stansbury, N.C. Evidence § 136, p. 446 (Brandis rev. 1973); *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924); 7 Wigmore on Evidence, § 1922 (3d Edition 1940); 2 Wigmore, *ibid*, § 675. This assignment is overruled.

[12] Defendant Abernathy finally argues that the trial court erred in its instruction to the jury by failing to state defendant's contention regarding the source of the fingerprints on the bat-

tery, after having stated the State's contentions regarding the same. In his instruction to the jury the trial judge said:

> "So the State contends that it was Abernathy's fingerprint and that Abernathy had necessarily handled the flashlight, or at least the battery to the flashlight and that no prints were found, so the State contends, on the outside of the flashlight because the men were wearing gloves, so it is contended by the State, when the alleged crimes were committed within the home."

The trial judge, in recounting defendant Abernathy's evidence, did not mention the specific contention of that defendant concerning the source of the fingerprints on the battery, but instead recounted at length the defendant's general contentions regarding his whereabouts on the day of the crime. Defendant now says that it was his contention that he handled batteries while working in his uncle's store, that his fingerprint must have been placed on the battery while making a sale at that store, and that the trial judge should have instructed the jury regarding this contention.

In *State v. Cook*, 273 N.C. 377, 381-82, 160 S.E. 2d 49, 52 (1968), this Court, speaking through Justice Huskins, said:

> "A trial judge is not required to state the contentions of the litigants. But when he undertakes to give the contentions of one party he must fairly charge as to those of the other. Failure to do so is error. . . ."

Moreover, where the court states the contention of the State on a particular phase of the case, it is error to fail to state defendant's opposing contention arising out of the evidence on the same aspect of the case. *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Fairley*, 227 N.C. 134, 41 S.E. 2d 88 (1947). However, objections to the charge in reviewing the evidence and stating the contentions of the parties must ordinarily be made before the jury retires, in order that the trial judge will have an opportunity for correction; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Thomas, supra; State v. Tart*, 280 N.C. 172, 184 S.E. 2d 842 (1971); *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971).

No such objection was made in this case. Defendant failed to bring to the court's attention its failure to instruct on his contention as to how the battery bearing his fingerprint may have been left at the scene of the crime. If defendant desired a more comprehensive statement of his contention, he should have requested it at trial. *State v. Thomas*, *supra; State v. Tart*, *supra*. His failure to do so operates as a waiver of this objection on appeal. Moreover, in view of the fact that the trial judge fully, fairly, and extensively explained defendant's contentions regarding his presence in another city on the day of the crime; and in light of the fact that the contentions actually stated by the court were in all respects correct; and finally, since this same contention was presumably argued by defendant just moments before in his jury argument, we fail to see how the omission of this specific contention could have prejudiced the defendant. This assignment is overruled.

Jaynes' Appeal

Defendant Jaynes first contends that, although there was ample evidence from which the jury could have found that prosecution witness Ronald W. Clark and codefendant David W. Abernathy entered into an agreement to rob the Rector residence, there is no evidence whatsoever in the record of any agreement between defendant Jaynes and the other alleged co-conspirators. Defendant contends, therefore, that the court erred in denying his motion for dismissal of the charge of conspiracy made at the close of the State's evidence and at the close of all the evidence.

[13] A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974). "Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. [Citation omitted.]" *State v. Bindyke*, *supra*, at 616, 220 S.E.

2d at 526. The existence of a conspiracy may be established by direct or circumstantial evidence. "Direct proof of the charge [conspiracy] is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy . . . ." *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933).

Upon a motion for nonsuit in a criminal action, the court considers the evidence in the light most favorable to the State, resolves all contradictions and discrepancies therein in its favor and gives it the benefit of every reasonable inference which can be drawn from the evidence. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

In present case State's witness Clark testified: "I know David Abernathy and Jack Jaynes. I did see them prior to May 8th, 1973, at my house. . . . At the time they came . . . they asked if I wanted to make some money to go check out a place." Clark further testified that on 8 May Abernathy came to his home in a pickup truck and they then drove straight to Jaynes' house where they got out of the truck and into a parked car. Jaynes and a man named "Cherokee" then came out of Jaynes' trailer and got in the car with them. With Jaynes driving, they then drove directly to the Rector residence in Marion, McDowell County. They went by the house one time, turned around at an intersection, and drove to a graveyard about 100 yards from the Rector house. They then got out of the car and took masks, guns and tape from its trunk. Clark, Abernathy and "Cherokee" put on masks and went toward the Rector house. There they broke into the house and robbed the Rectors. While they were in the Rector house for thirty minutes to an hour, Jaynes drove the car up and down the road in front of the house.

[14] While there is no direct evidence that the defendant Jaynes expressly agreed to commit the crime, the circumstantial evidence is sufficient to create an inference that Jaynes knew of an agreement to rob the Rector residence and that there was an implied understanding between him and the others to accomplish this purpose. Furthermore, Jaynes participated in the crime by driving the other parties to the scene of the crime, and by waiting for the actual robbers in order to assist them in escaping

after the robbery was completed. This evidence is sufficient to "point unerringly to the existence of a conspiracy." This assignment is overruled.

[15] Defendant Jaynes next contends that the court erred in allowing into evidence testimony of Deputy Sheriff Trinks and S.B.I. Agent Jarvis as to his bad character without first requiring a sufficient foundation to be laid to establish the witnesses' knowledge of the community's regard for defendant's character, and in failing to allow his motion to strike the witnesses' testimony after his cross-examination as to the factual basis of their knowledge

When a defendant testifies, but does not otherwise put his character in issue, he is subject to impeachment by evidence of bad character on the issue of his credibility but not as substantive evidence of guilt or innocence. 1 Stansbury, N.C. Evidence § 108 (Brandis rev. 1973). Character is generally proved by evidence of reputation, and although the rule formerly prevailing in North Carolina was that the testimony of a character witness must be confined to the general reputation of the person in the community in which he lives, *State v. Steen*, 185 N.C. 768, 117 S.E. 793 (1923), evidence will now be received from one knowledgeable with any "community or society in which the person has a well-known or established reputation. Such reputation must be his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion. Of course, 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).

The record in instant case shows that defendant testified but otherwise did not put on any evidence of his character. The State, therefore, properly could put on evidence of defendant's bad character on the issue of credibility. In *State v. Hicks*, 200 N.C. 539, 157 S.E. 851 (1931), this Court stated:

> "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. This he may do categorically, *i. e.*, simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices. *S. v. Colson*, 193 N.C., 236, 136 S.E., 730; *S. v. Nance*, 195 N.C., 47, 141 S.E., 468."

In this case each of the State's witnesses answered the "preliminary qualifying question" in the affirmative, that is, that they knew defendant's general character and reputation in the community where he lived. This requirement having been met, the court properly overruled defendant's objections. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. McEachern*, *supra*; *State v. Hicks*, *supra*. Furthermore, the court did not err in failing to strike each witness's testimony as to defendant's character upon the conclusion of defendant's cross-examination of them. The cross-examination did not elicit such facts as would disqualify them from testifying. Moreover, defendant apparently did not move to strike the testimony of Trinks until after he had been excused and another witness had been called, and defendant at no time objected to or moved to strike Jarvis's testimony after his examination into the facts of his knowledge of defendant's reputation. This assignment of error is without merit.

[16] Defendant Jaynes finally argues that the trial court erred in the following instruction:

> "[T]he State contends that he is guilty, even though under all the evidence there is—Jaynes never entered the house of the Rectors."

Defendant argues that the statement amounts to a comment by the judge in violation of G.S. 1-180 in that the jury could have interpreted the remark as an assertion by the judge that Jaynes, though he never entered the house, was still present at the scene in an automobile.

This argument is manifestly without merit. Placed within its context, the instruction clearly reveals that the judge was simply recounting the State's contention that defendant was an aider and abettor to the crime, for the sentence which immediately follows the above is, "The State contends that he was present as an aider and abettor." Since the judge made it quite clear that he was simply recounting the State's contentions, the jury could not have understood the statement to be an opinion by the judge regarding the facts of the case. The language will not support the inference which defendant tries to draw from it. This assignment is without merit.

We have made a careful examination of the entire record and find no prejudicial error.

No error.

REA J. ELMWOOD v. ROBERT E. ELMWOOD

No. 49

(Filed 6 June 1978)

1. Garnishment § 1— military disability pay

Payments a retired military officer received from the U.S. on account of disability are not "remuneration for employment" and the U.S. is therefore not subject to state garnishment proceedings on account of such payments under 42 U.S.C. § 659.

2. Garnishment § 1— military retirement pay

Retirement pay of the defendant, a retired military officer, is "remuneration for employment," currently earned, and the defendant has no vested right therein until it is so earned; therefore, it is subject to garnishment proceedings instituted in the courts of N.C. to the extent, and only to the extent, that compensation for services currently rendered to a private employer are so subject.

3. Garnishment § 1— anticipated military retirement pay

Nothing else appearing, the anticipated retirement pay, for a future period, of a regular officer, retired from a branch of the military service, is not subject to garnishment but accumulated, unpaid retirement pay for past periods of service is subject to garnishment except as limited by statutes relating to such proceedings.

4. Garnishment § 1— military retirement pay—no garnishment for alimony—limited garnishment for child support

Defendant's military retirement pay for the 60 day period next preceding the order of garnishment for alimony was exempt therefrom, it plainly appearing from defendant's affidavit that his retirement pay was necessary for the use of "a family supported wholly or partly by his labor," G.S. 1-362, nor was defendant's retirement pay earned after the garnishment order subject to garnishment for alimony; however, pursuant to G.S. 110-136, up to twenty percent of defendant's retirement pay from and after the period beginning 60 days prior to the service of the garnishment order was subject to garnishment for child support.

ON certiorari to review the decision of the Court of Appeals, reported in 34 N.C. App. 652, 241 S.E. 2d 693, reversing the orders of *Brewer, J.*, confirming the disbursement of certain garnished earnings of the defendant and denying the defendant's motion for dissolution of prior orders of attachment, but affirming his order adjudging the defendant to be in contempt of court.

The record discloses the following facts:

The parties were married 1 January 1951, at which time the defendant husband, 23 years of age, was enrolled as a midshipman in the United States Naval Academy, and the plaintiff wife, 45 years of age, was divorced and receiving alimony from her first husband, a former member of the United States Marine Corps. Their marriage was far from a happy one. Having no children of their own, they adopted Lynn Jane, now 20 years of age, living with and supported by the defendant, and Karl Robert, now approaching his 18th birthday and living with and supported by the plaintiff.

This action was instituted in 1967 by the plaintiff to obtain custody of the two children and to require the defendant to pay and secure to her a reasonable, separate subsistence, together with her attorney's fee. The defendant filed answer alleging the plaintiff abandoned him without just cause and praying that he be awarded custody of the children and that the plaintiff be denied the other relief sought by her.

Neither party then prayed for a divorce. Subsequently, the parties were divorced. The record does not contain the divorce decree and does not show in what court or at whose suit it was granted. A memorandum from the defendant to the Commandant

of the Marine Corps, which is attached to and made part of the plaintiff's reply to a motion filed by the defendant in the present proceeding, refers to a divorce decree dated 29 April 1975. Apparently, this is a typographical error since an affidavit of the defendant, filed in support of his motion, states that the defendant remarried in August 1970, by which second marriage he has two minor children. These two children and the adopted daughter of the parties now live with the defendant and his second wife in Spain and are supported by him.

Upon the defendant's graduation from the United States Naval Academy in 1952, he was commissioned as an officer in the United States Marine Corps and served therein until his retirement on 1 March 1970, attaining the rank of Major. He is now permanently retired but, as a permanently retired regular officer, remains subject to call to active duty in event of a declaration of war by the Congress of the United States. As a permanently retired officer, he is entitled to receive retirement pay, including disability allowance, of $870.40 per month, as of 30 April 1976. The laws of Spain, where he now resides, preclude him from obtaining employment in that country. The record does not indicate that he has any other income or property holdings.

The original decree of the District Court of Cumberland County, entered 20 February 1968, from which no appeal was taken, awarded the custody of the two adopted children, Lynn Jane and Karl Robert, then aged 10 and 7 years, respectively, to the plaintiff. At the time of the order now before the court for review, Karl continued to reside with and be supported by the plaintiff, but Lynn Jane had left the plaintiff's home and resided with and was supported by the defendant.

When Lynn Jane reached the age of approximately 16 years and began to drive an automobile, severe friction developed between her and the plaintiff, one factor in which was the daughter's frequent dating of Negro boys over the plaintiff's objection. As a result of this friction, the plaintiff instituted proceedings in the juvenile court which resulted in Lynn Jane's being adjudged a delinquent child and being confined first at Samarkand Manor and then at the C.A. Dillon School, these then being institutions of the Department of Correction. She remained in these institutions, and thus not under the support of the plain-

tiff, for approximately nine months. Upon her release, she returned to the plaintiff's home but friction between them continued so she went to live with the defendant.

The procedural history of this action is as follows:

On 27 April 1967, the plaintiff filed her complaint seeking custody of the two adopted children, an allowance for her separate support and maintenance from the defendant, an allowance for the support of the children and an allowance of attorney's fees.

On 20 February 1968, the defendant filed his answer to the complaint praying that he be awarded custody of the children, that the plaintiff be denied an allowance for her separate support and maintenance, that she be denied an award of attorney's fees, and that, if custody of the children be awarded to the plaintiff, the defendant be allowed reasonable visitation rights. The answer did not object to an award for the support and maintenance of the children in event the plaintiff be granted their custody.

On 20 February 1968, the date of the defendant's answer is shown to have been filed, judgment was entered by District Judge Carter, from which judgment no appeal was taken. This judgment set forth the court's findings of fact and adjudged and ordered: (1) The plaintiff is entitled to separate support and maintenance from the defendant pursuant to G.S. 50-16.1; (2) the plaintiff is awarded custody of the two children, then aged 10 and 7 years; (3) the defendant is awarded reasonable visitation with the children; (4) the defendant is ordered to pay to the plaintiff for her support and care and for the care and support of the children $475.00 per month, of which $100.00 per month is allocated to the support of each child until such child becomes 18 years of age or until further orders of the court; and (5) the defendant is ordered to make available to the plaintiff all medical benefits allowable to her as a dependent wife of one in the military status and to provide all such benefits allowable to the children, the defendant having been found by the court to be then in the military service of the United States with a gross salary of $1,069.23 per month.

In July 1975, the plaintiff wife filed her petition reciting the said judgment and asserting that the "defendant has wilfully failed and refused to make said payments or any part thereof since

May, 1970, and is now [July 1975] in arrears with said payments in the amount of $29,325, the same being represented by 63 default payments as to alimony and 60 default payments for the support of the children." The petition further recited that the defendant had departed from the State of North Carolina and had removed all of his property therefrom, that he is a career officer of the United States Marine Corps, retired, receiving approximately $851.00 per month retirement pay. The petition prayed that the court issue "an order of attachment with provision for garnishment," the petition being supported by a bond, with personal surety, in the amount of $200.00.

On 14 July 1975, District Judge Herring entered an attachment order directing the Sheriff of Cumberland County "to attach and safely keep all the property of the defendant within your county, which is subject to attachment or so much thereof as is sufficient to satisfy plaintiff's demand in the amount of $29,325, together with costs and expenses," and to return such order of attachment to the Clerk of the Superior Court.

A notice of levy and a summons to the garnishee, both addressed to the Secretary of Defense and to the United States District Attorney, were served by the Sheriff of Cumberland County on 14 July 1975. On 11 August 1975, the United States Marine Corps filed answer, asserting that, at the time of the service of the summons, the United States Marine Corps was indebted to the defendant in the amount of $531.09 in retirement pay and had since become additionally indebted to him in retirement pay, the total such indebtedness being $1,049.80 at the time of the answer, that the right of the defendant to receive retirement pay "is continuing" and the United States Marine Corps otherwise had in its possession no property of the defendant.

On 12 September 1975, the United States Attorney filed answer, stating that the defendant is entitled to a gross retirement pay of $825.81 per month, subject to certain deductions, making a net payment per month, subject to garnishment, of $801.52, and that, as of the date of the answer, defendant's retirement pay withheld, pursuant to the order of attachment and notice of levy, was $1,871.61, the defendant being entitled to the said retirement benefits until his death unless otherwise terminated or changed by law.

On 9 March 1976, District Judge Guy issued an order on the motion of the plaintiff directing the United States to pay into the Office of the Clerk of the General Court of Justice of Cumberland County the said sum of $1,871.61, together with such additional sums as have been withheld from the defendant's net retirement pay, as required by the above mentioned order of attachment and garnishment and further ordering that thereafter the additional net retirement pay of the defendant be withheld, pursuant to Public Laws 93-647 and § 459 of the Social Security Act, until the total sum of $29,325 shall have been withheld and paid into the office of the Clerk for the benefit of the plaintiff.

On 23 March 1976, the United States filed its motion to amend the judgment on the ground that the said judgment is void "as in contravention of North Carolina law." The said motion asserted: "While the Federal garnishment statute, Title 42, U.S.C., Section 659, allows the retirement pay due from United States to be garnished as if the United States were a private person, the laws of the State of North Carolina only provide garnishment for child support, not exceeding 20% 'of the responsible parent's monthly disposable earnings.' N.C.G.S. 110-136. This section preempts this area of child support garnishment. The suit in the instant case is governed by the laws of North Carolina, and therefore, the judgment should only provide for the maximum of 20% garnishment of that amount attributable to child support. Any alimony payment is subject to the provisions of Article 35, Chapter 1 of the North Carolina General Statutes, which allows recovery of the smaller of either the amount owed to the defendant, at time of judgment, or the amount prayed by plaintiff. Here, the $1,871.61 is the smaller amount, and is all that the law provides be rendered to plaintiff by this judgment. N.C.G.S. 1-440.28." For this reason, the United States moved the court to amend its judgment so as to specify the amounts attributable to child support and to provide that 20% of the net garnishment retirement pay of the defendant be garnished until the child support payments in arrearage be paid, and that no further amount be required to be paid by the United States.

On 20 May 1976, District Judge Guy, citing G.S. 1-440.2, and 42 U.S.C. § 659, and G.S. 110-136, concluded "that the net retirement pay of the defendant received from the United States Government by reason of his service in the Armed Forces is until

the death of the defendant or until sooner forfeited subject to attachment and garnishment" in this action. Consequently, Judge Guy denied the said motion of the United States, reaffirmed the above mentioned order of 9 March 1976 vesting title to the said sum of $1,871.61 and directed the United States to pay that sum, together with future withholdings from the defendant's net retirement pay to the Clerk.

On 22 July 1976, the defendant, in a motion supported by affidavits, moved the court to dissolve "all orders of attachment and garnishment which purport to attach and garnish defendant's earnings accrued after July 14, 1975, and to order the restoration to him of all amounts withheld pursuant to such orders." In this motion the defendant further asserted his right to a statutory exemption of so much of his retirement pay as became due to him within 60 days prior to the attachment order of 14 July 1975 and to order the restoration to him of the earnings so attached and so exempt. The defendant in this motion further prayed for an increase in the amount of the plaintiff's attachment bond from $200.00 to $12,000.

On 27 July 1976, the plaintiff filed a reply to the said motion by the defendant. In this reply she contended that the funds garnished were not earned by the defendant within 60 days next preceding the order of attachment but were earned by him prior to his retirement and constitute "a vested interest in defendant's favor, which is subject to attachment and garnishment in North Carolina.

On 26 August 1976, the plaintiff moved the court to issue its citation of contempt against the defendant for his failure to comply with the orders of the court. On the same date, District Judge Carter issued an order to the defendant to appear and show cause why he should not be adjudged in wilful contempt.

On 2 September 1976, the plaintiff moved the court that, pursuant to G.S. 1-440.32, the disbursement to the plaintiff of the above mentioned $1,871.61 be confirmed. To this the defendant filed a reply showing that the Clerk had disbursed to the plaintiff the said $1,871.61, the defendant asserting that such disbursement was unlawful, there having been no final judgment for a money award and G.S. 1-440.32 requiring that property seized pursuant to execution (attachment being in the nature of a

preliminary execution) be held subject to the order of the court pending judgment in the principal action. For this reason, the defendant moved that the court order the plaintiff to restore the said sum to the custody of the court and that no further disbursement be made pending the judgment of the court in the principal action. The defendant also moved the court to dissolve the order of attachment above mentioned.

On 12 October 1976, District Judge Brewer entered an order reciting substantially, as findings of fact, the above recounted history of the action, including the disbursement by the Clerk to the plaintiff of the said $1,871.61. In this order Judge Brewer concluded that G.S. 110-136, providing for garnishment for child support not exceeding 20% of earnings, does not repeal or modify "existing statutory provisions for attachment and garnishment, but constitutes an additional remedy." He further concluded that Title 42 U.S.C., Section 659, subjects the United States to garnishment for enforcement of child support and alimony obligations and applies to money, the entitlement to which is based upon remuneration for employment, due from the United States to any individual, including members of the Armed Services, and subjects net retirement pay of the defendant to attachment and garnishment proceedings instituted in this action. He further concluded that G.S. 1-362, providing for an exemption from execution of earnings of a debtor for personal services within 60 days next preceding an order of seizure, does not apply to the defendant's retirement pay earned prior to his retirement in 1973. Finally, Judge Brewer concluded that the order of 9 March 1976, designated "Order Vesting Title" conforms to G.S. 1-440.32. Consequently, Judge Brewer, in this order, denied the defendant's motion to dissolve the order of attachment and garnishment and his motion to restore to him amounts previously withheld pursuant thereto. He denied the defendant's motion for exemption, pursuant to G.S. 1-362, and his motion to order restoration to him of retirement pay theretofore attached. He further denied the defendant's motion to increase the plaintiff's attachment bond.

On 20 October 1976, District Judge Brewer entered a further order confirming the disbursement by the Clerk of the Superior Court of the said $1,871.61 to the plaintiff.

Also, on 20 October 1976, District Judge Brewer entered an order finding the defendant then in arrears in the said alimony and child support payments in the total sum of $35,525, subject to a credit on account of the said $1,871.61 and to a further credit of $1,000 representing the 10 months during which Lynn Jane was in the custody of the North Carolina Department of Correction (and so not supported by the plaintiff), and further finding; the defendant in wilful contempt of the court. Judge Brewer, in this order adjudged that the defendant be confined in the common jail of Cumberland County for a period of 30 days, but provided that the defendant might purge himself from his contempt by conforming to specified conditions set forth in the order.

On 27 October 1976, the defendant filed with the District Court a written "authorization for disbursement of earnings." This document recites that, pursuant to the above mentioned order of 20 February 1968, the defendant "owes approximately $7,700 as support for Karl Robert Elmwood and approximately $4,700 as support for Lynn Jane Elmwood." It further acknowledges that G.S. 110-136 authorizes the garnishment of 20% of the defendant's monthly disposable earnings for the support of minor children. The document, therefore, authorizes and instructs "the Marine Corps Finance Center and its disbursing officer to forthwith pay to the Clerk of the Superior Court of Cumberland County 20% of all of Respondent's accrued retirement earnings which have been withheld pursuant to garnishment/attachment proceedings in this case to the end that said sum may be forthwith disbursed to Plaintiff for the benefit and support of Karl Robert Elmwood." The document further authorizes and instructs the disbursing officer of the Marine Corps Finance Center "to withhold 20% of Respondent's future retirement earnings, as the same shall become due and owing to Respondent, and to pay said sum into the Office of the Clerk of Superior Court of Cumberland County until Respondent's child support arrearage of $12,400 shall be fully paid and satisfied." The document further declares the intent of the respondent to continue to support Karl Robert Elmwood as long as he remains a minor and dependent for support upon the plaintiff and the defendant and, to that end, authorizes the disbursing officer of the Marine Corps Finance Center "to withhold the sum of $100.00 per month or 20% of Respondent's retirement earnings, whichever is less, from Respondent's retirement earnings (after

all child support arrearages are paid) and to pay said monthly sums into the Office of the Clerk of Superior Court of Cumberland County for disbursement to the Plaintiff for the exclusive benefit and support of Karl Robert Elmwood."

The defendant appealed to the Court of Appeals from the said orders of 12 October 1976 and 20 October 1976, which denied the defendant's motion to dissolve the order of attachment and garnishment, confirmed the order of disbursement of the $1,871.61 and adjudged the defendant in contempt of court. The Court of Appeals adjudged:

> "The trial court erred in its order of 12 October 1976 in failing to allow defendant's motion for dissolution of the orders in the nature of attachment and for effectuation of the G.S. 1-362 earnings exemption and also erred in its order of 20 October 1976 in confirming disbursement of $1,871.61 garnished earnings. Defendant's first two assignments of error are sustained. The third and last assignment of error is without merit and overruled because the court did not err in adjudging defendant to be in contempt."

The plaintiff's petition for the issuance of a writ of certiorari to review this determination by the Court of Appeals was allowed.

Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance and James D. Little for Plaintiff.

Donald W. Grimes for Defendant.

LAKE, Justice.

Upon this appeal we are not concerned with the validity of the order of 20 February 1968 directing the defendant to make monthly payments to the plaintiff for her separate support and maintenance and for the support of the two children. The defendant did not appeal from that order and the record discloses no effort by him to procure a modification of it.

In response to the order of the District Court directing him to appear before it and show cause why he should not be adjudged in wilful contempt for his failure to abide by the provisions of that order of 20 February 1968, the defendant appeared and presented evidence by testimony and affidavit. Thereupon, the

District Court adjudged him to be in wilful contempt and ordered him to be confined in the Cumberland County jail for 30 days, commitment not to issue until further orders so as to give the defendant an opportunity to purge himself of such contempt in the manner prescribed. The District Court found that the defendant, at that time, in addition to his military retirement pay, was earning $700.00 per month from private employment in North Carolina. The findings of the District Court set forth in that order are supported by the evidence in the record and these, in turn, support its conclusion that the defendant was then in wilful contempt and the sentencing of the defendant to 30 days in jail therefor. This sentence is, therefore, affirmed.

After the defendant was so adjudged in contempt, he filed with the District Court his authorization and direction to the Marine Corps Finance Center and its disbursing officer to pay to the Clerk of the Superior Court 20% of all of the defendant's accrued retirement pay, for disbursement to the plaintiff for the benefit and support of his adopted son, Karl Elmwood, to withhold 20% of his future retirement earnings, as the same become due, to pay such future withholdings to the Clerk of the Superior Court until the entire arrearage in child support payments be fully paid and, further, to withhold $100.00 per month or 20% of his retirement earnings (whichever is less) after all such arrearages in child support payments are fully satisfied and pay that amount to the Clerk of the Superior Court of Cumberland County for disbursement to the plaintiff for the benefit and support of Karl.

This authorization does not fully conform to the provisions of the order of the District Court setting forth the way whereby the defendant might purge himself from his contempt of that court. The record does not show whether the District Court has considered the sufficiency of this act of the plaintiff to purge him from his contempt. If not, that matter is, initially, for determination by the District Court and is not presently before us.

We turn now to consideration of the validity of the garnishment order of the District Court.

42 U.S.C. 659 provides:

"Consent by United States to garnishment and similar proceedings for enforcement of child support and alimony obligations.

"Notwithstanding any other provision of law, effective January 1, 1975, monies (the entitlement to which is based upon the remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the Armed Services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

This Act of Congress does not create a right in the plaintiff, or the children of the parties, to garnish the defendant's military retirement pay. It merely removes the barrier of sovereign immunity so as to place the United States in the same position as a private employer for the purpose of the garnishment, for child support and alimony, of money due as "remuneration for employment." Whether or not the monthly payments which the defendant is entitled to receive from the United States are "remuneration for employment" is governed by Federal law. If they are, their susceptibility to garnishment in this proceeding is governed by the law of this State.

[1] Our attention has been directed to no Federal court decision dealing specifically, in this connection, with payments a retired officer receives from the United States on account of disability. 42 U.S.C. § 462(f)(2) appears to exclude such payments from "remuneration for employment" in absence of circumstances not appearing in this record. We conclude that this defendant's disability payments are not "remuneration for employment" and, therefore, the United States is not subject to state garnishment proceedings on account of such payments under 42 U.S.C. § 659. Such disability payments, in our opinion, are more closely akin to benefits payable, pursuant to the Workmen's Compensation Act, for disability by accident arising out of and in the course of employment than they are to wages.

On the other hand, retirement pay recieved by a retired regular officer of the Military Services (more accurately designated as "retired" pay) is "remuneration for employment." In this respect, the Federal authorities make a distinction between payments to a retired officer of the Regular Army (or other branch of the regular military service) and retired reserve officers.

In an opinion of the Comptroller General on this subject, it is said:

> "Retired pay * * * is paid to retired officers of the Regular Army as current compensation or pay for their continued service as officers after retirement and only while they remain in the service, whereas the retirement pay * * * for officers * * * other than officers in the Regular Army * * * is not conditioned upon their remaining in the service, but is more in the nature of a pension." 23 Comp. Gen. 284, 286 (1943). See also, *United States v. Tyler*, 105 U.S. 244, 245 (1881).

A retired officer of the Regular Army (or other branch of the regular military service) remains subject to the Uniform Code of Military Justice; that is, to military discipline. He may be court-martialed for conduct after retirement. 10 U.S.C. §§ 802, 3966; *Hostinsky v. United States*, 292 F. 2d 508 (Ct. Cl. 1961). He is still an officer in his branch of the service and is subject to recall to active duty under certain circumstances, this not being true of retired reserve officers. Thus, his retirement pay has been held by the Federal courts to be remuneration for his current employment as a retired officer, not a pension for past services. *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976); *Hostinsky v. United States, supra; Chambers v. Russell*, 192 F. Supp. 425 (N.D. Cal. 1961); *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), aff'd 274 F. 2d 429 (9th Cir. 1959); *Lemly v. United States*, 75 F. Supp. 248 (Ct. Cl. 1948). See also, *In re Marriage of Ellis*, 36 Colo. App. 234, 538 P. 2d 1347 (1975).

[2] Thus, we conclude that the retirement pay of the defendant is "remuneration for employment," currently earned, and the defendant has no vested right therein until it is so earned. It is, therefore, subject to garnishment in proceedings instituted in the

courts of this State to the extent, and only to the extent, that compensation for service currently rendered to a private employer are so subject.

The nature of garnishment is thus stated in *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904), wherein Justice Walker, speaking for the Court, said:

> "[A] garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. It would appear to be a necessary corollary from the proposition, thus stated, that the plaintiff in the garnishment is in his relation to the garnishee substituted merely to the rights of his own debtor and can enforce no claim against the garnishee which the debtor himself, if suing, would not be entitled to recover. [Citations omitted.] The garnishee can be placed in no worse position by reason of the garnishment than he occupied as a debtor to the defendant, nor subjected to any greater liability."

In *Ward v. Manufacturing Co.*, 267 N.C. 131, 148 S.E. 2d 27 (1966), speaking through Justice Higgins, we said that in order to subject a debt to garnishment "the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for recovery of the debt." Obviously, the defendant in the present action could not maintain a suit against the United States (treating the United States as a private employer) for retirement pay which he anticipates he will become entitled to receive in the future. Since his retirement pay is deemed to be compensation for services currently rendered, his present entitlement to future payments is obviously contingent upon his rendition of services in the future. Thus, his entitlement to future retirement payments may be defeated by a number of possible developments; e.g., his death, resignation, dismissal pursuant to court-martial or change in the Federal law.

In McIntosh, North Carolina Practice and Procedure, 2d, § 2124 (1956), it is said, "If the money due from the garnishee is payable at a future day, or the property is to be delivered at a future day, a conditional judgment may be entered against the garnishee." This statement relates to an obligation presently fix-

ed so that, with the mere passage of time, the principal debtor's right to enforce payment will become absolute, such as an unmatured note. It does not relate to a claim which is presently contingent upon the happening of an event not certain to occur or the continuation of a status such as the employment of the principal debtor by the garnishee. Thus, in *Motor Finance Co. v. Putnam*, 229 N.C. 555, 557, 50 S.E. 2d 670, 671 (1948), speaking through Justice Ervin, this Court said, concerning supplemental proceedings in execution: "[I]t is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisifaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Prospective earnings of a judgment debtor are entirely hypothetical. They are neither property nor a debt." See also, 38 C.J.S. Garnishment, §§ 87, 97 (1943); *Watson v. Watson, supra; In re Marriage of Ellis, surpa.*

[3] Thus, nothing else appearing, the anticipated retirement pay for a future period, of a regular officer, retired from a branch of the military service, is not subject to garnishment. Accumulated, unpaid retirement pay for past periods of service is subject to garnishment, except as limited by statutes relating to such proceedings.

The applicable statutes are G.S. §§ 1-440.1; 1-440.2; 1-440.4; 1-440.21; 1-440.28(a); 1-362 and 110-136. The pertinent provisions of these sections are:

> G.S.1-440.21. "*Nature of garnishment.*—(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment * * * (2) Any indebtedness to the defendant * * *"
>
> G.S. 1-440.1. "*Nature of attachment.*—(a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be ap-

plied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action."

G.S. 1-440.2. "*Actions in which attachment may be had.*—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action."

G.S. 1-440.4. "*Property subject to attachment.*—All of a defendant's property within this State which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this article."

G.S. 1-440.28. "*Admission by garnishee; set-off; lien.*—(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or

(2) the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs."

G.S. 1-362. "*Debtor's property ordered sold.*—The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied toward the satisfaction of the

judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor."

G.S. 110-136. "*Garnishment for enforcement of child-support obligation.*—(a) Notwithstanding any other provision of the law, in any case in which a responsible parent is under a court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, a judge of the district court in the county where the mother of the child resides or is found, or in the county where the father resides or is found, or in the county where the child resides or is found may enter an order of garnishment whereby no more than 20 percent (20%) of the responsible parent's monthly disposable earnings shall be garnished for the support of his minor child. For purposes of this section, 'disposable earnings' is defined as that part of the compensation paid or payable to the responsible parent for personal services, whether denominated as wages, salary, commission, bonus, or otherwise (including periodic payments pursuant to a pension or retirement program) which remains after the deduction of any amounts required by law to be withheld. The garnishee is the person, firm, association, or corporation by whom the responsible parent is employed.

* * *

(c) A hearing on the petition shall be held within ten days after the time for response has elapsed or within ten days after the responses of both the responsible parent and the garnishee have actually been filed. Following the hearing the court may enter an order of garnishment not to exceed 20 percent (20%) of the responsible parent's monthly disposable earnings. * * * The order shall set forth sufficient findings of fact to support the action by the Court and the amount to be garnished for each pay period."

In *Goodwin v. Claytor*, supra, this Court said with reference to G.S. 1-362 (then Code § 493):

"The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction so as to embrace all persons coming fairly within their scope. Black Interp. of Law, 311. This Court has uniformly held that where property is exempted from seizure under final process it is similarly exempt from levy or seizure under any mesne process issued for the purpose of placing it in the custody of the court and thus preserving it until it can finally be applied to the satisfaction of the plaintiff's debt. *Chemical Co. v. Sloan*, 136 N.C. 122. Supplementary proceedings are in the nature of final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as proceeding having the essential qualities of an equitable *fi.fa.*, and if the defendant comes within the general description of the persons designated in the act, there is no good reason for denying him the exemption under the garnishment." 137 N.C. at 236, 49 S.E. at 177.

G.S. 1-362 expressly exempts from sale under execution (and so, from garnishment) the earnings of a debtor from his personal services within 60 days next preceding the order when it appears by the debtor's affidavit "that these earnings are necessary for the use of *a* family supported wholly or partly by his labor." (Emphasis added.) It would seem reasonable to suppose that what the Legislature of 1870-71 had in mind, in enacting this exemption, was to protect the wage-earner's family from want as against the claims, however just, of his other creditors and that it was not contemplated that the needs of a wage-earner's second family should be supplied at the expense of the legitimate claims of his first family. However, the language of G.S. 1-362 is explicit and, according to *Goodwin v. Claytor*, supra, is to be given a liberal construction favorable to the exemption.

[4] Thus, we are compelled to hold that this defendant's retirement pay for the 60 day period next preceding the order of garnishment was exempt therefrom, except as hereinafter noted, it plainly appearing from the defendant's affidavit that his retirement pay was necessary for the use of "a family supported wholly or partly by his labor." For the reasons above mentioned, his retirement pay earned after the garnishment order was not sub-

ject thereto, except as hereinafter noted. Consequently, except as hereinafter noted, the defendant's retirement pay, from and after the period beginning 60 days prior to the service of the garnishment order, was not subject to garnishment either for alimony or for child support, as such retirement pay earned in the 60 days prior to the service of the garnishment order would have been, pursuant to G.S. 1-440.2 and G.S. 1-440.21 but for the exemption contained in G.S. 1-362. Consequently, it was error to garnish and distribute to the plaintiff the whole of the $1,871.61 (sometimes shown in the record as $1,871.63) paid into the court by garnishee. If this paramounting of the needs of a husband-father's second family over the needs of his first family be deemed inequitable, the remedy must be supplied by the Legislature by an amendment to G.S. 1-362.

With reference to child support, however, something else does appear in G.S. 110-136, above quoted. As this statute provides, "Notwithstanding any other provision of the law," which would include the exemption provision of G.S. 1-362, up to 20% of the defendant's "monthly disposable earnings" were garnishable for the support "of his minor child." We think the only reasonable interpretation of this statute is that the Legislature intended 80% of the parent's "monthly disposable earnings" to be beyond the reach of such garnishment order, even though there be more than one minor child entitled to support from him.

Subsection (c) of G.S. 110-136 seems clearly to contemplate the entry of a continuing order of garnishment reaching earnings for future pay periods, thus changing the former law of this State, as above set forth, with reference to the garnishment of, as yet, unaccrued wages. The liability of the garnishee under such an order would, of course, as to future pay periods, be contingent upon the actual accrual of the defendant employee's earnings in such future pay period.

It appears from the answers of the United States Attorney and of the United States Marine Corps that the defendant's net retirement pay, at that time, was $801.52, per month, and the total indebtedness of the Marine Corps to the defendant, on account of retirement pay, as of the date its answer was filed, was $1,049.80. Thus, it is clear that the retirement pay then accrued was for a period less than 60 days. Consequently, it was exempt

from garnishment for alimony under the provisions of G.S. 1-362 and not more than 20% thereof was subject to garnishment for child support under the provisions of G.S. 110-136.

The remainder of the total sum of $1,871.61 ($821.81) which has been paid in to the Clerk of the Superior Court by the United States and distributed by the Clerk to the plaintiff, pursuant to the order of the District Court, was retirement pay for then future pay periods and so, for the reasons above mentioned, was not subject to garnishment except to the extent of 20% thereof for child support pursuant to G.S. 110-136.

In his supplemental brief, filed in the Court of Appeals, the defendant stated:

> "Appellant [the defendant] has never contested his basic liability under [G.S.] § 110-136 to provide up to twenty percent (20%) of his retired pay for child support. Appellant has authorized the continuous withholding and disbursement of twenty percent (20%) of his retired *and disability pay* for past and present obligations. By doing so appellant waives any and all objections to said 'garnishment' including possible exemptions." (Emphasis added.)

By the above mentioned "authorization for disbursement of earnings," filed in the District Court 27 October 1976, the defendant authorized and directed the Marine Corps Finance Center to pay over to the Clerk of the Superior Court of Cumberland County "20% of all of Respondent's accrued retirement earnings which have been withheld pursuant to garnishment/attachment proceedings in this case to the end that said sum may be forthwith disbursed to Plaintiff for the benefit and support of Karl Robert Elmwood" and further authorized the withholding of 20% of his then future retirement earnings and payment thereof to the Clerk of the Superior Court until the arrearage in child support due from the defendant be fully paid, plus a further withholding, after the payment of all such arrearages, and during the minority of Karl, of 20% of the defendant's retirement earnings or $100.00 per month, whichever is less, for payment to the Clerk of the Superior Court for the benefit and support of Karl.

We conclude that the District Court erred in ordering the disbursement to the plaintiff of the entire $1,871.61 paid into the court by the garnishee, but the Court of Appeals also erred in its holding that the defendant's motion for dissolution of the order of attachment should have been allowed in its entirety. By virtue of G.S. 110-136, 20% of this $1,871.61, or the amount allowed for child support, for the pay periods in which this amount was earned, pursuant to the order of the District Court entered 20 February 1968, whichever is less, was subject to garnishment and distribution to the plaintiff, as was 20% of subsequent retirement pay accruals (or the amount of child support for such pay periods ordered by the District Court in its order of 20 February 1968, whichever is less). From the amount which is now withheld by the Marine Corps Finance Center and, as yet, undistributed, there should be paid over to the defendant an amount equal to that portion of the $1,871.61 heretofore distributed to the plaintiff which was improperly so distributed to her. Of the remainder of such presently accrued withholdings, 20% should be paid to the Clerk for distribution to the plaintiff and 80% to the defendant. Of future retirement pay installments, 20% should be withheld and paid over to the Clerk for distribution to the plaintiff until all arrearages in child support payments are fully paid and Karl Elmwood has reached the age of 18. Thereafter, the defendant's then future retirement pay should be paid to him free from the order of garnishment.

The order of the District Court dated 9 March 1976 and entitled "Order Vesting Title" was erroneous and is, hereby vacated. As the Court of Appeals held, the order of the District Court dated 20 October 1976 and entitled "Order Confirming Disbursement" by which the District Court purported to confirm the disbursement to the plaintiff of the sum of $1,871.61 paid by the garnishee into the Office of the Clerk of the Superior Court of Cumberland County, was also erroneous and is, hereby, vacated. The Court of Appeals, however, erred in holding that the District Court should have allowed the defendant's motion for dissolution of the order of attachment entered by the District Court 14 July 1975. That order should have been modified so as to limit it to the maximum amount subject to garnishment pursuant to G.S. 110-136. The garnishee should now be directed to make payments to the Clerk of the Superior Court of Cumberland County and to

the defendant as above stated. The Clerk should be directed to make distributions to the plaintiff as above stated.

The Court of Appeals erred in its holding that the District Court should have allowed the defendant's motion for dissolution of the attachment order. That order, entered 14 July 1975, modified to limit its effect to the maximum amount subject to garnishment, pursuant to G.S. 110-136, was within the authority of the District Court and proper.

This matter is, therefore, remanded to the Court of Appeals with direction that it enter its judgment further remanding the matter to the District Court for the entry of an order in conformity with this opinion.

Modified and remanded.

STATE OF NORTH CAROLINA v. RICHARD E. HOUSE

No. 12

(Filed 6 June 1978)

1. Indictment and Warrant § 5— true bill—foreman's attestation of concurrence by twelve grand jurors—directory provision

A bill of indictment was not invalid because it contained no attestation by the foreman of the grand jury that twelve or more grand jurors concurred in the finding of a true bill in compliance with G.S. 15A-644(5) since the foreman's signature on the indictment attesting that the grand jury found the indictment to be a true bill necessarily attested the concurrence of at least twelve of its members in this finding.

2. Constitutional Law § 45; Criminal Law § 87; Jury § 6— defendant represented by counsel—no right to question jurors and witnesses personally

The trial court did not err in denying defendant's request that he, personally, be permitted to question prospective jurors on voir dire and witnesses at the trial in addition to questions propounded by his counsel, since no one has the right to appear both by himself and by counsel.

3. Criminal Law § 102— opening statement in propria persona—defendant represented by counsel

The defendant, while retaining the services of his court-appointed counsel, was not entitled to make an opening statement to the jury *in propria persona.*

4. Constitutional Law § 68— court's refusal to subpoena witnesses

The trial court did not err in refusing, after the State had rested, to direct the issuance of subpoenas for persons whom the defendant said he wished to call as witnesses where the court ascertained that the testimony which defendant hoped to elicit from the proposed witnesses would not have been material in the trial of defendant, and no reason was suggested for defendant's failure to subpoena the proposed witnesses prior to the trial.

5. Constitutional Law § 68— refusal to permit defendant to present subpoenaed witnesses—denial of right of confrontation—harmless error

The trial court in a prosecution for first degree murder erred in refusing to permit defendant, who waived his right to counsel and appeared *in propria persona,* to put certain subpoenaed witnesses on the stand after the court determined in the absence of the jury that the testimony of the witnesses would be detrimental to defendant, since the defendant was entitled to use his own judgment as to the wisdom of introducing otherwise competent evidence, and the denial of that right violated defendant's right of confrontation afforded by the Sixth Amendment of the U.S. Constitution and Article I, § 23 of the N.C. Constitution. However, such error was harmless beyond a reasonable doubt where the record shows that none of these witnesses would have testified to any matter conceivably beneficial to the defendant.

6. Constitutional Law §§ 45, 49— defendant's representation of self—written waiver of counsel not required

The trial court did not err in permitting defendant to represent himself in his murder trial without executing a written waiver of his right to counsel when, during the trial, defendant informed the court that he wished to discharge his court-appointed counsel and to represent himself, and the court, upon proper inquiry, determined that defendant did desire to represent himself notwithstanding the court's advising him that he would be subject to the same rules of evidence applicable to defendants represented by counsel.

7. Constitutional Law § 48— failure to appoint trial counsel for appeal—motion by defendant

The trial court did not err in failing to appoint defendant's court-appointed trial counsel to represent him on appeal where defendant, himself, made a motion at the end of his trial that another lawyer be appointed to represent him on appeal.

APPEAL by defendant from *David Smith, J.,* at the 5 July 1977 Criminal Session of GRANVILLE.

The defendant having been found guilty of murder in the first degree was sentenced to imprisonment for life. The evidence for the State, if true, was sufficient to show:

During the morning of 22 December 1976, the defendant was released from jail. He reached his trailer home shortly after noon that day. There he met his wife, her sister and his father, walking from the trailer toward their car. All four went back into the trailer.

Almost immediately thereafter, the defendant's wife ran out and hid behind the trailer of their next door neighbor. The defendant was observed standing beside his trailer holding a shotgun. He then disappeared around the front of his trailer and came back empty handed. Thereupon, he and his wife had some conversation, inaudible to the witness, and she went with him to the front of the trailer and apparently they entered it.

A few minutes later, a neighbor heard a gunshot and, looking out, saw the defendant's wife fall to the ground outside the back door of the defendant's trailer. As she lay on the ground, crying out, "I am dying," the defendant, standing over her, with a shotgun in his hand, fired a second shot into her back, killing her instantly. He then took the gun to the back door of the trailer, threw it into the trailer, went to his car and left. He was arrested in Durham later in the afternoon. An autopsy revealed that the cause of death was the shotgun wound in the back, the deceased also having shotgun pellet wounds in her right leg.

The cause of the quarrel at the time of the shooting was the defendant's resentment of his wife's failure to come down to the jail to see him the previous night. As she fled out the back door, the second time she ran from the trailer, the defendant fired the gun out the back door in the direction in which she was running. There was a large hole through the lower portion of the door, apparently caused by a shotgun blast. The condition of the fatal wound in the back of the deceased was such that, in the opinion of the Chief Medical Examiner for the State, who performed the autopsy, the shot

was fired while the gun was pointed at right angles to the body and at a distance from it of at least two feet and not more than four feet. There were no fingerprints upon the barrel of the shotgun, which is not unusual by reason of a gun's having an oily surface.

Some three months prior to trial, the defendant, through his court-appointed counsel, appeared in court and orally moved that the bill of indictment be dismissed, for the reason that it contained no attestation by the foreman that twelve or more members of the grand jury had concurred in the finding of it to be a true bill. This motion was denied by the judge then presiding. The indictment, otherwise, proper in form, was signed by the solicitor, stated the names of witnesses for the State, including those examined by the grand jury, and stated, over the signature of the foreman:

"Those [witnesses] marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found 2-7-77 A True Bill."

When the case was called for trial, some three months later, the defendant, present in court with his court-appointed counsel, requested the court to permit him, in person, to interrogate the prospective jurors on voir dire, in addition to questions propounded to them by his court-appointed counsel. He also requested permission of the court to make an opening statement to the jury and that he be permitted, in person, to examine witnesses. These requests were denied by the trial judge who informed the defendant that if, at the conclusion of examination of prospective jurors by the attorneys, the defendant wanted further questions asked, he might submit them to the court through his court-appointed counsel and the court, if the questions were proper, would permit counsel to ask them. The trial judge advised the defendant that the same procedure would be followed in the examination of witnesses. He also advised the defendant that he was not entitled to make an opening statement to the jury unless the court, in its discretion, so permitted, and that neither the State nor the defendant would be permitted to make such statement.

Following the selection and impaneling of the jury, the defendant, in the absence of the jury, indicated a qualified dissatisfaction with his court-appointed counsel. Thereupon, the

court advised the defendant that he had the right to defend himself if he so desired and, if so, the court would dismiss his court-appointed counsel but would not assign another counsel to represent him. The defendant then stated that he would proceed with his court-appointed counsel.

During the cross-examination of the State's principal witness, the first witness called to the stand, the defendant, in the absence of the jury, advised the court that he wanted to discharge his counsel and represent himself. The court thereupon advised the defendant that if he took this course, he would be subject to the same rules of evidence as if he had an attorney representing him and the court would not undertake to advise him on any of the rules of evidence during the trial. The defendant advised the court that he understood this and, thereupon, the court, finding that the defendant had knowingly and intelligently waived his right to counsel and had moved the court that he be able to defend himself without the assistance of counsel, discharged the court-appointed counsel but directed him to remain in the courtroom throughout the trial and to be available to the defendant for legal advice, which the counsel did.

The jury was then recalled to the courtroom and advised of the defendant's election to represent himself. The trial proceeded with the defendant acting as his own counsel. The record discloses that, at the time of the trial, the defendant was 35 years of age, had progressed to the Ninth Grade in school and had an I.Q. above normal. It also discloses that he was an habitual drunkard and had served one or more prison sentences for offenses not disclosed.

The defendant then presented to the court a list of witnesses he wished subpoenaed in addition to those who had already been subpoenaed by his court-appointed counsel. Such subpoenas were issued.

The trial then proceeded in a somewhat confused manner due to defendant's lack of expertise in trial procedure. It was interspersed with several motions by the defendant for a mistrial due to the court's rulings upon evidentiary matters, all of which motions were overruled. These and other incidents necessitated frequent voir dires and discussions between the court and the defendant, all of which were conducted in the absence of the jury.

The following example of such motions and discussions occurred during the presentation of the State's evidence:

> "THE COURT: All right, Mr. House, do you have a motion?
>
> DEFENDANT HOUSE: Yes, sir. I make a motion for a mistrial; that the trail [sic] be declared on the grounds that 90 percent of my questions as to the truth of what happened on this fateful day have been overruled, but the prosecution questions regardless of how many have never been overruled. This shows prejudice to a fair trial for me. It seems the truth on my side is being suppressed on the expediency of this trial."

None of the questions to which this statement relates are set forth in the record on appeal.

Before beginning the introduction of his own evidence, the defendant once more moved for a mistrial, saying, in the absence of the jury:

> "DEFENDANT HOUSE: I protest the constitutional rights even though I choose to defend myself by telling and asking questions that I was refused a lawyer to guide me in the tricks of the lawyer of the legal trade to help in legal procedure to the truth of the crime. I am uneducated, indigent, so therefore, unable to act with the detriment [sic] of the court out of ignorance."

The court replied that the defendant had a standby attorney, whom he could consult at any time, and denied the motion.

Defendant then moved for a mistrial because the jury was not permitted to hear this protest and motions for a mistrial, leaving these matters to be decided only by the judge. The court denied this motion, explaining to the defendant that such motions were for determination by the court alone, presenting questions of law with which the jury was not concerned.

It appears from the record, including the defendant's somewhat confused and incoherent arguments to the trial court, that the defendant's theory of defense was that he, having been often hospitalized for acute alcoholism, was, at the time of the shooting of his wife, emotionally disturbed by reason of his belief that his wife had been unfaithful to him and that he was not the

father of one or more of the children ostensibly born of the marriage, and that he did not intend to shoot her, the fatal shot having been accidentally fired when his wife, lying wounded on the ground, reached up and grabbed the barrel of the gun so that it discharged when he tried to jerk it from her grasp, the first shot having been fired by him to stop her from running from the trailer but not to injure her. The record contains no evidence of unfaithfulness by the deceased to the defendant except by his own assertions relating to several years prior to the shooting.

Witnesses called by the defendant testified before the jury to the following effect:

For several months prior to the shooting of the deceased, the defendant had consultations with a representative of the County Alcoholism Program, who found him to be a man with "a very explosive type personality" and whose temper had "a very low threshold," but who was "capable of distinguishing right from wrong." He was released from jail on 22 December, the day of the shooting, so that he could go home for Christmas.

Dr. Royal, of the staff of Dorothea Dix Hospital, to which the defendant was sent for a mental examination following his arrest upon the charge of killing his wife, testified that, as a result of such examination, he was of the opinion that the defendant was able to determine right from wrong, was mentally capable of proceeding to trial on the charge in question, did not suffer from delusions or hallucinations, had generally adequate memory and intelligence, but had a problem with depression and alcoholism.

Two men, previously strangers to the defendant, testified that they gave him a ride from a poolroom to his trailer home, that he and they had drunk some beer but, upon arrival at his home, the defendant did not seem angry but was appreciative of the ride and thanked them. When he got out of the car they drove away immediately. In their opinion, he was not then intoxicated and acted normally.

The defendant, himself, testified to the following effect:

When he was released from the penitentiary in 1965, he returned to his home and determined that his wife was preg-

nant with another man's child. He then assaulted her "very bad" but then he "cooled off" and told her he would try to live with that situation. When he went to work, she took the two children and left for home. Again, in 1968, while he was in prison for another offense, she "took up with another man." She divorced the defendant while he was in the penitentiary but upon his release she came back to him and they "started making another go at it." It seemed that one of the other of them was "doing something all the time to agitate one another." He then began drinking in 1969 and was hospitalized numerous times for that reason. He learned then that if he drank any more he would die and he quit drinking for approximately a year but, in 1976, began drinking again. As a result, he lost his job.

He was arrested on 14 December 1976 (eight days prior to the shooting) and while in jail his wife visited him and told him she had attended a dance to have "a little fun." When he told her that all he wanted was to be at home for Christmas she laughed.

When he returned home, following his release from jail the morning of December 22, his wife, her sister and his father were leaving and he told her he would like to talk to her. They went into the trailer. They began to quarrel about her having been to the dance. She ran out the front door so he went into the bedroom and got the shotgun, went out of the house and observed his wife standing behind a neighbor's trailer. He called her and told her, "You better come back in the house and listen to what I got to say." She having stated she was afraid of him with the gun, he went back to the front of the trailer and handed the gun to his sister-in-law and then said to his wife, "Look, all I want to do is talk to you." Thereupon, she came back into the trailer.

The quarrel resumed and he slapped her and threw her to the floor. Upon her promise to "be good," he let her get up, telling her that their problems had to be worked out for the sake of the children. She then ran out the back door of the trailer, whereupon he "saw red." He got the shotgun and loaded it. Seeing a "flash" of her as she ran past the back door, he shot through the door, "thinking that would scare her to stop and stand still."

Going out the door, he observed her lying on the ground and asked her if she was hurt. She replied that she was shot in the leg. He walked up to her with the gun pointed away from her and asked how badly was she hurt. In a few seconds she raised up and grabbed the gun, shouting, "He's going to kill me." He jerked the gun from her grasp and, as he did so, it fired. He then ran into the trailer, threw the gun down, went back out to the car and left in a state of shock.

When he arrived at home following his release from the jail, he had drunk "approximately seven beers" but was not drunk. He knew what he was doing and he was "in the right frame of mind."

The defendant called as his witness his brother-in-law, Billy McGhee, who testified that he had known the defendant's wife since she was a child and knew nothing about her going with anyone else. In response to questions by the court, this witness said that he knew nothing whatever about the circumstances surrounding the shooting or about the mental or physical condition of the defendant. Though the record does not clearly so indicate, this questioning by the court seems to have been at the apparent conclusion of the defendant's direct examination of this witness. There being no cross-examination by the State, the court told the witness he could "step down and be excused." Thereupon, the defendant said, "I am not finished with this witness." The court instructed him to call his next witness.

Four witnesses, subpoenaed at the request of the defendant, were then examined by the court on voir dire, in absence of the jury. On such voir dire examinations, one of these testified that he did not become acquainted with the defendant until more than two months after the shooting. Another, whom the defendant advised the court was called for the purpose of showing that his wife had dated other men and had children by them, testified that he had not seen the defendant since the defendant's arrest eight days prior to the shooting, that all he knew about the defendant's mental or physical condition was that the defendant was "just mean," and that, if asked to testify as to his good character and reputation, he could not say anything good about him. The third of these prospective witnesses was the mother of the deceased who testified on voir dire that she was not present at the time of

the shooting and, if asked to testify concerning the defendant's good character and reputation, she would testify that he had "a bad character, absolutely bad." The fourth of these prospective witnesses testified that she did not know the defendant but knew of him, that every time she had seen him "he was drunk," that she did not know "a thing about the shooting," and, if asked to testify to the defendant's good character, she would testify, "He's got a bad character" and he "did have a good wife."

At the conclusion of these voir dires, the court ruled that the testimony of these witnesses would be adverse to the defendant's interests, that they could shed no light on the shooting, knowing nothing about it, and that they would all testify to the bad character and reputation of the defendant, so that to permit them to testify would be detrimental to his defense. Consequently, the court ruled that these witnesses would not be permitted to testify and released them from the subpoenas. The defendant protested this ruling as "suppressing the truth," saying that what he wanted to develop from these witnesses was that they were all hostile to him and what they were saying were "absolutely lies."

Similarly, the court, upon a voir dire in the absence of the jury, determined that another of the defendant's proposed witnesses, James Hudson, by whom the defendant proposed to show his wife's misconduct, had never seen the defendant's wife at a dance with anyone else, had never told the defendant he had so seen her and the only time he had ever seen her was when he was sent by the defendant to the defendant's home to get some clothing, the defendant being in jail. This witness would also be unable to testify to the defendant's good character and reputation. Over the defendant's protest, the court ruled that this witness could not be called to the stand, since his testimony could not be beneficial to the defendant and might be detrimental to him, and released the witness from the subpoena. The defendant protested, saying, "I'd like to ask this man to be charged with perjury."

Again, the defendant's sister-in-law, who was present at the defendant's trailer at the time of the shooting, was subpoenaed as a witness for the defendant. On voir dire, in the absence of the jury, she testified concerning the quarrel preceding the shooting, saying that, following the wife's return to the trailer, the wife

begged the defendant not to shoot her and that was all this witness knew about the occurrence. The court thereupon said that the testimony of this witness "would be highly prejudicial to the defendant's defense and in the interest of justice" ruled that the witness could not testify before the jury.

The defendant requested subpoenas for Nelson Blackwell, James Earl Ray, the editor of the Oxford newspaper, and the pastor of a church, presumably one which the defendant attended. Upon inquiry by the court, in the absence of the jury, the defendant stated that he expected to show through Blackwell that Blackwell was the father of one of the defendant's ostensible children, the child being 11 years of age at the time of the shooting; that he expected to show through Ray that he had "shacked up with" the defendant's wife some 10 years prior to the shooting; that he expected to show by the editor of the newspaper that the editor had published a story which was "prefabricated" and the defendant desired to examine this witness to show to the jury where and how he got this information and "why he didn't check this information out before he put this publicity into the public." The court ruled in each of these instances that the motion to subpoena the proposed witness was denied. As to the pastor of the church, the defendant stated that he proposed to use him as a character witness with reference to the defendant's mode of life from 1975 to 1976. The court denied the motion to subpoena this witness.

Upon the return of the verdict and the imposition of sentence, the defendant gave notice of appeal and, with the consent of his previously court-appointed counsel, requested that "another lawyer be appointed" to represent him on appeal. Such appointment was made.

There is no exception to the charge of the court to the jury.

Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State.

T. S. Royster, Jr., and John H. Pike for Defendant.

LAKE, Justice.

[1] The defendant's contention that his motion to dismiss the bill of indictment should have been granted for the reason that it con-

tains no attestation by the foreman of the grand jury that twelve or more grand jurors concurred in the finding of a true bill is without merit.

G.S. 15A-644 provides:

"*Form and content of indictment, information or presentment.*— (a) An indictment *must* contain:

(1) The name of the Superior Court in which it is filed;

(2) The title of the action;

(3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleadings and Joinder;

(4) The signature of the solicitor, but its omission is not a fatal defect; and

(5) The signature of the foreman or acting foreman of the grand jury attesting the concurrence of twelve or more grand jurors in the finding of a true bill of indictment." (Emphasis added.)

G.S. 15A-621 provides:

"*Grand jury defined.*— A grand jury is a body consisting of not less than 12 nor more than 18 persons, impaneled by a superior court and constituting a part of such court."

G.S. 15A-623 provides:

"*Grand jury proceedings and operation in general.*— (a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury."

In the present case, the indictment bears the signature of the foreman of the grand jury beneath the statement that the bill was found "a true bill" and the witnesses whose names were marked with an "X" were sworn by the foreman and examined by the grand jury. Since the statute requires the concurrence of at least 12 members of the grand jury in order to find an indictment a true bill, the foreman's signature attesting that the grand jury found the indictment to be a true bill, necessarily attests the concurrence of at least 12 of its members in this finding.

Although it is better practice for the foreman's entry upon the bill of indictment, over his signature, to state expressly that 12 or more grand jurors concurred in such finding, since even a directory provision of a statute should be obeyed, this is not necessary to the validity of the bill of indictment where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary.

G.S. 9-27 (now repealed) provided, "The foreman of the Grand Jury *shall* mark on the bill the names of the witnesses sworn and examined before the jury." (Emphasis added.) In this connection, the word "shall" is equivalent to the word "must," which is used in G.S. 15A-644. Nevertheless, in *State v. Avant*, 202 N.C. 680, 163 S.E. 806 (1932), this Court, speaking through Justice George Connor, said, with reference to the contention that an indictment should be quashed for the failure of the foreman of the grand jury so to mark thereon the names of the witnesses examined by the grand jury, the foreman having signed the bill and returned it into court as "a true bill":

> "The foreman of the grand jury is authorized by statute in this State to administer oaths and affirmatives to persons whose names are endorsed on a bill of indictment as witnesses for the State. He is required to mark on the bill the names of such persons as are sworn by him, and examined before the grand jury. C.S., 2336. In *S. v. Hollingsworth*, 100 N.C. 535, 6 S.E. 417, it is said: 'The endorsements on the bill form no part of the indictment, and it has been held that the act of 1879 (now C.S. 2336) [subsequently, G.S. 9-27] requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the grand jury, is merely directory, and a noncompliance therewith is no ground for quashing the indictment. *S. v. Hines*, 84 N.C. 810. It constitutes ground neither for a motion to quash, nor in arrest of judgment.' "

In *State v. Hines*, 84 N.C. 810 (1881), speaking through Justice Ashe, this Court said:

> "Before the act of 1879 [the former G.S. 9-27] * * * the omission to designate the witnesses who may have been sworn, by a + mark, was not sufficient to quash the bill. The

fact that they were not sworn must have been established by proof offered by the defendant. * * *

"This principle we think has not been changed by the act of 1879, ch. 12, § 1, which * * * provides that the foreman should mark on the bill the names of the witnesses sworn and examined before the grand jury. We hold that this provision is merely directory, and that it is competent for the state, when the foreman has omitted to mark the witnesses sworn, to show by proof that they were sworn.

"In Massachusetts, they have an act of assembly (Rev. Statutes, ch. 136, § 9), which provides 'that a list of all witnesses sworn before the grand jury during the term shall be returned to the court under the hand of the foreman; and it has been there held that it is directory merely, and a non-compliance therewith is no ground for quashing an indictment.' *Com. v. Edwards*, 4 Gray (Mass.) 1."

In *State v. Avant, supra*, the failure of the foreman to mark the names of the witnesses examined by the grand jury, as directed by the statute, was brought to the attention of the court in time to permit this to be done while the grand jury was still present in the courtroom and this was permitted. However, in *State v. Mitchell*, 260 N.C. 235, 132 S.E. 2d 481 (1963), speaking through Justice Parker, later Chief Justice, this Court held that the above quoted provision of the old G.S. 9-27 was directory and not mandatory, and the bill of indictment should not be quashed because of such omission, even though it was not brought to the attention of the trial judge in time to permit such correction.

In *State v. Calhoon*, 18 N.C. 374 (1835), Chief Justice Ruffin, speaking for the Court, said:

"It is the practice for the foreman to sign his name to the finding of the grand jury; and it seems to be a salutary practice, as it tends to the more complete identification of the instrument containing the accusation. We do not know in what it had its origin; but though useful and proper, it does not seem to be essential, nor to have been, at any time, the course in England. * * * It is the grand jury's returning the bill into Court, and their publicly rendering their verdict on it, in the form 'a true bill,' and that being recorded or filed amongst the records of the Court, that makes it effectual."

In *State v. Lancaster*, 210 N.C. 584, 187 S.E. 802 (1936), the defendant contended that the indictment against him should be quashed, and the judgment pursuant to his conviction be arrested, for the reason that it did not appear by an endorsement of the foreman upon the indictment that any person whose name appeared on the back of the bill as a witness for the State had been sworn and testified before the grand jury. The court held that the motions to quash and in arrest of judgment were properly denied, saying in a Per Curiam opinion:

> "The absence of such endorsement was not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as a 'true bill.' * * * The provisions of [the old G.S. 9-27] with respect to the duty of the foreman of the grand jury, are directory, and not mandatory." 210 N.C. at 585.

In 73 Am. Jur. 2d, Statutes, § 19, it is said: "In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory." To the same effect, *see*: 32 C.J.S., Statutes, §§ 376, 380; 12 Strong, N.C. Index 3d, Statutes, § 5.3.

While, ordinarily, the word "must" and the word "shall," in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute. To interpret G.S. 15A-644 as requiring the quashing of a bill of indictment under the circumstances of this case would be to attribute to the Legislature an intent to paramount mere form over substance. This we decline to do.

[2] The defendant's next contention is that it was error to deny his request that he, personally, be permitted to question prospective jurors on voir dire, and, subsequently, witnesses at the trial, in addition to questions propounded by his then counsel. There is no merit in this contention.

It is well settled that a defendant in a criminal action has a right to represent himself at the trial and cannot be required to accept the services of court-appointed counsel. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965); *State v. Bines*, 263 N.C. 48, 138 S.E. 2d 797 (1964). It is, however, equally well settled that "[a] party has the right to appear *in propria persona* or by counsel, but this right is alternative," so that "one has no right to appear both by himself and by counsel." *State v. Phillip*, 261 N.C. 263, 268, 134 S.E. 2d 386, 391 (1964); *New Hanover County v. Sidbury*, 225 N.C. 679, 36 S.E. 2d 242 (1945); *Abernethy v. Burns*, 206 N.C. 370, 173 S.E. 899 (1934). *See also*, *State v. Robinson*, *supra*. Thus, while the defendant elected to retain the services of the court-appointed counsel, the court did not err in holding that the interrogation of prospective jurors and of witnesses must be done through his counsel.

[3] The defendant's third contention is that he was entitled to make an opening statement to the jury and the court's refusal of permission for him to do so was error. There is no merit in this contention.

G.S. 15A-1221(4) which provides "each party must be given the oportunity to make a brief opening statement," does not become effective until 1 July 1978, and, therefore, has no bearing upon the present case. The General Rules of Practice for the Superior and District Courts, promulgated by this Court pursuant to G.S. 7A-34 and published in 276 N.C. 735, relate to procedure in civil actions. Futhermore, Rule 9, thereof, upon which the defendant relies, states: "At any time before the presentation of evidence *counsel* for each party may make an opening statement setting forth the grounds for his claim or defense." (Emphasis added.)

The defendant's request in the present case was not for permission to have his then counsel make an opening statement but for permission to make such statement himself. When his request was denied, his counsel did not request that counsel be allowed to make such statement to the jury. Even if such a request by his counsel should have been granted, the defendant, for the reason

above stated, while retaining the services of his court-appointed counsel was not entitled to make such statement *in propria persona.*

The defendant's fourth contention is that the court erred in refusing to direct the issuance of subpoenas for certain persons whom the defendant said he wished to call as witnesses and in refusing to permit him to call to the witness stand persons then in the courtroom pursuant to subpoenas previously issued.

[4] We turn to the refusal to issue the requested subpoenas. This request was made after the State rested its case. The court, by inquiries directed to the defendant, ascertained, to its satisfaction, that testimony which the defendant hoped to obtain from these persons would not be material and so declined to issue such subpoenas. In this we find no error.

The Constitution of North Carolina, Article I, § 23, provides:

> "In all criminal prosecutions, every person charged with crime has the right * * * to confront the accusers and witnesses with other testimony * * *."

The Constitution of the United States, in Amendment VI, made applicable to the states by Amendment XIV (*Washington v. Texas*, 288 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967)), provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor. * * *."

G.S. 15A-801 provides for the issuance of subpoenas for proposed witnesses in a criminal proceeding and provides that these shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1, for the issuance and service of subpoenas in civil actions. That rule provides for the issuance of subpoenas by the Clerk of the Superior Court, but also provides for the issuance of subpoenas over the signature of the party or his counsel. It also provides for service of subpoenas by the sheriff "or by any other person not less than 18 years of age, who is not a party."

Thus, the defendant had it within his power to issue, and have served, subpoenas requiring the attendance of the persons in question. It is abundantly clear from the record that whatever ability these people had, to give information pertinent to this prosecution, was known to the defendant long before the trial began. No reason is suggested in the record for the defendant's failure to subpoena these proposed witnesses prior to the trial, or his failure to advise his then counsel of his desire to have them subpoenaed, if, indeed, he did so fail to advise his counsel.

Furthermore, it does not appear that the testimony which the defendant hoped to elicit from any of these proposed witnesses would have been material in the trial of this action. According to the defendant's responses to the inquiries of the court, two of them were men whom he suspected of having committed adultery with his wife. Assuming, which seems unlikely, that these men, if called to the witness stand, would acknowledge such conduct, it would not be material to the trial of the present action in view of the fact that it occurred, if at all, ten and eleven years prior to the defendant's shooting of his wife and after he, with knowledge thereof, condoned the misconduct and he and his wife became reconciled and renewed their marital relations. Another was a minister, not shown to have any knowledge of any circumstance related to the shooting, or of the defendant's mental or emotional condition, or of his character or reputation.

As we said in *State v. Wells*, 290 N.C. 485, 491, 226 S.E. 2d 325, 330 (1976), "Here, defendant's lack of diligence in placing his witnesses under subpoena when he had ample opportunity to do so, thus requiring their attendance from day to day, forestalls his belated attempt to place responsibility on the trial judge for their absence." Furthermore, as was said in *Hoskins v. Wainwright*, 440 F. 2d 69, 71 (5th Cir., 1971), "The right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests." We, therefore, find no ground for disturbing the judgment below by reason of the refusal of the trial judge to issue subpoenas as requested by the defendant.

[5] A more difficult question is presented by the defendant's contention that the trial judge refused to permit him to call to the

witness stand persons who were then in the courtroom pursuant to subpoenas previously issued. In *State v. Wells*, *supra*, speaking through Justice Huskins, we said:

> "The right of an accused to offer the testimony of witnesses and to compel their attendance by compulsory process, if necessary, is a basic ingredient of the right to present a defense, i.e., the right to present the defendant's version of the facts, as opposed to the prosecution's, so the jury may decide where the truth lies." 290 N.C. at 490-491, 226 S.E. 2d at 329.

Again, in *State v. Pike*, 273 N.C. 102, 107, 159 S.E. 2d 334, 338 (1968), speaking through Justice Branch, we said:

> "It is basic to due process that a defendant in a criminal action be allowed to offer testimony. When the trial judge heard the State's witness on *voir dire*, he should have given defendant an opportunity to offer evidence to present his version of the search and seizure or to contradict, amplify, or explain the testimony offered by the State."

See also, *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, death sentence vacated, 429 U.S. 809 (1976).

As above recounted in the statement of facts, the defendant testified at length in his own behalf and was permitted to call to the stand other witnesses and present their testimony before the jury. However, certain witnesses, present in the courtroom and under subpoena and proposed to be called by the defendant, were first examined by the court, in the absence of the jury, and, as the result of those examinations, the court concluded that they knew nothing about the circumstances of the shooting, the defendant's then mental or emotional state or other matters material to the issue before the jury, or that the evidence they would give was so prejudicial to the defendant that it would seriously prejudice his defense to put them on the witness stand. Notwithstanding the court's original admonition to the defendant that, if the defendant discharged his court-appointed counsel and proceeded to represent himself, the court would not assist the defendant with reference to the rules of evidence, the court refused to allow the defendant to put these proposed witnesses on the stand. Obviously, the court was endeavoring to protect the defendant from disaster due to the defendant's bad trial tactics.

In this, we think the court was clearly in error. It would, of course, have been proper for the court to sustain appropriate objections by the State to specific questions, for the reason that the testimony so proposed to be elicited would be immaterial and irrelevant. The trial court, however, was not authorized to forbid the defendant to offer evidence, otherwise competent, for the reason that, in the judgment of the court, however sound, such evidence would be detrimental to the defendant. The defendant, whether represented by counsel or appearing *in propria persona*, is entitled to use his own judgment as to the wisdom of introducing otherwise competent evidence. To deny him this right is to deny him his constitutional rights afforded both by the Sixth Amendment to the Constitution of the United States and Article I, § 23, of the Constitution of North Carolina, as above quoted. *Washington v. Texas*, *supra; State v. Wells*, *supra; State v. Pike*, *supra.*

Nevertheless, not every constitutional error, either State or Federal, is ground for granting a new trial. If it plainly appears from the record that such error "was harmless beyond a reasonable doubt," the Supreme Court of the United States has said the judgment will not be disturbed on that account. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963). The doctrine of harmless error has repeatedly been applied by this Court, using the same test. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Fletcher and Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Bryant*, 236 N.C. 745, 73 S.E. 2d 791 (1953); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951). In the *Bovender* case, speaking through Justice Devin, later Chief Justice, this Court said:

> "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial. *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863. An error cannot be regarded as prejudicial unless there is a reasonable probability that the result would have been different." 233 N.C. at 690, 65 S.E. 2d at 330.

. Our careful review of the disclosures of the defendant's proposed witnesses in response to the court's inquiries directed to them, in the absence of the jury, makes it abundantly clear to us that none of these witnesses would have testified to any matter conceivably beneficial to the defendant. The defendant's own assertions as to what these witnesses could add to his presentation of his defense does nothing whatever to cast doubt upon this conclusion. As Justice Barnhill, later Chief Justice, said in *State v. Bryant, supra: "On this record* he could have no reasonable hope of acquittal in a future trial, for such a verdict would manifest a clear miscarriage of justice. Hence the verdict and judgment must be sustained." 236 N.C. at 748, 73 S.E. 2d at 792.

[6] We, likewise, find no merit whatever in the defendant's fifth contention, which is that the court should not have permitted him to represent himself since he did not waive in writing his right to counsel. G.S. 7A-457, dealing with waiver of counsel prior to the acceptance of a plea of guilty, has no application to the present case. Here, the defendant, having been appointed counsel for the trial of this case and not contending, either then or now, that such counsel was not competent, exercised his constitutional right (*see, Faretta v. California, supra*) to represent himself for the remainder of his trial. This was done after the court, upon proper inquiry, ascertained that this was, indeed, the desire of the defendant, notwithstanding the court's advising him that he would be subject to the same rules of evidence applicable to defendants represented by counsel. Under these circumstances, the court had no choice but to permit the defendant so to proceed, and, in so doing, committed no error.

That the defendant's court-appointed trial counsel was competent is not only presently unquestioned by the defendant but is affirmatively established by his assignment of error which we next note.

[7] The defendant's final contention is that the court below erred in not appointing his court-appointed trial counsel to represent him on this appeal. Normally, it is obviously advisable to appoint a defendant's trial counsel, with or without other counsel to assist him, for purposes of presenting his appeal and we are not to be understood as suggesting the contrary. However, the

defendant's present contention is sufficiently answered by noting that, at the conclusion of his trial, the defendant addressed the trial court as follows:

> "I make a motion on mutual agreement between Mr. Finch and myself that another lawyer be appointed to me to make a legal and fair appeal to the North Carolina Supreme Court."

His court-appointed trial counsel was then present in the court having remained therein, throughout the trial, at the direction of the trial judge in order to be available to the defendant for such legal advice as the defendant might desire.

We find no merit whatever in any of the defendant's assignments of error brought forward in his brief. Other assignments of error, contained in his statement of the case on appeal, are deemed abandoned. Rule 28 of the Rules of Appellate Procedure, 287 N.C. 679, 741. We have, however, examined these also and find no merit therein.

No error.

STATE OF NORTH CAROLINA v. SEBRINA DAVIS FREEMAN

No. 65

(Filed 6 June 1978)

1. Criminal Law §§ 75.9, 75.10— volunteered statements—statement made after rights waived—admissibility

The trial court in a homicide case properly allowed into evidence defendant's incriminating statements which an officer testified were made to him at the scene of the fire where the victim was burned and which another officer testified defendant made to him at the police department, since the statements made at the scene of the crime were volunteered; the officer's request for an explanation as to what defendant meant by one of her statements did not transform the situation into an interrogation necessitating warnings or waivers; and the statements made by defendant at the police station were made only after defendant was fully advised of her rights and she voluntarily waived those rights.

2. **Homicide § 21.7— second degree murder—burning of victim—sufficiency of evidence**

Evidence was sufficient to sustain defendant's conviction of murder in the second degree where it tended to show that defendant and her husband had a fight during which defendant hit her husband with an ax; the husband's jaw was fractured and several teeth were knocked out; a neighbor saw smoke coming from defendant's house and went to investigate; he saw the husband lying on a bed and both the husband and the bed were burning; only the area around the bed was burning; defendant was standing just inside the room looking at her husband as he lay on the bed in flames; there was a tub of water near defendant but she did not use it to extinguish the fire, even after being instructed to do so by the neighbor; immediately before and at the time of the fire, defendant and her husband were the only persons in the house except for defendant's small baby; and the physical facts at the scene of the crime did not correspond with defendant's account of what happened.

3. **Criminal Law § 163.2— exception to charge as given—proper instruction must be set out**

When an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. N.C. App. R. 10(b)(2).

4. **Homicide § 23.2— proximate cause—jury instruction proper**

In a homicide prosecution the trial court's instruction with respect to proximate cause was proper where the court defined proximate cause as "a real cause, a cause without which [deceased's] death would not have resulted."

5. **Criminal Law § 168.5— jury instructions—misstatement of evidence—harmless error**

The trial court's misstatement of one of the State's contentions with reference to a witness's testimony, to which defendant did not call the court's attention, was not of sufficient consequence to affect the verdict.

APPEAL by defendant under G.S. 7A-27(a) from *Small, J.*, at the 6 June 1977 Session of the Superior Court of BEAUFORT, docketed and argued as Case No. 74 at the Fall Term 1977.

Defendant, Sebrina Davis Freeman, was tried upon a bill of indictment, drawn under G.S. 15-144, in which she was charged with the murder of her husband, Donnie Freeman. She was convicted of murder in the second degree and appeals the sentence of life imprisonment imposed upon the verdict.

By a stipulation between defense counsel and the district attorney, it was established that Donnie Freeman died on 1 March 1977 as the result of extensive burns received on 9 January 1977.

During that afternoon Donnie Freeman (Donnie) was brought to the Pungo District Hospital badly burned, semi-conscious, and in shock. His right jaw had been fractured; several of his teeth were missing, and several were loose. Approximately 80-85% of his body had received second and third-degree burns. Blood from the injuries to his right jaw had been aspirated into the lungs and sucked into the stomach. He was in critical condition and unable to communicate. Arrangements were made immediately to transport him to the North Carolina Memorial Hospital at Chapel Hill, where he remained until his death.

Evidence for the State, summarized except when quoted, disclosed the time and manner in which Donnie's injuries were received.

On the afternoon of 9 January 1977, James Spencer was visiting in Belhaven at the home of a friend who lived directly across the street from the residence of defendant and Donnie Freeman on the corner of King and Duke Streets. Observing a fire in defendant's home, Spencer crossed King Street and peered into defendant's bedroom window. Near the window he saw Donnie lying on his back in the bed "with a lot of fire around him." Both the bed and Donnie Freeman were on fire. The area around the bed was burning, but he observed no burning about the stove or elsewhere in the room. When Spencer peeked through the window Donnie "was trying to mumble out something." Spencer also observed defendant standing up beside the wall next to the door in the room where the fire was. She was standing still, with her baby on her hip, facing the man on the bed. As Spencer ran into the house he saw in the hall, a short distance from defendant, a tub about half full of water. Defendant made no response when he told her to pour the water on Donnie while he went to call the fire department. At that time only he and defendant were in the house. Spencer's sister, Annie Clayton, went in a short time later. After he had returned from calling the fire department he went with her to the door, but there was too much smoke for him to enter.

In spite of the smoke, however, Annie Clayton went in the front door. In the bedroom she saw that "the man was still lying on the bed burning." He was lying on his back "and his clothes were on fire." He was completely on the bed. Mrs. Clayton

testified that there was so much smoke she was afraid to enter the room, but she called to the man to crawl out. He started getting up and she went back outside. There she saw defendant in the yard.

The auxiliary Chief of Police of Belhaven, Guy Larry Satterthwaite, received a report of the fire about 1:55 p.m. and three minutes later he arrived at defendant's home. He saw smoke coming from the roof area next to King Street and, as he walked to the house, he observed Donnie crawling from the doorway. "All the clothes he had left on" were still burning, but most of his clothing had been burned away. Satterthwaite pulled off his own shirt, beat out the fire, and ran back to his car to call the rescue squad. He then returned to Donnie and, while he and Annie Clayton were removing the smoldering remnants of Donnie's clothing, "defendant was hollering and came running to where [they] were." Prior to that time Satterthwaite had not seen defendant, and later he "did not see her assist her husband in any manner." Satterthwaite's testimony with reference to his encounter with defendant follows:

"I was in uniform when I went to the defendant's residence. The defendant ran up to me and said, 'God, I didn't mean for it to happen,' or 'God, I didn't mean it. . . . I didn't mean for it to happen like this.' I asked her who she was and what she meant by that statement. She told me that she was his wife and that they were having a fight. She told me that she hit him with the axe and that he fell over the kerosene jug and knocked it in the heater and then the kerosene caught afire. She told me that her husband was unconscious and that she tried to drag him out of the room but he was too heavy. She said that she ran out of the room and outside the house when she saw a man and a woman come by on a bicycle. She tried to get them to go into the house and help her but it was so smoky then that they could not get in the room. I told her to get in my car and I would carry her to the hospital. She was not in custody or under arrest at that time. She was asking to go to the hospital at that time and I offered to carry her."

When asked to describe defendant's behavior at the time she made the foregoing statement it was Satterthwaite's opinion that " she was not any more excited than [he] was." He said, "It was an emotional situation, particularly if you are not used to that type of excitement."

At the hospital Dr. Charles O. Boyette, who was attending Donnie, told defendant that her husband's condition was "critical" and he did not think he would live. He then asked her what happened and she replied "that she and her husband had a fight and she hit him with an axe and he fell across the heater." The doctor said that at that point, having perceived "there were possibly some complications in there that were not medical," he did not pursue the matter further.

At Officer Satterthwaite's request, defendant went from the hospital to the police department. There she talked with Captain Bruce L. Smith. He summarized her account of events preceding the fire substantially as follows:

Defendant and Donnie were fighting. She had left him three days before Christmas and returned sometime after New Year's. She was two months pregnant and Donnie wanted her to have an abortion. They kept arguing while both were working on a portable kerosene heater in which "the flame kept blazing up." When Donnie tried to hit her she grabbed an axe and hit him two times with it. In this struggle a jug of kerosene was upset. Kerosene was spilled on the floor and started blazing. She ran out and left Donnie lying on the floor with his shirt on fire. "She and another man tried to get him out of the house, but could not because Donnie was on fire."

At one time during their conversation Captain Smith said defendant "started to cry, but she quit. She kept asking what was going to happen to her. She did not say anything about the condition of her husband. She did not ask me one time how her husband was." Defendant was arrested immediately after she completed her statement to Captain Smith.

Doctor Boyette, who had treated Donnie at the hospital, happened to own the house in which defendant and Donnie were living on 9 January 1977. He inspected the property about 5:00 p.m. that day at which time he observed that the window facing King Street was broken out and a bed was burning "immediately under the window." Inside, in the "nearly square" room, which was "approximately twelve feet by twelve feet," he found a wood heater seven or eight feet from the smoking bed. A few inches from the wood heater and six to eight feet from the bed was an old kerosene portable heater standing upright with the lid open. "The

most extensive burning appeared to be in the northwest corner of the room and particularly on the bed under the window facing King Street." The burning "was approximately twice as extensive in the corner of the room where the beds were located . . . as opposed to any other area of the room." The "evidence of burning about the region of the heater" consisted of "charred fragments of board on the floor which had come from the ceiling." It appeared to Dr. Boyette that "the ceiling above the bed along the King Street wall was more extensively damaged than anywhere else." The top layers of the mattress on that bed were also burned extensively. There was not as much damage to the bottom of the mattress. . . ."

About 7:00 p.m. on 9 January 1977 Mr. Samuel Collins, "the maintenance man for Dr. Boyette's rentals," inspected the defendant's residence. At that time he found the bed under the King Street window still smoldering and the bed next to the Duke Street wall in flames. The wall behind the heater was burned badly, but no part of the floor had been burned. However, there were cinders around the heater from the badly burned ceiling above.

Collins had been in this house many times before and as he entered the hall he saw a jug half full of kerosene about ten or twelve feet down the hall from the door to the burned room. He had seen this jug of kerosene in the hall many times before. In his opinion that was where defendant kept her kerosene. He emptied the jug and called the fire department to return to the scene and extinguish the fire which had flared up again after the fire truck left the scene. Collins later tore the house down.

Defendant's evidence consisted of her own testimony and that of her sister, Novella Thomas. Defendant's testimony tended to show:

At the time of the trial defendant was twenty-one years old. She first met Donnie in September 1975 when he was in the Marine Corps, and she had lived with him from September to December that year. They were married on 2 December 1976. At that time she had two children, a four-year old girl and a two-year old boy. Donnie was not the father of either. Donnie's family and friends did not approve of his marriage to defendant, and they had let him know they thought him a fool for having married her. This implication upset him greatly. "Marital problems" developed.

On 23 December 1976 defendant left him because he was beating her and her children. However, she returned a few days before 9 January 1977.

On the day of the fire defendant and Donnie were arguing in their bedroom. She was pregnant. He wanted her to have an abortion and she was unwilling. Donnie was also concerned because she had not brought all her children's clothing when she returned home. He suspected that she did not intend to stay, and she assured him she would not stay if he continued to beat on her. During this altercation he threw her on the iron bed, beat her with his fists, and banged her head against the metal part of the bed. Donnie was six feet tall and weighed about 185 pounds. When he released her she brought the oil heater from the living room into the bedroom to burn off the wick so it would not smoke. Upon her return she found Donnie burning her children's toys in the wood heater.

As she worked with the wick in the oil heater Donnie started "cussing," and she attempted to calm him by telling him to give her his socks so that she could wash them with a pair of his pants she already had in a tub on the wood heater. He threw her the socks; she put them in the tub and left the room. Upon her return, the wash tub was outside the door and Donnie "got on her again" about his family calling him a fool. He threatened to kill defendant and threw her against the wall. He then began pulling her hair and beating her head against the wall. When she fell to the floor he kicked her in the stomach, all the while threatening to kill her and his unborn child. As a result of this assault her mouth was bleeding inside and her lip swelled. She also had scars around her neck where Donnie had choked her.

When he let her up defendant stood next to the door into the hall. At that time she said there was nothing to keep her from running into the hallway and on to Duke Street except that she was scared. As she stood there she saw Donnie look toward a paring knife on top of the TV stand beside the iron bed. She does not know whether he ever moved toward the knife for she then grabbed the axe located beside the chimney, hit Donnie, and ran out of the room. When she swung at him she "did not attempt to hit him in any particular place." She just "swung," hoping to slow him down, because she was scared, and because "immediately

before [she] hit him he kept saying he was going to kill [her]." She did not then know that she had hurt him. She ran to the kitchen where she hid the axe in a corner.

After she had been in the kitchen for several minutes defendant heard some people hollering across the street and went back to the room. Her account of the events which followed is quoted below:

"My child was in the hallway. I pushed the door open and the room was on fire and my husband was lying on the floor on fire. I did not see the kerosene heater at this time but the kerosene jug had been spilled over on the floor. The kerosene jug had rolled over in the front of the wood heater. The only place that was on fire at that time was the floor and Donnie. The South wall against the kitchen was not on fire at that time. I picked up the kerosene jug and took it to the kitchen and picked up two water jugs and went back to the burning room. When I got to the door of the room a man and a woman came in and asked if there was anybody else in the house. I asked the people for help and I wanted to pour the water on my husband but the man would not let me because he said he was on fire. I do not remember who the man was but I know it was not James Spencer. Mrs. Annie Clayton picked up my son and took him outside. The man pulled me by the arm outside and I laid the water jugs down. The last time I saw my husband he was lying on the floor."

On cross-examination defendant said, "[W]hen I heard some people in the street hollering something about a fire, I ran back to our room and I saw Donnie lying on his stomach on the floor and his clothes were on fire. When I walked in the room I saw the keorsene jug turned over in front of the wood heater. I picked up the jug and took it out of the room. . . . There was no fire immediately around the jug. I did not see any kerosene spilled on the floor. . . ."

Defendant testified that she did not "remember making any statement like the one Officer Satterthwaite said [she] made"; that she was crying, shaky, and very upset at that time. She did remember telling both Officer Smith and Dr. Boyette that she and defendant were fighting and that she hit him with the axe. She said, however, that she only swung one time and that she had also

told Officer Smith about Donnie beating her head against the bed and wall. She denied pouring any kerosene on Donnie.

After defendant's arrest on 9 January 1977 she remained in the Beaufort County jail until her sister, Mrs. Thomas from Norfolk, posted bail for her on January 30th. On that day she went to Norfolk where she remained until she was returned to the Beaufort County jail after Donnie's death.

Mrs. Thomas testified that when she visited defendant in jail on January 10th she saw "scars or finger marks" on her neck and bruises on her stomach. She also observed that defendant's lip was split inside her mouth.

The State's rebuttal evidence consisted of the testimony of Captain Smith and Iris Leary, a female police officer. Captain Smith testified that on January 9th he was in defendant's presence at the jail for two and one-half hours and that he observed no scars on defendant's person. He did see "two small dots around defendant's right eye," which might have been skinned places. Officer Leary testified that she conducted a "strip search" of defendant at the jail on January 9th and that she observed no bruises, cuts, or abrasions on her body, neck or face. Defendant made no complaints about having been injured.

Other facts pertinent to decision will be stated in the opinion.

Attorney General Rufus L. Edmisten and Special Deputy Attorney General William F. O'Connell for the State.

Franklin B. Johnston for defendant appellant.

SHARP, Chief Justice.

In appellant's brief counsel has grouped seventy-four assignments of error within the framework of eight questions. Of these questions we will consider only three. The other five encompass assignments which are either patently without merit or challenge miniscule errors which are harmless beyond a reasonable doubt. Any discussion of these questions would necessarily be (1) a mere repetition of the well-established rules regarding the sound discretion of the trial judge as to the allowance of leading questions and the scope of cross-examination, and (2) a wordy demonstration that the testimony challenged as

"opinion evidence" is actually a "shorthand statement of fact," and that the statements alleged to be hearsay are in fact spontaneous utterances, declarations accompanying an act, or a part of the *res gestae*. In this case, we have decided not to add to the surplusage of such discussions already in the books.

[1] We first consider the questions challenging the trial judge's rulings admitting in evidence defendant's incriminating statements which Officer Satterthwaite testified were made to him at the scene of the fire and which Captain Smith testified defendant made to him at the police department. When defendant objected to the introduction of these statements Judge Small properly conducted a *voir dire* at which he heard the testimony of both the officers and defendant.

The testimony which Satterthwaite gave before the jury with reference to defendant's statement to him, and the circumstances under which it was made, is set out in our preliminary statement of the evidence. His testimony on *voir dire* was substantially the same. Defendant, however, testified that she had no recollection of making any statement to Satterthwaite except a request that he take her to the hospital. Judge Small, however, found the facts in accordance with Satterthwaite's testimony and permitted him to relate to the jury what defendant said to him when he encountered her at the scene of the fire. *See State v. Harris*, 290 N.C. 681, 693-94, 228 S.E. 2d 437, 444 (1976).

Defendant's statements to Satterthwaite at the scene of the fire were clearly admissible. She was not in custody when she approached Satterthwaite and volunteered the statements in question. Therefore, neither *Miranda* warnings nor the correlative waiver of rights were necessary prerequisites to admissibility. *State v. Strickland*, 290 N.C. 169, 184, 225 S.E. 2d 531, 542 (1976). Further, "volunteered and spontaneous statements made by a defendant to police officers without any interrogation on the part of the officers are not barred in any theory of our law." *State v. Biggs*, 292 N.C. 328, 334, 233 S.E. 2d 512, 515 (1977). *Accord, State v. Bell*, 279 N.C. 173, 181 S.E. 2d 461 (1971). Nor did Satterthwaite's request for an explanation as to "what she meant by that statement," transform the situation into an interrogation necessitating warnings or waivers. *State v. McZorn*, 288 N.C. 417, 432-33, 219 S.E. 2d 201, 211 (1975), *death sentence vacated*, 428

U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *State v. Haddock*, 281 N.C. 675, 682, 190 S.E. 2d 208, 212 (1972).

As to the statements which Captain Smith testified defendant made to him at the police station, she denied only that she told him she hit Donnie twice with the axe. She insisted she told Smith that after Donnie had beaten her head against the bed and the wall she hit him *once* with the axe.

Upon direct examination on *voir dire* defendant testified, "the first thing he [Captain Smith] did was to read my Miranda rights." She also testified, "I told Officer Smith that I wanted to make a statement to him but I did not understand that I had a right to have an attorney present at that time." Notwithstanding, on cross-examination, she testified, "I understood that I did not have to say anything if I did not want to. . . . I knew that I could have a lawyer. I told Officer Smith I guess I understand my rights. As far as I can remember, I guess I agreed to make these statements without the presence of an attorney."

Captain Smith also testified on *voir dire* that before asking defendant any questions he read her the *Miranda* warning and then asked her if she understood each of her rights. She said that she did, but requested him to "repeat the number six item." Accordingly, he said to her again, "[I]f you decide to answer questions now without a lawyer present you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." Smith then asked her once more if she understood. She said she did understand, and upon being asked whether she wished to make a statement without her attorney being present, she replied, "Yes, sir." In response to a specific inquiry Smith said, "I did not promise her anything or threaten or coerce her in any way to make a statement."

At the completion of the *voir dire*, Judge Small rejected defendant's contention that she was obviously "scared and confused and any statements made by her to police officers without the aid and counsel of any attorney should have been suppressed." He found that prior to interrogation Smith had fully advised defendant of her constitutional rights as required by the *Miranda* decision and that she fully understood her rights; that no officer offered her any inducement to talk or made any threat or

show of violence. His conclusion that "defendant intentionally, freely, voluntarily, knowingly and understandingly waived each of her constitutional rights prior to making a statement to Captain Smith . . . on 9 January 1977" is supported by plenary competent evidence. His findings and conclusions are, therefore, binding upon this Court. *State v. Williams*, 289 N.C. 439, 443, 222 S.E. 2d 242, 245, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 45 (1976); *State v. Simmons*, 286 N.C. 681, 692, 213 S.E. 2d 280, 288 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 1208, 96 S.Ct. 3207 (1976).

[2] We next consider defendant's assignment that the court erred in refusing to grant her motion for a directed verdict of not guilty at the close of all the evidence. To this assignment we apply the long-established rule that in a criminal case upon a motion for nonsuit or directed verdict, the evidence is to be considered in the light most favorable to the State, which is entitled to the benefit of every reasonable inference of fact deducible from the evidence. *State v. Hall*, 293 N.C. 559, 561, 238 S.E. 2d 473, 474-75 (1977). The court is not concerned with the weight of the testimony but only with its sufficiency to sustain the indictment. Thus, if there is any evidence from which the jury could find that the defendant committed the offense charged, the motion should be overruled. The test of the sufficiency of the evidence to withstand a motion for a directed verdict is the same whether the evidence is direct, circumstantial, or both. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E. 2d 156, 157 (1971).

Relating these principles to the evidence before us, we hold that the trial judge correctly denied defendant's motion for a directed verdict. The evidence adduced is sufficient to show the following facts:

On the afternoon of 9 January 1977, after a fight in the bedroom with deceased, Donnie Freeman, during which he beat her head against the bed and wall of their bedroom and threatened to kill her, defendant hit him twice with an axe. The blows broke deceased's right jaw, knocked out several teeth, and loosened several others. Thereafter, attracted by smoke coming from defendant's house, James Spencer peered into the bedroom window and saw Donnie lying in bed on his back surrounded by fire. Both Donnie and the bed were burning. Donnie was mumbling

and defendant was looking at him as she stood against the wall by the door, her baby on her hip. In the room only the area by the bed was burning. Upon seeing this sight, Spencer ran into the house. Observing a "foot tub" half full of water by the door, he told defendant to pour the water on Donnie and he would go call the fire department. She made no reply. Spencer left the house and told a neighbor to call the fire department. He then returned to the house. Spencer's sister, Mrs. Clayton, who had not gone into the house with him the first time he entered, came in after he had returned from the neighbor's. This time he went to the door but did not go into the bedroom because there was too much smoke.

When Mrs. Clayton entered the house she saw Donnie lying on his back in the bed, his clothes burning. Although afraid to enter the room because of the smoke, she called to Donnie to "crawl out," and when he started to get up she left the house. Mrs. Clayton never saw defendant in the house, but when she left the house she did see her in the yard.

Officer Satterthwaite arrived at the Freeman residence three minutes after receiving the report of the fire. At that time he observed Donnie crawling from the doorway. He immediately sent him to the hospital, where Donnie arrived semiconscious and severely burned over 80% of his body.

Other testimony from State's witnesses also tended to show that in the early stages of the fire the area by the bed on which Donnie was lying was the only portion of the room on fire, the most extensive burning then being on the bed; that the top layers of the mattress were badly burned; and that there was no sign of burning on the floor around the heater or the wall behind it.

The State's theory of this case is that defendant intentionally, unlawfully and maliciously struck her husband about the head with an axe, thereby inflicting serious injuries upon him; that while he lay stunned or unconscious on the bed she set him on fire after having poured kerosene on his clothing and on the bed; that, in consequence, he received the extensive burns which caused his death.

Defendant's statements to Officers Satterthwaite and Smith, as well as her own testimony, are pertinent to an evaluation of

the State's evidence and its theory of the prosecution. *Inter alia*, she told Satterthwaite that as Donnie lay unconscious *on the floor*, his clothes burning, she tried to drag him from the burning room. He was too heavy for her to move, however, and she could persuade no one to go into the burning room to help her. She told Captain Smith that during the struggle in which she hit Donnie with the axe "*one or the other* knocked the jug over and kerosene spilled on the floor and started blazing." (Italics ours.) She also stated to him that she ran out leaving Donnie on the floor with his shirt on fire after she and an unknown man had tried unsuccessfully to get him out of the house "but could not because Donnie was on fire."

All the evidence tends to show that immediately before and at the time the fire started defendant and Donnie were the only persons, except for defendant's small baby, in the house. Moreover defendant concedes: (1) that she struck Donnie with an axe at a time when there was nothing to keep her from running out the door into the public street except that she was "scared"; (2) that after she struck Donnie he was lying face down, helpless on the floor, his clothes on fire, and at that time the only fire in the room was on Donnie and the floor; (3) that she did not use available water to extinguish the fire which was burning Donnie and his clothes; and (4) that she did not drag him approximately nine feet into the hall because he was "too heavy." She denies that at the time James Spencer and his sister came into the house Donnie was lying on the bed and insists that the last time she saw him he was lying on the floor.

The State's evidence, however, tends to show: (1) that Donnie was on his back on the burning bed in the room where defendant struck him and where she said he fell unconscious to the floor; (2) that defendant was standing just inside the bedroom looking at him as he lay on the bed in flames; (3) that when all the fire was extinguished the mattress was "burned about half way down from the top"; and (4) that the floor where defendant said Donnie fell and was lying in flames was not burned, the only evidence of fire at that spot being cinders which had fallen from the ceiling.

From the foregoing it is clear that both circumstantial evidence and the direct testimony of State's witnesses contradicted the exculpatory assertions contained in defendant's

statements to the officer. Contrary to defendant's contentions, therefore, the introduction of these statements did not preclude the State from showing that facts concerning the crime charged were different from defendant's version. The rule is that "the introduction by the State of an exculpatory statement made by a defendant does not preclude the State from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the State contradicts or rebuts defendant's exculpatory statement." *State v. May*, 292 N.C. 644, 658, 235 S.E. 2d 178, 187 (1977), *cert. denied*, --- U.S. ---, --- L.Ed. 2d ---, --- S.Ct. --- (----).

The State's evidence, taken as true, is sufficient to negate defendant's contention that Donnie fell on the floor by the heaters when she struck him; that his fall accidently upset a jug of kerosene which was nearby; that the kerosene was ignited from the wick of the oil heater; and that Donnie was burned as he lay there on the floor. Circumstantial evidence will also support a finding that Donnie's clothing was ignited on the bed where Spencer and Mrs. Clayton saw him lying in flames and that defendant, as the only other occupant of the house at the time, started that fire.

We hold that the evidence in this case was sufficient to sustain defendant's conviction of murder in the second degree. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975); *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977); *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971).

[3] Finally, we consider defendant's two assignments of error relating to the court's instructions to the jury. The first, "that the trial court committed reversible error . . . by failing to adequately define proximate cause to the jury," is a "broadside" which ignores the following requirement of N.C. App. R. 10(b)(2): "An exception to the failure to give particular instructions to the jury . . . which was not specifically requested of the trial judge shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given. . . ." We interpret this rule to mean that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, sub-

stantially supply the omission which he contends rendered the charge insufficient. Notwithstanding defendant's failure to comply with this rule, we have carefully examined the charge and we find it to be entirely adequate on proximate cause.

[4] At the beginning of his charge the judge correctly defined proximate cause as "a real cause, a cause without which Donnie Freeman's death would not have resulted." Thereafter, in his mandate with reference to second degree murder (the crime of which defendant was convicted), the judge instructed the jury as follows: "[I]f you find from the evidence beyond a reasonable doubt that on or about January 9, 1977 the defendant, Sebrina Davis Freeman, struck her husband with an axe and thereafter set him and his clothing on fire with malice and without lawful justification and excuse, as I have defined that term to you, thereby proximately causing the death of Donnie Freeman, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder." In his mandates on first degree murder and manslaughter, the other offenses included in the indictment drawn under G.S. 15-144, the judge gave practically identical charges with reference to proximate cause.

It is inconceivable that the jurors did not fully understand that before they could convict defendant of any degree of murder or of voluntary manslaughter, they first had to be satisfied beyond a reasonable doubt that Donnie died as the result of burns which defendant had intentionally and unlawfully inflicted upon him. In view of the stipulation that the burns which Donnie received on 9 January 1977 "were the direct and proximate cause" of his death, the crucial question in the case was whether defendant intentionally and unlawfully caused the burns.

[5] Defendant's other objection directed to the judge's instruction is set out in her assignment No. 63. In stating the State's contentions the judge incorrectly stated that the State contended James Spencer and Mrs. Clayton, after looking into the window and seeing Donnie lying in flames on the cot, went into the house where *they* saw defendant holding her baby and standing in the room where her husband lay burning. In fact, the State did not

contend that *both* Spencer and Mrs. Clayton saw defendant standing in the room. Spencer testified that his sister, Mrs. Clayton, was not with him when he looked into the window and went in the house the first time; that she was in the house after he went to call the fire department. Mrs. Clayton testified that when she looked in the window and after she went into the house she saw the man lying on the bed burning; she said she had no recollection of ever seeing defendant in the house. Upon leaving the house she then saw defendant outside in the yard.

Notwithstanding, under the circumstances here disclosed, the court's inaccurate statement of the State's contention with reference to Mrs. Clayton's testimony cannot be regarded as of sufficient consequence to have affected the verdict. This must also have been defense counsel's view of the inaccuracy since he did not call the judge's attention to the misstatement at the time it was made. *See State v. McAllister*, 287 N.C. 178, 185, 214 S.E. 2d 75, 81 (1975); *State v. Tart*, 280 N.C. 172, 184 S.E. 2d 842 (1971); *State v. Cornelius*, 265 N.C. 452, 144 S.E. 2d 203 (1965). Before the inadvertent misstatement occurred the judge had made it quite clear that he was stating contentions. Further, at the conclusion of the charge, he told the jurors that his references to the testimony had not been made for the purpose of refreshing their recollections, and it was their duty to recall all the evidence. As Justice Lake noted with reference to a similar situation in *State v. Thomas*, 292 N.C. 527, 540, 234 S.E. 2d 615, 623 (1977): "We do not think that this variance between the evidence and the judge's summary of it was of any substantial consequence, but, in any event, it is sufficient to note that neither defendant called this error to the attention of the court before the jury retired to consider its verdict. Their failure to do so renders this assignment of error of no avail."

When the charge is read as a whole, it is clear that the trial judge gave defendant the benefit of every defense and principle of law to which she was entitled. He fully stated and correctly applied the law to the evidence tending to sustain her contentions that she struck her husband with the axe in lawful self defense; that he did not die from that blow, which felled him, but from burns accidently received thereafter; that in falling he had upset a jug from which kerosene was accidently ignited by the burning wick of a portable heater; that deceased's clothing then caught

fire but, because of his weight, and the fire and smoke in the room, she was unable either to extinguish the fire on him or to pull him from the burning room.

Finally, in his charge, the judge emphasized the fact that before the jury could convict defendant of any crime encompassed by the indictment the State must have satisfied each juror beyond a reasonable doubt of every element of that crime, and—by the same token—the State must have negated beyond a reasonable doubt every defense upon which defendant had relied. He also charged as follows with reference to accident: "If Donnie Freeman died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. Her assertion of accident is merely a denial that she had committed any crime. The burden remains on the State of North Carolina to prove defendant's guilt beyond a reasonable doubt."

From our examination of the record we conclude that defendant has received a fair trial, free from prejudicial error. Her conviction of second degree murder is therefore sustained.

No error.

STATE OF NORTH CAROLINA v. PAUL WILFRED JOHNSON

No. 46

(Filed 6 June 1978)

1. Homicide §§ 27.1, 28.3— voluntary manslaughter—malice—excessive force while defending self—jury instructions improper

Where the trial court instructed, in effect, that defendant should be convicted of voluntary manslaughter if (1) due to the State's failure to carry its burden of proof, the jury had a reasonable doubt that defendant killed his victim "with malice because of the heat of passion," or (2) if the State failed to satisfy the jury beyond a reasonable doubt that defendant used excessive force while exercising his right of self-defense, defendant is entitled to a new trial, since the first part of the instruction was ambiguous and the second part was manifestly erroneous.

2. Criminal Law § 101.4— conversation between third person and juror—when new trial required

Generally speaking, a defendant is not entitled to a new trial because of a conversation between a juror and a third person unless the conversation is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.

3. Criminal Law § 101.4— comments to jurors by bailiff—new trial required

Comment made by the bailiff, who was in charge of the sequestered jury throughout each day during court hours, after the jury had received the case, that "he was proud or glad that the district attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County," constituted misconduct which was sufficiently gross and likely to cause prejudice to defendant that a new trial must be had, since the quality of investigation made by the sheriff and his deputies, and their credibility, were contested matters, and the remarks were calculated to harm defendant by impressing the case upon the minds of the jurors in a different aspect than was presented by the evidence in the courtroom.

ON certiorari to the Court of Appeals to review its decision, 34 N.C. App. 328, 238 S.E. 2d 313 (1977), finding no error in the trial before *Hasty, J.*, at the March 1977 Session of SWAIN Superior Court but remanding the case for a hearing on defendant's motion for a new trial.

The bill of indictment charges defendant with first degree murder of Clyde Junior Tabor on 15 January 1977 in Swain County.

The State's evidence tends to show that Clyde Junior Tabor, driving a 1971 blue Plymouth, left his home in Murphy on Saturday afternoon, 15 January 1977, to go to Bryson City to pick up an oil tank. He arrived at the home of Larry Joe Nance at about 2:40 p.m. where he remained until about 3:25 p.m. during which time he made a telephone call.

At approximately 4 p.m. on said date the dead body of Tabor was found lying in the snow in the Euchella Cemetery about 25 feet from his car, the engine of which was still running. There were footsteps in the snow all around the body and leading up a bank into a wooded area. There was blood on Tabor's face and under his body and also between the body and the car.

Sheriff Wiggins was called and while driving to the cemetery about 4:45 p.m. he saw defendant coming out of the woods with a revolver in a holster strapped to his belt. The sheriff had known defendant for several years and stopped to inquire why defendant was carrying a gun. Defendant said he was hunting and, upon the sheriff's request, gave the gun to him. Defendant got into the car and the sheriff stated that he didn't know what was going on at the cemetery. Defendant then said he intended to call the sheriff and turn himself in; that "he [Tabor] made a phone call and was going to meet my daughter out here, and I shot him. . . . I told him what I was going to do if he didn't leave us alone." Upon arriving at the cemetery the sheriff learned that Tabor had been shot and was dead. His body was still lying in the snow. The sheriff turned defendant over to other officers who took him to Bryson City where he was placed under arrest.

Sheriff Wiggins traced footsteps in the snow leading from the cemetery into the woods and followed them to the point where he had picked up the defendant. While tracing the steps he discovered the butt of a rifle sticking out of the snow in a fence row of kudzu vines. It was later determined that the bullet which killed Clyde Junior Tabor was fired from this rifle. Tests indicated that the rifle was less than four feet but more than two feet from the decedent at the time it was fired.

It was determined by autopsy that Clyde Junior Tabor died from loss of blood secondary to a gunshot wound in his chest and abdomen. His blood contained .15 percent alcohol, and in the opinion of the pathologist the decedent was intoxicated at the time of his death.

The State offered evidence to the effect that in September 1976 defendant had threatened the life of the decedent in the presence of decedent's mother and Deputy Sheriff Terry Crisp.

Defendant testified in his own behalf and offered other witnesses as well. His evidence tends to show that he had undergone surgery on his right eye for removal of a cataract on 1 December 1976 and his physical activities had been restricted by his physician. He denied having had any trouble with the decedent except for a few words on one occasion. On Saturday afternoon, 15 January 1977, defendant decided to go hunting and his wife drove him to the side road leading to the cemetery. At that

time he had a revolver and a .22 caliber rifle. He got out of the car, walked down the road leading to the cemetery and saw a blue car arriving but did not know who was driving it. The driver got out and left the motor running. At that time defendant recognized Clyde Junior Tabor. Tabor said he was going to kill him. A scuffle began and Tabor hit defendant over the head with something. Defendant then struck Tabor with the rifle. As they scuffled defendant's nose was smashed and began bleeding. During the fight defendant struck Tabor over the head with the rifle and stepped back, whereupon Tabor reasserted that he intended to kill defendant, made a dive for him, and defendant shot Tabor in self-defense.

Defendant testified that he then walked from the cemetery to Highway 19, hiding the rifle in the snow along the way because he was concerned that J. C. Tabor might happen along and see him. Upon reaching Highway 19 he saw the sheriff and told him he was the man he was looking for. The sheriff asked about the gun he was carrying and he surrendered it to the sheriff. Defendant denied telling the sheriff anything about a phone call or stating what he would do to Tabor if he didn't leave his daughter alone. He further denied telling the sheriff that he shot Tabor.

Trial of this case commenced on Monday, 7 March, and the verdict was returned and the jury discharged on Thursday afternoon, 10 March 1977 at 4:22 p.m. After the jury had been selected and empaneled the trial judge entered a written sequestration order which was read in open court and a copy delivered to each juror, each alternate juror, all counsel, and to Windell A. Crisp, a part-time Special Deputy Sheriff of Swain County who was appointed jury officer and placed in charge of the jury for the duration of the trial. Officer Crisp was dressed as a Deputy Sheriff of Swain County, wearing a uniform indistinguishable from the uniforms worn by Sheriff Wiggins and Deputy Sheriff Terry Crisp, the apparel including a shoulder patch, badge, name plate, gun and ammunition.

Under the sequestration order the jury was released at night but kept in custody of the jury officer during court hours. The order directed that: (1) the jury officer keep all jurors together and permit no person directly or indirectly, by voice, writing or otherwise, to approach or contact any of them; (2) the jurors talk

to no one and let no one talk to them about the case; and (3) the jurors permit no one to comment on the trial to them or in their presence and neither acquire nor attempt to acquire information or intelligence about the case from an outside source.

The trial judge submitted as permissible verdicts: guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter, or not guilty. At 4:22 p.m. on Thursday afternoon, 10 March 1977, the jury returned a verdict of guilty of voluntary manslaughter after which the jury was duly polled and excused. Shortly thereafter defendant was sentenced to imprisonment for a term of not less than twelve nor more than fifteen years and notice of appeal was given in open court. That term of Swain Superior Court duly expired by law on Saturday, 12 March 1977.

Around 5 p.m. on Friday, 11 March 1977, defense counsel first learned that the jury officer had allegedly gone into the jury room after the jury retired to deliberate and, in the presence of the twelve jurors, made the statement that "he was glad the State took up for the law enforcement officers instead of tearing them down like the defense did," as contained in the affidavit of Juror Bruce M. Medford, or "he was glad or appreciated or was proud that the attorney had commented on upholding the actions of the officers in the investigation of the case," as contained in the affidavit of Juror R. A. Patillo.

Based on the affidavits of the two jurors defendant filed a motion in the cause on Monday, 14 March 1977, to vacate the judgment, set aside the verdict and grant defendant a new trial.

On 15 March 1977 the district attorney who represented the State in this prosecution filed an answer to defendant's motion stating, among other things: "It is expressly denied that the jury officer Windell A. Crisp at any time made any comments to the jury or any member thereof on 'the case and the evidence'; it is not denied that on one occasion the jury officer, Windell A. Crisp made a comment in the presence of one or more members of the jury in substance that he was proud or glad that the District Attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County. . . ."

In connection with the district attorney's answer, the jury officer, Windell A. Crisp, filed an affidavit stating, among other things, that he "at one time did make a statement in the presence of one or more jurors that 'I am glad Marcellus stood up for law enforcement'; . . . and your affiant verily believes and recalls that said statement was made at Sneed's Restaurant at lunch on Thursday to the best recollection of your affiant."

The motion came on for hearing in another county on 28 March 1977 before Judge Hasty who, being of the opinion that the court was without jurisdiction to entertain and pass upon the motion, denied and dismissed it. Defendant in apt time appealed therefrom.

As soon as the record on appeal was certified to the Court of Appeals, defendant petitioned that court for certiorari to bring up for review Judge Hasty's order denying the motion for a new trial and, at the same time, renewed in the Court of Appeals his original motion for a new trial. Prior to oral argument the Court of Appeals withheld ruling on defendant's petition for certiorari and, after oral argument, dismissed the petition and the motion for a new trial filed in that court, stating that the questions presented therein were being considered in the appeal of the case. Thereafter, in its decision rendered on the merits, the Court of Appeals overruled all assignments of error and found "No Error in the Trial." With respect to the misconduct of the jury officer, the case was remanded to the Superior Court of Swain County for a hearing on defendant's motion for a new trial initially filed in that court and for findings as to whether there was any irregularity by which defendant was prevented from having a fair trial. To that end Judge Hasty's order dismissing defendant's motion for a new trial was vacated.

Defendant gave notice of appeal to the Supreme Court and also petitioned for discretionary review under G.S. 7A-31. We allowed the petition and denied the State's motion to dismiss the appeal.

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

Herbert L. Hyde and G. Edison Hill, attorneys for defendant appellant.

HUSKINS, Justice.

[1] We first consider defendant's assignment of error which challenges the following excerpt from the charge:

> "If you find from the evidence beyond a reasonable doubt that on or about January 15, 1977, Paul Wilfred Johnson intentionally and without justification or excuse, fired a .22 caliber shot into the body of Clyde Junior Tabor with the rifle offered and received into evidence as State's Exhibit 9 thereby proximately causing Clyde Junior Tabor's death, but the State has failed to satisfy you beyond a reasonable doubt that the defendant killed with malice because of the heat of sudden passion, or while exercising the right of self defense he used excessive force, it would be your duty to return a verdict of guilty of voluntary manslaughter."

When properly analyzed, this excerpt from the charge says: (1) If, due to the State's failure to carry its burden of proof, the jury has a reasonable doubt that defendant killed his victim "with malice because of the heat of passion," defendant should be convicted of voluntary manslaughter; or (2) if the State has failed to satisfy the jury beyond a reasonable doubt that defendant used excessive force while exercising his right of self-defense, defendant should be convicted of voluntary manslaughter. The first portion of the excerpt is ambiguous and subject to various interpretations—some permissible, others not. The second portion is manifestly erroneous. In view of the fact that defendant was convicted of voluntary manslaughter, a new trial is mandatory. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974). *Compare State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

We are inclined to think that the confusing instruction attributed to the able trial judge was erroneously transcribed. Even so, the record imports verity and we are bound by the record as certified. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975); *Rogers v. Rogers*, 265 N.C. 386, 144 S.E. 2d 48 (1965).

One remaining assignment merits discussion at this time.

Defendant assigns as error the denial of his motion for a new trial based upon the alleged misconduct of the jury officer in commenting to the jury after it had retired to deliberate on its ver-

dict, in substance, "that he was proud or glad that the district attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County."

[2] While courts are zealous in protecting litigants against improper influences exerted by court officers and other persons who are strangers to the litigation, "the rule sustained by the great weight of authority is that a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for a new trial by the accused in a criminal case as well as of applications made in civil actions. Clearly, a conversation between a juror and a third person which is of a harmless character, unrelated to the matter in issue, and not tending to influence or prejudice the jury in their verdict, will not afford cause for a new trial. . . . [A]nd if a trial is clearly fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. Generally speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person *unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.* The matter is one resting largely within the discretion of the trial judge." (Emphasis added.) 58 Am. Jur. 2d, *New Trial*, § 109 (1971). This statement is quoted with approval in *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962), and is quoted and applied to the conduct of an erring bailiff in *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

Ordinarily, motions for a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court, and unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed. *State v. Sneeden, supra; O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321 (1965); *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19 (1957). "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct.

When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915).

[3] We are of the opinion, however, that the remarks of the bailiff to the jurors were of such character as to require a new trial as a matter of law. The jury was sequestered and in the bailiff's charge throughout each day during court hours. The State admitted in its answer that the officer commented to some of the jurors, after the jury had received the case, that "he was proud or glad that the district attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County." The quality of the investigation made by the sheriff and his deputies, and their credibility, were contested matters and thus gave pointed significance to the comments. The improper remarks violated Judge Hasty's order that the jurors permit no one to comment to them on the trial and that the bailiff permit no person, directly or indirectly, to contact any of the jurors. The gratuitous communication by the bailiff to the jurors appears to have been calculated to result in harm to the defendant by impressing the case upon the minds of the jurors "in a different aspect than was presented by the evidence in the courtroom." We therefore are of the opinion, and so hold, that the bailiff's admitted remark constituted misconduct which was sufficiently gross and likely to cause prejudice to defendant that a new trial must be had. *See Parker v. Gladden*, 385 U.S. 363, 17 L.Ed. 2d 420, 87 S.Ct. 468 (1966). *Compare State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

Procedurally speaking, the motion here could not be addressed to the trial court because Judge Hasty's judgment of imprisonment entered on 10 March 1977 was a final judgment from which defendant immediately appealed to the Court of Appeals. This appeal from the final judgment took the case out of the jurisdiction of the superior court, and, *after the term expired*, Judge Hasty was *functus officio* to consider defendant's motion for a new trial because of the alleged misconduct of the bailiff. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962); *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971). The Court of Appeals correctly held that Judge Hasty was without jurisdiction to hear and pass upon the motion. It erred, however, in failing to pass upon the merits of defendant's motion for a new trial. Pend-

ing the appeal and after the adjournment of the term of court at which the judgment was rendered, jurisdiction was in the Court of Appeals and defendant's motion for a new trial was properly before that court. Inasmuch as the bailiff's admitted communication to the jurors was of such character as to require a new trial as a matter of law, the Court of Appeals should have ordered a new trial rather than remanding the case to the Superior Court of Swain County for a hearing and findings on the motion and a discretionary determination by that court.

Defendant's remaining assignments are not likely to recur on retrial and we deem it unnecessary to discuss them.

For the reasons stated the decision of the Court of Appeals finding no error in the trial is reversed and the case is remanded to the Superior Court of Swain County for a

New trial.

IN THE MATTER OF JAMES SHELTON BANKS

No. 44

(Filed 6 June 1978)

1. **Statutes § 10— construction of criminal statute**

While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress.

2. **Statutes §§ 5.1, 5.6— construction of statute—ambiguous or unambiguous language**

When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein; but where a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent.

3. **Statutes § 5.9— construction of statute—purpose**

Where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

4. **Obscenity § 4— "Peeping Tom" statute—judicial interpretation—constitutionality**

The statute making it a crime to "peep secretly into any room occupied by a female person," G.S. 14-202, prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy, and as so interpreted the statute is sufficiently definite to give an individual fair notice of the conduct prohibited so that it does not violate Article I, § 19 of the N.C. Constitution or the Due Process Clause of the U.S. Constitution by reason of vagueness and uncertainty.

5. **Obscenity § 4— "Peeping Tom" statute—constitutionality**

The statute making it a crime to "peep secretly into a room occupied by a female person," G.S. 14-202, is not so overbroad as to proscribe innocent and legitimate conduct when narrowed by judicial interpretation to require that the act condemned must be a spying for the wrongful purpose of invading the privacy of a female occupant of the room.

ON respondent's petition for discretionary review, prior to determination by the Court of Appeals, of order entered by *Gentry, J.*, on 21 September 1977 in GUILFORD District Court.

On 2 September 1977 a juvenile petition was filed against James Shelton Banks, a minor, alleging that he had violated G.S. 14-202 in that he did "unlawfully and wilfully peep secretly into a room occupied by Alvalena Manring, a female person." Prior to the introduction of evidence Banks' attorney moved to dismiss the petition for the reason that G.S. 14-202 is unconstitutional in that it is "overly broad" and "void for vagueness." On 21 September 1977 Judge Gentry found the statute unconstitutional "on the grounds listed" and dismissed the proceeding.

We allowed petition for discretionary review prior to determination by the Court of Appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Joan H. Byers for the State, appellant.

Public Defender Wallace C. Harrelson, and Assistant Public Defender Michael F. Joseph for respondent appellee.

MOORE, Justice.

The State argues that the trial court erred in ruling that G.S. 14-202, the so-called "Peeping Tom" statute, is unconstitutional. Respondent, however, contends that this statute is unconstitutional for two reasons. First, that it is unconstitutionally vague,

because "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926).

G.S. 14-202 provides:

> "*Secretly peeping into room occupied by female person.*—Any person who shall peep secretly into any room occupied by a female person shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court."

The requirement that a statute be couched in terms of appropriate definiteness has been referred to as a fundamental common law concept. *Pierce v. United States*, 314 U.S. 306, 86 L.Ed. 226, 62 S.Ct. 237 (1941). Early in the last century this Court, in *Drake v. Drake*, 15 N.C. 110 (1833), said:

> "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it, be itself intelligible. . . ." *See also State v. Partlow*, 91 N.C. 550 (1884).

This requirement of definiteness has in this century been declared an essential element of due process of law. *See Connally v. General Construction Co., supra.* Several United States Supreme Court cases indicate that the evils remedied by the definiteness requirement are the lack of fair notice of the conduct prohibited and the failure to define a reasonably ascertainable standard of guilt. *See Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618 (1939); *Connally v. Construction Co., supra; cf.* Note, "The Void-For-Vagueness Doctrine In The Supreme Court," 109 U. Pa. L. Rev. 66, 77 (1960). In present case respondent does not advance a strict vagueness argument based on the lack of intelligibility of the terms employed in the challenged statute. Instead, he argues that the statute cannot mean what it says, since, if taken literally, it would prohibit much conduct which the legislature clearly did not intend to include. Its intended scope is therefore indefinite and reasonable men could differ as to its application. Thus, concludes defendant, the statute is unconstitutionally vague.

In passing upon the constitutionality of the statute, we begin with the presumption that it is constitutional and must be so held unless it is in conflict with some constitutional provision of the State or Federal Constitutions. *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963); *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 (1960); *State v. Lueders*, 214 N.C. 558, 200 S.E. 22 (1938). A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality. *Smith v. Keator*, 285 N.C. 530, 206 S.E. 2d 203, (1974); *State v. Frinks*, 284 N.C. 472, 201 S.E. 2d 858 (1974); *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E. 2d 902 (1966).

[1, 2] Criminal statutes must be strictly construed. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967); *State v. Brown*, 264 N.C. 191, 141 S.E. 2d 311 (1965). But, while a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. *State v. Brown*, 221 N.C. 301, 20 S.E. 2d 286 (1942); *State v. Hatcher*, 210 N.C. 55, 185 S.E. 435 (1936). The intent of the legislature controls the interpretation of a statute. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975), and cases cited therein. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974). But when a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, *State v. Humphries*, 210 N.C. 406, 186 S.E. 473 (1936), and the courts will interpret the language to give effect to the legislative intent. *Ikerd v. R.R.*, 209 N.C. 270, 183 S.E. 402 (1936). As this Court said in *State v. Partlow*, 91 N.C. 550 (1884), the legislative intent ". . . is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. . . ." Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its

adoption, *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967); earlier statutes on the same subject, *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964); the common law as it was understood at the time of the enactment of the statute, *State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944), 157 A.L.R. 441; and previous interpretations of the same or similar statutes, *cf. Wainwright v. Stone*, 414 U.S. 21, 38 L.Ed. 2d 179, 94 S.Ct. 190 (1973).

[3] Finally, it is a well settled rule of statutory construction that, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970); *see* 12 Strong, N.C. Index 3d, Statutes § 5.9, and cases cited therein. Where possible "the language of a statute will be interpreted so as to avoid an absurd consequence. . . ." *Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E. 2d 1, 5 (1966).

On the subject of the constitutional challenge of a statute for indefiniteness, the United State Supreme Court has said, in *Boyce Motor Lines v. United States*, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329 (1952):

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

See also State v. Hales, 256 N.C. 27, 122 S.E. 2d 768 (1961); *State v. Morrison*, 210 N.C. 117, 185 S.E. 674 (1936).

In *Wainwright v. Stone*, *supra*, where defendant challenged the Florida "Crime Against Nature" statute on grounds of

vagueness, the United States Supreme Court, in upholding the constitutionality of the statute, held that the judgment of federal courts as to the vagueness of a state statute must be made in the light of prior state constructions of the statute. This holding implies that a statute challenged on the grounds of impermissible vagueness should not be tested for constitutional specificity in a vacuum, but should be judged in the light of its common law meaning, its statutory history and the prior judicial interpretation of its particular terms.

Applying the foregoing principles, we now turn to an examination of G.S. 14-202, commonly known as the "Peeping Tom" statute. The statute apparently was derived from the common law crimes of common nuisance and eavesdropping. *See* IV Blackstone 166, 168. The words "Peeping Tom" have a commonly understood meaning in this country as being one who sneaks up to a window and peeps in for the purpose of spying on and invading the privacy of the inhabitants. See, for instance, Ga. Code, § 26-3002; 70 C.J.S. p. 384.

Our statute, passed by the General Assembly in 1923, makes it a crime to "peep secretly." This Court has had the occasion to deal with this statute in four prior cases: *State v. Banks*, 263 N.C. 784, 140 S.E. 2d 318 (1965); *State v. Bivins*, 262 N.C. 93, 136 S.E. 2d 250 (1964); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Peterson*, 232 N.C. 332, 59 S.E. 2d 635 (1950). All four of these cases involved conduct within the purview of the common usage of the term "Peeping Tom." In *State v. Bivins*, *supra*, the Court interpreted the word "peep" in a manner so as to convey the idea of a "Peeping Tom." The Court said that "to peep" means "to look cautiously or slyly—as if through a crevice—out from chinks and knotholes."

This Court has not expressly defined the word "secretly" as used in the statute. Respondent argues that the word adds nothing to the clarification of the meaning of the statute. In order to pass on his contention, we must resort to the rules of statutory construction set forth above, and to the additional rule that words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute in harmony with its purpose. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). *See also State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

[4] In *State v. Banks, supra*, the Court stated that, when charged with a violation of G.S. 14-202, the defendant "is entitled to know the identity of the female person whose privacy he is charged with having invaded." This Court has, therefore, indicated that the word "secretly" as used in G.S. 14-202 conveys the definite idea of spying upon another with the intention of invading her privacy. Hence, giving the language of the statute its meaning as interpreted by this Court, G.S. 14-202 prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy. This is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions.

Defendant cites *Kahalley v. State*, 254 Ala. 482, 48 So. 2d 794, to support his contention that G.S. 14-202 is unconstitutionally vague. In *Kahalley*, the Alabama Supreme Court held that the Alabama "Peeping Tom" statute was violative of the Fourteenth Amendment in that it was so vague and uncertain that it fixed no ascertainable standard whereby the public could be governed. The Alabama statute is, however, distinguishable from G.S. 14-202 in that the former statute contains no requirement that the peeping be done "secretly." Thus, this element of wrongful intent required by the North Carolina statute is missing in the Alabama statute.

We hold, therefore, that G.S. 14-202 is sufficiently definite to give an individual fair notice of the conduct prohibited, and to guide a judge in its application and a lawyer in defending one charged with its violation, and that this statute violates neither Article I, Section 19, of the North Carolina Constitution, nor the Due Process Clause of the Federal Constitution by reason of vagueness and uncertainty.

[5] Respondent next argues that G.S. 14-202 is unconstitutional because it prohibits innocent conduct, and is therefore overly broad. In speaking to a similar contention, Mr. Justice Brennan, for the Supreme Court of the United States, in *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed. 2d 444, 88 S.Ct. 391 (1967), stated:

> "[H]is constitutional attack is that the statute, although lacking neither clarity nor precision, is void for

'overbreadth,' that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' [Citations omitted.]"

In *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973), the United States Supreme Court, in interpreting the overbreadth doctrine, said:

". . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. . . ."

In that case, the Court indicated that the doctrine of overbreadth has not and will not be invoked when a limiting construction has been or could be placed on the challenged statute. *Id.* at 613, 37 L.Ed. 2d at 841.

In *Lemon v. State*, 235 Ga. 74, 218 S.E. 2d 818 (1975), the Supreme Court of Georgia upheld the validity of their "Peeping Tom" statute. There, as here, defendant argued that the Georgia statute was overbroad and hence unconstitutional. In answer to this argument, that court stated:

"[T]he statute is not so overbroad as to proscribe legitimate conduct. The statute is sufficiently narrowed by the requirement that the defendant act with wrongful intent, thereby omitting from its scope those persons who have a legitimate purpose upon another's property, or those who only inadvertently glance in the window of another."

Likewise, our statute, G.S. 14-202, is sufficiently narrowed by judicial interpretation to require that the act condemned must be a spying for the wrongful purpose of invading the privacy of the female occupant of the room, thereby omitting from its scope those persons who have a legitimate purpose upon another's property and those who only inadvertently glance in the window of another. Thus, the statute is not so overbroad as to proscribe

legitimate conduct. We hold, therefore, that the statute is not unconstitutional for overbreadth.

Judge Gentry's ruling that G.S. 14-202 is unconstitutional is erroneous and is reversed. The case is remanded to the District Court of Guilford County for further proceedings in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JIMMY EUGENE GREEN

No. 6

(Filed 6 June 1978)

1. **Homicide § 21.7; Rape § 5— defendant's confession—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for murder and rape where it tended to show that the victim's body was found in woods near the motel where she was staying; there were multiple stab wounds in the body and decedent's clothing was in general disarray; medical examination revealed the presence of spermatozoa in the vagina; defendant was employed in the area where the victim worked; on the morning after the crime was committed, defendant told two people that he had engaged in sexual intercourse on the preceding night; and defendant confessed to the rape and murder of the victim.

2. **Criminal Law § 106.4— sufficiency of evidence—evidence required in addition to confession**

A confession will be sufficient to carry the case to the jury when the State offers such extrinsic corroborative evidence as will, when taken in connection with the confession, establish that the crime was committed and that the accused was the perpetrator of the crime.

3. **Criminal Law § 106.4— confession—reliability—sufficiency of evidence**

Defendant's contention that his motion for nonsuit should have been granted because his mental condition and proclivity for telling untruths in order to gain attention and favor made his confessions so unworthy of belief as to be without probative value, and these unreliable confessions were the only evidence indicating that he was the perpetrator of the crimes charged is without merit, since defendant's expert psychiatric evidence did not establish to a certainty that his confessions were false and therefore without probative value; rather, the evidence merely tended to cast some doubt upon the credibility of defendant's confessions.

State v. Green

APPEAL by defendant from *Ferrell, J.*, 23 May 1977 Session of CLEVELAND Superior Court.

Defendant was charged, by indictments proper in form, with first degree rape and first degree murder. The cases were consolidated for trial, and defendant entered a plea of not guilty to each charge.

The State offered evidence tending to show that Mrs. Rosemary Knauer was operating a penny arcade with a traveling show in Shelby, North Carolina, during the first week in October, 1976. She had employed defendant to assist her in the operation of the penny arcade. Mrs. Knauer was living at the Kings Mountain Inn, and on 4 October 1976, police officers were called to the Inn to investigate a report that she was missing. Shortly after their arrival, the police found Mrs. Knauer's body in a wooded area behind the motel. She had suffered multiple stab wounds, and her clothes were bloody, torn and in general disarray. There was medical testimony to the effect that Mrs. Knauer had been stabbed more than 24 times and that she died as a result of these wounds. Examination disclosed the presence of spermatozoa in her vagina.

S.B.I. Agent James C. Woodard testified as to certain statements made to him by defendant. Defendant had moved to suppress these extra-judicial statements, and prior to selection of the jury, a *voir dire* hearing was conducted in the absence of the jury panel. At the conclusion of this hearing, the trial judge found facts, entered conclusions of law, and overruled defendant's motion to suppress. In his testimony before the jury, Agent Woodard stated that he saw defendant on 6 October, and defendant initiated a conversation by asking Agent Woodard if he thought that he (defendant) could have killed Mrs. Knauer. The agent replied that he did not know. Defendant later said that he did not kill Mrs. Knauer. Agent Woodard again talked with defendant on 21 October 1976 in the mental ward of the South Carolina State Hospital in Columbia, South Carolina. Before this conversation, he gave defendant *Miranda* warnings and obtained a written waiver of rights. At that time, defendant made conflicting statements concerning his complicity in the murder and rape of Mrs. Knauer. Defendant was not detained.

On 4 January 1977, Agent Woodard saw defendant in a mental institution in Florida. After he warned defendant of his constitutional rights, defendant signed a waiver of rights. He then told Agent Woodard that on 3 October 1976 he saw Mrs. Knauer in a laundromat in Shelby, North Carolina, and she asked him to ride with her to her motel. Upon arrival, defendant took Mrs. Knauer's Doberman Pinscher into her motel room and assisted her in unloading various articles from her automobile. Defendant stated he then made sexual advances to Mrs. Knauer and when he was rejected, he seized Mrs. Knauer and attempted to cut her. After a scuffle, Mrs. Knauer managed to break away, but he caught her and by threat of using a knife made her walk into the woods. He there forced her to the ground, ripped her clothing, and proceeded to forcibly have intercourse with her. When Mrs. Knauer told him, "you'll pay for this," he stabbed her in the stomach, back and throat. He returned to the fairground the next morning. After this statment was made, Agent Woodard caused a warrant to be issued in North Carolina charging defendant with first degree murder, and the Sheriff's Department in Baker County, Florida, placed defendant under arrest on a fugitive warrant. On the following day, Agent Woodard obtained a tape recording which was, in substance, the same as the above statement. This tape recording was admitted into evidence over defendant's objection.

There was other testimony to the effect that on 4 October, defendant told two people that he had engaged in sexual intercourse on the preceding night.

Defendant's only witness was Dr. Billy W. Royal. It was stipulated that Dr. Royal was a medical expert specializing in forensic psychiatry. Dr. Royal testified that defendant was under his care at Dorothea Dix Hospital from 20 January until 5 February 1977 and from 9 March to 18 May 1977. Defendant was initially admitted to the hospital for the purpose of evaluating his competency to stand trial. The doctor stated that he had many interviews with defendant and saw him daily. Defendant was also given psychological and intelligence tests by other hospital personnel. The witness stated that, in his opinion, defendant suffered from schizophrenic reaction, latent type. His behavior involved telling untruths in order to get attention. Defendant had given

him a history of epileptic seizures, but in the witness's opinion, defendant had not suffered true epileptic seizures. The doctor stated that the intelligence tests given defendant revealed that he had borderline normal intelligence, and in his opinion, defendant was competent to stand trial. Dr. Royal further testified:

> Yes, from all of the history that I got from the defendant and the history that I got from the relatives, it was my opinion that the patient was aware of the charges against him, the consequences of the charges, that he was able to work with his attorney, if he so chose, in terms of his defense, and that he was able to discern right from wrong. It was also my opinion that the defendant was competent at the time of the alleged crime.

The jury returned verdicts of guilty of first degree rape and guilty of second degree murder. The trial judge imposed a sentence of life imprisonment on the verdict of guilty of first degree rape and a sentence of imprisonment for a period of forty years on second degree murder, to run consecutively.

Rufus L. Edmisten, Attorney General, by John R. Wallace, Associate Attorney, for the State.

Jim R. Funderburk, for defendant appellant.

BRANCH, Justice.

The sole question presented by this appeal is whether the trial court erred by denying defendant's motion to dismiss the charges against him.

When a defendant moves for judgment as of nonsuit or dismissal in a criminal action, the trial judge must 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. If there is evidence, whether direct, circumstantial or both, from which a jury could find that the offense charged had been committed and that the defendant committed it, the motion for judgment as of nonsuit or dismissal 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).

[1] In instant case, the State presented evidence which tends to show that on 4 October 1976 the body of Rosemary Knauer was found in the woods near the Kings Mountain Inn. Police officers observed multiple stab wounds on the body and observed that the decedent's clothing was in general disarray and that the rear seam of her pants was split. Medical examination of the body revealed the presence of spermatozoa in the vagina. In the opinion of the medical examiner, death was due to multiple stab wounds. There was evidence that defendant was employed in the area where the victim worked and that on the morning after the crime was committed, he stated that he had engaged in sexual intercourse on the preceding night. Further, the State introduced defendant's confessions to the rape and murder of Rosemary Knauer.

Taken in the light most favorable to the State, this evidence gives rise to reasonable inferences that Rosemary Knauer was forcibly raped and murdered and that defendant was the perpetrator of these crimes.

[2] Admittedly, defendant's confessions were the only evidence which clearly pointed to him as the perpetrator of the crimes. The rule in this jurisdiction is that a conviction cannot be sustained upon a naked extra-judicial confession. There must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained. This does not mean that the evidence tending to establish the *corpus delicti* must also identify the accused as the one who committed the crime. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954). *See also*, *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). A confession will be sufficient to carry the case to the jury when the State offers such extrinsic corroborative evidence as will, when taken in connection with the confession, establish that the crime was committed and that the accused was the perpetrator of the crime. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975).

[3] Here the State established the *corpus delicti* without reliance upon defendant's confessions, and without further showing, it would appear that the trial judge correctly denied defendant's motion to dismiss. Defendant nevertheless contends that his mental condition and proclivity for telling untruths in order to gain attention and favor make his confessions so unworthy of

belief as to be without probative value. He argues that since these inherently unreliable confessions are the only evidence indicating that he was the perpetrator of the rape and murder of Rosemary Knauer, his motion for nonsuit should have been granted. In support of his position, defendant relies upon *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967).

In *Miller*, the only evidence identifying the defendant as the person who committed the crime was the testimony of a witness who was never closer than 286 feet from the scene of the crime. The witness had never seen the defendant before and the only opportunity the witness had to observe the face of the perpetrator of the crime was when the man "peeped" around the side of a building. The witness could not tell the color of the man's hair or the color of his eyes. This Court held that the opportunity for the witness to observe the commission of the crime was not sufficient to reasonably permit the case against the defendant to be submitted to the jury. In so holding, we stated:

> "Ordinarily, the weight to be given the testimony of a witness is exclusively a matter for jury determination. Even so, this rule does not apply when, as here, the only testimony that would justify submission of the case for jury consideration is in irreconcilable conflict with physical facts established by plaintiff's uncontradicted evidence. * * *
>
> " 'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury.' " [Citations omitted] 270 N.C. at 731.

Defendant's reliance upon *Miller* is misplaced. Our rationale for rejecting the evidence in *Miller* was that the witness's testimony was contrary to the laws of physics and the laws of nature. Based upon the witness's own testimony, we held that it would have been physically impossible for him to have seen the robber so that he could later identify him.

Here defendant's reliance is upon evidence indicating that he is a latent schizophrenic which is accompanied by behavioral activity designed to obtain attention. Defendant's expert witness,

Dr. Royal, testified that if defendant felt it would be to his advantage he could tell a lie. However, Dr. Royal also testified that defendant is not incapable of telling the truth and that, in fact, defendant does on occasion tell the truth. He further unequivocally testified that in his opinion defendant had sufficient mental capacity to know right from wrong, to be aware of the charges against him, to be aware of the consequences of such charges, and to work with his attorney in terms of his defense.

While this evidence does give rise to the possibility that defendant falsely confessed to the rape and murder of Rosemary Knauer in order to gain attention, it does not preclude the possibility that the confessions were truthful. Defendant's evidence does not establish *to a certainty* that his confessions were false and therefore without probative value. The most that can be said is that it tends to cast some doubt upon the *credibility* of his confessions. The weight and credibility to be accorded to defendant's confessions are, however, matters solely for determination by the jury. *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968).

The State's independent evidence, when considered with defendant's confessions, was sufficient to carry the case to the jury on the charges of first degree murder and first degree rape. We, therefore, hold that the trial judge did not err by denying defendant's motion for dismissal of the charges against him.

For the reasons stated, we find no error sufficient to disturb the verdicts or judgments entered thereon.

No error.

STATE OF NORTH CAROLINA v. WILLIE THOMAS BUTLER, A/K/A TOP CAT

No. 87

(Filed 6 June 1978)

Criminal Law § 75.11— in-custody statement—specific waiver of counsel

The trial court erred in finding that, since defendant had been fully informed of and understood his right to the presence of counsel at his in-custody

interrogation and did not request a lawyer, his act in making an in-custody statement amounted to a waiver of counsel, and the court erred in the admission of defendant's statement where the evidence on voir dire failed to show that defendant specifically made a waiver of counsel after the *Miranda* warnings had been given him.

DEFENDANT appeals from judgment of *Grist, J.*, 31 October 1977 Session, WAYNE Superior Court.

Defendant was tried on separate bills of indictment charging (1) felonious assault, (2) kidnapping and (3) armed robbery, the State alleging that all three crimes were committed on 28 December 1976 in Wayne County.

The State's evidence tends to show that Ralph Burlingame was closing a Kayo station about 11 p.m. on 28 December 1976 when two black males came to the door to buy beer. They left when told that the station was closed. Burlingame completed his inventory for the day, locked up and started to his car parked nearby. The same two black males with pistols drawn then accosted Burlingame and forced him to drive them away in his own car. Defendant told Burlingame "it was a holdup" and he was going to kill him when the ride ended because he was a white boy. In a few seconds Burlingame opened the door and jumped from the moving car. As he jumped he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" as he lay in the street while the robbers stopped the car 200 feet away, returned, took his wallet containing $30, shot him twice more and ran away. Shortly thereafter police officers arrived and took him to the hospital.

Within a week Burlingame positively identified photographs of defendant Butler and Elmer Lee from a twelve-photograph display. He testified in court that he was certain defendant was the man who shot him.

Defendant fled the State and was arrested in New York City on 3 May 1977 by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings, refused to sign a waiver of rights but said he understood his rights and would talk with the arresting officers. He made an incriminating statement which was admitted into evidence over objection. Defendant contended at trial, and now contends, that he never waived counsel at the in-custody interrogation by Martinez.

Defendant testified as a witness in his own behalf. He denied that he was a participant in the robbery of Ralph Burlingame and denied ever having seen Burlingame prior to a pretrial hearing held three weeks before his trial. He further denied making an admission to FBI Agent Martinez and denied that he waived any of his rights. He stated he did not know Elmer Lee and was not with him on the night of 28 December 1976 when the kidnapping and armed robbery allegedly occurred.

Defendant was convicted as charged in all three cases and given a life sentence for kidnapping, a life sentence for armed robbery and five years for the felonious assault, all sentences to run concurrently. He appealed the kidnapping and armed robbery cases to the Supreme Court, and we allowed motion to bypass the Court of Appeals in the felonious assault case to the end that all three convictions receive initial appellate review in this Court. Defendant assigns errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Associate Attorney, for the State of North Carolina.

Michael A. Ellis and R. Gene Braswell, attorneys for defendant appellant.

HUSKINS, Justice.

Defendant assigns as error the admission of his inculpatory statement to FBI Agent David C. Martinez, made while in custody and without benefit of counsel. He contends the incriminating statement is inadmissible because he had not waived his constitutional right to the presence and assistance of counsel, relying on *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), as interpreted and applied by this Court in *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). This constitutes his first assignment of error and requires examination of the proceedings on voir dire and the findings of the court based thereon.

FBI Agent Martinez testified on voir dire that he arrested defendant at 1225 Sheraton Avenue in Brooklyn, New York, on a fugitive warrant on 3 May 1977. He was immediately and fully advised of his constitutional rights and transported to the New Rochelle office where he was again advised of his rights. Defendant, who had an eleventh grade education, then took the "Advice

of Rights" form and read it himself. He was asked if he understood his rights and he replied that he did. As to signing the "Waiver of Rights" printed at the bottom of the form, defendant said "he didn't want to sign this form and that he didn't want to sign anything." He was told that it was not mandatory that he talk and that he didn't have to sign the form but that "we would like for him to talk to us." Defendant replied: "I will talk to you but I am not signing any form." FBI Agent Martinez then made a notation on the form that defendant refused to sign it.

Since defendant had stated he would talk to Officer Martinez, he was then asked "if he had participated in the armed robbery and he stated that he was there but that he did not actually participate as such in the armed robbery. We asked him to explain a little further and he stated that he and an accomplice had been drinking heavily that day and were walking around and decided to rob a gas station. They came up to a gas station where the attendant was locking up for the night and walked inside the station. He stated that the fellow with him pulled out a gun and told the gas station attendant to get in his car. He then said that the gas station attendant tried to run away and that his friend shot the attendant. At this point Mr. Butler stated that he ran away from them and didn't look back. He stated that he ran to a bus station where he caught a bus to Virginia and that in Virginia he caught another bus to New York where he had been until he was apprehended that morning. We asked him if the other person was someone by the name of Elmer Lee and we had had communications from our Charlotte office saying that Elmer Lee had also been involved. Butler said that Lee was there."

On cross-examination Agent Martinez said: "He did not say anything when I advised him of his right to have an attorney and he just sat there and listened. I repeatedly asked him if he understood his rights and he said that he did. He stated that he would not sign the paper. . . ."

Upon further interrogation by the presiding judge, Agent Martinez said: "He never told us that he did not want the lawyer present. He never told us he did want a lawyer present. . . . He said 'I won't sign the form. I will talk to you but I won't sign the form.' . . . What made me believe that he did not want a lawyer present at that time was the fact that he was relating the story

concerning the charges against him at that point. If he had wanted an attorney present with him, he wouldn't have said anything."

Based upon the evidence of Agent Martinez—defendant offered none on voir dire—the court found, among other things, that defendant's statement to Agent Martinez was made freely and voluntarily after having been advised of his rights as required by *Miranda*, including his right to an attorney, and that defendant understood his rights and "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the waiver of rights; that the statement . . . was voluntarily made at a time when the defendant understood his rights. . . ." Upon those findings the court concluded as a matter of law that defendant had knowingly waived his right to counsel and that his statement was competent evidence in the trial of the action. Defendant's first exception and assignment of error is based on this ruling. We hold that the assignment is sound and must be sustained.

Admission of defendant's inculpatory statement to Agent Martinez was erroneous because the evidence on voir dire is insufficient to support the finding that defendant waived his right to counsel. He refused to waive it in writing and the evidence on voir dire fails to show a specific oral waiver knowingly made.

In *Miranda v. Arizona*, supra, the United States Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given. . . . [Emphasis added.]
>
> * * * *
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the

> accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . .
>
> * * * *
>
> After such warnings have been given, and such opportunity afforded him, 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."

384 U.S. at 470, 475, 479, 16 L.Ed. 2d at 721, 724, 726, 86 S.Ct. at 1626, 1628, 1630.

In *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L.Ed. 2d 70, 77, 82 S.Ct. 884, 890 (1962), the United States Supreme Court said:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Measured by *Miranda* standards it is apparent that the findings of fact are not supported by the voir dire testimony of Agent Martinez. Failure to request counsel is not synonymous with waiver. Nor is silence. *Compare State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). The trial judge erred in holding that since defendant had been fully informed and understood his right to the presence of counsel at the in-custody interrogation and did not request a lawyer, his act in making the statement amounted to a waiver of counsel. The holding in *Miranda* as interpreted and applied by this Court in *Blackmon* provides in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is "specifically made" after the *Miranda* warnings have been given.

Although there is other evidence amply sufficient to support a conviction in this case, the statement made by defendant to Agent Martinez placed him at the scene of the crime in company with Elmer Lee with whom defendant had agreed to rob a gas station and describes the attempted robbery. This statement

alone would have been sufficient to convict defendant of armed robbery at least. There is a reasonable possibility that defendant's statement might have contributed to his conviction. Therefore, we cannot say beyond a reasonable doubt that the inculpatory statement did not materially affect the result of the trial to defendant's prejudice or that it was harmless error. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). The State argues for harmless error, relying on *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. den.* 414 U.S. 1160 (1974), but that case if factually distinguishable. Error in the admission of defendant's incriminating statement to Agent Martinez requires a new trial.

Defendant's remaining assignment alleging error in allowing the district attorney to ask leading questions is without merit and requires no discussion.

For the reasons stated defendant is entitled to a new trial in each case and it is so ordered.

New trial.

IN THE MATTER OF: PHILLIP BYERS

No. 42

(Filed 6 June 1978)

Infants § 18— juvenile delinquency proceeding—insufficiency of evidence

In a proceeding to have respondent declared a juvenile delinquent, the trial court erred in denying respondent's motion to dismiss where there was no evidence before the court to show that respondent was one of the perpetrators of the alleged crimes since the victim of the assault and robbery could not identify respondent as one of his assailants; the trial judge sustained respondent's objection to the introduction of written statements obtained by police officers from three other co-respondents; and the unsworn testimony of one co-respondent elicited by the trial judge under circumstances which denied respondent his rights of confrontation and cross-examination was not competent evidence.

In re Byers

APPEAL by respondent from judgment entered on 11 May 1977 by *Lampley, Judge*, in District Court, UNION County.

This proceeding was initiated by the filing of a petition in the District Court Division, Union County, by Sergeant Frank Benton of the Monroe Police Department seeking to have respondent, who was then less than 16 years old, declared a juvenile delinquent. After conducting a hearing and overruling respondent's motion to dismiss, Judge Lampley ordered that respondent be placed in the custody of the Department of Human Resources for an indefinite period of time but not to extend beyond his eighteenth birthday.

Respondent appealed and before the Court of Appeals contended that Judge Lampley erred by denying his motion to dismiss and that the juvenile hearing provisions of G.S. 7A-285 were unconstitutional in that they do not permit a trial *de novo* before a law trained judge as required in *North v. Russell*, 427 U.S. 328, 49 L.Ed. 2d 534, 96 S.Ct. 2709 (1976). In affirming Judge Lampley's judgment, the Court of Appeals ruled that there was sufficient evidence to withstand respondent's motion to dismiss and that the requirements set forth in *North v. Russell, supra*, were not applicable to juvenile proceedings.

Respondent appealed to this Court pursuant to the provisions of G.S. 7A-30(1).

Rufus L. Edmisten, Attorney General, by William Woodward Webb, Assistant Attorney General, for the State.

Humphries and McCollum, by Joe P. McCollum, Jr., for respondent appellant.

PER CURIAM.

In the Court of Appeals, respondent assigned as error the denial of his motion to dismiss for lack of evidence. He did not raise that issue before this Court and ordinarily this assignment of error would be deemed to be abandoned. However, in reviewing a decision of the Court of Appeals, it is our duty to determine the correctness of that decision and in the exercise of our supervisory powers we may pass upon any relevant issue, even when that issue is not properly presented. *See, State v. Williams*, 274

N.C. 328, 163 S.E. 2d 353 (1968). We elect to consider respondent's motion to dismiss.

A motion to dismiss has essentially the same legal effect as a motion for judgment as of nonsuit. Such motion is properly denied when there is substantial evidence of each element of the crime with which an accused is charged and like evidence that the accused was the perpetrator or one of the perpetrators of that crime. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). Similarly, a motion to dismiss a petition seeking to declare a juvenile a delinquent is properly denied when there is substantial evidence that the juvenile respondent committed a criminal offense or violated a condition of a probationary judgment. *See*, G.S. 7A-278(2).

In instant proceeding, the victim, James Smith, testified that he had been assaulted and robbed. He could not identify the persons who committed these crimes. The trial judge sustained respondent's objection to the introduction of written statements obtained by police officers from three other co-respondents.

Counsel for respondent then made his motion to dismiss. At this point, there was obviously no evidence to identify respondent as one of the perpetrators of the charged offenses. After hearing conflicting recommendations from a juvenile counselor and a social worker as to the suitability of respondent's home, Judge Lampley turned to Donald Duncan, one of the co-respondents before him, and inquired if respondent Byers participated in the robbery and assault of James Smith. Duncan replied in the affirmative. The record does not disclose that Donald Duncan had been sworn as a witness. After he had elicited this statement from Donald Duncan, Judge Lampley denied respondent's motion to dismiss and entered judgment.

Donald Duncan's statements were elicited by the court, and, therefore, respondent was entitled to an automatic objection and exception. *See*, 1 Stansbury's North Carolina Evidence, Sections 27, 37 (Brandis Rev. 1973). Further, it is well established that before a witness can testify he must swear or affirm to tell the truth. 1 Stansbury's North Carolina Evidence, Section 23 (Brandis Rev. 1973). We note that the juvenile hearing provisions of G.S. 7A-285 (Cum. Supp. 1977) specifically provide:

> . . . In the adjudication part of the hearing, the judge shall find the facts and protect the rights of the child and his parents in order to assure due process of law, including . . . *the right to confront and cross-examine witnesses.* . . . [Emphasis ours.]

Moreover, in addressing the constitutional rights to be accorded a juvenile defendant in a proceeding similar to that in instant case, the United States Supreme Court has specifically held:

> . . . (A)bsent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of *sworn testimony subjected to cross-examination* in accordance with our law and constitutional requirements. [Emphasis ours.]

In re Gault, 387 U.S. 1, 57, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967).

The unsworn testimony of the co-respondent Donald Duncan, elicited by Judge Lampley under circumstances which denied respondent his rights of confrontation and cross-examination, was not competent evidence. Therefore, there was no evidence at all before the court to show that respondent was one of the perpetrators of the alleged crimes. The trial court should have allowed respondent's motion to dismiss.

Ordinarily, we do not pass upon a constitutional question when a case can be decided upon other grounds. *See. e.g., Iredell County v. Crawford*, 262 N.C. 720, 138 S.E. 2d 539 (1964); *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). In view of our holding that Judge Lampley erred by failing to grant respondent's motion to dismiss, we deem it inappropriate to consider the constitutional issue presented by resondent's appeal.

This cause is remanded to the Court of Appeals with direction that it be remanded to the District Court of Union County for entry of judgment in accordance with this opinion.

Reversed and remanded.

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

EDWARDS v. MEANS

No. 123 PC.

Case below: 36 N.C. App. 122.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

FOX v. FOX

No. 117 PC.

Case below: 35 N.C. App. 774.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 June 1978.

HALL v. HALL

No. 111 PC.

Case below: 35 N.C. App. 664.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

IN RE FORESTRY FOUNDATION

No. 101 PC.

Case below: 35 N.C. App. 414.

Petition for discretionary review under G.S. 7A-31 allowed 6 June 1978.

IN RE FORESTRY FOUNDATION

No. 100 PC.

Case below: 35 N.C. App. 430.

Petition for discretionary review under G.S. 7A-31 allowed 6 June 1978.

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

IN RE JOYNER

No. 108 PC.

Case below: 35 N.C. App. 666.

Petition by propounders for discretionary review under G.S. 7A-31 denied 6 June 1978.

MANLY v. PENNY

No. 109 PC.

Case below: 35 N.C. App. 774.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 June 1978.

MARTIN v. MARTIN

No. 112 PC.

Case below: 35 N.C. App. 610.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. BRACKETT

No. 141 PC.

Case below: 35 N.C. App. 744.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. BUNN

No. 130 PC.

Case below: 36 N.C. App. 114.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

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

STATE v. CLIFTON

No. 129 PC.

Case below: 36 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. DIXON

No. 118 PC.

Case below: 35 N.C. App. 774.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. HINES

No. 127 PC.

Case below: 36 N.C. App. 33.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 June 1978.

STATE v. HUGGINS

No. 119 PC.

Case below: 35 N.C. App. 597.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. HUNT

No. 121 PC.

Case below: 34 N.C. App. 749.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 6 June 1978.

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

STATE v. JOHNSON

No. 120 PC.

Case below: 35 N.C. App. 729.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 June 1978.

STATE v. LOUCHHEIM

No. 131 PC.

Case below: 36 N.C. App. 271.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978. Appeal dismissed ex mero motu for lack of substantial constitutional question 6 June 1978.

STATE v. PATTERSON

No. 126 PC.

Case below: 36 N.C. App. 74.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 June 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 6 June 1978.

STATE v. SETZER

No. 116 PC.

Case below: 35 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE v. WRAY

No. 124 PC.

Case below: 35 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 June 1978.

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

WILLIAMS v. WILLIAMS

No. 115 PC.

Case below: 35 N.C. App. 774.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 June 1978.

WOOD v. CITY OF FAYETTEVILLE

No. 110 PC.

Case below: 35 N.C. App. 738.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 June 1978.

STATE OF NORTH CAROLINA v. WILLIAM MATTHEWS AND VICTOR FOUST

No. 68

(Filed 14 July 1978)

1. Criminal Law § 15.1— change of venue—no prejudice from newspaper articles—motion properly denied

In a first degree murder case the trial court properly denied defendants' motions for a change of venue or a special venire since defendants did not contend that newspaper articles about their first trial were either biased or inflammatory; defendants' contention that news coverage which accurately reported the case and previous trial could be so "innately conducive to the inciting of local prejudices" as to require a change of venue was without merit; and the fact that the defendants were black and the victim white was mere happenstance, not *per se* grounds for a change of venue or special venire.

2. Jury § 7.12— jurors opposed to capital punishment—grounds for proper challenge

In a first degree murder case tried in August 1975, the trial court did not err in allowing the district attorney to challenge for cause 14 jurors, each of whom indicated that he was so opposed to capital punishment that, regardless of the evidence and even if convinced beyond a reasonable doubt of defendant's guilt, he would not return a verdict requiring the death sentence, the decision of *Witherspoon v. Illinois*, 391 U.S. 510, not having restricted the right of the prosecution to challenge for cause those jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to defendant's guilt; moreover, *Witherspoon*-related errors in the selection of the jury affect only the sentence of death and will not be held grounds for upsetting a conviction and ordering a new trial.

3. Jury § 5.2— black defendants—white jury—no grounds for new trial

The black defendants are not entitled to a new trial because all the jurors impaneled to try their case were white.

4. Jury §§ 7.6, 7.14— juror accepted by State—subsequent challenge by State permissible

The trial court did not err in allowing the district attorney to reexamine, and then excuse, a venireman after indicating that she was satisfactory to the State, since neither the case law nor G.S. 9-21(b) prohibits the trial court, in the exercise of its discretion before the jury is impaneled, from allowing the State to challenge peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant.

5. Constitutional Law § 29— pretrial showup permissible

So long as the circumstances were not unnecessarily suggestive, police officers were free to arrange a confrontation between defendants (whether they

were under arrest or not) and three witnesses to the alleged crimes, since defendants had no right not to be viewed.

6. Constitutional Law § 43— crime suspects—participation in showup—no right to counsel

Custodial arrest of a mere suspect does not constitute the initiation of "adversary judicial proceedings" and is not sufficient to draw the State and the prisoner into such an antagonistic relationship as to require the assistance of counsel from that moment forward; therefore, defendants, who were not formally charged with a crime but who accompanied officers to a police station for the purpose of participating in a showup, were not entitled to counsel at the showup.

7. Constitutional Law § 29; Criminal Law § 66.17— suggestive pretrial showup—in-court identification of independent origin

Though a showup in a first degree murder case was inherently suggestive because the witnesses would likely assume that the police had brought them to view persons whom they suspected might be the guilty parties and because two of the witnesses knew that officers had located the green Cadillac in which four black males came to the service station, the scene of the crime, earlier in the evening and that, through this car, the police had traced the persons they were to view, such confrontation nevertheless did not render inadmissible the witnesses' in-court identifications of defendants, since the witnesses had ample opportunity to observe defendants in the well-lighted service station where the crime took place or in the glare of automobile headlights, and these observations of defendants at the crime scene were not tainted by the impermissibly suggestive showup.

8. Constitutional Law § 31— denial of free transcript of first trial—alternatives available

The trial court did not err in refusing defendants' motions for a transcript of the testimony of certain State's witnesses at defendants' first trial which had ended in a hung jury one month earlier, since defendants had available to them at all times during the trial the court reporter at the first trial; the reporter had with her in court her notes and records of the first trial; defendants could have questioned her at any time with reference to the former testimony of any witnesses; and defendants therefore suffered no prejudice from the lack of a transcript.

9. Constitutional Law § 80; Homicide § 31.1— life imprisonment substituted for death penalty

Sentences of life imprisonment are substituted for the death penalty imposed upon defendants upon their conviction for first degree murder.

APPEAL by defendants from their conviction of first degree murder in a trial before *Tillery, J.*, at the 18 August 1975 Session of WILSON Superior Court. The case was docketed and argued as Case No. 2 at the Fall Term 1976.

Donald Mayo owned and operated the Spur Go Shop, a Spur gasoline service station on South Goldsboro Street in Wilson, North Carolina. The entire front of the building, including both corners, is clear glass except for the clapboard just below the roof and about two feet of brick construction just above the ground. The two swinging doors which afforded entrance to the service station are entirely glass. In addition to gasoline, Mayo also carried a small stock of groceries and other items.

Mayo was shot during the course of an armed robbery at his station on the night of 11 February 1975. He died one month later as a result of his wound. Defendants William Matthews (Matthews) and Victor Foust (Foust) and two other black youths, Ronnie Lee Matthews and Lawrence Matthews, were charged with the armed robbery in warrants issued on 12 February 1975. New warrants were issued on 12 March 1975 charging them with the murder of Mayo. They were rearrested on 13 March 1975. True bills of indictment were returned against the four at the May 1975 Session of the Wilson Superior Court. Defendants Matthews and Foust were first tried at the 7 July Session. The jury was unable to agree upon a verdict and a mistrial was declared on 20 July 1975.

To properly evaluate the testimony of the State's witnesses it is necessary to locate the Spur station with reference to its surroundings. The record indicates that Goldsboro Street runs north and south, and the Spur station is located on the west side, where Bank Street intersects Goldsboro, immediately south of the tracks of the Norfolk and Southern Railroad. Banks Street is discontinuous at Goldsboro, the western segment being on the south side of the railroad tracks and the eastern segment on the north side.

Linwood Williams (Williams), who was working for Mayo as a station attendant on the night of the robbery, testified in brief summary as follows:

About 8:30 p.m. a solid green 1965 Cadillac, with pink carpet trim around the rear window and covering the rear deck behind the back seat, drove up to the station. Four young black men got out and entered the station. One of them asked for "directions to a woman's house on Spruce Street"; Mayo told them how to get to Spruce Street and all four left. Something about the men

aroused Mayo's suspicions and he noted the license number of the Cadillac on a pad by the cash register.

Later that night, about 10:30 or 10:45 p.m., Mayo was behind the counter putting up cigarettes and Williams was standing at the corner of the door in front of the cash register talking to him, when four black youths arrived at the station on foot. The two who entered first (later identified by Williams as defendants Matthews and Foust) went to the "display island" to the left of the door. There they had a whispered conversation while Mayo and Williams continued to talk. A minute or so later the other two (whom Williams could not identify as Ronnie and Lawrence Matthews) entered the station and purchased a box of matches from Mayo. Thereafter, Matthews came toward Williams, pulled a gun from his shirt, and "leaned up against" Williams, pushing him against the entrance door so that he could not move. At that moment Williams heard Foust coming up behind him and he saw the other two move to the end of the counter. Matthews aimed his gun across the counter at Mayo and told him "to hand the money over." Instead, Mayo stepped back and attempted to pull his own gun. The two youths standing near him (allegedly Lawrence Matthews and Ronnie Matthews) disarmed Mayo in a brief scuffle and knocked him to his knees on the floor. William Matthews called out, "Shoot him, shoot him!" whereupon one of them shot Mayo in the back.

Williams could not testify who fired the shot because, he said, "once he [Matthews] pulled that pistol out, I kept my eyes fastened on it. . . .I'm still staring at that pistol while he is aiming it at Mr. Mayo." Immediately after he was shot one of the four began to search the prostrate Mayo. Matthews told Wiliams to hand over his wallet (which contained six dollars), and Williams handed it to him. Matthews then took forty to fifty dollars, money collected that evening from customers, from Williams' shirt pocket. Matthews then tried to open the cash register, failed, and ordered Williams to open it. All four then took money from the register. Three of the robbers then left; the fourth, Matthews, threw his gun in Mayo's face and asked where the rest of the money was. When Mayo did not respond Matthews also left. Williams observed the three men run across Goldsboro Street and through the yard at 715 S. Goldsboro Street directly opposite the gas pumps of the Spur station. They crossed the railroad tracks

and then "catercornered through that weight scale yard there. From there they went on the other side of that warehouse across the street." When Matthews left he ran in the same direction as the other three. All four recrossed Goldsboro Street at the B. J. High Home Improvement Company just north of the railroad tracks, and "disappeared behind the Spur Station."

Detective R. H. Broadwell was the first to arrive at the Spur station. At that time he spoke briefly with Williams, who was "highly nervous" and very pale. The detective could "make no sense out of what he was saying. He was just talking in riddles." Williams did, however, give Broadwell the license number of the green Cadillac, from which it was ascertained that the car belonged to Ronnie Matthews, Chestnut Street, Greenville, North Carolina. Broadwell then alerted the Greenville police to be on the lookout "for four blacks in a green Cadillac"; that there was reason to believe "it might be connected with the shooting and robbery" at the Spur station.

The testimony of William Branch, aged 17, who drove into Mayo's service station around 10:35 or 10:40 p.m. on the night of the robbery tended to show:

After parking his car at the self-service pump, Branch went into the station and prepaid three dollars for gasoline. He exchanged greetings with Mayo and observed the presence of Williams and four black men. Two were standing in front of the beer cooler. Another was standing by Williams, and the fourth was at the end of the counter. The latter two he later identified as defendants Matthews and Foust. Branch returned to his car, unfastened the gas cap and picked up the hose. When he turned toward the station to signal Mayo to turn on the pump he saw him down on his hands and knees. Sensing trouble, Branch got into his car and drove south on Goldsboro Street. He described his activities thereafter as follows:

"I went down about a block away to White's Tire Service where I stopped and parked my car. I got out and walked across the street to New Planters Warehouse No. 2, mainly so I could see if I could see into the station from that corner of the warehouse there." Branch then returned to his car and drove north on Goldsboro Street, toward the Spur station. He said he was in front of Exclusive Cleaners when "three black guys" ran

across the street in front of the station. He then pulled into the station lot. Upon seeing that Mr. Mayo had been shot he pulled back out of the station lot onto Goldsboro Street and was headed north when his headlights hit Matthews in the face. Matthews was "maybe 25 feet away," running across the street from B. J. High, right across the street from Statewide Scale Company. He was headed east down Banks Street on the north side of the railroad. Branch returned to the station. There he found Williams upset and silent, "like he was in a daze or in shock." Since no one else was at the station he waited until the Police and Rescue Squad arrived.

Donald Ellis, who was driving south on Goldsboro Street around 10:45 p.m. on 11 February 1975, testified in brief summary as follows:

He had slowed down for the railroad tracks and was traveling 20-25 MPH when he glanced to his right into the Spur station. Inside he saw four black men. One was behind the counter moving from one end to the other. Another was standing by Mr. Williams, who was standing over next to the wall against the storage room door. This scene struck Ellis as "sort of suspicious." He went on by, turned around, and started back toward the station. When he came abreast of the vacant lot adjoining the Spur station on the south, he saw three of the black males cross the street, running very fast. These men he could not identify. He drove on by the station, and just as he crossed the railroad track another one ran across the street in front of his car. He was so close that Ellis had to stop to keep from hitting him. When asked if he saw that man in the courtroom Ellis pointed and said, "Yes, sir, the defendant Matthews." After that Ellis saw the defendant Matthews and the other three running down Banks Street and disappear. In a few minutes he returned to the station as the police were driving up. He went in and saw Mr. Mayo on the floor behind the counter.

The State's evidence further tends to show that the Wilson police received information that the Greenville police had picked up some individuals who might have been connected with Wilson's "shooting and robbery." About 1:00 a.m. that same night, Detective Broadwell and another officer tooks Williams, Branch, and Ellis to the police department in Greenville. There the three witnesses were taken into a darkened room from which they

could look through a one-way glass into a well-lighted room where they saw four black men and a uniformed officer. Broadwell testified, "I told the fellows, 'Look in there and see if you see anybody you have seen before.' I said, 'Take your time, we've got plenty of time,' and they did." The testimony of each of the three witnesses with reference to this episode is summarized below.

Williams' version: When the police called him "they said they had picked up four blacks in a green Cadillac and wanted [him] to identify them." Upon arrival at the police station in Greenville, Williams noticed in the parking lot a green Cadillac with "pink carpet in the back glass." It was the same vehicle he had seen about 8:30 p.m. at the Spur station in Wilson. After looking at the four men in the lighted room he positively identified two of them as defendants Matthews and Foust. However, he could not identify Ronnie Matthews or Lawrence Matthews (both of whom were present in court) as the other two men who were in the Spur station at the time of the robbery.

On cross-examination Williams conceded that at the first trial he might have identified Ronnie and Lawrence Matthews as the other two men but said he was confused at that time. He would not identify them now. On redirect examination he said that there was no doubt at all in his mind that Matthews and Foust were two of the four men who robbed the station.

Branch's version: "Later on that night" Detective Broadwell called Branch's father and told him that "they had a lineup of some people at Greenville." The detective said that he wanted to take Branch along with Williams and Ellis to Greenville to see if they could identify anyone they had seen at Mayo's Spur station. Upon arrival at the police station Branch did not see any green Cadillac, but he did see one when he left. Inside the station they were escorted to a room in which there was a "one-way mirror" and told to look in it to see if they could identify anybody. After about 15 minutes Branch was asked if he "noticed" anybody, and he pointed out Matthews and Foust as two of the four men he had seen at the Spur station.

With reference to Ronnie and Lawrence Matthews, Branch said, "I've seen both of them in court before. They were in the room at Greenville and they were in court today. I can't say, though, that they were the other two that were in the Spur sta-

tion that night. They were standing in front of that refrigeration unit in the back, so I didn't get a good look at them. I can't identify them for sure." Branch contended that at the first trial he had said the same thing, that he could not be sure Ronnie and Lawrence Matthews were the other two in the station.

When Ellis testified before the jury neither the State's attorney nor defense counsel asked him any questions about his trip to Greenville.

Detective Broadwell testified that after Williams, Branch and Ellis had viewed the four men at Greenville, "Linwood Wiliams identified Victor Foust . . . , and Bill Branch and Linwood Williams identified Lawrence Matthews. . .Williams and Ellis identified William Earl Matthews to me, but nobody identified Ronnie Matthews."

On *voir dire*, before the introduction of any evidence, and in the absence of the jury, Judge Tillery heard defendants' motion to suppress all testimony from Williams, Branch and Ellis which tended to identify Matthews and Foust as two of the four men who were engaged in robbing Mayo's Spur station. At this *voir dire*, the testimony of Williams, Branch, and Ellis was substantially the same as that later given before the jury. In the main, it differed only in that a few details supplied in one were omitted in the other. For instance, on *voir dire*, Williams told the judge that while the four men were in the station for the second time Branch came in and laid down money for gas from the self-service pump and went out just before the robbery. However, he did not mention this incident in his testimony to the jury.

Also on *voir dire* Williams said that before going to Greenville, Broadwell told him he wanted him "to go over there and see if the four [men] and the green Cadillac were the same ones who came there." Further, he told Judge Tillery that the four men who robbed the station were in the building from 12-15 minutes; that there was "plently of light in the station"; that Foust had been standing at the end of the counter on which Williams was leaning; that he had not only observed Matthews but he had looked into his face as he came toward him with the pistol; that thereafter he kept his eyes on the gun as Matthews leaned against him, pinning him against the door, that as Matthews advanced upon him he saw that Foust moved in behind. He knew,

therefore, that it was neither Matthews nor Foust who attacked Mayo behind the counter. However, it was Matthews who told one of the other two men behind the counter to shoot Mayo. It was also Matthews who threatened to shoot Williams if he did not hand over his wallet, and it was Matthews to whom he handed it. Williams insisted, therefore, that he had correctly identified Matthews and Foust in Greenville as two of the men who robbed the Spur station and that he would have identified them in court had he not seen them in Greenville.

Williams was also positive that the four men who robbed the station were the same four men who came there in the green Cadillac at 8:30 p.m. In explanation of his inability to say whether Ronnie and Lawrence Matthews were the "other two" Wiliams said his glasses needed cleaning; that he had become very upset when he saw Matthews aim the pistol at him, and more upset after Mayo was shot; that he became highly agitated, nervous and confused, this condition lasting several weeks.

On *voir dire* Williams said he believed the last man to leave the station was the one who bent over Mayo with a gun and told him "he was going to finish him off if he didn't tell him where the other money was," but he didn't know. However, he told the jury that "William Earl Matthews was the one who got left behind when the three fled together."

On *voir dire* Branch testified that when he looked into the station to see if Mayo had turned on the pump, he saw Mayo looking at him. He said he also saw defendants Matthews and Foust. "One of them had a gun or something at Mr. Williams" and the other was standing up beside the counter, and that's when he left. These statements were omitted from his testimony before the jury.

On the way to Greenville, Branch said Broadwell told them they were going to Greenville for a lineup to identify the people they saw in Wilson at the Spur station at the time of the shooting. However, he futher testified, "No, no one at the station told me that they had a license number of a green Cadillac. I didn't know anything about a green Cadillac. I didn't see one when I got to Greenville. . . . No, there was no discussion about a green Cadillac on the way to Greenville."

After viewing the four men in Greenville, Branch told Broadwell he believed that Ronnie and Lawrence Matthews were the two men he saw standing at the refrigerator when he went into the Spur station to pay for gas. However, he could not be positive because he did not see them face to face as he had seen defendants Matthews and Foust. Matthews had a scar on his face and Foust had certain facial hair.

On *voir dire* Ellis' account of seeing the four men in the Spur station and in flight thereafter did not differ from his account on direct examination. It did, however, include the following testimony which was not adduced before the jury: After the men had fled he returned to the station. The police had arrived and he "heard some people talking about it" (the green Cadillac), and "someone said they had the license number." However, nobody mentioned it to him. He went home where he later received a call from Detective Broadwell, who told him they had picked up four guys in a green Cadillac in Greenville. "He didn't say the four guys; he just said they had four guys," and he wanted Ellis to go see if he had seen them in Wilson.

In Greenville, Ellis and the others viewed four black men from the small dark room with the one-way mirror. After looking at the suspects, the witnesses entered the room with them and Ellis got just a few feet from them. It took him just a few seconds to identify Matthews, but Matthews was the only one he could identify. He said he had no problem identifying Matthews in Greenville because he had seen him crossing in front of him on Goldsboro Street; that nobody suggested to him in any way that he should identify him; and that he "could identify him today in court even if [he] had not seen him in Greenville." On cross-examination Ellis reiterated that he was sure that his identification now had nothing to do with his identification in Greenville.

At the conclusion of the *voir dire* testimony, the trial judge made findings of fact in substantial conformity to the above outlined testimony and then concluded as a matter of law, "that the in-court identification of the defendants Matthews and Foust by Williams and Branch and Matthews by Ellis was of independent origin and not tainted by any illegal pre-trial identification procedure." Judge Tillery further concluded: "[T]he totality of the circumstances does not reveal pretrial procedures so unnecessari-

ly suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice."

Accordingly, all three witnesses were allowed to identify defendants at trial and were also allowed to testify as to their identification at the Greenville lineup.

The defense presented extensive testimony which tended to establish an alibi for each of the defendants, as well as for Lawrence and Ronnie Matthews, who were then also charged with murder.[1] William Earl Matthews (defendant) is the first cousin of Lawrence and Ronnie Matthews, who are brothers. All three live in Greenville in a big, two-story house belonging to Annie Matthews, their grandmother. Eleven or twelve other members of the Matthews family representing five generations, also live there.

According to defendant Matthews he played basketball on the afternoon of 11 February 1975. Around 6:00 p.m. he met his cousin Ronnie, who drives a green 1965 Cadillac with pink carpet trim in the back. Ronnie gave him and Victor Foust a ride to the Matthews home. (Foust was temporarily staying there, visiting Patricia Matthews, his girl friend.) Defendant Matthews ate, bathed, and watched television with other members of the family. He testified as to the programs he saw. According to Matthews, Victor Foust went out with Patricia at 10:00 p.m. to buy beer and returned shortly thereafter. Lawrence Matthews came home at 11:00 p.m. from his job at Fieldcrest Mills. Defendant Matthews stopped working at Fieldcrest in November and had been doing "part time" work since then. He was not working on February 11th.

Around 11:00 defendant Matthews and Lawrence went upstairs to bed. Shortly thereafter, Ronnie returned home and announced to them that he had been to Wilson with Charles Norfleet, Tyrone Dixon and "Boots." All three, defendant Matthews, Ronnie and Lawrence, then fell asleep. They were awakened later by the arrival of the police. When Sergeant Laughinghouse of the Wilson police asked Ronnie to go with him

1. On 1 December 1977, pursuant to G.S. 15A-931, the District Attorney dismissed the indictment charging Ronnie and Lawrence Matthews with the murder of Donald Mayo.

to the police station, defendant Matthews, Foust, and Lawrence also volunteered to go. Thereafter Foust changed his mind, but when the Sergeant asked, "Do you need any help?" he replied, "No, man, I'm coming," and the three went.

On direct examination, in response to specific questions from his counsel, defendant Matthews said that his hair was the same as it was on February 11th. "The scar on my nose was there then. It's right there. . . . I have been convicted of breaking and entering in 1971. I have not been convicted of anything else. I have a tattoo on my face. It is right there [left corner of his mouth]. I put it on when I was in prison in 1972. That was the breaking and entering thing I talked about." On cross-examination he said he "went to training school for not going to school."

Various members of defendant Matthews' family, including his grandparents, Annie and Thurman Matthews, confirmed his account. Mrs. Matthews, however, testified that Foust never volunteered to go to the police station. On the contrary, he refused to go until she told him "to go ahead, to keep down trouble."

In brief summary Victor Foust testified in his own behalf as follows:

The week before Christmas 1974 he had come to Greenville, the home of his family, from Washington, D. C., where he had been employed as a machinist. He worked for one employer two months and for another, seven and one-half months. On 11 February 1975 he was unemployed and, since the first week after New Year's, registered at the unemployment office in Greenville. He has never at any time been to a Spur station in Wilson. On February 11th he met Ronnie Matthews around 5:30 p.m. and solicited a ride to Ronnie's home in Ronnie's Cadillac. There, Victor watched television with his girl friend, Patricia Matthews. Around 10:00 p.m. they went out to the "Pak-A-Sak" and bought some malt liquor and soda. On the way back they saw one Marvin Adams, his wife, and an elderly woman. Pleasantries were exchanged, and Victor and Patricia returned to the Matthews' house, where they continued to watch television until the police arrived. Marvin Adams corroborated Foust's version of his encounter with him.

When the Sergeant asked the others if they would accompany him to the police station Foust volunteered to go too but then, he said, "[W]hen it dawned on me, you know, by past experience about the Greenville Police Department, I changed my mind." However, when the officers asked him if he "needed any help" he went along. His previous convictions had been for breach of peace, "disorderly conduct, you know, misdemeanors, a couple of traffic violations." Foust had a scar "right across [his] right eye and between [his] eyes," which he said he had had since he was 13 years old.

After "the people from Wilson" had viewed the group whom the officers had assembled, Foust was retained in jail overnight and was served with a warrant about 9:00 the next morning, Wednesday, February 12th. He was released on Saturday, February 15th. In March he was charged with the murder of Mayo and rearrested.

Ronnie Lee Matthews, 19 years of age, testified that although the title to the vehicle was in his mother's name he was the real owner of the green Cadillac with pink rug trim in the rear. On February 11th, between 5:00 and 6:00 p.m., he said he saw his first cousin, William Matthews, on the street and took him home. Thereafter, at the request of Charles Norfleet, Ronnie drove to Wilson with his friends, Robert Moore, Tyrone Dixon, and Charles Norfleet. They arrived around 8:30 p.m.; after being misdirected several times they went to a Spur station to get directions to Spruce Street. Charles Norfleet wanted to see a girl named Nell, who lived there. A fat man behind the counter gave them directions to Spruce Street. (According to Detective Broadwell Mr. Mayo "would weigh 400 pounds.") While at the station Ronnie Matthews bought a carton of orange juice. The others bought something to eat, and Tyrone Dixon and Charles Norfleet used the rest room.

The group left the station about 9:00 p.m. Although they found Spruce Street they could not find the home of Nell; so they returned to Greenville, arriving around 10:00 p.m. Ronnie Matthews let his friends out and went to visit his girl friend. Around 11:00 p.m. he, his girl friend, and Robert Moore drove to the Fieldcrest Mills to pick up James Dixon who was getting off work. Ronnie then went home. Neither William Matthews nor Vic-

tor Foust went with Ronnie to Wilson on the night of February 11th. His story was corroborated by Tyrone Dixon, Robert Moore, Charles Norfleet, James Dixon, Nell Pender, Phyllis Foreman (his girl friend), her sister, Lou Gail Foreman, and her boy friend, Melvin Roberson.

Lawrence Matthews testified that he worked two shifts at Fieldcrest Mills that day, getting off one hour early at 10:00 p.m. He took two friends home and then went to his own house. His story was confirmed by his supervisor, William Manning, several co-workers, and the guard at the mill.

As to both defendants, William Matthews and Victor Foust, the jury returned a verdict of guilty of murder in the first degree. Upon these verdicts, under the law then applicable, Judge Tillery entered the mandatory sentences of death. Defendants' appeal was not timely perfected. We allowed certiorari on 27 January 1976, and the appeal was docketed 18 June 1976.

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

Bobby G. Abrams and Willis A. Talton for defendant appellant William Earl Matthews.

Vernon F. Daughtridge and Willis A. Talton for defendant appellant Vernon Victor Foust.

SHARP, Chief Justice.

For our review defendants have submitted 14 questions comprising 60 separate assignments of error based upon 182 exceptions. No purpose would be served by discussing each of these assignments. With the gravity of the charge for which defendants stand convicted constantly in mind, we have carefully scrutinized the record and the multiplicity of alleged errors. We conclude that defendants have failed to show prejudicial error requiring a new trial.

[1] Defendants first contend that their conviction should be overturned because the trial judge refused to allow their motions for a change of venue or a special venire to be selected from a county other than Wilson. In support of these motions defendants assert only that the deceased victim, Mr. Donald E. Mayo, was a

member of a large family, well known throughout Wilson County, and that the Wilson Daily Times provided daily coverage of the first trial. For these reasons defendants assert it would be difficult to impanel twelve jurors who knew nothing about the victim or the case.

The decision whether to order a change of venue or a special venire rests in the discretion of the trial judge, and his decision will not be reversed except for gross abuse, such as the denial of a constitutional right. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). In this case neither abuse of discretion nor prejudice has been shown. The record recites that defense counsel provided the court with the nine issues of the Wilson Daily Times which reported the events of the first trial. These papers are not a part of the record on appeal. Their absence, however, is immaterial since defendants say in their brief, "We do not contend that the articles in said newspaper were either inflammatory or biased."

We specifically reject as devoid of merit defendants' argument that news coverage which accurately reports the circumstances of the case and previous trial can be so "innately conducive to the inciting of local prejudices" as to require a change of venue. The fact that the defendants in this case were black and the victim white is mere happenstance; it is not per se grounds for a change of venue or special venire. Defendants made no attempt at trial, or prior thereto, to show that there existed in Wilson County any prejudice which might have deprived them of a fair and impartial jury, and the record suggests no such prejudice.

Defendants' second group of assignments involve the selection of the jury. *In limine*, we note that as of 2 July 1976 this appeal ceased to be one in "a death case." On that date, in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978, the United States Supreme Court invalidated the death penalty provisions of N.C.G.S. 14-17 (Cum. Supp. 1975), the statute under which defendants were indicted, convicted and sentenced to death. Therefore, under the authority of 1973 N.C. Sess. Laws, ch. 1201, § 7 (2d Sess., 1974), a sentence of life imprisonment was

substituted in lieu of the death penalty imposed in this case. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977).

[2] Defendant first contends that the court erred in allowing the district attorney to challenge for cause 14 jurors, each of whom indicated that he was so opposed to capital punishment that regardless of the evidence, and even if convinced beyond a reasonable doubt that a defendant was guilty as charged, he would not return a verdict requiring the death sentence. Notwithstanding that on *voir dire* defendants did not request any further examination of the challenged jurors, defendants' contention now seems to be that had these jurors been further sifted by the judge he might have found them to be qualified under the rule laid down in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968). This contention is totally without merit.

The decision in *Witherspoon* did not restrict the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to defendant's guilt. The ruling of the court was "that a *sentence of death* cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty. . . . No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Emphasis added.) *Id.* at 522-23, 20 L.Ed. 2d at 784-85, 88 S.Ct. at 1777. Since each of the 14 challenged jurors declared his inability, no matter what the evidence, to render a verdict mandating the sentence of death, the 14 challenges were properly allowed. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976).

Witherspoon-related errors in the selection of a jury affect only the sentence of death; they will not be held grounds for upsetting a conviction and ordering a new trial. 391 U.S. at 522, n. 21, 20 L.Ed. 2d at 785, 88 S.Ct. at 1777. *Accord, State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). As heretofore pointed out, this appeal involves only the validity of defendants' conviction—not the death sentence, for defendants cannot be put to death.

[3] It appears in the record from a statement by one of defendants' counsel that the State used its challenges "to remove all blacks who were called as potential jurors" with the exception of a "police officer who happened to be born black." Since defendants complain that the court allowed "these black defendants" to be tried by a jury composed entirely of white, presumably defendants excused the policeman. Defendants, of course, are not entitled to a new trial because all the jurors impaneled to try their case were white. A defendant is not entitled to be tried by a jury composed of a proportionate number of his own race, or even a jury on which his race is at all represented. He does, however, have the inviolable right to be tried by a fair and impartial jury, selected from a venire from which no members of any race have been systematically or arbitrarily excluded. *E.g., State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049, 50 L.Ed. 2d 765, 97 S.Ct. 760 (1977); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976); *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). Defendants in this case do not even suggest racial discrimination in the drawing and selection of either the jury lists or the traverse juries.

[4] At one point during the selection of the jury, the State had challenged five jurors, impliedly indicating its acceptance of the seven remaining in the box, and the court instructed the clerk to refill the empty seats. Before this could be done, however, juror No. 1 (Mrs. Ida Sherrod, who, as defendants inform us in their brief, is black) requested permission to ask a question. Mrs. Sherrod then declared, "I'm against capital punishment. I don't believe in killing. . . . I'm against capital punishment, and I want you to understand that." Mrs. Sherrod had been examined by the district attorney and, in response to a specific question, had told him she "felt she could serve" in a capital case. Upon reexamination Mrs. Sherrod said that she would "love to sit" on such a case and stated her views on capital punishment in such a way that they did not subject her to challenge for cause. The district attorney, however, "out of an abundance of precaution," exercised one of his peremptory challenges to excuse her. Defendant contends that the court erred in allowing the district attorney to reexamine, and then excuse, a venireman after indicating that she was satisfactory to the State. Defendant relies on the authority of

State v. Fuller, 114 N.C. 885, 19 S.E. 797 (1894). *Fuller* does indeed support defendants' position. That case, however, has been overruled by *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976). *McKenna* held that neither the case law nor N.C.G.S. 9-21(b) "prohibits the trial court, in the exercise of its discretion before the jury is impaneled, from allowing the State to challenge *peremptorily or for cause* a prospective juror previously accepted by the State and tendered to the defendant." *Id.* at 680, 224 S.E. 2d at 545. *See also State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796 (1973), *cert. denied*, 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1974).

Defendants' remaining exceptions to the selection of the jury are without merit and are overruled.

As detailed in the preliminary statement of facts, at the completion of an extensive *voir dire* the trial court concluded that the State's witnesses Williams and Branch should be allowed to identify defendants Matthews and Foust in court, and that witness Ellis should be permitted to identify Matthews. The court found that the in-court identifications by these witnesses were independent of their pretrial confrontation with defendants at the Greenville police station, and that the earlier face-to-face encounter "was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of fairness and justice." Eight of defendants' assignments of error challenge the admissibility of these in-court identifications. Defendants contend that at the time they "were subjected to a showup at the police station" they were actually under illegal arrest and had not been advised of their right to counsel. They also contend that "the totality of the circumstances" show that the witnesses' in-court identification was "tainted by the suggestive showup procedures."

Defendants first argue that, although at the time of the showup they "were not under arrest in the sense that formal charges had been preferred against either of them," they were actually in the custody of police officers. They insist that they had been taken from their homes without a warrant and without probable cause for arrest, the effect of this police action being an unconstitutional arrest which was also illegal under N.C. Gen. Stats.

15-41(2) (1965) (Repealed by 1973 N.C. Sess. Laws, c. 1286, § 26, effective July 1, 1975). However, all the evidence tends to show that defendant William Matthews, upon learning that his cousin Ronnie Matthews was going with the police officers to the station, actually volunteered to accompany him, and that defendant Foust—after some vacillation and upon his grandmother's advice—decided to accede to the officer's request and go with them. Even so, we need not explore in any detail the question whether defendants were under arrest at the time of the showup or whether the police had probable cause to make an arrest.

[5] Assuming, *arguendo*, that defendants were under illegal arrest at the time of the showup, the relevant consideration at this point is whether the arrest produced any evidence which must be suppressed as "the fruit of the poisonous tree" or " the fruit of official illegality." As the Court said in *United States v. Young*, 512 F. 2d 321, 323 (4th Cir. 1975), *cert. denied*, 424 U.S. 956, 47 L.Ed. 2d 362, 96 S.Ct. 1432 (1976). "It is only when the arrest itself produces such pressure as to compel admissions or the production of contraband or the seizing of evidence that would not otherwise have been detected that the poisonous tree can be said to produce fruit. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963)."

The only fruit of the challenged "arrest" in this case was the positive identification of defendants as two of the four men who participated in the robbery of Mayo's Spur station on the night of 11 February 1975. The penalty of exclusion, therefore, does not apply; for the Constitution protects no citizen from being viewed by the police or by other citizens at the invitation of the police. *United States v. Young, supra; United States v. Quarles*, 387 F. 2d 551 (4th Cir. 1967). *See also Yancey v. State*, 232 Ga. 167, 205 S.E. 2d 282 (1974).

In holding that the defendant had no right to avoid being viewed, the Court in *United States v. Quarles, supra*, also noted an admonition by the United States Supreme Court that the power to exclude identification evidence "is one that must be sparingly exercised, for the 'function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent

evidence be admissible, unless the manner in which it has been obtained . . . compels the formulation of a rule excluding its introduction in a federal court.' *Lopez v. United States*, 373 U.S. 427, 440, 83 S.Ct. 1381, 1388, 10 L.Ed. 2d 462 (1963). We feel no such compulsion here. *[Defendant] had no right that he not be viewed. United States v. Wade, supra*, 388 U.S. at 221, 87 S.Ct. at 1929, 18 L.Ed. 2d at 1154. A lineup is not the only means of identifying a suspect; an individual not in custody, as [defendant], 'may be placed under surveillance—he may be viewed on the streets, entering or leaving his home or place of business, at places of amusement, or at any other place where he is not entitled to privacy.' " *Id.* at 555-56. (Emphasis added.)

In affirming defendants' conviction in *United States v. Young, supra* at 323, the Court said, "We hold that an unlawful arrest does not per se make inadmissible positive identification testimony that is otherwise competent. *See Vance v. State of North Carolina*, 432 F. 2d 984, 990 (4th Cir. 1970). Whether such testimony is admissible does not depend upon the validity of the arrest but upon whether the confrontation was 'so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellants were] denied due process of law,' *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed. 2d 1199 (1967)."

Thus, so long as the circumstances were not unnecessarily suggestive, the police officers were free to arrange a confrontation between defendants (whether under arrest or not) and witnesses Williams, Branch, and Ellis. The fact that defendants were in custody only made the confrontation easier to arrange. Therefore, the questions remaining to be answered are (1) whether defendants were denied the right to counsel at the showup, and (2) whether the procedures used were so impermissibly suggestive as to be conducive to an irreparably mistaken identification.

[6] The question of defendants' right to counsel at the time of the showup is quickly resolved. Defendants mistakenly assume that they were entitled to have counsel present as soon as they were taken into custody as *suspects*. This is not the case. The right to counsel attaches upon the initiation of formal prosecution. Prosecution does not begin until a formal charge has been levied against a suspect by a judicial officer, whether by a finding of

probable cause, or by arraignment, indictment, information or preliminary hearing. Custodial arrest of a mere *suspect* does not constitute the initiation of "adversary judicial proceedings" and is not sufficient to draw the State and the prisoner into such an antagonistic relationship as to require the assistance of counsel from that moment forward. *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972); *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *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); 1 Stansbury's N.C. Evidence § 57 (Brandis rev. 1973). *See also State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970); N.C.G.S. 7A-451(b)(2) (Cum. Supp. 1977). Thus, our remaining inquiry into the identification procedures must focus upon the reliability of the pretrial confrontation.

Regardless of the presence of counsel, or whether formal judicial proceedings against the defendant have begun, the due process clause forbids an out-of-court confrontation which is so unnecessarily "suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968); *State v. Sweezy, supra; State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968). *See Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967). Thus, if a pretrial confrontation and identification fails the test of due process, an in-court identification will be excluded in both state and federal courts unless the prosecution can show at a *voir dire* hearing that the witness's in-court identification is independent of and untainted by the suggestive out-of-court confrontation. *State v. Colson*, 274 N.C. 295, 306, 163 S.E. 2d 376, 383-84 (1968), *cert. denied*, 393 U.S 1087, 21 L.Ed. 2d 780, 89 S.Ct. 876 (1969); *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967). *See Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); 1 Stansbury's N.C. Evidence § 57 (Brandis rev. 1973).

[7] As we pointed out in *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), the use of a showup where other methods of identification are feasible has been widely condemned. The procedure in this case, like all showups, may have been inherently suggestive for the witnesses would likely assume that the police had brought them to view persons whom they suspected might be the

guilty parties. Further, Wiliams and Ellis knew that the officers had located the green Cadillac in which four black males came to the Spur station earlier in the evening, and that through this car, the police had traced the persons they were to view. Only Branch knew nothing about the Cadillac until after he had made his identification. However, as we have already noted, even if the out-of-court confrontation were impermissibly suggestive it will not render inadmissible the in-court identification provided it is first determined on *voir dire* that the in-court identification is of independent origin. *State v. Henderson, supra.*

In this case, all three witnesses saw the defendants at the Greenville police station within a few hours of the crime. Of the three, Williams was exposed to the most suggestion. He had seen the green Cadillac with pink trim in the back window when its four occupants had asked directions at Mayo's Spur station, and he again saw the car at the police station when he entered for the showup. It was also Williams, however, who had the best opportunity to observe the defendants. He observed them for several minutes at close quarters on two different occasions in a well-lighted room. On the second occasion he was no casual observer; the man he identified as Matthews came toward him, pulled a gun from his shirt, leaned against him, and pushed him into a corner so that he could not move. It was that same man whom Williams saw aim a gun across the counter at Mayo and whom he heard direct one of the other robbers to shoot Mayo. It was also Matthews who ordered Williams to open the cash register and to whom he handed his wallet.

Although four men participated in the robbery, they entered in pairs at different times. It is noteworthy that Williams was able to identify only the two who entered first, Matthews and Foust. He identified them at the showup and he never thereafter expressed any doubt that they were two of the four culprits. Albeit Williams was sometimes an inarticulate witness—troubled by the rapid-fire questions and the objections of counsel, as well as the recollections of the nerve shattering events of 11 February 1975—he stood by his identification of defendants Matthews and Foust. Moreover, he consistently refused to identify Ronnie and Lawrence Matthews because he could not be positive they had taken part in the robbery.

Witness Branch, who also identified the defendants as two of the men he saw in the Spur station, likewise observed them for several minutes while they were in a well-lighted room. In addition, he had seen Matthews' face caught in the full glare of the headlights of his car and had noted a scar on his face. Like Williams, however, he was unable to identify the other men who entered the station.

Witness Ellis had the least opportunity to observe the man he identified, defendant Matthews. Nevertheless, Ellis testified that when Matthews ran across the road in front of his car they were at such close quarters that Ellis would have hit Matthews had he not applied his brakes. Under similar circumstances the Supreme Court of the United States has held that reliable identification is possible. In *Coleman v. Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970), the witness was assaulted around 11:30 p.m. by three black men as he was changing his tire by the side of the road. As the car approached the scene, the three men fled across the road and were illuminated by the oncoming car's headlights. The witness in *Coleman* was able to give only a "vague" description to police before confronting defendants in a police lineup. Nonetheless, the Supreme Court held that there was no error in the trial court's findings that the in-court identification of the defendants by the witness was independent in origin from the pretrial confrontation.

Here, the trial court concluded that the in-court identification of both defendants by the witnesses Williams and Branch, and of defendant Matthews by the witness Ellis, was "independent in origin and not tainted by any illegal pretrial identification procedure." The court also concluded that the out-of-court identification procedure was not so suggestive as to give rise to a very substantial likelihood of misidentification. In our view, substantial evidence in the record supports these holdings, and we therefore uphold them on appeal. *E.g., State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971).

[8] Defendants' assignments of error 26 and 27 assert that the trial judge erred in refusing defendants' motions for a transcript of the testimony of certain State's witnesses at the first trial. They contend these transcripts were needed to demonstrate

discrepancies in the witnesses' testimony. The first trial ended in a mistrial on 20 July 1975, thirty days before the commencement of the second trial, which we now review. The facts with reference to these motions are set out below.

This case was called for trial and the selection of the jury began on Monday, 18 August 1975. The jury was impaneled on Friday, August 22nd, and the verdict was returned on Thursday, August 28th. On the morning of August 22nd, Judge Tillery began the *voir dire* examination of State's witnesses Williams, Branch, and Ellis to determine the admissibility of their identification of defendants. After these witnesses had testified, defense counsel addressed the court as follows: "We would like to request that a transcript of the *voir dire* testimony of Mr. Bill Branch which was taken at the last trial be transcribed and admitted into evidence on this *voir dire* for the Court's consideration, and we do that because his testimony here today is in conflict with what he said at the last trial." Judge Tillery denied this motion. Whereupon defendants called as a witness Mrs. Margaret Deanhardt, the official court reporter for Wilson County who had reported defendants' first trial.

Mrs. Deanhardt, who had with her in court her notes and records of the first trial, testified that she "took down verbatim" what Bill Branch had said on *voir dire* at the first trial. At that time "he said he picked out all four of them. He stated he identified all four blacks in the Greenville police station as being the four that were at the Spur station . . . on the night this occurred." Finally, Mrs. Deanhardt testified that the witness Branch never made any in-court identification of anyone other than defendants Matthews and Foust; nor at the first trial did he mention having seen a green Cadillac in Wilson.

At the conclusion of Mrs. Deanhardt's testimony, which ended the *voir dire*, Judge Tillery dictated his findings of fact and conclusions of law. He then inquired of counsel if there were "any other pre-jury matters." At that time defendants renewed their motion "that they be furnished a transcript of the testimony of the State's witnesses Linwood Williams, Bill Branch, and Donald Ellis from the last trial of this action;" whereupon, the district attorney made "the same motion as to all 25 of [defendants'] witnesses at the last trial." The trial judge denied both motions, and we affirm his rulings.

At every retrial a transcript of the former trial would undoubtedly be a convenience and at least of some assistance to all parties. That does not mean, however, that either an indigent or a wealthy defendant has an unqualified right to a transcript or to demand it at any stage of trial. As pointed out in *Britt v. North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431 (1971), the crucial test in any case is whether the requested transcript is "needed for an effective defense or appeal," a rule first enunciated in *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956). *See State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). *See also McGarry v. Fogliani*, 370 F. 2d 42 (9th Cir. 1966); *United States v. Shoaf*, 341 F. 2d 832 (4th Cir. 1964). In *Britt*, the Supreme Court identified two factors relevant to the determination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." 404 U.S. at 227, 30 L.Ed. 2d at 403-04, 92 S.Ct. at 434.

As in the case *sub judice*, *Britt* involved the retrial of a murder prosecution in eastern North Carolna only a month after the first trial had ended in a hung jury. In the interim the indigent defendant Britt had moved the court that the State be required to furnish him a free transcript of the first trial. The trial court denied the motion and the Supreme Court allowed certiorari to determine whether the rule of *Griffin v. Illinois, supra*, "applied in this context." The Court concluded that the rule did apply but that it had not been violated in Britt's case because, under the circumstances, "adequate alternatives to a transcript" were available. These circumstances included the fact that the second trial took place within a month of the first trial; that the second trial was before the same judge and with the same counsel; and that the same court reporter was present at both trials and could, at any time, have read back his notes of the mistrial to counsel.

Two factual differences are noted between Britt's case and this one: (1) Judge Tillery, who presided at the retrial, did not conduct the first trial. In our view, the fact that the same judge did not preside at both trials has no significance in this case. (2) On *voir dire* defendants Matthews and Foust called the court reporter as a witness and examined her with reference to the

testimony which State's witness Branch gave at the first trial. Albeit they did not see fit to call her again, the reporter was, of course, continuously present in court with her notes of the first trial, and defendants could have questioned her at any time, privately or before the judge or jury, with reference to the former testimony of any other witness as well.

We believe that the circumstances of the instant case disclose the availability of adequate alternatives to a transcript—alternatives more than equal to those in *Britt*—and that defendants here suffered no prejudice from the lack of a transcript. The record reveals that neither the district attorney nor counsel for the defense had a transcript of the former trial. The scales were not tipped in favor of the State on this count. We also note that defendants' request for the transcript came on the fifth day of the trial. At that time four days had been spent in selecting a jury and more than 400 persons—the original panel of prospective jurors and three special venires—had been summoned to court.

We hold that Judge Tillery did not abuse his discretion in denying defendants' motions. Assignments 26 and 27 are overruled.

The remainder of defendants' numerous assignments of error are without merit and do not warrant discussion. Suffice it to say, they concern matters within the discretionary control of the trial judge. Such rulings will not be reversed except for abuse of discretion. *E.g., State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976) (motion to set aside verdict, arguments of counsel); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975) (competency of jurors); *State v. Summers*, 284 N.C. 361, 200 S.E. 2d 808 (1973) (scope of allowable cross-examination). *See also State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976) (matters not governed by rule or statute are left to the discretion of the trial judge); 12 Strong's N.C. Index 3d, *Trials* § 5. We have carefully examined each of the trial judge's challenged actions and can find no abuse. Having done so, we are constrained to remind counsel that the most effective appellate advocacy is not to be achieved by bringing forward multitudinous assignments of error based on indiscriminate exceptions; it is achieved only by careful selection of those exceptions relating to matters which, it might be reasonably argued,

amounted to denial of a substantial right or constituted error which affected the verdict. *See* 1 Strong's N.C. Index 3d, *Appeal and Error* § 47.

[9] Defendants' assignment No. 60 relates to the sentence of death which, as we have heretofore noted, was invalidated by *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed 2d 944, 96 S.Ct. 2978 (1976). Accordingly, following the decision of *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976), we remand this case to the Superior Court of Wilson County with directions (1) that the presiding judge, without requiring the presence of defendants, enter as to each defendant a judgment imposing life imprisonment for the first degree murder of which he has been convicted; and (2) that in accordance with these judgments the clerk of Superior Court of Wilson County issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish to each defendant and his attorney a copy of their judgment and commitment as revised in accordance with this opinion.

As to the verdicts—No error;

As to the judgments—Error and remanded.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 44, WILLIAM J. MARTIN

No. 90

(Filed 14 July 1978)

1. Judges § 7— censure or removal of judges—jurisdiction of Supreme Court—constitutionality of statute

Art. IV, § 17(2) of the N. C. Constitution, which is a positive mandate to the Legislature to provide a procedure in addition to impeachment for the removal of judges and justices, by implication gives the Legislature authority to confer upon the Supreme Court original jurisdiction to censure or remove judges and justices.

2. Judges § 7— misconduct in office—lay judge

There is no merit in the contention of a district court judge that he was singled out for censure or removal because he was a lay judge.

3. Judges § 7— censure or removal of judge—independent judgment by Supreme Court

The Supreme Court is not bound by the recommendation of the Judicial Standards Commission as to the censure or removal of a judge but must consider all the evidence and exercise its independent judgment as to whether it should censure, remove, or decline to do either.

4. Judges § 7— proceedings before Judicial Standards Commission—quantum of proof

The quantum of proof in proceedings before the Judicial Standards Commission is proof by clear and convincing evidence—a burden greater than that of proof by a preponderance of the evidence and less than that of proof beyond a reasonable doubt.

5. Judges § 7— misconduct in office—arbitrary dismissal of criminal case

A district court judge's arbitrary dismissal of a criminal case, after the district attorney had refused to take a nol pros and without permitting the State to offer its evidence, constituted willful misconduct in office clearly calculated to bring the court into disrepute and was not excused by the fact that the judge was a lay judge holding his first week of court.

6. Judges § 7— misconduct in office—ex parte order for delivery of personalty

The conduct of a district court judge in signing an order for delivery of personal property without notice to the opposing party or his counsel and without giving the opposing party or his counsel an opportunity to be heard constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

7. Judges § 7— misconduct in office—ex parte hearing after continuance granted by another judge—insufficiency of evidence

The evidence did not support a finding by the Judicial Standards Commission that a district court judge entered an order granting plaintiff alimony *pendente lite*, child custody and possession of the homeplace without the presence of or notice to defendant or his counsel after having been advised that another judge had granted a continuance in the case.

8. Judges § 7— misconduct in office—ex parte consideration of case

The conduct of a district court judge in holding a hearing in a civil case an hour after notice of the hearing was given to defendant's counsel and in entering judgment for plaintiff in the absence of defendant or his counsel was, in effect, a willful *ex parte* consideration of the case without proper legal notice to defendant or his counsel and constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

9. Judges § 7— misconduct in office—censure or removal

There are no strict guidelines or standards for determining whether a judge or justice should be censured or whether he should be removed since each case must be decided on its own facts.

In re Martin

10. Judges § 7— misconduct in office—when removal is required

A judge should be removed from office where his misconduct involves personal financial gain, moral turpitude or corruption or where he knowingly and willfully persists in indiscretions and misconduct which the Supreme Court has declared to be, or which under the circumstances he should know to be, acts which constitute willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

11. Judges § 7— misconduct in office—censure

Any act by a judge or justice which is prejudicial to the administration of justice and brings the judicial office into disrepute warrants censure.

12. Judges § 7— misconduct in office—suborning perjury—insufficiency of evidence

A finding that a district court judge had committed the felony of suborning perjury, if supported by clear and convincing evidence, would require the removal of the judge from office. However, a finding by the Judicial Standards Commission in this proceeding that a district court judge had suborned perjury was not supported by clear and convincing evidence and would not support removal of the judge from office.

13. Judges § 7— misconduct in office—censure—arbitrary dismissal of criminal case—ex parte orders

A district court judge is censured by the Supreme Court for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute for his conduct in arbitrarily dismissing a criminal case without hearing evidence after the district attorney refused to take a nol pros, signing an order for delivery of personal property without giving the opposing party or his counsel notice and an opportunity to be heard, and holding a hearing and entering an order for plaintiff in a domestic relations case without giving proper notice to defendant or his counsel and without the presence of defendant or his counsel.

THIS matter is before this Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 28 February 1978, that Judge William J. Martin, a judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District of the State of North Carolina, be removed from office 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; G.S. 7A-376 (1977 Cum. Supp.); Canons 2(a) and 3(a)(4) of the North Carolina Code of Judicial Conduct.

Harold D. Coley, Jr., Special Counsel for the Judicial Standards Commission.

West and Groome, by Ted G. West, for respondent.

BRANCH, Justice.

A citizen of this State filed a written complaint concerning the conduct of Judge William J. Martin (respondent), and pursuant to the provisions of G.S. 7A-377, the Commission conducted an investigation. This proceeding was initiated by the filing of a complaint verified by Harold D. Coley, Jr., Special Counsel for the Commission, alleging that respondent had committed specified acts constituting "wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Respondent answered initially alleging that the Commission was without jurisdiction or authority to review the decisions or judgments of the judges of duly constituted courts made after hearing evidence in open court. By the remainder of his answer, he denied the principal allegations of the complaint and set forth his contentions as to the true facts.

On 10 November 1977, respondent was accorded a plenary hearing before seven members of the Commission on the charges contained in the complaint. The Commission's evidence was presented by Mr. Harold D. Coley, Jr., Special Counsel for the Commission, and respondent was represented by his counsel, Mr. Ted. G. West. Respondent testified and offered witnesses who testified as to his good character. After hearing the evidence, the Commission made extensive written findings of fact and concluded as a matter of law that the conduct of respondent as set forth in its findings constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The findings upon which the Commission based its conclusions are as follows:

> a.) That in reference to the case *STATE OF NORTH CAROLINA v. JOHN BUXTON LONG*, 74Cr18783, over which Respondent was scheduled to preside on 10 December 1974 in Catawba County District Court, Respondent, prior to opening of Court, summoned Assistant District Attorney Edward J. Crotty to his chambers; that in the presence of the defendant and defendant's mother, Respondent advised Mr. Crotty that the defendant "needed a break"; that the defendant's father and a relative of Respondent had died in a common accident, that for these reasons, Respondent requested Mr.

Crotty to enter a "nol pros" in the case; that Mr. Crotty advised Respondent that the breathalyzer reading was too high for him to enter a "nol pros" but that he would take a plea of guilty to the charge of careless and reckless driving under the circumstances; that subsequent to this conversation and in open court, Assistant District Attorney Crotty called the case for trial; that Respondent ordered the case "held open"; that thereafter, without the knowledge of Mr. Crotty, Respondent ordered the Courtroom Clerk, Carolyn Wrightsell, to enter a dismissal in the case; that the order of dismissal was entered when no evidence was introduced by either the State or the defendant.

b.) That in reference to the case of *STATE OF NORTH CAROLINA v. CHARLES D. FLEMING*, 75Cr20356, over which the Respondent was scheduled to preside on 4 March 1975 in Catawba County District Court in Hickory, North Carolina, the Respondent, while accompanied by Mr. Joe K. Byrd, Jr., attorney for the defendant, approached Officer G. P. Herman of the Hickory Police Department, in the hallway outside the courtroom; that the Respondent knew that Officer Herman was the arresting officer in the case and was present when the breathalyzer test was administered to the defendant; that the Respondent initiated a conversation with Officer Herman during which the Respondent requested Officer Herman to testify under oath that he was not present when the breathalyzer test was administered; that Officer Herman immediately reported the conversation and incident to the Chief of Police, Hickory Police Department, Melvin Tucker.

c.) That on 14 December 1976 in the case *REBECCA DOWELL v. JESSE CHARLES DOWELL*, 76CvD726, Burke County District Court, Respondent entered an order in favor of the plaintiff for the possession of an automobile without notice to or the presence of the defendant or counsel for the defendant, J. Richardson Rudisill, as provided by law; that Respondent entered the Order outside of Burke County and while Respondent was scheduled to preside over the District Court in Catawba County.

d.) That on 31 January 1977 in the case of *REBECCA DOWELL v. JESSE CHARLES DOWELL*, 76CvD726, Burke County District Court, the Respondent signed an Order awarding

alimony *pendente lite*, child custody, and that plaintiff Dowell have possession of defendant's homeplace; that Respondent took evidence from the plaintiff before signing the Order; that the hearing was held and the Order entered without the presence of or notice to defendant or defendant's counsel as provided by law; that the Respondent was specifically and directly notified in a telephone conversation by Samuel M. Tate, District Court Judge, 25th Judicial District, on the same day, just prior to the hearing and entry of judgment, that he, Judge Tate, had granted a continuance until 14 February 1977, and specifically requested the Respondent to honor this order of continuance; that Judge Tate advised both the Respondent and Counsel for the plaintiff in a telephone conversation that counsel for the defendant had cases in Superior Court of Catawba County and Superior Court of Caldwell County on Monday, 31 January 1977, with the Caldwell County case having been preemptorily set.

e.) That on 8 February 1977 in the case *SUE HIGGINS STROUP v. STEPHEN HILLARD STROUP*, 76CvD834, Burke County, the Respondent knowingly presided at a hearing out of term when Respondent was not scheduled to hold court in Burke County and entered a judgment for the plaintiff in the case in the absence of the defendant or defendant's counsel and with knowledge that proper notice as required by law had not been given the defendant or Stephen T. Daniel, Jr., attorney for the defendant.

Based upon these findings of fact and conclusions of law, the Commission recommended that the Supreme Court of North Carolina remove respondent from judicial office. On 15 March 1978, respondent petitioned this Court for a hearing on the Commission's recommendation for removal.

[1] We first consider respondent's contention that this Court is without original jurisdiction to censure or remove judges.

The procedures by which this Court may pass upon the actions or recommendations of the Judicial Standards Commission are set forth in N.C.G.S. ch. 7A, art. 30 (Cum. Supp. 1977). G.S. 7A-376 provides:

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. . . .

Further, G.S. 7A-377(a), in part, provides:

> . . . A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. 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. . . .

Respondent contends, however, that since the jurisdiction of this Court is defined by Article IV, Section 12, of the North Carolina Constitution, it can be altered only if constitutionally authorized. He argues that the Constitution does not authorize expansion of the jurisdiction of the Supreme Court by the Legislature and that the Legislature was, therefore, without authority to confer upon this Court original jurisdiction over the censure and removal of judges. In support of this contention, respondent relies upon the decisions of this Court in *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), and *Utilities Commission v. Finishing Plant*, 264 N.C. 416, 142 S.E. 2d 8 (1965).

In discussing the jurisdiction of this Court, we held, in *Smith v. State, supra*, that the Supreme Court no longer had original jurisdiction over claims against the State since the electorate had approved the present Article IV which did not contain the earlier provisions which granted original jurisdiction over such claims to the Court. In so holding, Chief Justice Sharp, speaking for the Court, stated:

> It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or

enlarge that jurisdiction unless authorized to do so by the constitution. . . . 289 N.C. at 328.

In that opinion, the Chief Justice also summarized the holding in *Utilities Commission v. Finishing Plant, supra,* as follows:

Thus *Finishing Plant, supra,* squarely held the General Assembly without authority to expand the appellate jurisdiction of this Court beyond the limits set in the Constitution. 289 N.C. at 329-330.

Article IV, Section 12, of the North Carolina Constitution, in pertinent part, provides:

Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of other courts.

We agree with respondent that this section of the Constitution does not contain any authority by which the Legislature could confer upon this Court original jurisdiction over the censure and removal of judges. We do not agree, however, with respondent's contention that the Constitution does not elsewhere authorize the Legislature to confer such jurisdiction upon this Court.

As the result of an amendment, proposed by Chapter 560 of the 1971 Session Laws and ratified by the people of this State of 7 November 1972, Article IV, Section 17, of the North Carolina Constitution now, in part, provides:

(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 physicial 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. [Emphasis ours.]

The North Carolina Constitution expresses the will of the people of this State and is, therefore, the supreme law of the land. *In re: Advisory Opinion, Constitutionality of H.B. 276*, 227 N.C. 708, 43 S.E. 2d 73 (1947). Thus, it is a fundamental principle of constitutional construction that effect must be given to the intent of the people adopting the Constitution, or an amendment thereto, and that constitutional provisions should be construed in consonance with the objectives and purposes sought to be accomplished, giving due consideration to the conditions then existing. *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512 (1953). It is well established that, in construing either the federal or State Constitution, what is implied is as much a part of the instrument as what is expressly stated. *See*, 16 Am. Jur. 2d, *Constitutional Law*, Section 72 (1964). Further, amendments are to be construed harmoniously with antecedent provisions, insofar as possible. *See*, 16 Am. Jur. 2d, *Constitutional Law*, Sections 68, 69 (1964).

Patently, N.C. Const., Art. IV, § 17(2), which is a positive mandate to the Legislature to provide a procedure in addition to impeachment for the removal and censure of judges and justices, does not expressly authorize the Legislature to confer original jurisdiction upon the Supreme Court over the censure and removal of judges. The article neither specifies a tribunal nor directs the creation of an authority for this purpose. It merely commands the Legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient, and impractical remedy of impeachment.

Section 17(2) of Article IV comes under the heading of "new matter." Construing this provision in accordance with the rules of construction stated above, we are of the opinion that, by clear implication, it grants to the Legislature authority to confer the challenged jurisdiction upon the Supreme Court. It seems both appropriate and in accordance with the constitutional plan that the Supreme Court, to which the Constitution gives "general

supervision and control over the proceedings of the other courts" (Art. IV, § 12(1)) should also have final jurisdiction over the censure and removal of the judges and justices. That this was the people's intent is demonstrated by the circumstances under which they ratified Section 17 of Article IV of the Constitution.

The Judicial Standards Commission Act, which defines the role of this Court in the censure and removal of judges, was enacted on 17 June 1971, nearly seventeen months prior to the ratification of the amendment to Article IV which authorizes removal of judges other than by impeachment. The effective date of the Act, however, was made contingent upon the ratification of the amendment. Ch. 560, Sec. 3, 1971 N.C. Sess. Laws. This Court has held that the General Assembly may enact a statute which is not authorized by existing provisions of the Constitution when the statute is passed in anticipation of a constitutional amendment authorizing it and provides that it shall take effect only upon ratification of such amendment. *Fullam v. Brock*, 271 N.C. 145, 155 S.E. 2d 737 (1967).

The people of this State ratified the proposed amendment to Article IV with knowledge that ratification would make effective legislation conferring upon the Supreme Court jurisdiction not elsewhere constitutionally authorized. Further, since this legislation is not inconsistent with the express language of Article IV, Section 17(2), and does not in any way enlarge or diminish the jurisdiction and powers granted to this Court as part of the General Court of Justice by Article IV, Section 12, we are of the opinion that ratification of the amendment carried with it an expression of the will of the people that the Constitution be amended so as to empower the Legislature to confer upon this Court original jurisdiction over the censure and removal of judges.

By accepting and acting upon the original jurisdiction authorized by the people and conferred by the Legislature, this Court does not usurp power constitutionally reserved to another branch of government. Thus, our exercise of jurisdiction in instant case does not violate the constitutional doctrine of separation of powers. We hold that the Judicial Standards Commission Act, Chapter 7A, Article 30, of the General Statutes, is constitutional and that, under that article, this Court is vested with jurisdiction to act in the case *sub judice*.

[2] Respondent's contention that he was denied equal protection of the law in that he was singled out for censure or removal because he was a lay judge is totally without merit. There is nothing in the record before us which suggests that the Judicial Standards Commission indulged in such conduct.

We do not deem it necessary to discuss the remaining constitutional questions presented by respondent since each of them has been answered adversely to respondent in *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977).

We now turn to the question of whether Judge Martin should be removed from office or censured, or whether the proceeding should be dismissed or remanded for further proceedings before the Commission.

The function of the Commission is to conduct hearings upon complaints filed against judges and justices, to find facts and make recommendations so as to bring before the Supreme Court the questions of whether a judge or justice should be censured or removed in order to maintain proper administration of justice, public confidence in our judicial system and the honor and integrity of judges.

[3] The recommendations of the Commission are not binding upon the Supreme Court, and this Court must consider all the evidence and exercise its independent judgment as to whether it should censure, remove, or decline to do either.

[4] The quantum of proof in proceedings before the Commission is "proof by clear and convincing evidence—a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt." *In re Nowell, supra*, at 247. *See also, In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978).

Chief Justice Sharp, speaking for the Court, in *In re Nowell, supra*, defined *wilful misconduct in office* and its relationship to *conduct prejudicial to the administration of justice that brings the judicial office into disrepute* as follows:

> *Wilful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad

faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. *In re Edens, supra*, at 305, 226 S.E. 2d 5, 9. *See, Spruance v. Commission*, 13 Cal. 3d 778, 796, 532 P. 2d 1209, 1221, 119 Cal. Rptr. 841, 853; *Geiler v. Commission on Judicial Qualifications, supra* at 287, 515 P. 2d at 11, 110 Cal. Rptr. at 211; *In re Haggerty*, 257 La. 1, 39, 241 So. 2d 469, 478.

Wilful misconduct in office of necessity is *conduct prejudicial to the administration of justice that brings the judicial office into disrepute.* However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. *In re Edens, supra.* Likewise, a judge may also commit indiscretions, or worse, in his private life which nonetheless brings the judicial office into disrepute. *See, e.g., In re Haggerty, supra* (judge was arrested during a police raid on a party at which, *inter alia*, prostitutes were present and obscene films were being shown.) 293 N.C. at 248-249.

The findings upon which the Commission based its recommendation for removal of Judge Martin are such that we find it necessary to consider each of them seriatim.

We are of the opinion that there was clear and convincing evidence to support the facts found by the Commission in finding (a) relating to the case of *State of North Carolina v. John Buxton Long*, No. 74CR18783, except that portion of the finding which stated that the order of dismissal was entered without the knowledge of Mr. Crotty, the Assistant District Attorney. The record shows that Mr. Crotty testified that, after ordering the matter to be held open, Judge Martin turned to the clerk later in the day and ordered the case dismissed.

[5] We ordered that the respondents be censured in *In re Stuhl*, 292 N.C. 379, 233 S.E. 2d 562 (1977), in *In re Edens*, 290 N.C. 299, 226 S.E. 2d 5 (1976), and in *In re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1975), because the judges entered judgment outside the courtroom when court was not in session and without notice to the distict attorney. Here the respondent has elicited evidence tending to show that he was a lay judge holding his first week of court and that the case was dismissed in open court. Even so, the *ex parte* disposition of a case by a judge for reasons other than an honest appraisal of the law and facts as disclosed by the evidence and the advocacy of both parties to the proceeding amounts to conduct prejudicial to the administration of justice which in due course will bring the judicial office into disrepute. A trial judge cannot rely on his inexperience or lack of training to excuse acts which tend to bring the judicial office into disrepute. *See, In re Nowell, supra.* The arbitrary dismissal of this case, after the district attorney had refused to take a nol pros and without permitting the State to offer its evidence, was wilful misconduct in office clearly calculated to bring the court into disrepute.

[6] The Commission's findings (c) in the case of *Rebecca Dowell v. Jesse Charles Dowell*, 76CVD726, is supported by clear and convincing evidence, and the conduct of Judge Martin in signing an order for delivery of personal property without notice to defendant or his counsel and without giving opposing party or counsel an opportunity to be heard constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In *In re Stuhl, supra*, we stated:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. 292 N.C. at 389.

[7] We next consider finding (d) relating to the above-mentioned case of *Dowell v. Dowell.* In support of finding (d), the special counsel for the Commission offered the testimony of Richard Rudisill, attorney for defendant Dowell, who testified that the case had been continued on several occasions and that on the last occasion District Court Judge Tate had continued it to 14

February 1977. He stated that he had been attending a seminar on the weekend prior to Monday, 31 January, and his first knowledge that the case of *Dowell v. Dowell* was set for 31 January 1977 came to him on that date through a note left on the preceding Friday by his secretary. He had cases set in Catawba County in superior court for that morning, and he proceeded to Hickory for his appearance in superior court. Upon his arrival in Hickory, he called Judge Tate and requested him to contact Judge Martin and to advise him that the case had been continued to 14 February 1977.

Joe K. Byrd, Jr., attorney for Rebecca Dowell, testifying for the respondent, stated that the case was continued by Judge Tate to 31 January 1977 and was calendared on that date for trial.

District Court Judge Tate, testifying for the special prosecutor, read from an affidavit prepared by Mr. Rudisill which in effect averred that at Mr. Rudisill's request he called Judge Martin on 31 January 1977 and told him that he (Judge Tate) had continued the *Dowell* case to 14 Feburary 1977 and requested that his action be honored. However, on cross-examination Judge Tate testified that the only thing that he told Judge Martin was that he was asking for a continuance of the *Dowell* case at Mr. Rudisill's request because he (Judge Tate) had apparently led Mr. Rudisill to believe the trial would be set for another date.

Judge Martin testified that when he came to court on 31 January 1977, he was handed a calendar which showed the case of *Dowell v. Dowell* to be set for trial. He had never seen the calendar before. He received a call from Judge Tate after he had commenced the hearing of the *Dowell* case, and Judge Tate said that he was calling to ask for a continuance at Mr. Rudisill's request. Judge Tate further said that he and Mr. Rudisill had "sort of agreed to continuing to another date." Judge Martin refused to continue the case. The special prosecutor introduced his Exhibit 9, a certified copy of the district Court docket of Burke County for 31 January 1977, which showed that the case of *Dowell v. Dowell* appeared on the printed copy in someone's handwriting. Respondent introduced his Exhibit (c) which was also a copy of the 31 January docket of Burke County District Court. He also introduced his Exhibit (a), a copy of the 17 January 1977 calendar of Burke County District Court, Judge Tate presiding, which con-

tained a handwritten entry indicating that the case of *Dowell v. Dowell* was continued to 24 January 1977. Respondent's Exhibit (b) was a copy of the 24 January 1977 calendar of the Burke County District Court, Judge Tate presiding, which contained a handwritten entry indicating that the case of *Dowell v. Dowell* was continued to 31 January 1977.

The evidence presented by the special counsel for the Commission was countered by believable evidence from the respondent. We are unable to conclude that finding (d) is supported by evidence that meets the required quantum of proof in proceedings before the Commission.

[8] We conclude that finding (e) relating to the case of *Sue Higgins Stroup v. Steven Hillard Stroup*, Case No. 76CVD834, is supported by clear and convincing evidence. We note, however, that there was evidence indicating that the case had been calendared for trial at the 4 February 1977 Session of Burke County District Court, and, when the case was not reached, counsel for both parties agreed to set the case the following week if they could get a judge to hear it. Even so, the only showing of actual notice to defendant's counsel as to the time of hearing at which judgment was entered against defendant was one hour before the trial judge began to receive evidence. This conduct did not afford the defendant Stroup or his counsel full right to be heard according to law and was, in effect, a wilful *ex parte* consideration of the proceeding without proper legal notice to defendant or his counsel. Such conduct constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Stuhl, supra.*

Except as expressly hereinabove modified, we accept and adopt as our own the Commission's findings of fact (a), (c) and (e).

[9-11] We think it proper at this point to note that we have not previously adopted precise guidelines or standards for our determination of whether a judge or justice should be censured or whether he should be removed. Such strict guidelines should not be adopted since each case should be decided upon its own facts. *In re Hardy, supra.* Certainly where a judge's misconduct involves personal financial gain, moral turpitude or corruption, he should be removed from office. Further, if a judge knowingly and wilfully persists in indiscretions and misconduct which this Court

has declared to be, or which under the circumstances he should know to be, acts which constitute wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office. Unquestionably, any act by a judge or justice which is prejudicial to the administration of justice and brings the judicial office into disrepute warrants censure.

The record before us leaves the distinct impression that Judge Martin's indiscretions to some degree resulted from lack of legal training and perhaps from bias toward either a party or his lawyer.

Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges. 46 Am. Jur. 2d, *Judges*, Section 166 (1969). A judge must avoid even the appearance of bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 21 L.Ed. 2d 301, 89 S.Ct. 337 (1968). By the same token, the lawyer as an officer of the court should be careful never to exploit a judge's lack of learning or known bias in favor of himself or his client.

[13] The conduct reflected in the Commission's findings (a), (c) and (e) is strikingly similar to, but no more indiscreet than, the judicial misconduct which resulted in censure in the cases of *Crutchfield*, *Edens*, *Stuhl*, and *Hardy*. As stated by Justice Huskins in *In re Hardy*, *supra*, "fairness requires a similar result here." We hold that the conduct of Judge Martin as set forth in findings (a), (c) and (e) and the evidence supporting these findings do not rise to such a level as to require his removal but do merit censure. Nevertheless, this conclusion does not end our consideration of this proceeding.

[12] The most serious charge of misconduct on the part of respondent is summarized in the Commission's finding (b) which relates to the case of the *State of North Carolina v. Charles D. Fleming*, Case No. 75CR20356. This finding of fact amounted to a finding that respondent had committed the felony of suborning perjury. G.S. 14-209, G.S. 14-210. Were we to conclude that this finding is supported by clear and convincing evidence, we would order Judge Martin's removal from office as recommended by the Commission. We briefly review the evidence relative to the Commission's finding (b).

The Commission's counsel offered the testimony of Officer George P. Herman of the Hickory Police Department who had arrested Charles D. Fleming and charged him with driving under the influence. The case was set for trial on 4 March 1975 and according to the witness Herman, Judge Martin initiated a conversation with him concerning the Fleming case on that date. The witness stated that he was first asked about how he felt about a plea of careless and reckless driving. It is not clear from his testimony as to who posed this question. Officer Herman also testified that Judge Martin then said to him, "What I want you to do when you are called to the stand is to say that you weren't present when the breathalyzer test was given." The witness replied, "No, sir; you have the wrong officer. I don't lie for anyone." The witness further testified that he then left and went directly to the office of the Chief of Police of the City of Hickory and reported this incident to him. On cross-examination, Officer Herman stated that it would not have been helpful to defendant if he had testified that he was not present when the breathalyzer test was given.

Chief of Police Melvin Tucker testified and corroborated Officer Herman's testimony that the incident was reported to him on 4 March 1975.

Joe K. Byrd, Jr., an attorney from Morganton, North Carolina, testified that he had been employed to represent Mr. Charles D. Fleming in the District Court in Hickory, North Carolina, on 4 March 1975 for the purpose of entering a plea. He arrived in the District Court in Hickory on that date just prior to a recess and during the recess he saw Judge Martin and told him that he did not know the officer who arrested his client. Judge Martin took him into a hallway near the officers' rooms where he introduced him to Officer Herman. Mr. Byrd testified that he asked Mr. Herman what his postion would be concerning a reckless driving plea if the District Attorney saw fit to consider such a plea. Officer Herman replied that it was the policy of his chief or his department not to take reductions in charges. In response to the witness's inquiry, Officer Herman stated that the breathalyzer reading on Mr. Fleming was .15 or .16. At that point, Judge Martin asked the witness, "Are you going to stipulate to that?" Judge Martin then turned to Officer Herman and said, "Do you understand you cannot testify to the breathalyzer results?"

The officer appeared to be very upset and left. Mr. Byrd further stated that he thereafter entered a plea of guilty to driving under the influence for Mr. Fleming, and before leaving the courthouse, he sought out Officer Herman and inquired of him if he (Mr. Byrd) had done anything to upset the officer. Officer Herman replied in the negative but said that the judge was trying to tell him that he could not testify to something. Attorney Byrd said that he then told the officer that, in fact, as an arresting officer he could not testify to breathalyzer results. The witness testified that he knew of no possible advantage that could have accrued to his client if Officer Herman had testified that he was not present when the breathalyzer test was given. Shortly after the witness returned to his office in Morganton, he received a telephone call from a person who identified himself as being with the Hickory Daily Record newspaper. This person said that he had a report that the judge in the Hickory District Court had tried to get an officer to testify incorrectly. After consulting with one of his senior associates, he told the caller he had no comment.

Judge Martin's testimony concerning this incident tended to corroborate the testimony of the witness Byrd.

The testimony concerning this serious charge is in sharp conflict. The testimony of officer Herman would require Judge Martin's removal if we find it to constitute proof by clear and convincing evidence. However, the testimony of Mr. Byrd squarely contradicts the officer's testimony. Thus, the testimony of these two witnesses, whose character stands unimpeached in this record, at least balances the weight of the evidence. The testimony of the respondent, an admittedly "interested" witness, corroborated the testimony of the witness Byrd. We believe that the testimony of Mr. Byrd gains some strength from the fact that the question addressed to him concerning whether he would stipulate to the breathalyzer result was a normal pretrial inquiry. On the other hand, an attempt to suborn perjury in the presence of witnesses and when no advantage would result to anyone runs counter to ordinary human conduct. We, therefore, do not find the evidence upon which the Commission's finding (b) is based to constitute proof by clear and convincing evidence.

[13] For the reasons stated and in the exercise of our independent judgment on this record, we delcine, on this record, to remove

Judge Martin from his elected office. However, for the reasons herein stated, we conclude that the respondent's actions in the cases of *State of North Carolina v. John Buxton Long*, No. 74CR18783, *Rebecca Dowell v. Jesse Charles Dowell*, No. 76CVD726, and the case of *Sue Higgins Stroup v. Steven Hillard Stroup*, No. 76CVD834, constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. For this conduct, respondent merits censure.

Now, therefore, it is ordered by the Supreme Court in conference that Judge William J. Martin be, and he is hereby, censured by this Court for the conduct specified in the Commission's findings (a), (c) and (e).

STATE OF NORTH CAROLINA v. NORBERT GLEN RICHARDSON

No. 89

(Filed 14 July 1978)

1. **Indictment and Warrant § 5— foreman's signature—number of concurring jurors—certification stamped on bill**

Defendant's motion to dismiss the bill of indictment on the ground that it failed to state the number of qualified jurors who concurred in the finding of the bill in violation of G.S. 15A-644(a)(5) was properly denied since the bill of indictment bore the signature of the foreman of the grand jury immediately beneath the language which had been stamped thereon and which would have read, had the stamp been properly applied: "This is to certify that 12 or more members of the grand jury were present and concurred in the finding of this bill of indictment."

2. **Rape § 6— first degree rape—toy gun not a deadly weapon—instruction not required**

In a prosecution for first degree rape, the trial court was not required to instruct the jury that a toy gun was not a deadly weapon and that, if the jury believed that defendant used a toy gun in the perpetration of the rape charged, then the jury must find defendant not guilty of first degree rape, since the significance of a deadly weapon was graphically and correctly pointed out by the court, and the charge as given properly required the State to prove beyond a reasonable doubt that defendant overcame his victim's resistance and procured her submission by the use of a deadly weapon, *i.e.*, a weapon which was likely to cause death or serious bodily injury.

3. **Criminal Law § 138.9— consecutive sentences—credit for time served—computation incorrect**

Where defendant was given a life sentence for rape, ten years for felonious breaking or entering to begin at the expiration of the life sentence, and ten years for crime against nature to begin at the expiration of the ten-year sentence imposed for the felonious breaking or entering, defendant received one sentence of 100 years for purposes of determining credit for pre-conviction incarceration, and it therefore made no difference to which one of the consecutive sentences the credit was applied; however, the trial court erred in computing the amount of credit as 154 days instead of 155 days, since the time from 4 May, the date of defendant's arrest, to 6 October, the day the sentences were pronounced and commitments issued, should have been computed by excluding the first day and including the last.

4. **Criminal Law § 76.5— voir dire—time for setting out findings and conclusions—defendant not prejudiced**

Though it would have been the better practice for the trial court to make findings of fact and conclusions of law with respect to the admissibility of defendant's statements and the admissibility of evidence which defendant contended had been illegally obtained at the time such evidence was tendered and before it was admitted, defendant failed to show that he was prejudiced by the court's manner of entering its findings and conclusions, since any proposed findings of fact defendant wished to submit could have been tendered to the trial court at the conclusion of the voir dire hearing or any time thereafter during the course of the trial, and any objections defendant wished to make to the findings and conclusions which the court belatedly entered would be considered by the appellate courts.

5. **Criminal Law § 75.1— delay in taking defendant before magistrate—confession not rendered inadmissible**

No constitutional principle of law requires the exclusion of defendant's confession simply because it was made during a four and one-half hour delay in bringing the defendant before a judicial official. G.S. 15A-501.

6. **Criminal Law § 75; Searches and Seizures § 43— violation of Criminal Procedure Act—when evidence admissible**

If challenged evidence would have been obtained regardless of violation of G.S. Chapter 15A, such evidence has not been obtained "as a result of" such official illegality and is not, therefore, to be suppressed by reason of G.S. 15A-974(2).

7. **Criminal Law § 75.1— delay in taking defendant before magistrate—confession admissible**

Defendant's confessions were not a result of a substantial violation of G.S. Chapter 15A and not inadmissible under G.S. 15A-974(2) because there was a four and one-half hour delay in bringing defendant before a magistrate during which time defendant by reason of the delay was not advised concerning his right to communicate with friends where defendant did not contend that the minimal delay in being informed of this right played any causal role in his decision to admit his involvement in the crimes charged.

8. Searches and Seizures § 43— search of defendant's premises—failure to give receipt for seized items—evidence admissible

Defendant's contention that evidence seized by officers during searches of defendant's toolbox and residence should have been excluded because officers failed to comply with G.S. 15A-223(b) which requires that a list of items seized pursuant to a consent search be compiled and embodied in a receipt which must be given to the person who consented to the search is without merit since failure to comply with G.S. 15A-223(b) has no constitutional significance within the meaning of G.S. 15A-974(1), and G.S. 15A-974(2) is likewise inapplicable, the items seized and later offered into evidence not being "obtained as a result of" violation of Chapter 15A.

9. Criminal Law § 76.5— confession—no conflict in evidence on voir dire—findings unnecessary

Since there was no conflict in the evidence concerning the circumstances under which defendant's confession was made, it was not prejudicial error for the trial court to fail to make findings of fact relating thereto.

10. Criminal Law § 76.2— confession used for impeachment—no coercion alleged—voir dire unnecessary

Drawings and statements by defendant were admissible for impeachment purposes, though the trial court conducted no voir dire to determine their voluntariness, since defendant made no contention that the drawings or statements were coerced or involuntary in fact.

11. Criminal Law § 76.2— confession used for impeachment—challenge on ground of coercion—voir dire required

When a confession is used on rebuttal for impeachment purposes and a defendant specifically challenges the admissibility of the confession on the ground that it was coerced or "induced by improper means," a voir dire hearing must be held for the purpose of determining whether the trustworthiness of the confession satisfies this State's legal standards.

DEFENDANT appeals from judgments of *Browning, J.*, 3 October 1977 Session, PITT Superior Court.

Defendant was charged in separate bills of indictment, consolidated for trial, with (1) felonious breaking or entering of the Patrick and Joyce Barfield residence, located at Route 3, Stokes, North Carolina, with intent to commit rape therein, (2) crime against nature with Joyce Barfield and (3) first degree rape of Joyce Barfield, all on 3 May 1977.

The State's evidence tends to show that on 3 May 1977 Patrick Barfield left home for work at 6:25 a.m. and saw defendant Richardson on the edge of the parking lot at Roebuck and Parker's Store walking toward Mr. Barfield's home. He had seen

defendant several times in and around Stokes and recognized him on this occasion.

Mrs. Joyce Barfield heard her dog barking shortly after her husband left and looked out the window of her bedroom but did not see anything. In a few moments she heard a thump on the front porch, then steps in the living room, and then saw a man with a stocking tied around his face and with a gun in his hand pointed at the ceiling. The stocking he wore on his face was thick like a support hose but the area above the tip of his nose, including his eyes and a portion of his forehead and part of his hair, was not covered by the stocking. After closing the door to the children's bedroom, the intruder pushed Mrs. Barfield down on the bed, put the gun barrel between her eyes and said he was going to kill her and the children unless she behaved and cooperated. He then forced her to have oral sex with him after which he raped her and left. Her assailant was a white male who appeared to be about her husband's height and was wearing dirty off-white leather gloves, an off-white suit and a dark shirt with a paisley print on it. After his departure Mrs. Barfield called her husband and officers were alerted.

Defendant was picked up at 11:30 a.m. on the same day, advised of his rights, and agreed to talk with the officers. He denied committing the crimes and voluntarily permitted the deputies to search his residence. They did so and confiscated a pair of pants and a coat which Mrs. Barfield later identified as garments worn by the man who assaulted her. At 2 p.m. on the same day, after again being warned of his constitutional rights and waiving them, defendant made another statement denying all culpability. At 6:30 p.m. the same day, after again being warned of his rights and waiving them, defendant agreed to stand in a lineup and was positively identified by Mrs. Barfield as the man who raped her. After the lineup he was questioned again, and this time he admitted seeing Mrs. Barfield's husband leave for work and stated that he then went to the Barfield home with a toy pistol in hand and a stocking over his head and raped Mrs. Barfield after forcing her to commit oral sex upon him. He described in detail the Barfield house and the acts which took place. He said he entered through the front door which was unlocked. He took the officers to a place where he said he had thrown the "toy" gun and the stocking, but these items were not found. At 1 p.m. the following afternoon,

defendant confessed again and led deputies in a search for the gun but it was never found. He consented to a search of his toolbox in which a pair of gloves was found and later identified by Mrs. Barfield as the gloves defendant wore when he entered her home and raped her.

Defendant testified in his own behalf. His testimony tends to show that on the morning of 3 May 1977 he first arose at 6 a.m. but laid back down and finally got up at 7:15 a.m. He talked to Mr. Carter Crandall on his CB radio at about 7:15 a.m. or 7:20 a.m. and then left his home for work at approximately 7:45 a.m. He walked to the post office in Stokes where he mailed a letter, then rode with Stan Cherry in his truck to Crandall's Grocery, stopping on the way to purchase pipe tobacco at Roebuck and Parker's Store. He got out of the Cherry vehicle at Clark Crandall's Store about 8:10 a.m. and thereafter worked for Mr. Crandall until he was first approached by police officers at 11:30 a.m. Defendant denied entering the Barfield home, raping or otherwise molesting Mrs. Barfield.

With respect to his various confessions, oral and written, defendant said: "The first statement that I made that was written down . . . is not what happened. I signed it out of impulse. . . . I came up with the idea that it was a toy pistol, I was taking a wild guess. I just said it was a toy gun. I did not come up with the idea about putting the stocking over my face. I don't remember if I drew a picture of this pistol for Deputy Sheriff Moye. I don't remember how in the world I drew a picture of the pistol I used in the commission of the crime when I don't even have the pistol. I can't tell you whether State's Exhibit 8 is the floor plan of the house that I drew. I guess that I drew one. . . . I had already gotten nervous and shook up. I have hypertension. . . . I carried them out there to try to help them find that gun and stockings on two different times. . . . I was pretty well scared already. It was my hypertension. . . . I do not rape women. . . . I further signed saying that no one had made me any threat or forced me into signing these statements and no one had offered me any reward or hope of reward for making the statement. That was the truth."

Defendant emphasized that he made the various confessions and signed them because he was tired and hungry. He denied knowing Mrs. Barfield or knowing where she lived. He said he

told the sheriff that Mr. Barfield was wearing a cowbody hat that morning because he had seen the man once before at Mr. Crandall's Store and he was wearing his cowboy hat. Defendant said he was twenty-nine years of age.

Stan Cherry testified that he picked up defendant at the post office at approximately 8 a.m., stopped at Roebuck and Parker's so defendant could get some tobacco, and then carried him to Crandall's Store, arriving there at 8:10 a.m.

Carter Crandall testified that the first conversation he had with defendant on the CB that morning was at 7:20 a.m.

Cecil Crandall testified that defendant worked for him from 8:10 a.m. until he was picked up by the police at 11:30 a.m. on the morning of 3 May.

The State's rebuttal evidence tends to show that, in his confession, defendant described the Barfield house and its surroundings in detail and drew a diagram (State's Exhibit 8) accurately depicting the floor plan. He told the officers how to get to the Barfield house and described a certain Pepsi-Cola sign, an "old timey" well, a fake well in the front yard, and the screen porch on the house. He told about a garden and an open field and a thick woodland on one side. All these references were very accurate. He also told the officers about a dog and there was a dog there.

State's evidence on rebuttal further tends to show that it takes sixteen minutes to walk from the Barfield house to defendant's house by the longest route. Taking available shortcuts, the distance between the two houses may be traversed in much less time.

The jury found defendant guilty as charged in each case. He was sentenced to life imprisonment for the rape, ten years for crime against nature and ten years for felonious breaking or entering, to run consecutively. Defendant appealed the life sentence to the Supreme Court, and we allowed motion to bypass the Court of Appeals in the other two cases to the end that initial appellate review be afforded in all cases by this Court.

Rufus L. Edmisten, Attorney General, by Rudolph A. Ashton III, Associate Attorney, for the State of North Carolina.

Russell Houston III, attorney for defendant appellant.

HUSKINS, Justice.

[1] In the felonious breaking or entering case (77Cr7468), defendant moved to dismiss the bill of indictment on the ground that it fails to state the number of qualified grand jurors who concurred in the finding of the bill. Denial of this motion constitutes defendant's first assignment of error.

Defendant relies on G.S. 15A-644(a)(5) which provides that an indictment must contain the signature of the foreman or acting foreman of the grand jury attesting the concurrence of twelve or more grand jurors in the finding of a true bill of indictment.

G.S. 15A-621 defines "grand jury" in these words: "A grand jury is a body consisting of not less than 12 nor more than 18 persons, empaneled by a superior court and constituting a part of such court."

G.S. 15A-623(a) provides: "The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury."

The bill of indictment here in question bears the signature of the foreman of the grand jury immediately beneath the following language which has been stamped thereon: "[Illegible] is to certify that [illegible] or more members of the grand jury were present and concurred in the finding of this bill of indictment." It is quite apparent that the stamped language was placed on the bill of indictment at the time it was returned a true bill for the purpose of complying with G.S. 15A-644(a)(5). Had the stamp been properly applied, the certificate would have read: "This is to certify that 12 or more members of the grand jury were present and concurred in the finding of this bill of indictment." Such a certification is implicit in the presence of the foreman's signature upon the bill of indictment immediately beneath the stamped message. Had less than twelve members of the grand jury concurred in the finding of this bill of indictment, there would have been no stamped certificate whatsoever on the bill and no signature of the foreman. To hold otherwise would produce a ridiculous result and elevate form over substance.

The question posed by this assignment has been answered by this Court in *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978). There Justice Lake, writing for the Court, said:

"In the present case, the indictment bears the signature of the foreman of the grand jury beneath the statement that the bill was found 'a true bill' and the witnesses whose names were marked with an 'X' were sworn by the foreman and examined by the grand jury. Since the statute requires the concurrence of at least 12 members of the grand jury in order to find an indictment a true bill, the foreman's signature attesting that the grand jury found the indictment to be a true bill, necessarily attests the concurrence of at least 12 of its members in this finding.

Although it is better practice for the foreman's entry upon the bill of indictment, over his signature, to state expressly that 12 or more grand jurors concurred in such finding, . . . this is not necessary to the validity of the bill of indictment where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary."

There is no merit in defendant's position and his first assignment is overruled.

[2] Defendant requested the court to instruct the jury that "a toy gun is not a deadly weapon" and assigns as error the failure of the court to instruct the jury "that if it believed from the evidence that the object the defendant carried into the bedroom was not a real pistol but was a toy pistol, then the jury could not find that the victim's submission was procured by use of a deadly weapon, and it would be the jury's duty to return a verdict of not guilty of first degree rape." This constitutes defendant's second assignment of error.

The record discloses the following charge on first degree rape:

"Now, I charge you that in order for you to find the defendant guilty of first degree rape, the State of North Carolina must prove to you beyond a reasonable doubt five things. The first thing is that the defendant had sexual intercourse with Joyce Ann Barfield. The second thing is that the defendant used or threatened to use force sufficient to overcome any resistance that she might make. Third, that Joyce Ann Barfield did not consent and that it was against her will.

Fourth, that the defendant overcame her resistance and procured her submission by the use of a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. I instruct you that a pistol is a deadly weapon. And fifth, that at the time the defendant was more than 16 years of age. So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about May 3, 1977, Norbert Glen Richardson was more than 16 years of age and had sexual intercourse with Joyce Ann Barfield without her consent, and against her will, and forcibly overcame her resistance and procured her submission by the use of a deadly weapon it would be your duty to return a verdict of guilty of first degree rape. However, if you do not so find, or *if you have a reasonable doubt as to any one of the five things which I just talked about, it would be your duty to return a verdict of not guilty of first degree rape.*" (Emphasis added.)

Following the foregoing charge on first degree rape, the trial judge instructed on second degree rape and specifically stated that the use of a deadly weapon was not required to convict an accused of rape in the second degree. Thus the significance of a deadly weapon was graphically and correctly pointed out. The jury obviously was convinced that a real pistol was used. The verdict on this point is quite understandable in view of the victim's description of the gun and the fact that defendant took the stand as a witness in his own behalf and testified under oath that he did not rape Mrs. Barfield and just "made up" the story about the toy pistol.

The court is not required to give an instruction in the exact language of the request. *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974). Of course, it would have been quite proper for the court to charge the jury here that a toy pistol is not a deadly weapon, but refusal to do so was not error. We hold the charge as given properly required the State to prove beyond a reasonable doubt that defendant overcame Mrs. Barfield's resistance and procured her submission by the use of a deadly weapon, *i.e.*, a weapon which is likely to cause death or serious bodily injury. If the jury had a reasonable doubt about that aspect of the case it was instructed to return a verdict of not guilty of first degree rape. Defendant's second assignment is overruled.

[3] Defendant was given a life sentence for rape, ten years for felonious breaking or entering to begin at the expiration of the life sentence, and ten years for crime against nature to begin at the expiration of the ten-year sentence imposed for the felonious breaking or entering. The ten-year sentence for felonious breaking or entering was then credited with 154 days for time spent in confinement pending trial. Defendant contends the trial court should have allowed this credit on the first degree rape sentence. This constitutes his third assignment of error.

The record shows that defendant was first arrested on a warrant charging first degree rape, dated and served on 4 May 1977. He was later arrested for felonious breaking or entering and for crime against nature on warrants dated and served 5 May 1977. At that time defendant was already in custody under the rape warrant and had served one day in jail.

G.S. 14-2 provides in pertinent part: "A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison."

G.S. 15-196.1 provides in pertinent part:

> "The term of a determinate sentence or the minimum and maximum term of an indeterminate sentence shall be credited with and diminished by the total amount of time a defendant has spent . . . in confinement . . . as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing . . . ."

G.S. 15-196.2 provides in pertinent part:

> "In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive sentences for which a defendant is imprisoned."

Applying the quoted statutes to the facts before us, defendant received one sentence of 100 years for purposes of determining credit for pre-conviction incarceration. It makes no difference, therefore, to which of the consecutive sentences the credit is applied. Defendant will be eligible for parole and other privileges at the same time regardless of which of the consecutive sentences is credited. The trial court did err, however, in computing the amount of credit as 154 days. Defendant was arrested on the rape charge on 4 May 1977. The three consecutive sentences to State's prison were pronounced and commitments issued on 6 October 1977. The time from 4 May to 6 October is computed by excluding the first day and including the last. Defendant is therefore entitled to credit for 155 days instead of 154, and the judgment and commitment in the felonious breaking or entering case, docket No. 77CrS7468, will be corrected accordingly. Otherwise, there is no merit in defendant's third assignment of error.

[4] Upon defendant's objection to the introduction of various confessions attributed to him and to the fruits of various searches and seizures made by the investigating officers, the court conducted an extensive voir dire covering twenty pages of the record. At the conclusion of the voir dire hearing the court said: "Now, I am not going to enter the formal findings of fact and conclusions of law, as they will be very lengthy. I will do that prior to the close of the trial and place them on the record. The general conclusion at that time will be that the motion of the defendant, the motions, all of them are denied, and that the statements, the search, were made in such a manner as did not violate the constitutional rights of this defendant."

Thereafter, at a time not disclosed by the record, the court made lengthy findings of fact and conclusions of law supporting admission of the evidence and formally denying all motions to suppress it. These findings and conclusions appear in the record underneath the following notation: "Dictated into the record by the court as indicated during the trial at the conclusion of the third voir dire hearing."

Defendant's fourth assignment of error challenges the foregoing procedure. Defendant contends the findings of fact and conclusions of law on the third voir dire hearing "were dictated into the record after entry of judgment and in the absence of defense

counsel" as a result of which counsel could not make objections to the findings or conclusions when they were dictated into the record by the court. Defendant says he "was directly prejudiced by this procedure because defense counsel anticipated requesting that certain specific findings of fact be made . . . and anticipated making objections to certain conclusions of law. . . ."

In *State v. Doss*, 279 N.C. 413 at 424, 183 S.E. 2d 671 at 678, *death sentence vacated* 408 U.S. 939 (1972), this Court noted that "it is better practice for the court to make [findings of fact] at some stage during the trial, preferably at the time the [defendant's inculpatory] statement is tendered and before it is admitted." This admonition is equally applicable to findings of fact and conclusions of law respecting the admissibility of evidence which defendant contends has been illegally obtained. *See generally State v. Vestal*, 278 N.C. 561, 578, 180 S.E. 2d 755, 766 (1971).

In the present case we need not determine whether the trial court's failure to follow what was described in *Doss* as "better practice" constitutes error. If we assume *arguendo* (defendant has made no showing that the court's findings and conclusions were in fact belatedly entered) that the trial court did enter its findings of fact and conclusions of law after the trial was over, defendant has failed to show he has been prejudiced thereby. Any proposed findings of fact defendant wished to submit could have been tendered to the trial court at the conclusion of the voir dire hearing or thereafter during the course of the trial. Any objections defendant wished to make to the findings of fact and conclusions of law which the trial court belatedly entered following voir dire will be considered by appellate courts of this State just as fully as if defendant had specifically objected to the findings or conclusions at the time they were entered. Since defendant has failed to demonstrate any prejudice resulting from the manner in which the trial court entered its findings and conclusions, his fourth assignment of error must be overruled. *See State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Williams*, 34 N.C. App. 386, 238 S.E. 2d 195 (1977).

By his fifth, sixth and seventh assignments of error, defendant challenges the admissibility of his two confessions made at 12:15 a.m. and 1 p.m. on 4 May 1977. He contends that uncontradicted evidence adduced on voir dire indicates he was under

arrest from the time Mrs. Barfield identified him at approximately 8:30 p.m. on 3 May 1977. Defendant was not served with an arrest warrant or brought before a magistrate, however, until approximately 1 a.m. on the morning of 4 May. His first confession was elicited during this four and a half hour interlude. Hence, defendant argues that the officers failed to comply with G.S. 15A-501 which provides, *inter alia*, that "upon the arrest of a person . . . a law enforcement officer: (2) Must . . . take the person arrested before a judicial official without unnecessary delay." He further argues that the officers' failure to comply with G.S. 15A-501 constitutes a "substantial violation" of the provisions of Chapter 15A, that his confession was obtained as a result of this violation, and accordingly should have been suppressed pursuant to G.S. 15A-974.

G.S. 15A-974 provides: "Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. . . ." If it be assumed, for purposes of argument, that the four and a half hour delay was, under the circumstances, an "unnecessary delay" within the meaning of that phrase as used in G.S 15A-501, and if it further be assumed that such unnecessary delay constitutes a "substantial violation" of Chapter 15A of the General Statutes, defendant's argument is nonetheless without merit. We reach this conclusion because, even under the foregoing assumptions, exclusion of defendant's confessions is not required by Federal or State Constitutions (see G.S. 15A-974(1)) and because we are satisfied defendant's confessions were not obtained *"as a result of"* the assumed substantial violation of G.S. 15A-501 (see G.S. 15A-974(2)).

[5] No constitutional principle of law requires the exclusion of a confession simply because it was made during a four and a half hour delay in bringing the defendant before a judicial official. In *McNabb v. United States*, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943), it was held that federal officers' failure to comply with statutory directives requiring arrested persons to be brought before a judicial officer rendered an ensuing confession inadmissible. Numerous cases, federal and state, make clear that this exclusionary rule is not of constitutional stature. *Culombe v. Connecticut*, 367 U.S. 568, 6 L.Ed. 2d 1037, 81 S.Ct. 1860 (1961); *Brown v.*

Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953); *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960). *See* Annot., 19 A.L.R. 2d 1331 (1951); McCormick, Evidence § 155 (2d ed. 1972). Confessions elicited by in-custody interrogation need not be excluded from evidence on constitutional grounds so long as such confessions are voluntary (*see Culombe v. Connecticut, supra; State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975)), are obtained without violation of the accused's right to remain silent and to be represented by counsel (*see Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966)), and are not the "fruit of official illegality" proscribed by constitutional principles (*Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963); *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973)). *See generally* McCormick, Evidence §§ 144-63 (2d ed. 1972); Stansbury's North Carolina Evidence §§ 183-84 (Brandis rev. 1973). In the present case we have assumed, *arguendo*, that the delay in bringing defendant before a judicial officer was a violation of G.S. 15A-501. Even under this assumption, however, no constitutionally mandated exclusionary rule bars the admission of defendant's confession. It follows that G.S. 15A-974(1) does not require that defendant's confession be suppressed.

G.S. 15A-974(2) provides that evidence "obtained as a result" of a substantial violation of the provisions of Chapter 15A must, upon timely motion, be suppressed. The use of the term "result" in this statute indicates that a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed. The comment of the drafters of G.S. 15A-974 affords no insight into the sort of causal connection contemplated (see Criminal Code Commission, *Legislative Program and Report to the General Assembly of North Carolina* at 238 (1973)); and research has disclosed no cases throwing light on the matter. Cases construing the scope of the exclusionary rule required by federal constitutional principles are quite numerous, however, and these cases indicate that, *at a bare minimum*, there must be a "cause in fact" or "but-for" relationship between the unconstitutional conduct and the evidence sought to be suppressed. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975); *Harrison v. United States*, 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1968); *Wong Sun v. United States, supra; United*

States v. Carino, 417 F. 2d 117 (2d Cir. 1969); *State v. Branch*, 288 N.C. 514, 543, 220 S.E. 2d 495, 515, *cert. denied*, 433 U.S. 907 (1977). Under these and other cases of like import, evidence will not be suppressed unless it has been obtained *as a consequence* of the officer's unlawful conduct (*e.g.*, an unconstitutional search or arrest). The evidence must be such that it would not have been obtained *but for* the unlawful conduct of the investigating officer.

[6] We are of the opinion that G.S. 15A-974(2) requires, at a minimum, this sort of causal connection between violations of Chapter 15A and the evidence objected to if such evidence is to be suppressed. In so holding, we do not decide that a mere "cause in fact" or "but-for" relationship is sufficient *ipso facto* to require exclusion of evidence obtained as a consequence of substantial violations of Chapter 15A. In certain cases, intervening circumstances might "dissipate the taint" of unlawfulness so that such evidence would be admissible at trial. *See, e.g., Wong Sun v. United States, supra* (holding admissible certain evidence which would not have been obtained but for violations of constitutional requirements). We leave all such decisions to future cases. For present purposes, we merely hold that if the challenged evidence would have been obtained regardless of violation of Chapter 15A, such evidence has not been obtained "as a result of" such official illegality and is not, therefore, to be suppressed by reason of G.S. 15A-974(2).

[7] In the present case defendant's confession is not, in our opinion, causally related to the four and a half hour delay in bringing defendant before a judicial official. Had defendant been promptly brought before a magistrate, he would have been advised of (1) the charges against him, (2) his right to communicate with counsel and friends and (3) the general circumstances under which he could secure pretrial release. G.S. 15A-511(b). The record indicates that as of 20 May 1977 defendant had not been released on bond, though he had some two weeks earlier been brought before a magistrate and, presumably, informed of and afforded the rights to pretrial release required by G.S. 15A-511(e) and Article 26 of Chapter 15A. The record also indicates that the officers had repeatedly advised defendant of (1) the charges against him or the crime he was suspected of having committed, (2) his right to counsel prior to answering any questions, and (3) his right to obtain appointed counsel free of charge if he could not afford to hire a lawyer. Thus, the only benefit denied defendant by reason of the delay in bringing him before a magistrate was advice concern-

ing his right to communicate with friends. Defendant does not argue that the minimal delay in being informed of this right played any causal role in his decision to admit his involvement in the assault and rape of Mrs. Barfield. Under these facts we are of the opinion that the confessions did not result from such delay. We therefore hold that defendant's confessions were not a result of a substantial violation of Chapter 15A and not inadmissible under G.S. 15A-974(2).

Defendant's fifth, sixth and seventh assignments of error are overruled.

[8] By his eighth, ninth and tenth assignments of error defendant contends evidence seized by officers during searches of defendant's residence and toolbox should have been excluded. He argues that the officers failed to comply with G.S. 15A-223(b), which requires that a list of items seized pursuant to a consent search be compiled and embodied in a receipt which must be given to the person who consented to the search. It is contended that this failure to provide defendant with such a receipt renders inadmissible the evidence seized in the consent search of his residence and toolbox.

We find no merit in these assignments because (1) failure to comply with G.S. 15A-223(b) has no constitutional significance within the meaning of G.S. 15A-974(1), and (2) G.S. 15A-974(2) is likewise inapplicable. It is clear that the items seized and later offered into evidence were not "obtained as a result of" violations of Chapter 15A. No causal connection exists between the failure to follow the requirements of G.S. 15A-223(b) and the acquisition of the items seized from defendant's residence and toolbox. Defendant's eighth, ninth and tenth assignments of error are overruled.

Defendant's eleventh assignment of error challenges the sufficiency of the trial court's findings of fact concerning the admissibility of (1) defendant's second confession (made at approximately 1 p.m. on 4 May) and (2) defendant's statements and two drawings made by him (one of the floor plan of the Barfield home, the other of the pistol defendant used). Defendant's second confession was introduced by the State in its case in chief; the other items were offered in rebuttal after defendant had testified and denied any involvement in the crimes charged. Defendant contends the trial court's voir dire findings of fact make no specific reference to any of these items and, in the absence of specific findings of fact that defendant made such statements and drawings voluntarily, their admission was error.

[9] We have carefully examined the testimony introduced at the voir dire hearing. All testimony concerning the 1 p.m. 4 May confession is to the same effect: defendant, after proper warnings and without having been threatened or offered any hope of reward, verbally and in writing waived his right to counsel and agreed to make a statement. Since there is no conflict in the evidence concerning the circumstances under which the 1 p.m. 4 May confession was made, it was not prejudicial error for the trial court to fail to make findings of fact relating thereto. *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973). All the evidence supports the trial court's conclusion that the confession was admissible. No error was committed by admitting this confession into evidence.

[10] Defendant's drawings and other statements were introduced by the State for impeachment purposes after defendant had testified and denied any involvement in the rape of Mrs. Barfield. In *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), and *Oregon v. Hass*, 420 U.S. 714, 43 L.Ed. 2d 570, 95 S.Ct. 1215 (1975), the United States Supreme Court held that inculpatory evidence initially inadmissible in the prosecution's case in chief under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), was competent on rebuttal for impeachment purposes when defendant testified at trial and his testimony was inconsistent therewith. Both *Harris* and *Hass* indicate, however, that such evidence is admissible "provided . . . the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224, 28 L.Ed. 2d at 4, 91 S.Ct. at 645; 420 U.S. at 722, 43 L.Ed. 2d at 577, 95 S.Ct. at 1221. By this proviso the Supreme Court apparently sought to limit its holding to those cases in which the defendant "makes no claim that the statements made to police were coerced or involuntary." *Harris v. New York, supra*, at 224, 28 L.Ed. 2d at 4, 91 S.Ct. at 645. In *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. denied*, 409 U.S. 995 (1972), this Court held, in accordance with *Harris*, that defendant's in-custody admissions were admissible for impeachment purposes. In *Bryant*, as in *Harris*, no voir dire hearing was conducted when defendant objected to the use of his admissions for impeachment purposes, and no findings of fact were made by the trial court regarding the voluntariness of defendant's admissions.

In the present case several voir dire hearings were conducted, but in none of these hearings was any reference made to defendant's drawings and statements which the State offered in

rebuttal after defendant testified and denied any involvement in the rape of Mrs. Barfield. Consequently, the trial court made no findings as to whether such drawings and statements were made voluntarily. Just as in *Bryant* and *Harris*, however, defendant in the present case made no contention that these drawings and statements were coerced or involuntary in fact. Accordingly, the drawings and statements were admissible for impeachment purposes under the rule enunciated in *Harris* and *Bryant*.

It has long been the rule in this jurisdiction that confessions induced by force, threat, fear or promise of reward are inadmissible. *See generally* Stansbury, North Carolina Evidence § 184 (Brandis rev. 1973). Prior to the *Miranda* decision the weight of authority held that such coerced confessions were inadmissible *for any purpose*. Annot., 89 A.L.R. 2d 478 (1963). This majority view had been favorably alluded to in *State v. Meadows*, 272 N.C. 327, 336, 158 S.E. 2d 638, 644 (1968), and neither *Bryant* nor our holding here should be regarded as authority to the contrary.

[11] We further note that *Harris v. New York*, supra, sanctions the denial of a voir dire hearing when a general objection is made to the use of *Miranda*-barred confessions for impeachment purposes. However, this Court has held as a matter of State law that "when the admissibility of a confession is challenged on the ground that it was induced by improper means, the trial judge is required to determine the question of fact whether it was or was not voluntary before he permits it to go to the jury." *State v. Rogers*, 233 N.C. 390, 396, 64 S.E. 2d 572, 576 (1951). *Accord, State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960). When a confession is used on rebuttal for impeachment purposes and a defendant *specifically challenges the admissibility of the confession on the ground that it was coerced or "induced by improper means,"* a voir dire hearing must be held for the purpose of determining whether the trustworthiness of the confession satisfies this State's legal standards. If not satisfied that the confession was made under circumstances rendering it trustworthy, *i.e.*, not produced by coercion or induced by other improper means, the trial court should bar use of the confession for any purpose.

In the present case the record does not indicate that defendant objected to the impeaching use of his statements and drawings on the ground they were coerced or otherwise induced by improper means. Defendant did not request a voir dire hearing to determine whether the statements and drawings were coerced. Neither defendant's testimony nor any other evidence suggests

that the statements and drawings were coerced or induced by force, threat, fear or promise of reward. *Cf. State v. Byrd*, 35 N.C. App. 42, 240 S.E. 2d 494 (1978); *State v. Langley*, 25 N.C. App. 298, 212 S.E. 2d 687 (1975). Under such circumstances it was altogether proper for the trial court to overrule defendant's general objection to the use of the challenged evidence for impeachment purposes without conducting further voir dire hearings.

Defendant has failed to show prejudicial error, and our review of the record has revealed no error warranting a new trial. The verdicts and judgments must be upheld.

No error.

STATE OF NORTH CAROLINA v. RUBEN SONNY CONNLEY

No. 2

(Filed 14 July 1978)

1. **Criminal Law §§ 73.1, 75— hearsay testimony—basis for finding confession voluntary**

The trial court erred in allowing an FBI agent to testify over defendant's objection concerning a conversation the agent had with one of defendant's attending physicians shortly after the crime occurred, since such testimony was unmistakably hearsay and was the basis for the court's finding that defendant was not under medication or sedation, could be talked to concerning the matters that occurred earlier at the crime scene, and answered the FBI agent's questions knowingly, understandingly and voluntarily.

2. **Criminal Law § 75.12; Constitutional Law § 49— right to counsel not waived—statements improperly admitted**

The trial court erred in concluding that defendant waived his right to counsel where defendant specifically refused to sign a waiver, there was no showing of an oral waiver, and a waiver could not be presumed from defendant's silence; therefore, defendant is entitled to a new trial, since his statements were admitted in violation of his constitutional right to have counsel present at his in-custody interrogation, and it cannot be said that there was no reasonable possibility that the evidence obtained at the interrogation contributed to defendant's conviction.

3. **Criminal Law § 5— insanity—burden of proof on defendant—test**

The rule that a defendant pleading insanity has the burden of proving that at the time of the crime he lacked capacity to know the nature and quality of his act or to distinguish between right and wrong in relation to it, the M'Naghten rule, remains the test of criminal responsibility in this State.

4. **Criminal Law § 69— radio communications—admissibility analogous to telephone conversations**

Radio communications, by analogy to telephone conversations, are governed by the rules of evidence regulating the admission of oral statements made during a face-to-face transaction, once the identity of the speakers is ascertained.

5. **Criminal Law § 73.4— radio transmissions—hearsay testimony—res gestae—transmissions in regular course of business**

In a prosecution for first degree murder where defendant abducted a Virginia State Trooper at gunpoint and forced the Trooper to carry him in the Trooper's car to Georgia, radio transmissions by the Trooper concerning his predicament and defendant's threats, though hearsay, were properly admitted into evidence, since they were part of the *res gestae*, and since they were made in the regular course of business and in the midst of the transaction the Trooper was reporting.

6. **Criminal Law § 73— double hearsay—admissibility**

In a prosecution for first degree murder of a Virginia State Trooper whom defendant abducted and forced to drive to Georgia, radio transmissions by the Trooper which reported defendant's threat to kill him if anyone attempted to impede their progress to Georgia, though double hearsay, were admissible in evidence since the Trooper, had he survived, could have testified to defendant's statements because they were competent against defendant as admissions, a statement of his mental condition, or a declaration of intent.

ON appeal pursuant to N.C. Gen. Stat. 7A-27(a) (Cum. Supp. 1977) from *Thornburg, J.*, at the 14 March 1977 Special Criminal Session of GRANVILLE.

Defendant, Ruben Sonny Connley, was indicted under G.S. 15-144 (Replacement 1975) for the murder of Garland W. Fisher, a Virginia State patrolman.

At trial the State offered evidence which tended to show the following facts:

According to defendant's statement he left Atlanta, Georgia, on 14 November 1976 and drove his car to Baltimore, Maryland, for the purpose of eluding "people" whom he believed to be following him. Before leaving Atlanta, defendant purchased a .38 caliber revolver to protect himself from his pursuers. After spending approximately an hour visiting friends in Baltimore he left to return to Atlanta. When defendant observed an unmarked Virginia State Police car on Interstate Highway 85 near McKenney, Virginia, at about 11:00 p.m. that night, he turned his automobile around and headed north in the southbound lane, intending to "stop the trooper because [defendant] was being pursued by people."

When defendant found the Virginia patrol car, driven by Patrolman Garland W. Fisher, he got out of his car and said to him, "I was fixing to come get you to lock me up." In the course of their conversation defendant told Fisher about his gun, the .38 caliber revolver. Whereupon, the officer told defendant he would have to surrender his gun before defendant could get into the police car. To this statement defendant replied, "You keep yours and I will keep mine. When we get to jail, you can keep both of them." At this point Fisher attempted to wrest the gun from defendant, but in the ensuing struggle, defendant removed the trooper's .38 caliber service revolver from its holster. As he did, the gun discharged, wounding Fisher in the shoulder. Defendant then forced him to get into his patrol car and drive it southward toward Atlanta. Sometime after 11:40 p.m. defendant permitted Fisher to radio his dispatcher three times in order to inform the authorities of his situation and to warn them against interfering with his progress to Atlanta.

As defendant and Fisher proceeded southward several patrolmen from Virginia and North Carolina, having been informed of Fisher's abduction by radio, gradually formed a small convoy behind his vehicle. Virginia Patrolman J. L. Crowder was immediately behind it. He was followed by Troopers W. H. Terry and F. H. Clark, Jr., of Virginia. Then came Sergeant Raines and Trooper J. M. Smith of Virginia, Patrolman C. G. Todd of North Carolina and, finally, North Carolina Patrolman D. H. Matthews. After Patrolman Crowder first pulled his cruiser behind it, the "target vehicle" did not stop until it encountered a roadblock.

While the convoy was proceeding south, North Carolina Patrolman R. P. Williams parked his patrol car about a mile north of N.C. Highway 56 on a wooded median strip so as to conceal it from southbound traffic. Then, with assistance from fellow officers D. M. Terrell and D. F. King, Williams created a roadblock by causing a tractor-trailer rig to park diagonally across the southbound lanes with its cab facing the median. Having blocked the road, the patrolmen took cover to await the arrival of Fisher's patrol car. Trooper Williams, armed with a State-issued 12 gauge shotgun, positioned himself behind the rear end of the trailer.

As Fisher's patrol car approached the roadblock it slowly pulled onto the right-hand shoulder as if to pass around the truck. When the approaching car came within 25 feet of the rear of the trailer, Williams raised his shotgun and fired into the center of its windshield. The Virginia patrol car stopped within 15 feet of

Williams, who stepped forward to examine it. Gunfire immediately erupted from inside the vehicle; several witnesses heard from four to six shots emanate from Fisher's car and saw muzzle flashes near the middle of the seat. Williams again "took aim and fired through the left side of the vehicle attempting to shoot into the back seat where it appeared to [him] the gunshots came from." Williams testified that the passenger, whom he had first seen seated by the driver, was no longer in view. The officer next fired through the windshield just to the left of center and then, from a crouching position, fired from the hip, attempting to shoot into the back door. Thereafter, he retreated behind Sergeant Bailey's patrol car, which had been driven past the Fisher vehicle and stopped near the truck on the right-hand shoulder of the southbound lanes of I-85.

Contemporaneously with the first exchange of gunfire, the patrolmen in the convoy pulled their vehicles into positions near Fisher's unmarked patrol car and assumed vantage points behind them from which to shoot. After Patrolman Williams returned to cover, Sergeant Bailey used his public address system to direct the other patrolmen to shoot the tires on the Fisher automobile. After the tires were thus deflated, the officers held their fire while Patrolman Matthews crawled from his car to the back of Fisher's automobile and attempted to look through the rear window. It was too dark to see inside; so Matthews returned to his car, drove past Fisher's automobile, and then made a U-turn so as to project his headlights into it.

The headlights revealed the man behind the wheel to be a white male. When he did not move, Matthews crawled to the door and observed that the man wore the arm patch of a trooper. He had a gaping hole in his left cheek. Matthews then shone his flashlight inside the car and saw a black male, later identified as Ruben Sonny Connley, kneeling or squatting on the front floorboard on the passenger's side. When the black man pointed a revolver toward him Matthews dropped to the ground and crawled back to his vehicle. Using his public address system Matthews informed Sergeant Bailey that the driver-trooper appeared dead, but that the passenger was alive and armed.

Matthews volunteered to get the armed man out. After extinguishing his headlights, he crawled to within 20 feet of the passenger's side of Fisher's car and called to the black man to come out with his hands up. Receiving no response, Matthews moved to within 10 feet of the door, drew his .357 Magnum Colt,

and fired six rounds into the door in a shot group which covered the man's position on the floorboard.

After reloading his pistol, Matthews raised his flashlight and checked the back seat of the vehicle. It was empty. He then peered into the front of the car and saw the defendant lying unconscious, the trunk of his body hunched onto the seat. In his right hand defendant grasped a shiny .38 caliber pistol; a .22 caliber pistol lay underneath the heel of the same hand. Matthews reached in through the shattered window on the passenger's side and removed these weapons as Sergeant Bailey and Tooper Todd came up behind him. Officers Bailey and Todd pulled the defendant from the car and removed a cocked and loaded .38 caliber blue-steel revolver from his person. This gun, which was later sent to the SBI lab in Raleigh for examination, was placed with the other two. Other patrolmen approached the car to render Trooper Fisher aid but could find no pulse in his body. Defendant and Fisher were taken by ambulance to the emergency room of Duke Medical Center in Durham. Later, Trooper Fisher's body was removed to Memorial Hospital in Chapel Hill, where it was examined by the Chief Medical Examiner of North Carolina.

Dr. Wilton M. Reavis, Jr., a forensic pathologist on the staff of the Chief Medical Examiner, gave expert testimony based on the autopsy he had performed on Fisher's body. It was Dr. Reavis's opinion that the trooper had sustained at least 14 gunshot wounds. Any one of four of these, wounds Nos. 4, 5, 11 and 12, could have been fatal. Wound No. 4 resulted from a projectile which entered Fisher's right side, passed upward through the body at an angle of approximately 45 degrees, and exited the back near the left armpit. The projectile causing wound No. 5 entered slightly above Fisher's waistline on his right side, traveled upward at an angle of approximately 45 degrees and lodged in the back just beneath neck. After its removal this bullet, State's Exhibit No. 17, was turned over to the SBI. The gunshot causing wound No. 11 entered on the right side of Patrolman Fisher's neck and came out on his left cheek just below the eye. The point of entry for the bullet causing wound No. 12 was only two inches from the entry hole of wound No. 11, and the bullets causing these two wounds apparently exited the body at the same place. A small metal fragment, State's Exhibit 19, was recovered from entry wound No. 12 and given to SBI agents.

Numerous lead cases, bullet fragments, and spent cartridges collected by SBI Special Agent Douglas Branch from various loca-

tions in and around Fisher's unmarked car were submitted to Examiner Stephen T. Carpenter, an expert in firearm identification employed by the SBI. Mr. Carpenter compared these materials, along with the fragments received from Dr. Reavis, against test items fired from three guns: (1) Patrolman Matthews' .357 Magnum Colt (State's Exhibit 5); (2) the R. B. Industries, Model R. J. 31, .38 caliber revolver with a four-inch barrel removed from defendant's person by Sergeant Bailey (State's Exhibit No. 6); and (3) the Smith & Wesson, Model 10-5, .38 caliber special revolver with a two-inch barrel taken from defendant's hand by Trooper Matthews (State's Exhibit No. 7).

Based on his ballistic examinations, Mr. Carpenter testified that State's Exhibit No. 17 was the only projectile associated with one of the potentially lethal wounds which could be identified. In his opinion that bullet was fired from State's Exhibit No. 6, the R. G. 31, .38 caliber revolver taken from the defendant. Mr. Carpenter also analyzed the fabric of the jacket and shirt Trooper Fisher had been wearing when he was shot for traces of gunpowder and lead wipings. Based on the quantity of gunpowder and singed fabric detected, it was Carpenter's opinion that the holes in the jacket which corresponded to the entry holes of the bullets inflicting fatal wounds Nos. 4 and 5 were caused by projectiles fired from a distance of six inches or less.

Other than immaterial testimony from a member of the ambulance crew, defendant's only evidence came from two psychiatrists, Dr. Billy W. Royal and Dr. Robert Harper. Dr. Royal, a member of the staff of Dorothea Dix Hospital, first examined defendant on 3 February 1977. In his opinion, defendant was able to determine right from wrong at that time and, at the time of the trial, was "able to work with an attorney in terms of his defense" and to determine right from wrong. He had no opinion as to defendant's state of mind or whether defendant knew right from wrong at the time of the roadblock on the early morning of 15 November 1976. It was his opinion that defendant "has a paranoid personality and on occasions . . . might have frank delusions of hallucinations or be psychotic, and that it was a more or less chronic problem with the patient."

Dr. Robert Harper, a psychiatrist engaged in private practice in Raleigh, examined defendant for about two hours on 5 March 1977 after having studied the report of Dr. Royal's examination. In consequence, Dr. Harper formed the opinion (1) that defendant "suffered from paranoid schizophrenia," and was subject to delu-

sions; (2) that "at the time defendant took the State Trooper, Garland W. Fisher, hostage . . . he knew it was wrong"; and (3) that "when confronted with the roadblock and attendant circumstances in the early morning hours of November 15, 1976 . . . in spite of the fact that he was operating in a delusional state and was psychotic . . . [defendant] still knew the difference between right and wrong."

At the conclusion of counsel's arguments to the jury the court, in a bifurcated charge, submitted to the jury the following issues: (1) "Did the defendant kill the deceased?" and (2) "If so, was the defendant insane when the killing occurred?" Upon concluding their deliberations the jury returned to the courtroom and announced their verdict that defendant killed Trooper Fisher, and that he was sane when he did it. The trial judge then explained the elements of first and second degree murder and instructed the jury to return either a verdict of guilty as to one of these offenses or a verdict of not guilty. The jury returned a verdict of guilty of first degree murder. Judge Thornburg sentenced defendant to life imprisonment and defendant appealed.

Additional facts will be stated in the opinion as necessary.

Rufus Edmisten, Attorney General, and Lester V. Chalmers, Jr., Special Deputy Attorney General, for the State.

Hugh M. Currin and John H. Pike for defendant appellant.

SHARP, Chief Justice.

The assignments of error which defendant brings forward challenge the admission of certain portions of the State's evidence and the court's instructions to the jury.

We first consider defendant's contention that the trial judge committed prejudicial error by permitting State's witness Victor Holdren, a special agent with the Federal Bureau of Investigation, to testify about statements which defendant made to him in the emergency room at Duke Medical Center between 4:00 and 5:00 a.m. on 15 November 1976. These statements, the substance of which Holdren related to the jury, included defendant's explanation of the circumstances which prompted his trip from Atlanta to Baltimore on 14 November 1976 and the details of his initial en-

counter with Trooper Fisher. Other statements made by defendant during this interview dealt with his ride from McKenney, Virginia, to the road block in North Carolina. Often quoting defendant verbatim, Agent Holdren recounted the substance of their conversation in his testimony to the jury. His testimony, except when summarized, is quoted below:

After defendant forced Fisher into his patrol car, defendant "told the trooper, 'Drive me to Atlanta, to the Atlanta Police Department and you are free.' " As they drove south defendant "allowed the trooper to use the radio and talk to his headquarters. Connley said he also talked on the radio but wouldn't tell me [Holdren] what the conversation was. He said they continued along Interstate 85 into North Carolina and came to a road block made up of a tractor-trailer across the road. He said he saw a number of people around the tractor-trailer and when the car stopped, the officers began shooting at their car and Trooper Fisher hit his arm and appeared to be trying to get out of the car. He [defendant] stated and I quote: 'I was shooting at the dude on top of the trailer and don't know if I shot the trooper or not.' I questioned him how many times he had fired his gun. He didn't recall but he said that he fired the guns he had in his possession which included his gun, a .38 caliber revolver and the trooper's gun. He told me that his gun held 5 rounds of ammunition. He said everything went off pow, pow, pow, pow. At this point I was trying to determine if he had in fact shot Officer Fisher. I asked him if he had been allowed to continue to Atlanta, Georgia, would he have shot Fisher and he replied quote 'No, I wouldn't have. I'm sorry, no.' Mr. Connley said that during the drive from Virginia to the road block he and Trooper Fisher talked about life in general." At that point defendant terminated the conversation.

For the reasons hereafter stated, defendant's assignment of error based upon his exceptions to the foregoing testimony must be sustained and a new trial granted.

When Special Agent Holdren was called as a witness and asked to recount his conversation with defendant, the court, *ex mero motu*, conducted a voir dire to determine the competency of that testimony. Only Agent Holdren testified; defendant offered no evidence. Upon completion of the voir dire the trial judge entered findings of fact upon which he concluded (1) that defendant waived his right to an attorney and his other constitutional rights as explained by Officer Holdren; (2) that defendant "knowingly, understandingly, and voluntarily . . . intelligently and intentional-

ly answered" Holdren's questions; (3) that his statements were "made with a full understanding" of his constitutional rights; and (4) that these statements should be admitted into evidence against him.

[1] On *voir dire* Holdren testified that he in no way coerced, or attempted to coerce, defendant into giving a statement; and that he made no threat or promise nor offered defendant any hope of reward. He "observed that Mr. Connley was alert and responded to questions in a normal, rational way." Holdren also told the court that before interviewing defendant he had spoken with Dr. W. R. Belts, one of defendant's attending physicians. Whereupon the State's attorney who was examining Agent Holdren propounded this question, "And what advice was given to you by Dr. Belts?"

The court overruled defendant's objection to the question and Holdren answered: "I was concerned about whether he [defendant] would be able to talk to me. He [Dr. Belts] described Mr. Connley as having been treated for a gunshot wound in the left chest area and the right hand and apparently what he thought was a bullet crease across his left knee. He said that Connley was in a stable condition; that he had recieved no medication to sedate him at all, and that he was alert and entirely capable of talking to me about this."

The admission of this testimony from Agent Holdren was, of course, error. It was unmistakable hearsay which was not within any exception to the general rule rendering hearsay incompetent and inadmissible evidence. Patently, this testimony was the only basis for the court's finding that "FBI Agent Victor Holdren went to the hospital and talked with one of Connley's attending physicians; that at this time, he was advised by the doctor that Connley was not under medication and sedation, and that he could be talked with concerning the matters that occurred at the previous evening and early morning hours." It is equally obvious that the incompetent hearsay also supported the court's finding that defendant's answers to Holdren's questions were "knowingly, understandingly, voluntarily . . . willingly and intelligently and intentionally" made. The only other evidence tending to support that finding was Holdren's testimony that Connley "was alert and responded to the questions in a normal, rational way" when the agent talked to him.

"Unquestionably it is the rule in this jurisdiction that a judge's findings of fact will be reversed where it affirmatively appears they are based in whole or in part upon incompetent evidence. . . . However, 'in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision.' " *State v. Davis*, 290 N.C. 511, 541-42, 227 S.E. 2d 97, 115 (1976). However, "this presumption is weakened when, over objection, the judge admits clearly incompetent evidence." *Ibid.* Defendant argues that the admission of this testimony requires a new trial. Because the record in this case reveals other error requiring a new trial, we need not determine whether the court's finding as to what Dr. Belts told Holdren with reference to defendant's condition constituted prejudicial error. *See State v. Patterson*, 288 N.C. 553, 566-67, 220 S.E. 2d 600, 610 (1975).

[2] The trial court's conclusion that defendant waived his right to counsel was based upon the following factual findings:

"[T]hat while the defendant did not specifically make the affirmative statement that he did not have a desire, that he did not desire to have an attorney present, he nevertheless fully was advised of his rights to have an attorney present and knew and understood his right to have an attorney present and knew and understood his right to have an attorney present before he answered any questions put to him by Officer Holdren.

"And the Court finds as a fact from the totality of these surrounding circumstances that he did in fact waive his right to an attorney and his other constitutional rights. . . ."

On voir dire Holdren had testified that he approached defendant in the emergency room and asked him if he would talk. Defendant said he would, and Holdren informed defendant of his constitutional rights, reading the Miranda warning from a form entitled "Interrogation and Advice of Rights." This form also contained a "waiver of rights" section, under which was a line for defendant's signature. Additionally Holdren gave defendant a copy of the form and told him to read it for himself. The agent then asked defendant if he understood his constitutional rights and defendant replied, "I know what it says and I understand, but I'm not going to sign it." The record discloses no further statement by defendant bearing upon his rights. He did not sign the form.

Although a trial judge's findings of facts are binding upon appellate courts when supported by competent evidence, whether such evidence supports the findings and whether the findings themselves support the court's conclusions are questions of law reviewable on appeal. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). The findings in this case, quoted above, are insufficient to support the conclusion that defendant waived his right to counsel. Defendant unequivocally refused to sign a waiver, and Holdren's testimony on voir dire fails to show a specific oral waiver. As this Court said in a recent case involving similar findings:

"Measured by *Miranda* standards it is apparent that the findings of fact are not supported by the voir dire testimony of Agent Martinez. Failure to request counsel is not synonymous with waiver. Nor is silence. . . . The trial judge erred in holding that since defendant had been fully informed and understood his right to the presence of counsel at the in-custody interrogation and did not request a lawyer, his act in making the statement amounted to a waiver of counsel." *State v. Butler*, 295 N.C. 250, 255, 244 S.E. 2d 410, 413 (1978).

As we have frequently noted, the Supreme Court said in *Miranda v. Arizona*, 384 U.S. 436, 470, 16 L.Ed. 2d 694, 721, 86 S.Ct. 1602, 1626 (1966), that a waiver must be explicit and cannot be presumed from silence:

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we have delineated have been given. . . ."

In *State v. Blackmon*, 280 N.C. 42, 49-50, 185 S.E. 2d 123, 128 (1971), this Court ordered a new trial because there was no evidence that the defendant expressly waived his right to counsel. "Although the evidence at the *voir dire* is ample to support a finding that the defendant made the statements in question freely and voluntarily, having been fully advised of and having full understanding of his right to have an attorney present, the plain language of the *Miranda* decision above quoted in addition requires a waiver of right to counsel knowingly and intelligently

made by defendant. '. . . [F]ailure to ask for a lawyer does not constitute a waiver.' " We reiterated this principle in Blackmon's second appeal, *State v. Blackmon*, 284 N.C. 1, 9-10, 199 S.E. 2d 431, 437 (1973), and have noted or applied it in other decisions. *See State v. Lawson*, 285 N.C. 320, 204 S.E. 2d 843 (1974); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Turner*, 281 N.C. 118, 187 S.E. 2d 750 (1972); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied* 414 U.S. 1160.

Since defendant's statements were admitted in violation of his constitutional right to have counsel present at his in-custody interrogation, a new trial must be granted because we cannot say that there was no reasonable possibility that the evidence complained of contributed to defendant's conviction. *State v. Chapman*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Thacker*, supra; *State v. Hudson*, supra; *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). The most hotly contested issue in this case was whether Fisher was killed by defendant or by the law enforcement officers who fired into the patrol car in attempting to rescue him. The import of Agent Holdren's testimony was that defendant first said he did not know whether he shot Fisher; that he later said he could have shot him; and that he finally said he was sorry, because he would not have shot Fisher had they been allowed to continue to Georgia. It cannot be denied that such a quasi confession by an accused would ordinarily make a profound impression upon the minds of the average juror. *See State v. Blackmon*, 280 N.C. 42, 50, 185 S.E. 2d 123, 128 (1971). Therefore, the erroneous admission of defendant's in-custody statements entitles him to a new trial.

[3] Of the remaining assignments of error only assignment No. 1 raises a question likely to recur at defendant's second trial. Notwithstanding, we note assignment No. 9, which is not an assertion of legal error; it is but a recurring plea to this Court to reverse the rule that a defendant pleading insanity has the burden of proving that at the time of the crime he lacked capacity to know the nature and quality of his act or to distinguish between right and wrong in relation to it. Defendant concedes that this test, known as the M'Naghten rule, has "existed in North Carolina for well over a century." *State v. Helms*, 284 N.C. 508, 201 S.E. 2d 850 (1974). He argues, however, that the rule is "incommensurable" with present psychiatric thinking, "archaic and

unyielding," and places an "insurmountable" burden upon a defendant. We again reject this argument.

In recent years we have repeatedly reaffirmed our adherence to the M'Naghten rule; we now do so again. Although the science of psychiatry has made great strides since *M'Naghten's Case*, in our view, the psychiatrists have offered nothing better than the standard it established. As Justice Huskins, speaking for the Court, said in *State v. Helms*, 284 N.C. 508, 514, 201 S.E. 2d 850, 854 (1975) "[T]he M'Naghten rule is constitutionally sound; and our adherence to it is based on reason and common sense." *Accord, State v. Pagano*, 294 N.C. 729, 242 S.E. 2d 825 (1978); *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976).

Further, we again point out, as we did in *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), that the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975) did not change our rule that the burden of proof with respect to insanity rests upon the defendant pleading it. *See Patterson v. New York*, 432 U.S. 197, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977); *State v. Pagano, supra; State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977).

Finally, we proceed to defendant's assignment No. 1, which challenges the admission of the testimony of two Virginia State Police Dispatchers, Thomas M. Richardson and Frances C. Houchins, dealing with radio transmissions they received from Trooper Fisher while on duty late in the evening of 14 November 1976 and the early morning hours of November 15th. Both dispatchers knew Fisher and had engaged in radio communications with him prior to November 14th.

Richardson testified that while on duty he received two transmissions before midnight from Trooper Fisher, who identified himself by his coded "batch" number of 1309. He also stated that he heard the substance of a third communication from Fisher which was received by Mrs. Houchins, who relieved Richardson at midnight. Mrs. Houchins testified that she received one communication from unit 1309 and identified the speaker as Patrolman Fisher. When the State sought to elicit from each dispatcher the substance of the broadcasts he or she had heard

(three broadcasts for Richardson and one for Mrs. Houchins), defendant objected. The trial judge overruled defendant's general objection and admitted the following testimony pertaining to the content of the three communications.

(1) Communication received by Richardson at 11:44 p.m., November 14, 1976:

"Q. And what did [Fisher] say to you at that time?

"A. His transmission was . . . 'I have a subject who now has me in his custody. He has my service revolver. He wants me to take him to Atlanta, Georgia, and I am now on Interstate 85, ten miles south of McKenney. I have been shot once.' "

(2) Communication received by Richardson at 11:52 p.m.:

"Q. Would you tell the court what G. W. Fisher told you on this occasion?

"A. His transmission was 1309. 'I am now escorting the subject to Atlanta Police Department.' "

(3) Communication received by Houchins and heard by Richardson at 12:08 a.m., November 1976:

"Q. (To Richardson) And at approximately 12:08 a.m. on the morning of November 15, 1976, what if anything, did Patrolman G. W. Fisher say to you at that time?

"A. (By Richardson) He called in on his radio and Mrs. Houchins, the other dispatcher, was with him at this time. And his transmission was 1309. She said, 'Go ahead.' He said, 'The subject now has both pistols on me. If anybody or any officer hits him, he is going to kill me.'

"Q. (To Houchins) What, if anything, did [Fisher] say to you at 12:09 a.m. on the morning of November 15, 1976?

"A. (By Houchins) He called me, he said, '1309 to Richmond,' and I acknowledged him and then he said, 'Mrs. Houchins, the man in the car with me has two pistols on me. He said if we are interfered with in any

> way, or if he is hit, that he will kill me.' I waited for him to continue and he repeated the same thing over."

Defendant contends that the trial court's admission of this testimony regarding the content of the broadcasts received from Patrolman Fisher constituted reversible error.

[4] Radio communications, by analogy to telephone conversations, are governed by the rules of evidence regulating the admission of oral statements made during a face-to-face transaction, once the identity of the speakers is ascertained. *See Everette v. D. O. Briggs Lumber Co., Inc.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). That the radio messages received by Mr. Richardson and Mrs. Houchins were sufficiently identified as being those of the deceased is undisputed. Accordingly, this assignment of error may be analyzed in light of the general principles of evidence governing hearsay.

[5] Evidence, whether oral or written, is hearsay (1) "when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Deck*, 285 N.C. 209, 213, 203 S.E. 2d 830, 833 (1974). "Hearsay evidence, unless it falls within one of the recognized exceptions to the hearsay rule, is inadmissible." 1 Stansbury's North Carolina Evidence, § 138 (Brandis rev. 1973). Indisputably, the content of the radio transmissions by Patrolman Fisher was hearsay; the evidence was offered to show (1) that the trooper was being forced to drive to Atlanta and (2) that his armed abductor was threatening to kill him should a rescue be attempted. This testimony, however, falls within two well-established exceptions to the hearsay rule and was therefore properly admitted.

First, Fisher's entire report to the dispatchers—both the stark statement of his predicament and his repetition of defendant's threats—were admissible under the "*res gestae* concept." An excellent general statement of this concept appears in 1 Underhill's Criminal Evidence § 266, p. 664 (5th Ed. 1956), as follows:

"The rule of res gestae, under which it is said that all facts which are a part of the res gestae are admissible, is a rule deter-

mining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the res gestae, it will be accepted, because, as it is said, that fact is then relevant. . . . Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae.

"These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to exclude the idea of deliberation or fabrication. A statement made as part of res gestae does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design."

The res gestae concept was the basis of decision in the following cases:

In *Brown v. State*, 249 Ala. 5, 31 So. 2d 681 (1946) the defendant shot and killed his brother-in-law, Wilkey, in front of the deceased's restaurant after considerable argument in and around the premises. During the course of the disturbance, Wilkey twice telephoned the sheriff and told him that two men armed with a shotgun were outside his place, cursing and threatening to kill him. On the second call he told the sheriff "to get on out here; they are going to kill me." Before the sheriff could get there the defendant did kill Wilkey. Defendant was convicted or murder. On his appeal to the Court of Appeals the conviction was vacated because the trial judge permitted the sheriff to testify about those conversations between the deceased and himself. Upon the State's appeal, the Alabama Supreme Court reversed the Court of Appeals, holding "that the conversation between the deceased and the sheriff superinduced by the menacing presence and threats by the defendant are within the res gestae of the killing, 'substantially contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character.' (Citations omitted)" *Id.* at 7, 31 So. 2d at 682.

The case of *Commonwealth v. Coleman*, 458 Pa. 112, 326 A. 2d 387, 74 A.L.R. 3d 954 (1974) is also illuminating. The evidence tended to show that at approximately 6:15 a.m. on 3 May 1971 the deceased telephoned her mother and, in an agitated voice, stated that defendant (her boyfriend) "would not let her leave the apartment, that he would hang up the phone, and that he was going to kill her." When the connection was broken at approximately 6:25 a.m. the girl's mother called the police, as she had been implored to do. At 6:35 a.m. policemen found the girl in her apartment, dead of multiple stab wounds. Defendant appealed his conviction of murder, contending that the trial judge had erred in permitting the decedent's mother to testify for the Commonwealth as to the decedent's statements to her on the telephone. The Supreme Court of Pennsylvania held that decedent's statements to her mother over the telephone were properly admitted in evidence as one of the "res gestae exceptions to the hearsay rule." However, one group of Justices thought the decedent's statements came in as "an exception to the hearsay rule for present sense impressions." The other was "satisfied" that the challenged statements were "admissible under the so-called 'excited utterance' exception, another variant of the res gestae exception." The consensus was that the indicia of reliability for such a declaration is its contemporaneousness with the observation of the occurrence or condition.

Hearsay testimony in *Knight v. State*, 338 So. 2d 201 (Fla. 1976) indicated that the defendant confronted one Mr. Gans in his business parking lot and ordered him, at gunpoint, back into Gans's car. Defendant and Gans returned to the Gans home and picked up Mrs. Gans, whereupon defendant forced the two hostages to drive to a bank. Mr. Gans was instructed to go inside the bank and obtain $50,000 or Mrs. Gans, who remained in the car as hostage, would be killed. Mr. Gans entered the bank and related the situation to Mr. Gill, the bank president, who provided Gans with the money and promptly alerted the FBI and local authorities. Before the law enforcement officers could react, however, Mr. and Mrs. Gans were shot to death. At the defendant's trial for murder Mr. Gill's testimony recounting Mr. Gans's description of the kidnapping and extortion plot was admitted over objection. On defendant's appeal from his conviction of murder, the Supreme Court of Florida held that "[t]he testimony

given by Mr. Gill was admissible as being within the res gestae of the crime of kidnapping. . . . The trial court properly held this evidence admissible as res gestae, an exception to the hearsay rule." *Id.* at 204.

The above cases support this Court's conclusion that the total content of Trooper Fisher's radio broadcasts, including defendant's alleged threats, were admissible under the "res gestae concept." Statements made by a deceased immediately prior to or during the course of a continuing criminal transaction are frequently admitted under this theory. *See generally,* 2 Wharton's Criminal Evidence § 297 (13th Ed. 1972); Annot., 74 A.L.R. 3d 963 (1976). However, admission of Fisher's radio communications, in their entirety, is also supported by other formulations of certain other exceptions to the hearsay rule.

Trooper Fisher's radio reports to the Virginia State Police Control Station for the area through which he was traveling were made "in the regular course of business," and in the midst of the transaction he was reporting. As it was his duty to do, the trooper was informing his headquarters of an extraordinary situation which threatened the public safety, his life, and State property; he and his patrol car were under the control of an armed abductor who had possession of Fisher's weapon. The reasonable probability of the truthfulness of Fisher's report is obvious: (1) Common experience would reject the suggestion that a highway patrolman on duty would falsely report the loss of his service revolver and his forcible abduction. (2) In Virginia (as in North Carolina) to falsely report the commission of a crime with intent to mislead State authorities is a criminal offense. Va. Code § 18.2-461 (Replacement 1975). (3) The subsequent tragedy fully corroborated his report.

[6] Fisher's oral dispatches were admissible for the same reason written entries in the regular course of business are admissible. *State v. Cawthorne*, 290 N.C. 639, 227 S.E. 2d 528 (1976); *Geralds v. Champlin*, 93 N.H. 151, 37 A. 2d 155 (1944). *See* 1 Stansbury's N.C. Evidence § 155 (Brandis rev. 1973); C. McCormick, Evidence §§ 307, 310 (2d Ed. 1978); 93 Univ. of Pa. L. Rev. 101 (1945). Of course, that portion of these dispatches which reported defendant's threat to kill Fisher if anyone attempted to impede their progress to Atlanta is a classic example of "double hearsay."

However, as stated in 2 Jones on Evidence § 8.8 (6th Ed. 1972), "[T]here is no good reason why a hearsay declaration, which within itself contains a hearsay statement, should not be admissible to prove the truth of the included statement, if both the statement and the included statement meet the tests of an exception to the hearsay rule." *See Yates v. Bair Transport, Inc.*, 249 F. Supp. 681, 688 (S.D.N.Y. 1965); 13 U.L.A., Uniform Rules of Evidence § 805 (West 1975). The dispatches challenged here meet this requirement. Had Fisher survived, upon a trial of defendant for kidnapping, or any other offense growing out of the events involved here, he could have testified to defendant's out-of-court statements which are now in question. They would have been competent against defendant either as admissions, a statement of his mental condition, or a declaration of intent. *See* Stansbury's North Carolina Evidence §§ 161, 162, 167 (Brandis rev. 1973).

For the reason set out above the verdict and judgment from which the defendant appeals are vacated and a new trial ordered.

New trial.

STATE OF NORTH CAROLINA v. WARREN HARDIN JONES AND ALBERT JOYNER ALIAS THURMAN BOYKIN

No. 57

(Filed 14 July 1978)

1. Searches and Seizures §§ 34, 37 — shotgun in automobile — plain view — search incident to lawful arrest

In a prosecution for armed robbery defendants' contention that a shotgun was unconstitutionally seized from their automobile is without merit, since a patrolman's uncontradicted testimony established that the weapon was in plain view, the officer observing it in the floor of the car while he was standing on the curb, and it was seized pursuant to a lawful arrest, the officer having stopped defendants' car because it fit the description of a car involved in an armed robbery which the officer learned about over the radio.

2. Searches and Seizures § 11 — warrantless search of vehicle — probable cause

Where probable cause exists to search an automobile and circumstances warrant removing it for a search at some other location, such as the police station, the "exigent circumstances" requirement is satisfied and a warrantless search may be conducted within a reasonable time at the location to which the automobile is removed.

3. Searches and Seizures § 11— warrantless search of vehicle at police station—probable cause

The trial court properly concluded that probable cause existed to search defendants' automobile at the police station where it had been taken following defendants' arrest and that the search was neither unreasonable nor conducted in violation of defendants' constitutional rights where the car fit the description of one used in an armed robbery a few hours earlier; the officer who stopped the car saw a shotgun in plain view in the vehicle; the vehicle was removed to the police station and a warrantless search was conducted without consent having been given; the arrest and the search at the station took place on the same day, apparently while it was light, and were separated by a period of only a few hours; and the trial judge expressly found probable cause for the search.

4. Arrest and Bail § 9— motion to reduce bail—denial no abuse of discretion

Defendants' contention that the trial court erred in denying their motion for reduction of bail is without merit, since bail in the amount of $30,000 was not so excessive as to transgress the bounds of the trial court's discretion or to infringe upon defendants' constitutional rights; defendants were charged with armed robbery which carried a maximum penalty of life imprisonment; evidence against defendants included the testimony of two eyewitnesses and numerous items identified as fruits of the robbery found in their custody and control shortly after the crime; defendants stated their intention to obtain counsel at their own expense if released; one defendant had previous convictions for assault, breaking and entering, larceny and passing worthless checks; bail was twice reduced, which suggested that defendants' requests for reduced bail received fair consideration by the trial court; and defendants failed to show how they were prejudiced by the court's refusal to reduce their bail.

5. Constitutional Law § 30— motion for discovery—abandonment of motion

Defendants' contention that the trial court erred in failing to allow their motion for discovery made pursuant to G.S. 15A-903 is without merit since defendants waived their statutory right to have the trial court order the prosecutor to permit discovery by failing to argue or make any other showing in support of their discovery motion at a hearing on the motion; upon the judge's conclusion that the motion had been abandoned, defendants made no objection or attempt to be heard; the judge never ruled on the motion, and although five months elapsed between the hearing and trial, defendants never sought to obtain a ruling; even if the trial court had ordered the prosecutor to comply with defendants' discovery requests and he had failed to comply, defendants would not necessarily be entitled to a new trial since that is only one of the four different sanctions provided in G.S. 15A-910 and defendants never sought to invoke any of them; and defendants never suggested how any foreclosure of discovery might have operated to hinder their preparation or otherwise prejudice them at trial.

6. Constitutional Law § 45— court-appointed counsel—motion to dismiss properly denied

The trial court did not err in denying defendants' *pro se* motions to dismiss their court-appointed trial attorneys since the motions were made on the day the cases were called for trial; defendants stated that they wished to

employ their own counsel; defendants could not tell the court the names of the attorneys they intended to employ; and though defendants had already had six months in which to employ counsel, they had failed to do so, and the court had every right to suspect the bona fides of the defendants.

APPEAL by both defendants from *Martin (Perry), J.*, at the 17 January 1977 Session of EDGECOMBE Superior Court. Defendants were convicted of armed robbery and sentenced, respectively, to life imprisonment. Docketed and argued as No. 30 at the Fall Term 1977.

Rufus L. Edmisten, Attorney General, by Archie W. Anders, Assistant Attorney General, for the State.

George A. Goodwyn, Attorney for Defendant Appellants.

EXUM, Justice.

Defendants' assignments of error deserving discussion challenge (1) the admissibility of various items of evidence, on the ground that they were obtained through unconstitutional searches of an automobile in which defendants were apprehended; (2) the legality of their pre-trial confinement, on the ground that bail was unconstitutionally excessive; (3) the failure of the trial court to grant their pre-trial motion for discovery pursuant to G.S. 15A-902, *et seq.*; and (4) the failure of the trial court to allow their motion to dismiss their court-appointed attorneys. We find no merit in any of these assignments and no error in the trial.

The state's evidence tends to show that on 27 June 1976 Faye Medlin was working at J&J Quik Mart on Leggett Road in Edgecombe County. Just after she opened the store around 9:00 a.m., a man came in, purchased a pack of cigarettes, and then left. A few minutes later another man entered and bought cigarettes. Faye Medlin identified the two men at trial as defendant Jones and defendant Joyner (alias Thurman Boykin), respectively. Joyner was wearing sunglasses, a tan hat and a blue shirt. Mrs. Medlin turned around to get another carton of cigarettes and turned back to discover Joyner pointing a shotgun at her head. He told her it was a robbery and tied her hands behind her back as she lay face down on the floor. Her diamond ring and wedding band were then removed, and she heard the cash register emp-

tied and a money bag taken from under the counter. Altogether $550 in cash and about $675 in checks and food stamps were taken.

About this time James Suggs arrived at the J&J Quik Mart. He saw in the "store yard" a 1968 dark green Plymouth with the hood "a different color from the rest of the car," a dent in the fender, and a white chrome strip down the side. As he entered the store, James Suggs saw Faye Medlin lying on the floor and Jones standing over her. Then Joyner, standing behind the door and holding a sawed-off shotgun, told him to "Hit the floor." He did so, whereupon defendants tied his hands with some cord, told him not to move, and left. Shortly thereafter another customer arrived and untied Faye Medlin and James Suggs. They immediately summoned the police.

Around 9:20 a.m. the same morning police observed a 1968 dark green Plymouth with a discolored hood, dented fender and white chrome strips, North Carolina license JWL 135, traveling south on Main Street in Tarboro. Having been alerted that a vehicle of this description was used in a robbery in Edgecombe County, they stopped the car and found it occupied by defendants. Patrolman Jimmy Lewis approached the passenger side, where Joyner was seated, and observed a shotgun protruding from beneath the seat. Lewis seized the shotgun, which proved to be a sawed-off gun. Jones and Joyner were then placed under arrest. They and the Plymouth automobile were taken by investigating policemen to the Tarboro Police Station. There a roll of money wrapped in rubber bands, amounting to $550, was taken from Joyner's left front pocket. A search of the vehicle at the station resulted in the discovery and seizure of a woman's pair of gloves, diamond ring, wedding band, sunglasses, tan hat, blue shirt, and twenty-four cartons of cigarettes.

Defendants offered evidence in an attempt to impeach the testimony of Faye Medlin and James Suggs on the basis of variances in their testimony at an earlier probable cause hearing, and tending to show that the Plymouth owned by defendant Jones did not have a chrome strip down the side. Ada Lee Boykin testified that Joyner regularly carried over $500 folded in his pocket before 27 June 1976.

Defendant Jones testified, denying any involvement in the robbery and any knowledge of the location of J&J Quik Mart. He

stated that on 27 June 1976 he and Joyner traveled from Wilson to visit Ralph Nettles, who lives near Tarboro. Nettles was not at home, so they proceeded to Princeville to see Wilbur Staton. Upon learning that Staton had moved to Washington, D. C., they left to visit some friends in East Tarboro and were traveling through Tarboro on Main Street when the police stopped them shortly after 9:20 a.m. They were told they were suspected of possessing marijuana, shoved repeatedly, and informed that they "didn't have any rights down here." Joyner did not testify.

I

Defendants first contend the trial court erred in admitting the sawed-off shotgun and other items of evidence taken from defendants' automobile because these items were unconstitutionally seized.

No voir dire examination was held concerning the shotgun seized at the time of defendants' arrest. Tarboro patrolman Jimmy Lewis testified before the jury:

> "I walked right up to the door of the car, the right-hand side. I observed [defendant Joyner] sitting in the seat by the door with his hand palms down between his legs and I didn't know whether he had his hands clinched—I couldn't tell whether he had his hands clinched or not but they were between his legs, palms down. I asked him to put his hands up on the dash so that I could see them and to see if anything was in them. He put his hands up in this manner on the dash. At that time after he pulled his hands out from between his legs and put them up like that there was a space between his hands and his legs. At that location the curb is fairly high and I was looking directly down between his legs and sticking out from under the seat of the car was a shotgun, what appeared to be a shotgun. When I looked into the floorboard of the car I saw part of the stock of a shotgun and the hammer area of the shotgun. The trigger part was up under the seat. At that time I opened the door and took [defendant Joyner] by his right hand and told him he was under arrest for carrying a concealed weapon. . . . I reached in and took the shotgun out of the car and held it up in this manner."

Following this testimony the state offered the shotgun into evidence. Defendants at that point objected, and the shotgun was received in evidence over the objection.

Upon defendants' motion to suppress "any further evidence concerning the automobile and the search," the trial judge held a voir dire examination. Only the state offered evidence. Sergeant Russell Armstrong of the Tarboro Police Department testified he and Patrolman Jimmy Lewis were on patrol in the morning of 27 June 1976. He had information that two black males, armed with a sawed-off shotgun and riding in a 1968 or 1969 dark colored Plymouth with a white chrome side strip, had perpetrated an armed robbery. As a result of a radio report he and Lewis went to St. John Street in Tarboro near the post office. They found that policemen Knox and Sherman had stopped a green 1968 Plymouth. Two black males were observed at the scene. Jones was standing at the left side of the Plymouth. Joyner was sitting in the right front passenger seat. Sergeant Armstrong asked to search the car and Jones refused to give consent. He nevertheless proceeded to search the car. He opened the trunk and then observed Patrolman Lewis holding up the sawed-off shotgun. Sergeant Armstrong then placed Jones under arrest for armed robbery. Both defendants and the automobile were taken by the officers to the Tarboro Police Station.

On further voir dire Edgecombe County Deputy Sheriff Marion Proctor testifed that he investigated the robbery at J&J Quik Mart. His investigation revealed that the perpetrators were two black males who were operating a dark green 1967 or 1968 Plymouth with a dent on one side, a "rusty colored or primer brown" hood and a white side strip, and who were armed with a sawed-off shotgun. He then received information from the Tarboro police that they had stopped two black males riding in a 1967 or 1968 green Plymouth and that one of the men had a sawed-off shotgun. He learned also that the men and the automobile were at the Tarboro Police Station. Upon arriving at the police station he observed the Plymouth automobile, which fitted precisely the description he had been given. Deputy Proctor then got the keys to the automobile and searched it, finding the items delineated above.

The trial court found facts in accord with the state's evidence, concluded that probable cause existed to search the

automobile at the police station and that the search was neither unreasonable nor conducted in violation of defendants' constitutional rights, and consequently denied defendants' motion to suppress.

[1] Defendants' contention that the shotgun was unconstitutionally seized is totally without merit. Patrolman Lewis' uncontradicted testimony establishes that the weapon was in plain view, *Harris v. United States*, 390 U.S. 234 (1968); *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976), and it was seized pursuant to a lawful arrest, *United States v. Robinson*, 414 U.S. 218 (1973); *State v. Harrington*, 283 N.C. 527, 196 S.E. 2d 742 (1973); *State v. Dobbins*, 277 N.C. 484, 178 S.E. 2d 449 (1971).

Turning now to the admissibility of the other items obtained from defendants' vehicle after it was removed to the police station, we begin with the rule stated in *State v. Legette, supra*, and *State v. Allen*, 282 N.C. 503, 512, 194 S.E. 2d 9, 16 (1973): "[A] warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant." In *Allen* this Court found no error in the admission into evidence of burglary tools discovered when police arrested the defendants around 2:30 a.m., removed their automobile to the police station, and shortly thereafter conducted a warrantless search that produced the tools. Justice Branch, writing for the Court, observed, 282 N.C. at 512-13, 194 S.E. 2d at 16, "The search yielding the burglary tools cannot be justified as a search incident to defendants' arrest since the search was made *after* defendants were under arrest and in custody at the police station. . . . Nor were the burglary tools in plain view so as to preclude the necessity of a search. Thus, if the search was reasonable, it must be because there was probable cause to search under such exigent circumstances as to make it impracticable to obtain a search warrant." (Emphasis original.) He then proceeded to discuss the leading cases of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); and *Carroll v. United States*, 267 U.S. 132 (1925), in which the Supreme Court has sought to define the circumstances justifying a warrantless search of an impounded or immobilized vehicle. No purpose would be served by repeating here Justice Branch's careful discussion of

each of these cases. It seems appropriate, however, to add *Texas v. White*, 423 U.S. 67 (1975), and *Cardwell v. Lewis*, 417 U.S. 583 (1974), to the list of leading decisions which, as noted by Mr. Justice Rehnquist in *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973), "suggest that this branch of the law is something less than a seamless web." *See generally* Comment, Warrantless Searches and Seizures of Automobiles and the Supreme Court from *Carroll* to *Cardwell*: Inconsistently Through the Seamless Web, 53 N.C.L. Rev. 722 (1975).

In *Cardwell v. Lewis*, *supra*, a murder case reaching the Supreme Court via federal habeas corpus, the defendant was summoned to appear at the police station on a certain day and, complying voluntarily, he arrived shortly after 10:00 a.m. The police had obtained a warrant for his arrest and served him with it around 5:00 p.m. that afternoon, whereupon his car was removed from a public lot to the police impoundment lot. The next day the car was subjected to a warrantless "examination" by an investigator, who found the tread of one tire to match an impression made at the scene of the crime. The investigator also took paint samples and subsequently testified that in his opinion the samples were not different from foreign paint scrapings removed from the victim's automobile. Four justices found no constitutional error in the admission of this evidence against the defendant. Mr. Justice Blackmun's opinion, joined by Chief Justice Burger and Justices White and Rehnquist, declared that the exterior examination violated no privacy interest and thus was not a "search" requiring the interposition of a warrant. Justice Blackmun also emphasized the distinction between homes and offices, on one hand, and movable vehicles, on the other, that has resulted in less stringent warrant requirements for vehicle searches, and the exigent circumstances justifying the initial seizure of the defendant's car. Mr. Justice Powell concurred in the result for reasons related to the scope of federal collateral review of Fourth Amendment claims. 417 U.S. at 596; *cf. Stone v. Powell*, 428 U.S. 465 (1976).

In *Texas v. White*, *supra*, police were informed that a man was attempting to pass fraudulent checks at the drive-in window of a bank. They arrived around 1:30 p.m. and directed the defendant to park his automobile at the curb. A bank employee and one of the officers observed the defendant "attempting to 'stuff'

something between the seats." The police then arrested him, and one officer drove him to the station house while the other drove his car there. The defendant was questioned briefly at the station, and he refused to consent to a search of the automobile. The police nevertheless proceeded to search, without a warrant, and discovered checks which were subsequently admitted against the defendant at trial. In a per curiam opinion the Supreme Court found no constitutional violation in the search of the defendant's vehicle. The Court relied on *Chambers v. Maroney, supra*, 399 U.S. 42 (1970), for the proposition that "police officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant." 423 U.S. at 68.

[2,3] This Court, following the decisions, as we understand them, of the United States Supreme Court, has continued to insist on the requirement of "exigent circumstances" to justify a warrantless search of an automobile. *State v. Legette, supra; State v. Allen, supra.* The United States Supreme Court has indicated that the inherent mobility common to all automobiles is of "no constitutional significance." *Coolidge v. New Hampshire, surpa*, 403 U.S. 443, 461 n. 18 (1971) (plurality opinion of Justice Stewart, joined by Justices Douglas, Brennan and Marshall). In *Coolidge*, however, the police had entered the defendant's property and towed his automobile from his driveway, where it was parked, to the station house, where the search was conducted. The plurality opinion found *Chambers* not controlling and concluded that the seizure and subsequent search was unconstitutional, stating, 403 U.S. at 463 n. 20: "[I]t seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." In *Cardwell v. Lewis, supra*, the defendant's car was seized from a public lot near the police station while the police had custody of the defendant and the car keys. In both *Coolidge* and *Cardwell* the justices who found the seizure of the automobile unconstitutional were less than a majority of the Court. In *Chambers* and *White*, on the other hand, the automobile was being operated on or near public roadways immediately prior to the arrest and seizure. Six and seven justices, respectively, found no constitutional error in the

seizure and removal of the automobile to the police station. We think *Chambers* and *White* mean that where an automobile is stopped on or near[1] a public street or highway and there is probable cause to search at the scene, this may constitute "exigent circumstances" permitting police to impound the automobile. We understand *White* to hold, moreover, that where probable cause exists to search an automobile and circumstances warrant removing it for a search at some other location, such as the police station, the "exigent circumstances" requirement is satisfied and a warrantless search may be conducted within a reasonable time at the location to which the automobile is removed. *White* is indistinguishable from the case now before us. There, as here, probable cause for the arrest was clearly present; the vehicle was removed to the police station and a warrantless search conducted without consent having been given; the arrest and the search at the station took place on the same day, apparently while it was light, and were separated by a period of only a few hours; and the trial judge expressly found probable cause for the search.

On the facts of this case, therefore, we find no constitutional error in the seizure of the defendants' automobile or the search which disclosed the rings and other items subsequently admitted at trial. This assignment of error is overruled.

II

[4] Defendants next contend the trial court erred in denying their motion for reduction of bail. Defendants do not contend that our statutes on pre-trial release, G.S. 15A-531, *et seq.*, were violated. Defendants seem to contend that their pre-trial appearance bonds were so unreasonably high as to violate our constitutional prohibition against "excessive bail." N.C. Const., Art. I, § 27.

The record discloses that defendants were arrested on 27 June 1976. The next day their release was authorized upon execution by each of them of an appearance bond in the amount of $100,000. Failing to post this amount they were held until 15 July 1976, when bail for each defendant was reduced to $50,000. On 28

1. "The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance. The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain." *Cardwell v. Lewis, supra*, 417 U.S. at 594-95 (plurality opinion by Justice Blackmun).

July defendants moved for further reduction of bail on the grounds that $50,000 was in excess of the amount necessary to assure their appearance and that confinement hindered their defense preparation. Judge George M. Fountain heard and denied their motions on 5 August. The next day defendants filed application for writ of habeas corpus, seeking primarily a determination whether $50,000 bail was unreasonable and excessive. The matter was heard on 23 August by Judge Albert W. Cowper, who reduced bail to $30,000. On 9 December 1976 defendants filed another motion for reduction of bail. This motion was denied the same day by Judge Fountain.

The primary purpose of an appearance bond is to insure the defendant's presence at trial. *Stack v. Boyle*, 342 U.S. 1 (1951); *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970). General Statute 15A-534 authorizes the requirement of an appearance bond in lieu of outright unsecured release if such release "will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." Defendants do not contend they were entitled to an unsecured pre-trial release. They quarrel only with the *amount* of bail.

The amount of bail pending trial is a matter within the trial judge's discretion. *Forest v. United States*, 203 F. 2d 83 (8th Cir. 1953); *People ex rel. Klein v. Krueger*, 25 N.Y. 2d 497, 255 N.E. 2d 552 (1969); *see* 8 Am. Jur. 2d Bail and Recognizance §§ 68-69 (1963), and cases therein cited; *compare In re Reddy*, 16 N.C. App. 520, 525, 192 S.E. 2d 621, 625 (1972), and cases therein cited.

While bail in the amount of $30,000 seems somewhat high relative to amounts usually set in similar circumstances, *see State v. McCloud, supra*, it was not so excessive as to transgress the bounds of the trial court's discretion or to infringe defendants' constitutional rights. Defendants were charged with armed robbery in violation of General Statute 14-87, which at the time provided for "imprisonment for not less than five years nor more than life imprisonment in the State's prison" upon conviction. Evidence against defendants included the testimony of two eyewitnesses and numerous items identified as fruits of the robbery found in their custody or control shortly after the crime. While defendants alleged that they and their families are "persons of

very modest means," they also stated their intention to "obtain expert assistance at our own expense" if released. Defendant Jones had previous convictions for assault, breaking and entering, larceny and passing worthless checks. We note further that the amount of bail was twice reduced, from $100,000 to $50,000 and finally to $30,000, which suggests that defendants' requests for reduced bail received fair consideration by the trial court and were not met with arbitrary denials.

Even if we assume arguendo that $30,000 bail was excessive, defendants must show they were thereby prejudiced in order to prevail on appeal. *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). Such prejudice must appear of record. *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). A claim that excessive bail prejudiced the efforts of the accused to prepare for trial will not be sustained on mere "unsupported and conclusory allegations." *McCabe v. North Carolina*, 314 F. Supp. 917 (M.D.N.C. 1970). Here the record reveals in support of defendants' contention only allegations that the "bail bond requirement . . . does not allow us to properly prepare our defense unhampered by confinement" and that defendants' "preparation for trial is seriously hampered and hindered." It does not appear what evidence, if any, was offered in support of these allegations. On the other hand, Judge Fountain expressly found in his order of 3 November 1976 that "the court is informed by [defendants'] attorneys that they have had every opportunity necessary to confer with and advise their clients and secure all information that can be furnished by their clients."

We hold, consequently, that no prejudicial error appears in the trial court's denial of defendants' motion for reduction of bail below $30,000.

III

By their third assignment of error defendants contend the trial court erred in failing to allow their motion for discovery made pursuant to G.S. 15A-903 or to order that counsel be permitted "to interview the witnesses named in the request presented."

The record discloses a letter dated 25 August 1976 from defendants to Assistant District Attorney Frank R. Brown. Rely-

ing on G.S. 15A-902,[2] defendants sought voluntary compliance by the prosecution with certain discovery requests. On 31 August 1976 defendants, relying on G.S. 15A-903, filed a motion with the court seeking an order requiring Mr. Brown to produce or permit them to inspect various items referred to in the statute. The motion declared that Mr. Brown had "indicated" he would not comply voluntarily with the requests made in their letter. Neither the letter nor the motion contained any mention of a request by defendants to interview witnesses. This motion, along with several other defense motions, came before Judge Cowper on 9 September 1976. The order entered by Judge Cowper states: "As to the motion for discovery, the court heard no evidence with respect to this and assumes that this motion has been abandoned."

While G.S. 15A-903 *requires* the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery,[3] "generally, in order for an appellant to assert a constitutional or statutory right in the appellate courts, the right must have been asserted and the issue raised before the trial court. Further, it must affirmatively appear on the record that the issue was passed upon by the trial court." *State v. Young*, 291 N.C. 562, 567, 231 S.E. 2d 577, 580 (1977); *State v. Parks*, 290 N.C. 748, 752, 228 S.E. 2d 248, 250 (1976). In *Young* the defendant assigned as error the failure of the trial court to hold a hearing to determine his capacity to proceed with trial, as required by G.S. 15A-1002(b)(3). As there was no evidence that the defendant or his attorney ever demanded such a hearing or objected to the failure of the trial judge to hold one, and no indication that the question was passed upon by the trial judge, we held, 291 N.C. at 568, 231 S.E. 2d at

2. The pertinent provisions of the statute are:

"§ 15A-902. *Discovery procedure.*—(a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

(b) To the extent that discovery authorized in this Article is voluntarily made in response to a request, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

(c) A motion for discovery under this Article must be heard before a superior court judge."

3. The statute says repeatedly that "[u]pon motion of a defendant, the court *must* order the prosecutor . . . ." G.S. 15A-903(a),(b),(c),(d), and (e). (Emphasis supplied.)

581, that "defendant's statutory right . . . was waived by his failure to assert that right. His conduct was inconsistent with a purpose to insist upon a hearing to determine his capacity to proceed."

In *State v. Cross*, 293 N.C. 296, 237 S.E. 2d 734 (1977), the defendant's attorney discovered upon cross-examination of a state's witness that the witness had been shown certain photographs prior to trial and had not been able to identify the defendant. Rejecting the defendant's contention that the trial court erred prejudicially in not requiring the state to produce the photographs, we said, 293 N.C. at 304, 237 S.E. 2d at 740: "When defendant learned of the pictorial lineup, he did not object, move for a mistrial, or in any manner bring this to the attention of the trial judge. . . . The record does not indicate that the photographs should or could have been provided to defendant since they were never requested. Under these circumstances, defendant has failed to show any prejudicial error on the part of the trial judge."

[5] In the present case we are satisfied defendants waived their statutory right to have the trial court order the prosecutor to permit discovery. It appears defendants did not argue or make any other showing in support of their discovery motion at the hearing before Judge Cowper. Upon his conclusion that the motion had been abandoned, the record discloses no objection or attempt to be heard on the part of defendants. Judge Cowper, moreover, never ruled on the motion. Although some five months elapsed between the hearing and trial, defendants never sought to obtain a ruling. Consequently, they cannot now be heard to complain of prejudicial error in Judge Cowper's failure to rule.

Even if the trial court had ordered the district attorney to comply with defendants' discovery requests and he had failed to comply, defendants would not necessarily be entitled to a new trial. The sanctions for such a failure are provided in G.S. 15A-910 as follows:

> "*Regulation of discovery — failure to comply.*—If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders. (1973, c. 1286, s. 1; 1975, c. 166, s. 17.)"

Imposition of these sanctions is within the discretion of the trial court. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Defendants here never sought to invoke them.

Finally, defendants have not suggested how any foreclosure of discovery might have operated to hinder their preparation for or otherwise to prejudice them at trial. They do not specify any items of evidence which surprised them or which they could have excluded or rebutted more effectively had they been able to discover such evidence prior to trial.

Defendants' third assignment of error is therefore overruled.

IV

[6] Finally, defendants contend the trial court erred in denying their *pro se* motions to dismiss their court-appointed trial attorneys. Defendants were arrested on 27 June 1976. On 23 July 1976 Mr. H. Vinson Bridgers was appointed to represent Jones and Mr. George M. Britt was appointed to represent Joyner. Mr. Bridgers and Mr. Britt acted in the capacity of court-appointed counsel from the date of their appointments until the completion of the trial. After trial the court appointed Mr. George A. Goodwyn to represent defendants on this appeal.

When these cases were called for trial and before the selection of the jury, the trial court conducted a brief hearing at the request of defendants in the absence of the jury panel. Each defendant moved *pro se* to have his court-appointed counsel "dismissed from the case." The reason given by each defendant was that he wanted to employ his own counsel. Upon inquiry of the court Jones admitted that he had not been able to employ counsel during the approximately six months between his arrest

and the impending trial but that money for that purpose was "being raised." Mr. Joyner when asked if he had employed an attorney replied, "One is in progress of coming in on the case. He is from out of state." Joyner, however, could not advise the trial court of the name or address of this attorney. He could only say that the attorney was from Baltimore. He said his "people" had money to employ counsel but that they were not in court because he had "told them not to come." Whereupon the trial judge stated for the record that he had been well acquainted with both Mr. Britt and Mr. Bridgers for over twenty years and knew both of them to be able, experienced trial lawyers. He denied each defendant's motion to dismiss his trial counsel, to which ruling each defendant excepted and now assigns as error on appeal.

There was no error in the trial court's denial of these motions. It is clear these defendants did not wish to represent themselves. They wanted, apparently, to dismiss their court-appointed counsel on the ground that they were or might be in a position to employ counsel of their own choosing. Since defendants had already had approximately six months to employ such counsel if they wished and were able to do so, the trial judge, as we said in *State v. Sweezy*, 291 N.C. 366, 373, 230 S.E. 2d 524, 529 (1976), had "every right to suspect the bona fides of the defendant[s]." We have held that a defendant's *pro se* motion to dismiss his court-appointed attorney was properly denied when it was made on the day trial was to begin and on the ground, among others, that defendant wished to employ his own counsel. *State v. Gray*, 292 N.C. 270, 281-82, 233 S.E. 2d 905, 913 (1977). We said then:

> "Defendant's assertion that he wished to employ his own counsel, made as it was, on the day trial was to begin and without the appearance or even the name of a single attorney who might be privately employed to represent him, was no ground for the dismissal of his court-appointed counsel. Defendant did not claim he had the funds to employ counsel. There is not a scintilla of evidence indicating defendant's intention or desire to represent himself . . . .
>
> "While defendant may have been peeved with his attorney for personal reasons, the court had no reason to doubt that attorney's effectiveness and capability as an advocate or

to suspect the relationship between defendant and his counsel to have deteriorated so as to prejudice the presentation of his defense. . . . To have allowed the motions to remove counsel would have significantly delayed defendant's trial without the slightest demonstration of any potential benefit to his case."

Precisely the same considerations obtain in the instant case. This assignment of error is overruled.

No purpose would be served by discussions of the remaining assignments of error presented in defendants' brief. We have examined them all and find them to be without merit.

No error.

STATE OF NORTH CAROLINA v. WILLIAM E. SANDERS

No. 16

(Filed 14 July 1978)

1. Homicide § 17.2— first degree murder—threat to kill deceased—evidence admissible

In a prosecution for first degree murder of a military policeman, the trial court did not err in admitting testimony that defendant had been taken into custody approximately two weeks before the killing and had threatened to kill the policeman after being slapped by him at the Law Enforcement Center following that arrest, since evidence of threats by defendant was freely admissible to show premeditation and deliberation; the lapse in time between utterance of the threat and commission of the crime went only to the weight to be given the evidence and not its admissibility; and the evidence of defendant's prior arrest was inextricably connected to the circumstances which led to the making of the threat and was competent to show the relations between the parties.

2. Arrest and Bail § 6; Homicide § 21.5— unlawful arrest—defendant's attempt to escape—use of force—first degree murder—sufficiency of evidence

In a prosecution for the first degree murder of a military policeman while defendant was in a holding cell of the Law Enforcement Center, defendant's contention that his motion for nonsuit should have been granted because the evidence conclusively demonstrated that his actions were fully justified as a valid attempt to escape from an unlawful arrest and that he was privileged to use deadly force because he was confronted by attackers of greatly superior size and number and thus had a reasonable fear of death or serious bodily harm is without merit since defendant's prior threats against the deceased's

life and his statements to the military policemen to come on into the cell where he was, that he had something for them, together with his actions in deliberately backing into the toilet area of the cell and waving the victims toward him before drawing a knife, were sufficient to allow the jury reasonably to infer that defendant, after seeing the deceased at the Law Enforcement Center following his unlawful apprehension, decided to make good his earlier threat and, further, that defendant, by coincidence already having a knife in his possession, designedly and maliciously goaded the deceased into entering the cell and following him into the confined area of the toilet where defendant stabbed deceased and another policeman.

3. Homicide § 15.4— intent of officers—opinion testimony inadmissible

In a prosecution for first degree murder of a military policeman while defendant was in a holding cell of the Law Enforcement Center, the trial court did not err in refusing to permit three defense witnesses to testify that they thought military policemen and deputies entered the holding cell prior to the stabbing for the purpose of beating up defendant, since it was possible for the witnesses to inform the jury of the words, acts and demeanor of the officers as they entered the cell, and the witnesses were in no way more qualified than the jury to conclude what the officers intended to do at that time.

4. Criminal Law § 75.1— unlawful arrest—subsequent inculpatory statement—admissibility

Defendant's contention that his inculpatory statement was the fruit of his original unlawful arrest on a city street and therefore should have been suppressed is without merit since there was no conflict in the evidence on voir dire to determine voluntariness of the confession; the purpose of defendant's unlawful arrest was not intentionally investigatory in nature but was to take him off the city street and transport him back to Fort Bragg in order to prevent him from causing trouble; and a lawful arrest for homicide was interposed between the unlawful earlier arrest and defendant's subsequent inculpatory statement.

5. Homicide § 15— place for carrying knife—admissibility of evidence

In a first degree murder prosecution where defendant stabbed his victim to death, the trial court did not err in allowing into evidence that part of defendant's statement in which he explained that when he carried a knife he placed it in front of his stomach or in back because an officer patting him down would be more likely to find it if it was carried to the side, since this admission was primarily one of fact, but even if it were an opinion, the prevailing rule now is that admissions in the form of opinions are competent.

6. Criminal Law § 85.2— character evidence relating to defendant—character not in issue—evidence inadmissible

In a first degree murder prosecution where defendant stabbed his victim to death, the trial court erred in allowing the State, during presentation of its case in chief, to offer evidence of defendant's gang membership in another city, his stabbing of another gang member, and his expression of his hopes that the gang member would die, since defendant did not place his character in issue at trial and, at the time the State's evidence of defendant's earlier gang member-

ship was offered, he had not testified; and evidence of the prior stabbing showed a single, isolated event with insufficient elaboration of the surrounding circumstances to afford it any probative value on the question of defendant's intent during the incident which gave rise to the current charges against defendant.

7. Arrest and Bail § 3.1— no probable cause for arrest—arrest unlawful

The trial court properly determined that, notwithstanding the officer's declaration to the contrary, defendant's initial detention was in fact an arrest and that it was unlawful, since officers had no probable cause to arrest defendant who was apprehended while on a city street; he was asked to show his military identification card but refused; he was searched and his card was taken from him; and defendant was handcuffed and subsequently taken to the Law Enforcement Center.

8. Arrest and Bail § 6; Homicide § 23— defendant's unlawful arrest—subsequent homicide—jury instructions improper

In a prosecution for first degree murder of a military policeman while defendant was in a holding cell in the Law Enforcement Center, the trial court erred in reading to the jury during its charge certain provisions of the U. S. Army regulations and the Uniform Code of Military Justice having to do with off-installation military enforcement and striking a non-commissioned officer since defendant's arrest was unlawful; his actions in verbally abusing the military policemen and striking one of them were not violative of the Code, as the officers were acting outside their authority in unlawfully detaining defendant; the Code provisions and related Army regulations consequently were irrelevant to the consideration of the facts of the case; and the instructions were prejudicial to defendant, as they strongly suggested that defendant's claim of privilege to resist the efforts of the military policemen to continue his unlawful confinement was totally groundless, regardless of his intent in entering into the affray with them.

Justice LAKE dissents.

DEFENDANT was charged with and convicted of murder in the first degree and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant appeals, pursuant to G.S. 7A-27(a), from judgement of *Godwin, J.*, 20 June 1977 Session, CUMBERLAND County Superior Court, imposing a sentence of life imprisonment on the first degree murder conviction. A sentence of twenty years, to commence at the expiration of the life sentence, was imposed on the assault conviction, which is before us for review upon certification under G.S. 7A-31(a).

The evidence for the State tended to show that:

On the evening of 16 October 1976, Officer Wayne Alsup of the Fayetteville Police Department was on foot patrol walking

the four and five hundred blocks of Hay Street in Fayetteville accompanied by two military policemen, Sergeant Charles Terry and Sergeant Willard Barber. As a result of a conversation that evening between Officer Alsup and Officer Richard Porter of the Fayetteville police, Alsup was on the lookout for a black male wearing a red shirt and a white scarf.

While standing outside Rick's Lounge on Hay Street, Officer Alsup saw a man fitting the description given him by Officer Porter approaching the lounge. Alsup stopped the man, later identified as the defendant, and asked if he was in the military. Defendant replied that he was. The officer then asked to see his identification card and defendant asked why. Alsup responded that he wanted to see who defendant was. After asking several times to see defendant's identification card and being asked why each time in return, Officer Alsup placed defendant against the wall in search position. Defendant tried repeatedly to lift his arms off the wall and had to be held in position by Sergeant Barber and Officer Alsup. The officer then searched defendant for weapons and took defendant's wallet from his pocket. After defendant's military identification card was removed, the wallet was returned to his pocket.

Defendant was then handcuffed and Officer Alsup told Sergeant Terry to take defendant to the Law Enforcement Center. Alsup informed Sergeant Terry that defendant was not being charged with anything, that he was merely being placed in protective custody for the purpose of taking him off the street and returning him to Fort Bragg. A Fayetteville police car was summoned and defendant was taken to the Law Enforcement Center in the company of Sergeant Terry.

Upon reaching the Law Enforcement Center, defendant was taken inside and placed in a holding cell occupied by two other persons. Sergeant Terry then delivered defendant's military identification card to Sergeant Robert Lambert, a military policeman who was on duty that evening to assist the police department in returning apprehended military personnel to Fort Bragg. Sergeant Terry subsequently removed defendant's handcuffs. During this time defendant was talking in a loud voice and was asked repeatedly to be quiet.

Sergent Lambert later came to the holding cell area and talked to defendant from outside the cell. Shortly after this conversation commenced, defendant reached through the bars of the cell and slapped Sergeant Lambert in the face. At this point, Sergeant Lambert told defendant that he was in no trouble with the civil authorities, but that he could get in trouble with the military for striking a non-commissioned officer. Defendant replied that he did not care and slapped Sergeant Lambert again.

Sergeant Lambert spoke to Sergeant Terry, who turned to a deputy sheriff on duty at the jail and requested permission to go inside the cell and put handcuffs on defendant. Permission was granted and Sergeant Lambert unlocked the door and entered the cell, accompanied by Sergeant Terry and several other officers. Defendant backed away from the officers as they entered the cell and retreated to the toilet area, which was separated from the rest of the cell by a partition. Upon reaching the toilet area, defendant swung out at Sergeant Lambert. Sergeant Terry then delivered a karate kick to defendant's stomach in an attempt to knock the wind out of him in order to subdue him. Terry then moved toward defendant seeking to pin his arms, at which point defendant reached back and produced a knife and proceeded to stab Terry in the back and left arm. Sergeant Terry shouted that defendant had a knife and fell back to the floor. Defendant then stabbed Sergeant Lambert a number of times. Several officers scuffled with defendant and succeeded in subduing him. Sergeant Lambert subsequently died as a result of the wounds inflicted on him by defendant.

Approximately two weeks before the killing, defendant had been taken into custody by the Fayetteville police and, during a confrontation at the Law Enforcement Center, had been slapped in the face by Sergeant Lambert. At that time, defendant had threatened to kill Lambert if it was the last thing he ever did.

In addition, a saleswoman at a military store in the four hundred block of Hay Street testified that, on the day of the killing about the time defendant was arrested in front of Rick's Lounge, she had sold a ten or twelve inch long survival knife with a black sheath to a man matching the description of defendant on that date, although she never specifically identified the defendant as that man.

Defendant presented evidence which tended to show that he acted in self defense in stabbing the military policeman. According to defendant's testimony, he found the knife on the floor of the cell while he was being assaulted by the officers and, thinking it was a stick, struck at them with it to drive them away from him.

A voir dire hearing was conducted prior to the presentation of the State's case in chief. Based on the evidence adduced at that hearing, Judge Godwin found, among other things, that the initial search and arrest of defendant on Hay Street was unlawful.

Additional facts relevant to the decision are related in the opinion.

Public Defender Mary Ann Tally for defendant appellant.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., and Assistant Attorney General Joan H. Byers, for the State.

COPELAND, Justice.

After reviewing defendant's assignments of error, we have concluded that there was prejudicial error in the trial below; thus, defendant must be afforded a new trial. We initially discuss several of defendant's contentions which are without merit but likely to be raised on retrial.

[1] It is argued that the trial court erred in admitting testimony that defendant had been taken into custody approximately two weeks before the killing and had threatened to kill Sergeant Lambert after being slapped by him during an encounter at the Law Enforcement Center following that arrest. Defendant asserts that these events were irrelevant because of the length of time that elapsed between the threat and the killing and that their probative value was far outweighed by the inherent prejudicial effect of informing the jury of this prior arrest.

Evidence of threats by the defendant in a homicide prosecution, however, is freely admissible to show premeditation and deliberation. *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); 1 Stansbury's N.C. Evidence (Brandis Rev., 1973), § 162a. Moreover,

mere remoteness in time between the utterance of a threat and the commission of a crime ordinarily goes only to its weight and effect as evidence, rather than to its competence. *State v. Shook*, 224 N.C. 728, 32 S.E. 2d 329 (1944) (lapse of nine months between threat and shooting did not render evidence incompetent). The evidence here of the prior arrest was inextricably connected to the circumstances which led to the making of the threat and was competent to show the relations between the parties. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938). This assignment of error is overruled.

[2] Defendant also maintains that his motion for judgment of nonsuit as to all charges should have been granted because the evidence conclusively demonstrated that his actions were fully justified as a valid attempt to escape from an unlawful arrest and that he was privileged to use deadly force because he was confronted by attackers of greatly superior size and number and thus had a reasonable fear of death or serious bodily harm. In passing upon a motion for judgment of nonsuit, the court must consider the evidence in the light most favorable to the State, resolving all contraditions and discrepancies in favor of the State and giving it the benefit of every inference reasonably to be drawn in its favor. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

A person indeed has the right to resist an unlawful arrest by the use of force, as in self defense, to the extent that it reasonably appears necessary to prevent unlawful restraint of his liberty. *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100 (1954). Nonetheless, a killing done with malice and not in self defense is murder, even though the person killed may have been seeking to effect an unlawful arrest upon the defendant. *Mims v. Commonwealth*, 236 Ky. 186, 32 S.W. 2d 986 (1930); 40 C.J.S. Homicide § 19, p. 866 (1944); 40 Am. Jur. 2d Homicide § 104, p. 399 (1968). Further, although a party is privileged to use deadly force to defend against an attack by unarmed assailants of vastly superior size, strength or number, *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975), if the defendant precipitated the altercation intending to provoke a deadly assault by the victim in order that he might kill him, his subsequent killing of the victim in response to the attack is murder. *State v. Martin*, 24 N.C. (2 Ire.) 101 (1841) (per Ruffin, C.J.).

The State's evidence tended to show that: (1) about two weeks before the killing defendant, in response to being slapped by the deceased, had threatened to kill him if it was the last thing he ever did; (2) while the deceased was standing near the holding cell talking to defendant just prior to the stabbing, defendant reached through the bars and slapped the deceased; (3) the deceased warned defendant that, while he was in no trouble with the civil authorities, he could get in trouble with the military for striking a non-commissioned officer; (4) defendant replied that he did not care and slapped the deceased again; (5) as the deceased and Sergeant Terry opened the cell door, defendant stood back and told them to come on in, that he would fight all of them, that he would kill all of them and to bring their buddies; (6) as the two military policemen entered the cell, defendant kept telling them to come on, that he would "kick [their] asses and to bring all the deputies and he would kick their asses"; (7) defendant then began backing toward the toilet area of the cell, telling the military policemen to come on, that he had something for them; (8) the military policemen, who were much larger physically than defendant, were accompanied into the cell by several deputy sheriffs; (9) defendant backed into the toilet area of the cell, which was separated from the rest of the cell by a partition such that the entrance would permit only one person to walk through; (10) Sergeant Terry stepped around the deceased, who had stopped at the partition, and moved into the toilet area, where he delivered a karate kick to defendant's stomach in an attempt to knock the wind out of him so that he could be subdued and handcuffed; (11) after the kick, defendant bent over, then straightened up, smiled, and waved for Sergeant Terry and the deceased to come on; (12) Sergeant Terry moved forward and grasped defendant's arms, seeking to pin him against the wall, at which time defendant reached back, produced a knife and stabbed Sergeant Terry in the back and left arm; (13) defendant then stabbed the deceased several times; (14) at about the time defendant was initially arrested on Hay Street on the date of the killing, a man matching defendant's description had bought a survival knife with a black sheath at a military store near the site of the arrest; (15) shortly after purchasing the knife, this man was seen by the military store saleswoman being placed against the wall outside Rick's Lounge by a city policeman and two military policemen; (16) the knife used by defendant in the stabbing of the two victims was

described as a large hunting knife; (17) after the altercation, a dark knife sheath was observed in the waist of defendant's pants just above the left rear pocket; (18) defendant, in a statement taken after the slaying, indicated that when he carried a knife he usually placed it in front of his stomach or in back, since an officer would find it in a pat-down search if it was placed on the side.

The trial court, after a voir dire hearing, concluded that the initial arrest of defendant on Hay Street was unlawful. For reasons which are outlined later in this opinion, we have determined that any subsequent attempt to arrest defendant for striking a non-commissioned officer was likewise illegal. Nevertheless, defendant's prior threats against the deceased's life and his statements to the military policemen to come on, that he had something for them, together with his actions in deliberately backing into the toilet area of the cell and waving the victims toward him before drawing the knife, were sufficient to allow a jury to reasonably infer that defendant, after seeing the deceased at the Law Enforcement Center following his unlawful apprehension, decided to make good his earlier threat and further, that defendant, by coincidence already having a knife in his possession, designedly and maliciously goaded the deceased into entering the cell and following him into the confined area of the toilet, where defendant stabbed the deceased and Sergeant Terry. Under these circumstances, the trial court was correct in denying defendant's motion for nonsuit; therefore, this assignment of error is overruled.

[3] We next consider defendant's exceptions to the trial court's refusal to permit three defense witnesses to testify as to why they thought the military policemen and deputies entered the holding cell prior to the stabbing. The witnesses, if allowed to answer, would have stated that, in their opinion, the officers went into the cell for the purpose of beating up defendant.

Opinion evidence ordinarily may not be admitted when the facts underlying the opinion are such that the witness can state them in a manner which will permit an adequate understanding of them by the jury and the witness is no better qualified than the jury to draw inferences and conclusions from the facts. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). Moreover, a

witness's opinion of another person's intention on a particular occasion is generally held to be inadmissible. *State v. Patterson*, 288 N.C. 533, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3211 (1976); *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316 (1949); *State v. Vines*, 93 N.C. 493 (1885).

It was certainly possible for the witnesses to inform the jury of the words, acts and demeanor of the officers as they entered the cell. In addition, it does not appear that these witnesses were in any way more qualified than the jury to conclude what the officers intended to do at that time; therefore, the exclusion of this evidence was proper and this assignment of error is overruled.

[4] After a voir dire hearing, the trial court, on competent evidence, found that defendant, following his arrest for the murder of Sergeant Lambert, was given the full warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and, without threats or inducements of any sort, signed a written waiver of his right to remain silent and his right to the presence of an attorney during questioning. Defendant subsequently made an inculpatory statement to officers of the Sheriff's Department which was reduced to writing, signed by him and ultimately admitted into evidence at trial over objection. It is now argued by defendant that this statement was the fruit of the original unlawful arrest on Hay Street and therefore should have been suppressed.

Defendant relies largely upon the recent case of *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975), in which the Supreme Court of the United States held that the mere fact that police had warned a suspect who had been subjected to an unlawful arrest of his rights under *Miranda v. Arizona*, *supra*, could not, without more, serve to establish that an inculpatory statement made by him following the warnings was sufficiently an act of free will under *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963), to sever the causal connection between the illegal arrest and the statement. The Court thus rejected any rule which would permit a finding of voluntariness under the Fifth Amendment standards of *Miranda* to satisfy per se the Fourth Amendment requirement, set forth in *Wong Sun*, that any connection between an illegal arrest and a subsequent inculpatory statement be so attenuated as to dissipiate the taint of

the unlawful arrest. The Court also expressly declined to adopt the so-called "but-for" test which would require the suppression of any statement made subsequent to an illegal arrest, regardless of the circumstances.

Instead, the Court determined that,

> "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois, supra* at 603-604, 45 L.Ed. 2d at 427, 95 S.Ct. at 2261-2262, (citations omitted).

The trial court here made findings and conclusions which satisfied the threshold requirement of voluntariness of the statement, but did not attempt an analysis of the other factors outlined in *Brown.* Although it is the better practice to find all facts upon which the admissibility of a statement depends, its admission without sufficient findings is not error if there is no material conflict in the evidence on voir dire. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). When the uncontradicted evidence clearly tends to establish that the statement was not subject to suppression, the necessary findings are implied from the admission of the statement into evidence. *State v. Whitley*, 288 N.C. 106, 215 S.E. 2d 568 (1975). In the instant case, defendant presented no evidence on voir dire; thus, there was no conflict in the evidence and the admission of the statement was not error if there was sufficient proof that it was not obtained by undue exploitation of the unlawful arrest.

In *Brown v. Illinois, supra*, no significant intervening event occurred between the defendant's unlawful arrest and his statement; moreover, the arrest there was executed for the purpose of turning up evidence and was obviously investigatory. In the case *sub judice*, however, the evidence tended to show that, while defendant's statement was signed less than three hours after his initial illegal arrest, during this time defendant killed one military policeman, seriously wounded another and, with probable cause, was placed under lawful arrest for murder. It also appears from the record that defendant's original arrest, while flagrantly unlawful, was carried out for the purpose of taking him off the street and transporting him back to Fort Bragg in order to prevent him from causing trouble in the Hay Street area.

Defendant's unlawful arrest consequently lacked the intentionally investigatory quality which was found so offensive to the Fourth Amendment guarantees in *Brown*. In addition, the lawful homicide arrest was interposed between the earlier unlawful arrest and defendant's subsequent inculpatory statement. *Cf.*, *Johnson v. Louisiana*, 406 U.S. 356, 32 L.Ed. 2d 152, 92 S.Ct. 1620 (1972) (lineup following commitment by a magistrate after an unlawful arrest was carried out during detention imposed under authority of the commitment, and thus was not conducted by exploitation of the challenged arrest). From these factors we conclude that defendant's statement was sufficiently attenuated from the unlawful arrest such that it was not obtained by undue exploitation of the Fourth Amendment violation and was properly admissible in evidence. This assignment of error is overruled.

Defendant further maintains that even if his signed statement was not subject to suppression as fruit of the unlawful arrest, certain portions of it should have been excluded under various common law evidentiary rules. The segments of the statement to which defendant excepts are those in which he explained that when he carried a knife he placed it in front of his stomach or in back because an officer patting him down would be more likely to find it if it was carried to the side, and that he had been in a gang when he lived in Philadelphia, during which time he had carried a knife and had stabbed one of the other gang members, and that when he went to court on the charge he had told the judge that he hoped the other gang member died.

[5] It is argued that the first of these segments is objectionable because it was a mere opinion and not based on any special expertise in these matters. This admission, however, is primarily one of fact as to where defendant carried a knife. Moreover, the prevailing rule now is that admissions in the form of opinions are competent. *Wells v. Burton Lines, Inc.*, 228 N.C. 422, 45 S.E. 2d 569 (1947); McCormick, Handbook on the Law of Evidence § 264 (2d ed. E. Cleary 1972); *but cf.*, 2 Stansbury's N.C. Evidence (Brandis Rev., 1973) § 167. This portion of the statement was therefore admissible.

[6] Defendant asserts that the evidence of his gang membership in Philadelphia was inadmissible since it was presented during the State's case in chief and thus violated the rule prohibiting the use of character evidence against an accused who has not testified or put his character in issue. He contends that the evidence of the prior stabbing and the alleged death wish should have been excluded under the general ban on proof of other offenses on the issue of guilt of a defendant.

Where a defendant has neither testified as a witness nor introduced evidence of his good character, the State may not present evidence of his bad character for any purpose. *State v. Tessnear*, 265 N.C. 319, 144 S.E. 2d 43 (1965). Defendant did not place his character in issue at trial and at the time the State's evidence of defendant's earlier gang membership was offered, he had not testified; therefore, it was not properly admissible at the time it was presented.

"It is well settled that in the trial of one accused of a criminal offense, who has not testified as a witness in his own behalf, the State may not, over objection by the defendant, introduce evidence to show that the accused has committed another independent, separate criminal offense where such evidence has no other relevance to the case on trial than its tendency to show the character of the accused and his disposition to commit criminal offenses." *State v. Perry*, 275 N.C. 565, 570, 169 S.E. 2d 839, 843 (1969).

The State here contends that the evidence of the prior stabbing was admissible to show defendant's familiarity with knives in order to rebut his testimony that he found the knife on the cell floor and, thinking it was a stick, began swinging it at the officers

in an attempt to clear some room to run. *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1938), is cited in support of this position. That case involved the alleged murder of a young girl by her father which was carried out by means of strychnine poisoning. Following the girl's death, the father collected the proceeds of an insurance policy on her life. At trial, evidence was admitted which tended to show that the defendant had killed his first two wives by the use of strychnine and collected life insurance proceeds shortly after their deaths. There was also evidence that the defendant had poisoned the mother of a woman with whom he had been living and he had insurance on that victim's life at the time. This later victim had survived. This Court held that evidence of the other similar poisonings was admissible to establish criminal intent on the part of the defendant and quoted from a California case that admitted such evidence to show familiarity with the effects of strychnine.

In the case under consideration, however, the evidence of the prior stabbing showed a single, isolated event with insufficient elaboration of the surrounding circumstances to afford it any probative value on the question of defendant's intent during the incident which gave rise to these charges. *Cf., State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 98 S.Ct. 414 (1977) (evidence of a similar earlier robbery committed with the same sawed-off shotgun was admissible to show intent in a subsequent murder carried out in the course of an attempted robbery). In addition, the use of a knife, as compared with poison, is not so uncommon or particularized a skill as to support an exception to the general rule of exclusion of evidence of prior crimes. Finally, the State's argument ignores the fact that the evidence of this prior stabbing was presented during the State's case in chief and not on rebuttal.

After careful consideration, we fail to see that the evidence concerning this earlier stabbing had any logical relevance to the facts at hand other than to show a tendency on the part of defendant to commit criminal offenses; therefore, it was inadmissible. *State v. Perry, supra.* If a defendant's in-custody statement contains irrelevant and prejudicial matter which can be separated from the relevant portions, the State may introduce only the relevant matter. *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949). The inadmissible portions of defendant's statement

were readily severable from the remainder; consequently, the trial court's failure to do so was error.

[7,8] We now consider defendant's contention that the trial court erred in reading to the jury during its charge certain provisions of United States Army regulations and the Uniform Code of Military Justice having to do with off-installation military enforcement and striking a non-commissioned officer. As noted earlier, the trial court, after a voir dire hearing, determined that defendant's initial arrest on Hay Street was unlawful. The circumstances leading to that arrest were: (1) Officer Alsup of the Fayetteville Police Department, while on foot patrol with two military policemen, was informed by Police Officer Porter that there had been some trouble at Rick's Lounge and that a black male subject inside giving a "little bit of disturbance" had been told to leave the bar and asked to leave the block; (2) Officer Porter asked Officer Alsup to be on the lookout for the subject; (3) Officer Alsup and the military policemen subsequently encountered defendant, who matched the description given by Officer Porter, as defendant was walking past the front of Rick's Lounge; (4) Officer Alsup stopped defendant, asked if he was in the military and, upon being told that he was, requested to see defendant's identification; to which defendant responded "Why?"; (5) this exchange was repeated several times, at which point defendant was placed against a wall, searched, and his military identification card taken from him; (6) defendant was then handcuffed and informed that he was not being arrested, but was merely being taken off the street for transportation back to Fort Bragg; (7) defendant was subsequently placed in an unmarked police car and taken to the Law Enforcement Center.

Under G.S. 15A-401(c)(1),

"An arrest is complete when:

a. The person submits to the control of the arresting officer who had indicated his intention to arrest, or

b. The arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force."

Defendant here resisted his apprehension on Hay Street, both physically and verbally; thus, this case is governed by subpart b. of subsection (c)(1). Although the police officer informed

defendant that he was not under arrest, he nonetheless was handcuffed, placed in the police car and taken to the Law Enforcement Center against his will.

Just as a formal declaration of arrest is not essential to the making of an arrest, an officer's statement that a defendant was or was not under arrest is not conclusive. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). When a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty. *Huebner v. State*, 33 Wis. 2d 505, 147 N.W. 2d 646 (1967).

There was no showing of probable cause for arrest of defendant without a warrant. Defendant's conduct in the officer's presence on Hay Street in no way appears to have been criminal and the allegation that defendant created a "little bit of disturbance" earlier in Rick's Lounge does not demonstrate sufficiently provocative behavior to rise to the level of disorderly conduct under G.S. 14-288.4(2). The trial court therefore was correct in determining that, nothwithstanding the officer's declaration to the contrary, defendant's initital detention here was in fact an arrest and that it was unlawful since it was not based on probable cause.

The provision of the Uniform Code of Military Justice which was read to the jury during the charge is found at 10 U.S.C. § 891 and makes it a court-martial offense for an enlisted man to strike, assault or treat with disrespect a non-commissioned officer while that officer is in the execution of his office or to disobey a lawful order of a non-commissioned officer. Army Regulation 190-24, chapter 3, section 3-3 was also read to the jury during the court's instructions and authorizes Armed Forces enforcement personnel to apprehend any person subject to the Uniform Code of Military Justice when a reasonable belief exists that such a person has committed an offense under the Code.

These provisions were submitted for consideration by the jury in support of the State's contention that, while defendant's original arrest was unlawful, he was still a soldier and subject to the Uniform Code of Military Justice and during his confinement at the Law Enforcement Center he struck and was otherwise disrespectful in language and deportment toward a non-

commissioned officer. From this it was asserted that the jury should find that defendant had violated the Code and, as a result, Sergeants Terry and Lambert were acting within the scope of their offices in entering the cell prior to the fatal altercation and that, consequently, this subsequent arrest attempt was not unlawful and defendant had no right or privilege to resist their efforts to handcuff him.

The provision of the Code relied on by the State, however, requires that the alleged disrespect or assault occur while the non-commissioned officer "*is in the execution of his office.*" 10 U.S.C. § 891 (emphasis added). Military law enforcement personnel who unlawfully apprehend a subject or perpetrate his unlawful custody are acting in excess of the scope of their offices, both as military law enforcement personnel and as non-commissioned officers. *United States v. Rozier*, 1 M.J. 469 (Court of Military Appeals, 1976); cf., *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied in*, 403 U.S. 940, 29 L.Ed. 2d 719, 91 S.Ct. 2258 (1971) (one who resists an unlawful entry by a police officer is not resisting an officer in the discharge of the duties of his office).

The initial arrest and the ensuing custody here were clearly unlawful. After defendant's arrest on Hay Street, he was taken to the Law Enforcement Center in the company of Sergeant Terry and placed in the holding cell. Sergeant Terry then went to Sergeant Lambert's office, where he gave Lambert defendant's identification card and "described to him what had happened." Sergeant Lambert thus was aware of the circumstances of defendant's arrest, but refused to release him upon his demand; therefore, defendant's actions in verbally abusing the military policemen and striking Sergeant Lambert were not violative of the Code since the officers were acting outside their authority in unlawfully detaining defendant. The Code provisions and the related Army regulations consequently were irrelevant to the consideration of the facts of this case.

Although objections to the trial court's statement of the contentions in its charge ordinarily must be brought to the trial judge's attention in sufficient time to permit correction, when these statements contain an erroneous view of the law or an incorrect application of it, counsel need not bring the error to the

court's attention in order to have the matter considered on appeal. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). Moreover, an instruction on an abstract proposition of law which is not pertinent to the facts of the case at hand is error. *State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965).

The prejudicial nature of the instruction here can hardly be doubted, since it strongly suggested to the jury that defendant's claim of privilege to resist the efforts of the military policemen to continue his unlawful confinement was totally groundless, regardless of his intent in entering into the affray with them. We therefore conclude that the trial court committed reversible error in submitting the instructions on the Uniform Code of Military Justice and Army Regulations to the jury.

We deem it unnecessary to discuss defendant's remaining assignments of error, inasmuch as the matters which gave rise to them probably will not recur on retrial.

For the reasons set out above, we have determined that prejudicial error occurred in the trial below; consequently, defendant's conviction is set aside and the case remanded for

New trial.

Justice LAKE dissents.

STATE OF NORTH CAROLINA v. JAMES EDWARD WOOTEN

No. 38

(Filed 14 July 1978)

1. Homicide § 21.6— murder in perpetration of robbery—sufficiency of evidence

In a first degree murder prosecution, evidence that defendant killed deceased while committing or attempting to commit a robbery was sufficient to be submitted to the jury where it tended to show that, immediately prior to deceased's death, defendant was short of money, unable to afford food or heat for his apartment; shortly after deceased's death, defendant purchased groceries and clothing, paid $85 for heat, treated his housemates to a night at the State Fair, and offered a friend $200 cash as down payment for a car; when defendant went to a nightclub, the scene of the crime, he parked his vehicle at the side of the club, out of sight of the front entrance, though the

parking lot was virtually empty and there was space to park by the club's front entrance; when he walked to the entrance of the club defendant carried a blackjack with him; shortly after deceased's death defendant explained his newly acquired wealth to a housemate by saying he had seen "a friend that owed him some money and the friend wouldn't give it to him and he had to take it"; on his second trip to the club, immediately after gathering up various objects from around deceased's body, defendant drove to a lake and threw "an armful of stuff" into the lake, but he did not throw deceased's pistol or money into the lake; defendant's avowed purpose for making his second trip to the club was the elimination of evidence tending to connect him with deceased's death, but his action in retaining possession of deceased's money and pistol was inconsistent with this purpose; and defendant's own statement tended to show that he took deceased's pistol immediately after killing him.

2. Homicide § 17— murder in perpetration of robbery—intent—evidence improperly excluded—no prejudice

In a prosecution for murder committed during the perpetration of a robbery, the trial court erred in refusing to permit defendant to testify that he had no intention of robbing or harming deceased when he went to a nightclub, the scene of the crime, but such error was not prejudicial to defendant since the jury was made aware by other testimony that defendant's intention in going to the club was to see his wife, who was an employee there, to talk to her about her upcoming surgery, and that his intention was not to rob deceased, the proprietor of the club.

DEFENDANT appeals from judgment of *Godwin, J.*, entered at the 8 August 1977 Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment charging him with the first degree murder of Bernest H. Tucker.

The State's evidence tends to show that at 7:45 a.m. on Thursday, 21 October 1976, the lifeless body of Bernest Tucker was discovered lying in front of his car in the parking lot of The Entertainer Club near Gresham's Lake. Mr. Tucker had been shot twice in the left chest, one of the two shots passing completely through his body. Decedent had also been struck over the head repeatedly with a blunt object. His skull had been fractured and, in the opinion of State's expert witness Dr. Gordon LeGrande, the blow which caused the fracture was sufficient to cause unconsciousness. A number of decedent's ribs were broken, apparently as the result of having been run over by a motor vehicle. An autopsy showed the ribs had been broken at a time when Mr. Tucker was already dead and that the cause of death was bleeding resulting from the two gunshot wounds. An analysis of Tucker's blood revealed .11 percent alcohol.

The State's evidence further tends to show the following:

1. The front door of The Entertainer Club was unlocked and the parking lot lights had not been turned off. It was customary for Mr. Tucker, the club's proprietor, to lock the door and turn off the parking lot lights at the close of business for the evening.

2. Footprints made by someone wearing work shoes were found leading to the body. A comparison of these prints with boots belonging to defendant and obtained during a search of his apartment disclosed that the prints were made by defendant's shoes. The shoes were stained with type A human blood. Mr. Tucker's blood was type A, defendant's is type B.

3. Tire tracks spotted with blood were found on each side of Bernest Tucker's body. Subsequent examination of a borrowed pickup truck which had been in defendant's possession on 21 October disclosed that the width of the tire tracks was identical to the width of the wheel base of the pickup truck and that the size and design of the tracks corresponded to the size and design of the truck's tires. Examination of the truck also showed the presence of human blood on its right side and undercarriage.

4. Footprints made by someone wearing tennis shoes were found in the immediate area surrounding the body. These footprints did not lead off in any direction but pointed in several different directions and were found only in the immediate vicinity of the body. Tennis shoes belonging to defendant matched the prints with respect to size, tread design and wear but could not be positively identified as the shoes which made the tracks.

5. Two .38 caliber bullets were recovered, one from Tucker's body and one from the ground where his body lay. These bullets had been fired from a .38 caliber Colt revolver which belonged to decedent and which he customarily kept in his car or in the office at The Entertainer Club, or carried with him when going between car and office. This gun was recovered from a stream in Johnston County by police officers who were directed to its location by defendant.

6. On 25 October 1976, pursuant to a search warrant, officers searched defendant's apartment. In addition to the work boots and tennis shoes previously referred to, officers recovered a quantity of cash and four small brown paper bags. Three of these bags bore writing. One contained a quantity of coins. One of the bags

was positively identified as a bag used to keep money received from the operation of The Entertainer Club; the others were similar to bags used for this purpose, and two bore handwriting similar to Mr. Tucker's. It was customary for Mr. Tucker to carry such bags containing the night's cash receipts with him at the time he closed the club for the evening. These small brown paper bags were customarily placed in blue plastic zipper bags. These blue plastic zipper bags were then in turn customarily put into a white canvas bag which Mr. Tucker carried with him when he closed the club.

7. Also recovered as a result of the search of defendant's apartment was a blackjack approximately one foot in length. This blackjack belonged to Clinton Hinton, the man who owned the pickup truck which defendant borrowed during October, and had been kept with the truck. When found at defendant's apartment it bore bloodstains of undetermined origin.

8. Defendant was arrested on 25 October 1976, advised of his rights, and questioned concerning the death of Bernest Tucker. As a result of this questioning defendant made a statement substantially as follows: He drove to The Entertainer Club at approximately 1:30 a.m. on 21 October for the purpose of meeting and talking with his wife who was employed there. Bernest Tucker's Cadillac was parked near the entrance to the nightclub and another vehicle was parked nearby. Someone was "bending down" in front of Tucker's Cadillac and this person fled at defendant's approach. Defendant drove around the Cadillac to where the figure had been crouched and inadvertently drove over Tucker's body. Defendant got out of the pickup truck he was driving, picked up Tucker's body, realized Tucker was dead, panicked, inadvertently backed the truck over Tucker's body and fled. When defendant arrived at his apartment he changed his clothes and put on tennis shoes. He then realized he had dropped his cigarette lighter and cigarettes by Mr. Tucker's body and drove back to The Entertainer Club to retrieve them. At this time Mr. Tucker's Cadillac was the only vehicle in the parking lot. In response to specific questioning, defendant stated that on neither trip did he take anything from the crime scene other than his cigarette lighter and cigarettes, which he retrieved on his second trip.

9. Defendant was informed by the officers that the evidence they had obtained contradicted his story. After a brief interlude

defendant made a second statement in which he said: He went to The Entertainer Club to see his wife who was employed there. Defendant arrived at the club at approximately 1:30 a.m. and parked the pickup truck he was driving. In his pocket he carried the nightstick from the truck. (Since he had been robbed in Virginia some time earlier he had always carried a nightstick with him for defensive purposes.) Defendant walked to the club entrance where he encountered Mr. Tucker who was attempting to lock the door. Tucker seemed to be intoxicated. Defendant inquired concerning the whereabouts of his wife. Mr. Tucker responded by saying that he—Tucker—was now caring for her. An argument ensued, Tucker drew a gun and struck defendant on the back of the head, knocking him to the ground. Tucker stood over defendant and stated he was going to kill him. Defendant grabbed the gun and the two men struggled and wrestled, each attempting to gain control of the firearm. Defendant removed the nightstick from his back pocket and hit Tucker on the head repeatedly during the struggle. The gun fired during the scuffle but Tucker still did not release the weapon and defendant continued to attempt to wrest it from Tucker's control. The gun fired. Defendant jumped up, ran to his truck and drove off. In his haste and confusion he inadvertently ran over Tucker. Defendant drove to his residence where he changed clothes, took off his work boots and put on tennis shoes. He then realized he had left his cigarette lighter and cigarettes at the scene of the shooting. He drove back to The Entertainer Club, found his lighter and cigarettes, and also picked up numerous other items, including "a rectangular-shaped white item that contained three blue bags, vinyl type." Defendant then drove to nearby Gresham's Lake and threw several items into the water. Later on 21 October he drove down a dirt road in Johnston County where he disposed of the gun and the pants he had worn during his struggle with Mr. Tucker.

In response to officers' questions, defendant stated that the first time he remembered seeing the small brown paper bags found in his apartment was when he discovered them on the seat of the pickup truck during the daytime on the morning of October 21.

10. After making this second statement defendant directed the officers to a dirt road in Johnston County where the gun

which had fired the shots that killed Tucker was recovered. Also recovered was a pair of pants identified as belonging to defendant. These pants were stained with type A human blood.

11. Defendant was provided with writing materials and wrote out an eight-page statement which was substantially in agreement with his second statement summarized above. In this written statement defendant said he drove back to The Entertainer Club after the killing because he thought he had lost his cigarettes and cigarette lighter, billfold and keys during the altercation. The written statement describes defendant's return trip to the nightclub as follows:

> ". . . I got to the club and Mr. Tucker was still laying there. . . .
>
> As I bent over Mr. Tucker crying, something happened to me. It's like my mind and body went blank. All I know was I had to get away, and then it hit me what I was there for, so I started picking up everything that was laying on the ground. . . . I picked up everything I could see. I even picked up some small rock.
>
> The next thing I remember was I was standing at Gresham's Lake. I had an armful of stuff, so I just threw it into the lake. . . .
>
> I don't remember bringing the gun in the house or the money. I do remember when I went back the second time, there was little bags of money laying on the ground, but I don't remember putting them in my pockets, or the gun. . . .
>
> I thought I throwed the gun and money in Gresham's Lake."

12. Other evidence introduced by the State tended to show that defendant's wife was in fact employed at The Entertainer Club, though she did not generally work on Wednesdays, and that she had been at the club "for the better part of the evening" on Wednesday, October 20.

At the close of the State's evidence defendant's motion to dismiss the charge against him was denied. Defendant then testified in his own behalf. His testimony tends to show that in the early morning hours of 21 October defendant was highly in-

toxicated as the result of drinking beer and liquor and smoking marijuana. After visiting several other nightclubs, he drove to The Entertainer Club where he hoped to meet and talk with his wife who was employed there. He arrived just as Mr. Tucker was attempting to lock the front door of the club and inquired about his wife's whereabouts. Tucker told him her whereabouts were none of his business. In further conversation Tucker referred to defendant's wife as a whore and stated that defendant had "destroyed his plans" by moving from Washington, D. C. back to Raleigh. Defendant and Tucker argued. Tucker then drew a gun and with it struck defendant on the back of his head several times. Defendant attempted to disarm Tucker and the two men fell to the ground. Defendant drew the nightstick from his back pocket and, as the two men struggled over the gun, attempted to hit Tucker. During the struggle and while defendant did not have control of the gun, it discharged again, and Tucker then released it.

Defendant left Tucker's body and walked to the pickup truck where he vomited. He then drove off, inadvertently driving over Tucker who was not yet dead and who shouted "I'll kill you." When he arrived at his residence defendant washed, changed clothes and put on a pair of tennis shoes. He then realized he could not locate his cigarettes, cigarette lighter, wallet or keys. Defendant drove back to The Entertainer Club, saw a number of articles, including bank bags, lying near Tucker's body, picked up "just about everything [he] saw," drove to nearby Gresham's Lake and threw a number of objects that he'd picked up into the water. He then drove back to his apartment and took Tucker's pistol and some brown paper bags inside. Later that morning defendant drove to Johnston County where he disposed of the pistol and the pair of pants he'd been wearing when he fought with Tucker.

Defendant sought to testify that when he first went to The Entertainer Club he had no intention of robbing or harming Mr. Tucker. Upon the State's objection, however, this testimony was excluded.

Defendant also presented several witnesses who testified concerning his docile temperament and his behavior at times other than the night of October 20-21, 1976.

The trial court submitted the case to the jury under instructions that it could find defendant guilty of murder committed in

the perpetration of robbery, second degree murder, voluntary manslaughter, or could find him not guilty. The jury found defendant guilty of first degree murder and he appealed, assigning errors as noted in the opinion.

Rufus L. Edmisten, Attorney General, by Donald W. Grimes, Associate Attorney, for the State of North Carolina.

Gerald L. Bass, Attorney for defendant appellant.

HUSKINS, Justice.

[1] By his first assignment defendant contends the trial court erred in denying his motion for judgment as of nonsuit and submitting the issue of his guilt of first degree murder to the jury.

The record reveals that the State proceeded on the theory that defendant killed Tucker while robbing him, *i.e.*, felony murder; this was the only theory of first degree murder submitted to the jury. Defendant argues that there was no evidence tending to show he killed Tucker while committing or attempting to commit a robbery. On the contrary, defendant contends all the evidence, including his own extrajudicial statements which were put into evidence by the State, tends to show that he made two trips to The Entertainer Club in the early morning of 21 October 1976; that he killed Tucker during the first trip; and that he stole property belonging to Tucker only on the second trip, several hours later, when he returned to the club for the purpose of eliminating evidence which might implicate him in Tucker's death. We find no merit in this contention.

G.S. 14-17, insofar as pertinent to the present case, provides: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree. . . ." In order to support defendant's conviction of first degree murder, the evidence taken in the light most favorable to the State must be adequate to support a legitimate inference that defendant killed Tucker while robbing or attempting to rob him, *i.e.*, that the killing was part of the *res gestae* of the robbery or attempted robbery. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977). A killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide

are part of the same series of events, forming one continuous transaction. *State v. Squire, supra; State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). If there is evidence tending to show that defendant took property belonging to Tucker immediately after killing him, such evidence would support a jury determination that the killing occurred during the perpetration of a robbery. *See, e.g., State v. Rich*, 277 N.C. 333, 177 S.E. 2d 422 (1970). If, on the other hand, there is no evidence tending to show that defendant went to The Entertainer Club with the intent to rob Tucker, and there is no evidence tending to show that defendant took Tucker's property during the same continuous series of events that resulted in Tucker's death, defendant could not be convicted of first degree murder under the felony-murder doctrine.

On defendant's motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the State—all contradictions and discrepancies are to be resolved in the State's favor, and the State is entitled to every favorable legitimate inference arising from the evidence. *E.g., State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). When the evidence in the present case is so considered, we hold it is adequate to support the jury's finding that defendant killed Tucker while engaged in a robbery or attempted robbery. Our conclusion is based on the following evidentiary matters which tend to support the State's theory of felony-murder:

1. Immediately prior to Tucker's death defendant was short of money, unable to afford food or heat for the apartment in which he lived.

2. Shortly after Tucker's death defendant had enough money to purchase groceries and clothing, pay $87 for heat, treat his housemates to a night at the State Fair, and offer a friend $200 cash as a down payment for the purchase of a car.

3. When defendant went to The Entertainer Club on the night of October 20-21, 1976, he parked the vehicle he was driving at the side of the club, out of sight of the front entrance, even though the parking lot was virtually empty and there was space to park by the club's front entrance.

4. When he walked to the entrance of the club defendant carried a blackjack with him.

5. Shortly after Tucker's death defendant explained his newly acquired wealth to a housemate by saying he had seen "a friend that owed him some money and the friend wouldn't give it to him and he had to take it."

6. On the second trip to The Entertainer Club, immediately after gathering up various objects from around Tucker's body, defendant drove to nearby Gresham's Lake and threw "an armful of stuff" into the lake. Apparently all objects defendant took from the nightclub's parking lot except Tucker's money and pistol were thrown into the lake. Defendant offered no explanation why, if Tucker's money and pistol were taken on this second trip, he did not dispose of these items in the same manner.

7. Defendant's avowed purpose in making the second trip to The Entertainer Club was the elimination of evidence tending to connect him with Tucker's death. His action in throwing objects picked up from the club's parking lot into Gresham's Lake was consistent with this purpose. His action in retaining possession of Tucker's money and pistol was inconsistent with this purpose, and their retention tends to support the State's theory of felony-murder.

8. Defendant's own statement tends to show that he took Tucker's pistol immediately after killing him. In his written statement, introduced by the State, defendant described the conclusion of his struggle with Tucker as follows: "And I finally got away from him [Tucker]—and I finally got away from him with the gun in my hand. . . . I ran to the truck."

The evidence adduced at defendant's trial clearly shows that defendant killed Tucker and made off with Tucker's money and handgun. We think the evidence, taken in the light most favorable to the State, permits a legitimate inference that defendant was engaged in the perpetration or attempted perpetration of a robbery at the time Tucker was killed. The jury was entitled to draw this inference, notwithstanding the State's introduction of defendant's extrajudicial declarations in which he stated he killed Tucker in self-defense rather than in the course of a robbery. In *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575, *reversed on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), the State introduced into evidence defendant's extrajudicial statements which included assertions that the killing with which

he was charged was committed in self-defense. Justice Exum, writing for this Court, overruled defendant's contention that the charges against him should be dismissed. His reasoning there is pertinent here:

> "While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to 'throw a different light on the circumstances of the homicide' and to impeach defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of defendant's statement. The case is for the jury."

288 N.C. at 638, 220 S.E. 2d at 581. Also *see State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, --- U.S. --- (1977); *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39 (1957); *State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953). *See especially State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313, *death sentence vacated*, 428 U.S. 904 (1976).

So it is here. The issue of defendant's guilt of first degree murder was properly submitted to the jury. Defendant's first assignment of error is overruled.

[2] By his second assignment defendant contends the trial court erred by sustaining objections to two questions asked of defendant on direct examination: (1) "Did you go out there [to The Entertainer Club] . . . with the intentions of robbing Mr. Tucker?" (2) "Did you go out there, Mr. Wooten, with the intent to harm Mr. Tucker?" The record shows that if permitted to answer, defendant would have answered "No" to each question.

As heretofore noted, the State proceeded on the theory that defendant killed Tucker while engaged in perpetration or attempted perpetration of a robbery. Intent to steal is an essential element of the crimes of robbery and attempted robbery. *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965); *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410 (1948). It therefore follows that unless defendant was possessed of an intent to steal Bernest Tucker's property at the time Tucker was slain, defendant could not be convicted of first degree murder under the felony-murder doctrine. Defendant's own testimony regarding his purpose or inten-

tion in visiting The Entertainer Club was thus competent and relevant; the exclusion of this testimony was error. *See State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972).

Our examination of the record convinces us, however, that defendant suffered no prejudice as a result of the exclusion of this testimony. Defendant testified without objection that his purpose in going to The Entertainer Club was to meet his wife and talk with her about surgery which she was about to undergo. Deputy Sheriff John Stubbs, as a witness for the State, related the substance of two oral statements defendant made shortly after being arrested. Deputy Stubbs testified that in each of these statements defendant said his purpose in going to The Entertainer Club was to see and speak with his wife, Grace Wooten. The whole fabric of defendant's account of events which transpired at The Entertainer Club is entirely inconsistent with his having gone to the club for the purpose of robbing Bernest Tucker. Moreover, the trial court, in summarizing defendant's evidence, stated that defendant contended "he went [to the club] for the purpose of talking with [his wife Grace] about surgery that she had planned and which she was to undergo at some time in the near future."

Thus it is obvious that the jury was fully aware of defendant's contention that he went to The Entertainer Club to see his wife and not for the purpose of robbing Bernest Tucker. Under such circumstances the trial court's error in refusing to permit defendant to testify that he had no intention of robbing Bernest Tucker did not prejudice him. *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487, *death sentence vacated*, 403 U.S. 948 (1971); *State v. Tyson*, 242 N.C. 574, 89 S.E. 2d 138 (1955). We are convinced that defendant's conviction did not stem from the fact that the jury was deprived of his testimony regarding his intentions; rather, the jury was fully aware of defendant's contentions and chose to believe the true facts were otherwise. Defendant's second assignment of error is overruled.

By his remaining assignments defendant contends the trial court erred in an evidentiary ruling, in making certain comments out of the presence of the jury, in instructions pertaining to reasonable doubt and self-defense and in suggesting to the jurors how they should go about considering the evidence presented. We

have considered these further exceptions and find no merit in any of them. No useful purpose would be served by discussing these assignments separately and reiterating principles of law well established by prior decisions of this Court.

We hold that defendant has received a fair trial, free from prejudicial error. The verdict and judgment must be upheld.

No error.

WENDELL HOLMES MURPHY, SR. v. EMILY WYNELLE MURPHY

No. 37

(Filed 14 July 1978)

Husband and Wife § 12— separation agreement—resumption of sexual relations—agreement rescinded

Sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract, and this is true whether the resumption of sexual relations be "casual," "isolated," or otherwise.

Justice EXUM concurring in part and dissenting in part.

DEFENDANT appeals from the decision of the Court of Appeals finding "no error" in the judgment of *Crumpler, J.*, entered 17 June 1976 in the District Court of Duplin County. The opinion of *Clark, J.*, with *Brock, J.*, concurring and *Martin, J.*, dissenting, is reported in 34 N.C. App. 677, 239 S.E. 2d 597 (1977).

On 8 August 1973 plaintiff, Wendell Holmes Murphy, Sr., instituted this action for divorce, based on one year's separation, against his wife, defendant Emily Wynelle Murphy. The complaint, in brief summary, alleged:

The parties were married on 23 May 1958 and lived together until 1 March 1972. Since that date plaintiff and defendant have lived continuously separate and apart, at no time having resumed the marital relation which formerly existed between them. To the marriage of plaintiff and defendant were born two children, Wendell Holmes Murphy, Jr., born 23 April 1964, and Wendy Deanne Murphy, born 20 December 1968. The parties settled the custody and support of these children by deed of separation executed on 4 March 1972.

In her amended answer and counterclaim defendant admitted that the parties separated on 1 March 1972 and executed a deed of separation on 4 March 1972. However, she also alleged that, after June of 1972 and continuing through April or May of 1973, plaintiff and defendant "resumed their marital relationship" by having intercourse with one another and that they thereby rescinded the deed of separation. In addition, defendant alleged that the deed of separation should be set aside because, at the time of its execution, plaintiff had not properly informed her of his assets. Defendant further averred that she is the dependent spouse, unemployed, and with no income whatsoever; that plaintiff has willfully failed to provide her with necessary subsistence and, by his conduct, has offered such indignities to her person as to render her condition intolerable and her life burdensome.

Defendant prayed that plaintiff's claim for relief be denied; that the deed of separation between the parties be declared void; that she be awarded custody of the children of the marriage; and that she be granted alimony and child support.

At the beginning of the trial, pursuant to N.C.G.S. 1A-1, Rule 42(b) (1969), Judge Crumpler allowed plaintiff's motion to sever plaintiff's action for divorce from defendant's cross-action to set aside the deed of separation. In consequence, only two issues were submitted to the jury and they were answered as follows:

"1. Was the separation agreement and property settlement dated March 4, 1972, a valid separation agreement when executed? Answer: YES.

"2. If so, was the separation agreement and property settlement dated March 4, 1972, terminated by the acts and conduct of the plaintiff and defendant? Answer: NO."

From the judgment entered upon the verdict declaring the deed of separation to be "in all respects a valid and existing separation agreement," defendant appealed to the Court of Appeals and from its decision to this Court as a matter of right under G.S. 7A-30(2).

Vance B. Gavin, Russell J. Lanier, Jr., and William E. Craft, for plaintiff appellee.

Kornegay & Rice for defendant appellant.

SHARP, Chief Justice.

Defendant's evidence on the first issue, which the trial judge deemed sufficient to go to the jury on the question whether the separation agreement was obtained by plaintiff's fraud or undue influence, is sufficiently set out and discussed in the opinion of the Court of Appeals. We affirm that Court's decision that the judge committed no prejudicial error in his rulings and instructions on the first issue and that the evidence supports the jury's verdict on that issue. However, defendant's assignment of error No. 10, which challenges the judge's instruction on the second issue, must be sustained for the reasons hereinafter set out.

Defendant's testimony with reference to the relationship between plaintiff and herself after the execution of their separation agreement is summarized and quoted below:

After March 1972 defendant lived in a trailer in Chinquapin and plaintiff lived in a trailer behind the office of Murphy Mills Company. "Within the immediate year after the separation agreement," plaintiff called her "many times" asking her to come to his trailer, which she did. On most of those occasions they discussed "getting back together." Defendant testified, "On some of those occasions he did ask me to go to bed with him. . . . I went to bed with him at the trailer after the separation agreement and had intercourse with him numerous times. I don't really know (how many times)." Plaintiff also went to defendant's trailer " a couple of times after the separation agreement." On those occasions they talked about getting back together and she had "sexual relations with him." Several times she stayed with him at his trailer "practically all night and left early in the morning." During all those times they were still talking about getting back together.

Defendant further testified that after March 1972 she and plaintiff engaged in sexual intercourse at places other than their respective trailers. They "had sex" at their "place at the beach," and defendant once came to Kenansville while she was there working at the Farm Bureau office.

Under the terms of the separation agreement the parties' children spent alternate weekends together with first one parent and then the other. Defendant said that it was on some of those occasions when they "would alternate the children" that they had

sexual relations. However, she also testified, "We engaged in sexual intercourse on other occasions when not transporting the children from home to home. I didn't count the number of times I engaged in intercourse with him altogether from the execution of the deed of separation. I would not even venture a guess, numerous times. I am sure more than a dozen times. Certainly at least two dozen, probably more."

Defendant began attending Campbell College at Buies Creek in January of 1973 and remained there for a year and a half. During that time plaintiff visited her in her trailer where they had sex on more than one occasion. Defendant testified that the last time they had intercourse was at Buies Creek in the spring of 1973. On that occasion they "discussed getting back together." She testified, however, "He told me that he loved me, that he always would, but there was no way to go back. He told me that on other occasions prior to then."

In his testimony plaintiff readily admitted that after the execution of the separation agreement he had engaged in sexual intercourse with his wife. When asked to what extent, he replied, "Several instances, not nearly as numerous as she suggested, but there were instances." He estimated "six or eight times," and said: "It was always when I carried on an exchange of the children. . . . I did not ever agree with her we would resume the marital relation. I always told her there was no way under the circumstances we could resume our relationship. I did not ever move any of my clothes into her house. She did not ever move any of her clothes or belongings into my house."

Plaintiff testified on cross-examination that he left his wife in January of 1972 on the day her car remained parked from early morning until 9:00 p.m. in the yard of one Milton Parker. This one issue, he said, "is what our marital differences had been about over this whole period of time [the six-eight months before the separation]. . . ." When asked about his continued sexual relations with his wife after the execution of the separation agreement and when he knew "there was no way under the circumstances" that they could ever resume the marital relationship, plaintiff offered this explanation: "Wynelle and I had lived together nearly 14 years as husband and wife."

In response to questions about his visits to defendant at Buies Creek, plaintiff did not specifically recall going to defendant's trailer in April of 1973. However, he did say, "I went many times. I very well could have. I said I did (engage in sexual intercourse) as many as a half dozen times, as many as eight at her trailer at Buies Creek or at the trailer behind the office, the mill. We did have sexual intercourse six or eight times."

The second issue submitted to the jury posed the question whether the subsequent acts and conduct of the parties terminated their separation agreement of 4 March 1972.

It is established law that a separation agreement between husband and wife is terminated, insofar as it remains executory, upon their resumption of the marital relation. *In re Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). In *Adamee, supra*, we hold that when separated spouses have executed a separation agreement and thereafter resume living together in the same fashion as before their separation, in contemplation of law their action amounts to a resumption of marital cohabitation which rescinds their separation agreement. This is true irrespective of whether they had resumed sexual relations. *Id.* at 393, 230 S.E. 2d at 546.

The question now before us is whether a husband and wife who, after having executed a separation agreement and established separate abodes, continue to engage in sexual intercourse from time to time thereby rescind the agreement. Defendant's assignment of error No. 10 challenges the following instructions which the judge gave the jury on the second issue with reference to this specific question:

"Now in this connection I charge you that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew the marital relations, the agreement is terminated for every purpose insofar as it remains executory. And the words "become reconciled and renew their marital relations' means not just a mere reconciliation or making up of the parties, but it means renewal and resumption of the marital relations, *and this would require something more than sexual intercourse alone.* It's essential that there be a mutual intent to resume cohabitation. The word cohabitation in our law means something more than sexual intercourse between the parties.

Cohabitation ordinarily contemplates establishment of a home in which the parties live in the married relationship, normal relationship of husband and wife." (Emphasis added.)

And finally the trial judge charged, "Now here, the burden of proof is also on Mrs. Murphy to show you by the greater weight of the evidence that not only did they have sex together after the separation agreement, but that there was a mutual intent on the part of both to reconcile and resume their cohabitation."

The foregoing instructions find support in two prior decisions of the Court of Appeals, *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E. 2d 323 (1977), and *Newton v. Williams*, 25 N.C. App. 527, 214 S.E. 2d 285 (1975). In both these decisions the court held that mere proof of "isolated" or "mere casual acts of sexual intercourse" did not establish reconciliation and the resumption of marital relations. In reaching this conclusion the Court of Appeals relied upon the following statement in 1 R. Lee, *North Carolina Family Law* § 35, at 153 (3d ed. 1963): "Mere proof that isolated acts of sexual intercourse have taken place between the parties is not conclusive evidence of a reconciliation and resumption of cohabitation. There must ordinarily appear that the parties have established a home and that they are living in it in the normal relationship of husband and wife."[1] *See also* 2 R. Lee, *North Carolina Family Law* § 200 (3d ed. 1963).

That the foregoing statement is the general rule may be inferred from the decisions collected in the following annotations and the supplemental case services: Annot., 40 A.L.R. 1227 (1926); Annot., 35 A.L.R. 2d 707 (1954). However, this rule—be it "general" or limited—is not the law in North Carolina. The rule in this State was clearly enunciated by Justice Brogden, speaking for the Court in 1932 in the case of *State v. Gossett*, 203 N.C. 641, 166 S.E. 754. This case is cited in 42 C.J.S., *Husband and Wife* § 601, at 186 (1975), as authority contrary to the general rule that "mere casual acts of sexual intercourse are not conclusive evidence that the parties have ceased to live separate within the meaning of a separation agreement." In *Gossett*, the defendant was indicted for the abandonment and nonsupport of his wife. At

1. In a footnote to this statement (n. 105 at 153), the author says: "*But cf. State v. Gossett*, 203 N.C. 641, 166 S.E. 754 (1932), which was a criminal case involving a prosecution for abandonment and nonsupport and the effect of a separation agreement upon the same; the language in this case would seem to be applicable only to the facts of the particular case."

the trial the defendant contended that by executing a separation agreement his wife had released him from any obligation to support her. The wife testified, however, that after the separation agreement was signed her husband had visited her and they had engaged in sexual intercourse on each occasion. The number of times the defendant visited his wife is not disclosed in the opinion.

In pertinent part, Judge Thomas J. Shaw, the trial judge in *State v. Gossett, supra*, instructed the jury as follows: "When a husband and wife enter into a deed of separation the policy of the law is that they are to live separate, that they are not to keep up the sexual relation and continue that, but that they are to live separate and apart and if after the deed of separation is entered into a man goes to see his wife and child, and every time he goes to see her he has sexual intercourse with her, the deed of separation is of no validity at all . . . and the court instructs you, if you find that this man visited his wife and child after this deed of separation was entered into and before this indictment or warrant was taken out . . . and that every time he came to see her they had sexual intercourse, then the court instructs you to disregard entirely the evidence about the deed of separation because, if that would be true, the parties themselves would disregard it and cannot expect the court to regard it if they did not regard it, and . . . the rights of husband and wife and the duties and obligations would be reimposed upon the parties." *Id.* at 643-44, 166 S.E. at 755.

On appeal, defendant Gossett assigned the foregoing instruction as error. He contended that Judge Shaw had stated the law "too broadly," for it had never been held that the mere resumption of sexual relations invalidated a deed of separation.

Justice Brogden began the Court's opinion, which rejected the defendant's contentions, with the following question: "If a separation agreement is duly executed by husband and wife, and thereafter the husband visits the wife from time to time, and upon each visit resumes the conjugal relationship, does such conduct invalidate the agreement?" Before answering this question in the affirmative Justice Brogden wrote:

"There is ample support in the books justifying the defendant's exception, but this Court is constrained to uphold the view of the law so expressed by the trial judge; otherwise, the separa-

tion agreement would degenerate into a mere cloak or device by means of which the husband would escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy. Manifestly it is not to be assumed that the law would protect the integrity of the agreement and yet thereby sanction and approve, for all practical purposes, illicit intercourse and promiscuous assignation.

"The separation agreement constituted the sole defense to the crime charged in the warrant, and it necessarily follows that after the agreement has been treated by the parties as a 'mere scrap of paper' and set at naught by their conduct, then it no longer avails." *Id.* at 644, 166 S.E. at 755. *Cf.* 24 Am. Jur. 2d *Divorce & Separation* § 214 (1966) (one act of sexual intercourse between a husband and wife may constitute a condonation by the innocent spouse of the other's infidelity).

Albeit forty-six years have intervened since the decision in *Gossett*, this Court is still constrained to hold that sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract. We therefore reaffirm *State v. Gossett, supra*, and apply its rationale to this case. It is quite true, as plaintiff points out in his brief, that marriage involves many duties, responsibilities and activities other than sexual relations. *See Young v. Young*, 225 N.C. 340, 344, 34 S.E. 2d 154, 157 (1945). However, in the normal situation they are an integral part of marriage.[2] Indeed, severance of marital relations by a separation agreement and continued sexual intercourse between the parties "are essentially antagonistic and irreconcilable notions." 1 A. Lindey, *Separation Agreements and Ante-nuptial Contracts* §§ 8-13 (1977). In our view, this is true whether the resumption of sexual relations be "casual", "isolated", or otherwise. *See Weeks v. Weeks*, 143 Fla. 686, 197 So. 393 (1940); *Wolff v. Wolff*, 134 N.J. Eq. 8, 34 A. 2d 150 (1943); *Ahrens v. Ahrens*, 67 Okla. 147, 169 P. 486 (1917). Plaintiff's assignment of error No. 10 is sustained.

The foregoing ruling, of course, requires that the judgment in this case be vacated and the cause remanded for a new trial on the second issue prior to the trial of plaintiff's action for divorce

2. *See* 1 R. Lee, *North Carolina Family Law* § 87, at 332 (3d ed. 1963).

and defendant's cross-action for alimony and child custody. Presumably, however, in view of the admissions made by plaintiff husband in the course of his testimony at the trial, defendant wife will now move for summary judgment under G.S. 1A-1, Rule 56(c). Under this rule "any material that is on file that may properly be treated as an admission of a party may be considered on a motion for summary judgment." 6 Moore's Federal Practice, *Summary Judgment* § 56.11 [1.5], at 56-201 (1976). *See Ramsouer v. Midland Valley R. Co.*, 135 Fed. 2d 101 (8th Cir. 1943) (where a transcript of testimony taken at an earlier trial in an action dismissed without prejudice was used in support of a motion for summary judgment); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); C. Wright and A. Miller, *Federal Practice and Procedure* § 2723 (1973).

There remains to be considered only the questions raised by defendant's assignment of error No. 2—whether the trial court erred in denying her motion to amend her amended answer by the addition of proposed paragraphs 12, 18, 19, and 22. These paragraphs (with the exception of No. 12, which would appear to be mainly evidentiary) contain the allegations constituting defendant's defense to plaintiff's claim for divorce and the substance of her claim for alimony without divorce. The Court of Appeals held that, in view of the severance of issues, the denial of this motion to amend "was not error because the matters alleged (no income, indignities to the person, and failure to provide subsistence) were not material to the single issue [then] before the court, the validity of the separation agreement." However, in view of the present posture of the case, defendant contends that the proposed amendments are now pertinent, and that her motion to amend should be considered *de novo* by the trial court. We agree with that contention and direct that, prior to the trial of plaintiff's action for divorce and defendant's cross-action for alimony without divorce, the trial judge shall reconsider defendant's motion to amend her pleadings as provided by Rule 15(a).

In summary, for the reasons previously stated, the decision of the Court of Appeals finding no error in the trial below on the first issue is affirmed; its decision finding no error as to the second issue is reversed, and a new trial is ordered as to that issue only. *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E. 2d 190, 195 (1974); *Johnson v. Lewis*, 251 N.C. 797, 804, 112 S.E. 2d 512, 517

(1960); *Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911). Accordingly, this case is returned to the Court of Appeals for remand to the District Court for proceedings consistent with this opinion.

Affirmed in part; Reversed in part.

Error and Remanded.

Justice EXUM concurring in part and dissenting in part:

I agree with the decision of the Court of Appeals and with the law in this area as it has been developed by that Court. *See Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E. 2d 323 (1977); *Newton v. Williams*, 25 N.C. App. 527, 214 S.E. 2d 285 (1975). Therefore I vote to affirm. I disagree with the majority's conclusion that the trial judge's instructions on the second issue were erroneous. Insofar as *State v. Gossett*, 203 N.C. 641, 166 S.E. 754 (1932), relied on by the majority, is inconsistent with these conclusions I would consider it no longer controlling.

STATE OF NORTH CAROLINA v. DARNELL BANKS

No. 72

(Filed 14 July 1978)

1. Kidnapping § 1— statute not vague or overbroad

G.S. 14-39, the kidnapping statute, is not unconstitutionally vague or overbroad.

2. Kidnapping § 1— purpose for kidnapping—separate, punishable offenses

Since the charges of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon were alleged in the bill of indictment charging kidnapping as the purposes for which defendant confined and restrained the victim, and the charges so alleged were not elements of the offense of kidnapping which the State had to prove, the crimes of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon were separate and distinct offenses and were punishable as such.

3. Jury § 6— voir dire—consultation with psychologist—no prejudice

Defendant was not prejudiced by the trial court's ruling which permitted the prosecutor to consult with a psychologist during the voir dire examination

of the jury, since there was no evidence that would tend to show that the psychologist's presence during the jury voir dire precluded the selection of an impartial jury; defendant did not seek the aid of the psychologist; and defendant did not contend that the jury as finally impaneled was partial or biased.

4. Criminal Law § 66— in-court identification of defendant—no timely objection

The trial court did not err in admitting the in-court identification of defendant by the prosecuting witness since defendant failed to make a timely objection or a motion to strike; other than an ambiguous statement by the witness that she "identified the guy at the hospital," there was nothing in the record tending to show the existence of any pretrial identification procedures of a suggestive nature; the witness's in-court identification of defendant was positive and unequivocal; and the witness's description of her assailant prior to his arrest was detailed and accurate.

5. Rape §§ 4.3, 18.1— assault with intent to commit rape—unchastity of prosecutrix—evidence improperly excluded—no prejudice

When a defendant has been charged with rape or with assault with intent to commit rape, evidence of the prosecutrix's reputation for unchastity is admissible both to attack her credibility as a witness and to show the likelihood of consent, but testimony of specific acts of unchastity with someone other than defendant is incompetent; therefore, in a prosecution for assault with intent to commit rape, the trial court erred in not permitting the prosecuting witness to testify as to whether she had engaged in sexual relations since the birth of her illegitimate child, but defendant failed to show that the exclusion of such evidence was prejudicial where the record did not show what the witness's answer would have been.

6. Criminal Law § 169— evidence improperly admitted—no prejudice

In a prosecution for assault with intent to commit rape where a witness was asked when he first saw the victim, the trial court erred in failing to strike his response, "That was after she had been raped," since defendant was not charged with rape and there was no evidence that defendant raped the prosecuting witness; however, the jury was not misled by the witness's testimony and the trial court's error was therefore not prejudicial to defendant.

7. Criminal Law §§ 50, 96— nurse's testimony—no expression of opinion—curative instruction given

In a prosecution for kidnapping, robbery with a dangerous weapon, assault with intent to commit rape and crime against nature, defendant was not entitled to a mistrial where a nurse, who testified for the State concerning the medical treatment administered to the prosecutrix following the assault, expressed her opinion that the prosecutrix's complaints concerning chest pains were more related to an emotional upset than to physical injury and stated that she could "usually pick them out, ones fussing and fuming for no good reason," since the nurse did not thereby express an opinion as to the veracity of the prosecutrix, and any possible prejudice resulting from the remarks was removed by the court's prompt curative instruction.

8. Criminal Law § 60— palmprint—admissibility to show identity

The trial court did not err in allowing a fingerprint expert to testify that a palmprint found at the scene of the assault was defendant's, since such evidence was admissible to corroborate the prosecuting witness's identification of defendant as the perpetrator of the charged crimes.

9. Rape § 18.2— assault with intent to commit rape—sufficiency of evidence

Evidence was sufficient to withstand defendant's motion for nonsuit in a prosecution for assault with intent to commit rape, though there was no evidence that defendant actually attempted coition, since defendant's actions in forcing prosecutrix into a stall in a restroom, forcing her to disrobe and to sit on the commode, rubbing his genitalia against hers and forcing her to perform oral sex gave rise to a reasonable inference that the assault upon prosecutrix was motivated, at some point, by an intent to commit rape.

10. Criminal Law §§ 113, 114.1— instructions—explanation of law sufficient—no unequal stress to contentions

Defendant's contentions that the trial court violated the requirements of G.S. 1-180 by failing to explain the law as it applied to his evidence and by giving unequal stress to the contentions of the State are without merit.

11. Rape § 18.4— assault with intent to commit rape—failure to instruct on lesser offense—error

In a prosecution for assault with intent to commit rape, the trial court did not err in failing to instruct the jury on assault with a deadly weapon since that was not a lesser included offense of the offense charged, or on the offense of simple assault, since all of the evidence showed that, if there was an assault, the assault was upon a female; however, the court did err in failing to instruct the jury on the lesser included offense of assault upon a female, since the factual issue separating the greater offense from the lesser, *i.e.*, intent, was not susceptible to clear cut resolution.

APPEAL by defendant from *McLelland, J.*, 27 September 1976 Session of WAKE Superior Court, docketed and argued as Case No. 103 at the Spring Term 1977.

Defendant was charged by indictments with kidnapping, Case No. 76CR27995, robbery with a dangerous weapon, Case No. 76CR27432-A, assault on a female with intent to commit rape, Case No. 76CR27432-B, and crime against nature, Case No. 76CR27432-C. The State's evidence tends to show that Lucille Wesley, aged 21, arrived at the Raleigh Greyhound Bus Terminal at about 3:30 a.m. on 7 July 1976. She was a resident of Bishopville, South Carolina, and was en route to Wendell, North Carolina, to visit relatives. After calling her relatives to notify them of her arrival, Miss Wesley returned to the lobby of the bus terminal and began to read a paperback book. She felt uncomfortable and went into the lobby of the women's restroom to con-

tinue her reading. However, just as she sat down, a man whom she had never seen before (later identified by her as defendant) burst into the restroom. He began to ask her personal questions, and when she attempted to leave, he pushed her back into the chair. Miss Wesley managed to get up and start to the door, but defendant blocked her, pushed her against the wall and started to kiss her. When she attempted to get away from him, defendant produced a knife and forced her to go to the last of the stalls in the restroom where he ordered her to disrobe. After she had partially disrobed, he forced her to sit on the commode and rubbed his private parts against hers, fondled her with his hands and then forced her to perform oral sex. Thereafter, he demanded and received two dollars from her. After warning her not to follow him, he left. Shortly after defendant departed, Miss Wesley told an employee of the bus terminal that she had been attacked while in the restroom of the terminal. He called the police, and after she told the officers what had happened, she was then taken to Wake Memorial Hospital where she received medical attention. Miss Wesley testified that she did not go into the stall in the restroom willingly, she did not submit to any of the acts she described willingly, or give defendant money willingly or voluntarily. She submitted to all of the defendant's demands because she feared he would harm her with the knife which he displayed.

The State also offered testimony of police officers who testified that Miss Wesley gave them a detailed description of defendant and the clothing worn by him. Defendant was apprehended at about 4:30 a.m. about ten blocks from the bus terminal. His clothing matched the description given by the victim. He was carrying a knife, and there were two one dollar bills in his shirt pocket.

There was expert testimony to the effect that fingerprints "lifted" from a chair in the lobby of the women's restroom at the Greyhound Bus Terminal matched fingerprints taken from defendant after he was placed in custody. Further, a newspaper carrier, who had known defendant for several years, testified that he observed defendant run from the Greyhound Bus Terminal during the early morning hours of 7 June 1976.

Defendant offered Ronnie McCullers and Mickey Wilson as his only witnesses. McCullers testified that Lucille Wesley solicited him to engage in sex for pay and suggested that the act

be consummated in the women's restroom of the bus terminal. He later saw her talking to defendant in the main lobby of the bus terminal. Wilson testified that he saw Lucille Wesley talking with defendant in the lobby. He said that he dozed off and that he and defendant later left the bus terminal together at about 4:30 a.m.

The jury returned verdicts of guilty as to each of the four charges. Defendant appealed from judgments imposing prison sentences of life imprisonment on the verdict of guilty of kidnapping, life imprisonment on the verdict of guilty of armed robbery, fifteen years on the verdict of assault with intent to commit rape and ten years on the verdict of crime against nature. On 16 February 1977, we allowed defendant's motion to bypass the Court of Appeals on the charge of assault with intent to commit rape and on the charge of crime against nature.

Rufus L. Edmisten, Attorney General, by David S. Crump, Assistant Attorney General, for the State.

Thomas L. Barringer, for defendant appellant.

BRANCH, Justice.

By his first assignment of error, defendant contends that G.S. 14-39 is unconstitutional on its face and as applied to him.

G.S. 14-39 in part 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 custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

[1] Defendant first argues that he was denied due process of law upon his conviction under this statute because its provisions were so vague that men of common intelligence must guess as to its meaning and differ as to its application. This argument was answered adversely to defendant in *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). There Justice Lake speaking for the unanimous Court stated:

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. 294 N.C. at 525.

Defendant further argues that in addition to being unconstitutionally vague, G.S. 14-39 also violates the requirement of due process of law by being "overly broad." The fault of overbreadth is often very intimately related to the vice of "vagueness." Note, *The First Amendment Overbreadth Doctrine*,

83 Harv. L. Rev. 844 (1970). However, the overbreadth doctrine is a separate principle devised to strike down statutes which attempt to regulate activity which the State is constitutionally forbidden to regulate, such as activity protected by the First Amendment to the United States Constitution. *E.g., Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967); *United States v. Dellinger*, 472 F. 2d 340, 357 (7th Cir. 1972), *cert. den.*, 410 U.S. 970 (1973); *State ex rel. Purcell v. Superior Court*, 111 Ariz. 582, 584, 535 P. 2d 1299, 1301 (1975); Note, 83 Harv. L. Rev., *supra*. G.S. 14-39 does not interfere or prohibit any activity protected by the First Amendment or any other Federal or State constitutional provision. It is a penal statute completely within the State's police power. The doctrine of overbreadth has no application to it. We, therefore, hold that G.S. 14-39 is neither unconstitutionally vague nor "overbroad."

[2] Defendant assigns as error the failure of the trial judge to allow his motion to arrest judgment upon the verdicts of guilty of crime against nature, robbery with a dangerous weapon and assault with intent to commit rape. He argues that these crimes are lesser included offenses of the crime of kidnapping as defined by G.S. 14-39. In support of his position, he relies upon the well-established rule that when an accused is convicted of first degree murder under the felony murder rule pursuant to G.S. 14-17, there can be no additional punishment for the underlying felony. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). The rationale of this rule was clearly stated in *State v. Thompson*, *supra*, by Chief Justice Bobbitt in the following language:

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

ing. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution of the theory of felony-murder. [Citation omitted.] 280 N.C. at 215-216.

This is inapposite to kidnapping as defined in G.S. 14-39. The charges of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon were alleged in the bill of indictment charging kidnapping as the *purposes* for which the defendant confined and restrained the victim. The charges so alleged were not *elements* of the offense of kidnapping which the State had to prove as is the case of the underlying felony in the felony murder rule. When the State proves the elements of kidnapping and the purpose for which the victim was confined or restrained, conviction of the kidnapping may be sustained. Thus, the crimes of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon are separate and distinct offenses and are punishable as such. *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). Further, in instant case, since the trial judge entered a separate, complete judgment upon each verdict whereby defendant was sentenced to imprisonment in the State's prison, the sentences so imposed run concurrently as a matter of law. 4 Strong's North Carolina Index 3d, *Criminal Law*, Section 140.1 (1976). Consequently, defendant has failed to show that he suffered substantial prejudice from the denial of his motion.

This assignment of error is overruled.

We note in passing that some of our opinions refer to the crime defined in G.S. 14-39A as "aggravated kidnapping." This is a misnomer. The proper term for the crime there defined is "kid-

napping." Subsection (b) of the statute states the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear.

[3] Defendant assigns as error the ruling of the trial court which permitted the prosecutor to consult with a psychologist during the *voir dire* examination of the jury.

The record shows that Mr. Jeff Frederick, a student psychologist was present in the courtroom during jury selection and that the district attorney conferred with him before and during the jury selection. Mr. Frederick was present in the courtroom as a matter of academic interest, and he was neither retained nor paid by the State. The nature of the advice given by Mr. Frederick to the prosecutor is not disclosed.

Defendant contends that the presence of Mr. Frederick in the courtroom during the jury selection denied him his constitutional right to assistance of counsel, to equal protection under the laws, and to a fair and impartial trial. He cites no authority or gives no suggestion as to how the presence of the psychologist resulted in a denial of these constitutional rights.

The purpose of the *voir dire* examination of prospective jurors is to secure an impartial jury. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). Control of the examination of prospective jurors rests in the sound discretion of the trial court, and in order for a defendant to show that the court's regulation of jury selection constitutes reversible error, he must establish both that the trial judge abused his discretion and that he suffered prejudice as a result of such abuse. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. den.*, 410 U.S. 958, 410 U.S. 987 (1973).

Here defendant has presented no evidence or reasonable argument which would tend to show that Mr. Frederick's presence in the courtroom during the *voir dire* of the jury precluded the selection of an impartial jury. Defendant did not seek the aid of Mr. Frederick or any other psychologist. In fact, he does not even contend that the jury as finally impaneled was partial or biased. Under these circumstances, we are unable to say that Judge McLelland abused his discretion in permitting Mr.

Frederick to consult with the district attorney during the *voir dire* of the jury or that defendant has demonstrated prejudice resulting from this ruling.

[4] Defendant assigns as error the trial judge's ruling admitting the in-court identification of defendant by the prosecuting witness.

On direct examination of Lucille Wesley, the following exchange occurred:

Q. Well, who was it that came in?

A. Him. (Pointing)

Q. The defendant questioned?

A. Yes, sir.

MR. BARRINGER: Objection, your Honor.

COURT: Overruled.

The defendant cannot challenge an in-court identification so as to obtain a *voir dire* hearing without, at least, a timely general objection. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. den.*, 400 U.S. 946 (1970). Further, an objection to incompetent evidence must be interposed at the time the question intended to elicit it is asked, and a motion to strike an incompetent answer should be made when the answer is given. When an objection is not timely made, it is waived. *State v. Davis*, 284 N.C. 701, 202 S.E. 2d 770, *cert. den.*, 419 U.S. 857 (1974); *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598 (1943). Here defendant failed to timely object or to move to strike.

Later, while still on direct examination and after the witness had described part of the treatment administered to her at the hospital on the night the crimes were committed, the record discloses the following:

Q. Anything else?

A. Not no more than identifying the guy at the hospital.

MR. BARRINGER: We would object and move to strike that last answer.

COURT: I didn't hear what it was. I don't know whether your motion should be granted or not.

MR. BARRINGER: She said something about not doing anything else at the hospital other than identifying someone.

COURT: Denied.

We see no prejudicial error in the witness's reply concerning identifying someone at the hospital. There was no evidence that she referred to defendant. Further, the record discloses that at some time after the crimes were committed and before the defendant was taken into custody, the witness gave the police a detailed description of defendant and his clothing. It is entirely possible that this rather inarticulate witness was referring to the giving of this description to police officers rather than to a personal confrontation with defendant or any other person. Other than this ambiguous statement, nothing appears in this record which even tends to show the existence of any pretrial identification procedures of a suggestive nature. The witness's in-court identification of defendant was positive and unequivocal. Her description of her assailant prior to his arrest was detailed and accurate.

We find no error in the trial judge's ruling admitting the identification testimony of the prosecuting witness.

[5] Defendant argues that the trial court erred by sustaining the State's objections to his cross-examination of the prosecuting witness concerning the identity of the father of her illegitimate child and as to whether she had had sexual relations since the birth of the child.

When a defendant has been charged with rape or with assault with intent to commit rape, evidence of the prosecutrix's reputation for unchastity is admissible both to attack her credibility as a witness and to show the likelihood of consent. *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. den.*, 362 U.S. 917 (1960); 65 Am. Jur. 2d, *Rape*, Sections 82, 86 (1972). The testimony of specific acts of unchastity with someone other than defendant is, however, incompetent. *State v. Grundler*, *supra*.

In instant case, the prosecuting witness answered that she knew the identity of her child's father. The answer was before the jury and was not stricken from the record. Thereafter, the defense attorney asked the witness whether she had engaged in sexual relations since the birth of her child. The trial judge sustained the State's objection. In our opinion, the trial judge should have permitted the witness to answer this question; however, the record fails to show what the witness's answer would have been. We are, therefore, unable to determine whether the exclusion of this evidence was prejudicial. *See, State v. Little,* 286 N.C. 185, 209 S.E. 2d 749 (1974); *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Brewer,* 202 N.C. 187, 162 S.E. 363 (1932).

[6] Defendant next contends that the trial court erred by overruling his objection to and his motion to strike the testimony of the witness Phillip King.

In response to a question concerning when he first saw the victim, the witness replied, "That was after she had been raped." We first note that defendant was not charged with rape, and there was no evidence from which the jury could infer that defendant had in fact raped the prosecuting witness. It is obvious that the witness was not attempting to testify that in his opinion the victim had been raped but was merely using the incident which occurred in the restroom as a point of reference to time. Although we are of the opinion that the trial judge should have stricken this answer, we do not believe under the circumstances of this case that the jury was misled by Mr. King's statement or that the verdict would have been different had the witness's answer been stricken.

[7] By his next assignment of error, defendant contends that the trial court erred by denying his motion for mistrial.

Patricia Castriano, a registered nurse, testified for the State concerning the medical treatment administered to Lucille Wesley following the assault. The witness testified that the doctor in attendance diagnosed the victim's chest pains as resulting from tension rather than from injury. The witness then stated:

> I felt that the pain in her chest was emotional at that time because I mean she obviously was under great stress. I can usually pick them out, ones fussing and fuming for no good reason.

Defendant's objection to this testimony was sustained and his motion to strike was granted. The trial judge, however, denied defendant's subsequent motion for a mistrial.

Defendant argues that the above-quoted testimony was tantamount to a statement by the witness that she could tell that the victim was telling the truth and that the court's instructions to the jury to disregard this testimony were insufficient to remove its prejudicial impact. We disagree.

The witness did not express an opinion as to the veracity of Lucille Wesley. The challenged statement was in no way related to the prosecuting witness's in-court testimony but simply was a statement of opinion by the witness that the prosecuting witness's complaints concerning chest pains were more related to an emotional upset than to physical injury.

A motion for mistrial is addressed to the sound discretion of the trial court. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). Here the challenged testimony appears to favor rather than prejudice defendant. Any possible prejudice was removed by the court's prompt curative instruction. We find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

[8] Defendant also argues that the trial court erred by allowing a fingerprint expert to testify that a palmprint found at the scene of the assault was defendant's. Relying upon *State v. Smith*, 274 N.C. 159, 161 S.E. 2d 449 (1968), defendant contends that the circumstances in instant case are not such that the palmprint found at the scene of the crime could have been impressed only at the time the alleged crime was committed and that the expert's testimony, therefore, should have been excluded. *State v. Smith, supra*, and the cases there cited are cases in which the *sufficiency* of circumstantial evidence to withstand a motion for judgment of nonsuit is the question before the Court rather than the admissibility of fingerprint evidence. *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949); *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935). *See also*, 30 Am. Jur. 2d, *Evidence*, Section 1144 (1967).

It is well established that evidence of the correspondence of fingerprints given by an expert is admissible on the question of identity. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972);

State v. Tew, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Helms*, 218 N.C. 592, 12 S.E. 2d 243 (1940). The admissibility of such evidence is consistent with the rule of relevance which permits the introduction of any evidence which "has any logical tendency, however slight, to prove a fact at issue in the case." 1 Stansbury's North Carolina Evidence, Section 77 (Brandis Rev. 1973). Here defendant's pleas of not guilty placed upon the State the burden of proving every element of the charged crimes including identity. The fingerprint evidence was, therefore, admissible to corroborate the prosecuting witness's identification of defendant as the perpetrator of the charged crimes.

[9] Defendant's next assignment of error is that the trial court erred by denying his motion for judgment as of nonsuit on the charge of assault with intent to commit rape. He argues that the State's evidence fails to show that the assault upon Lucille Wesley was made with an intent to commit rape.

In discussing the sufficiency of the evidence necessary to submit a charge of assault with intent to commit rape to the jury, this Court, in *State v. Gammons*, 260 N.C. 753, 755-756, 133 S.E. 2d 649 (1963), held:

> . . . It is not necessary to complete the offense that the defendant retained the intent throughout the assault, but if he, at any time during the assault, have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. *State v. Petry*, 226 N.C. 78, 81, 36 S.E. 2d 653. Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarly be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred. *State v. Petry, supra; State v. Adams*, 214 N.C. 501, 199 S.E. 716.

Accord, State v. Hudson, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. den.*, 414 U.S. 1160 (1974). *See also*, 65 Am. Jur. 2d, *Rape*, Section 24 (1972); 75 C.J.S., *Rape*, Section 77 (1952).

In *State v. Hudson, supra*, the accused for some period of time brutally performed sexually motivated assaults upon a fourteen year old girl without actually attempting coition. Holding that the evidence presented was sufficient to withstand the

defendant's motion for nonsuit on the charge of assault with intent to commit rape, this Court, speaking through Chief Justice Sharp, stated:

> Although Clemmie did not testify that defendant ever attempted coition, his attack upon her was indisputably sexually motivated, and we think the jury could reasonably infer from his treatment of her that defendant intended at some time during his continuous assaults to rape Clemmie if he could, notwithstanding any resistance on her part. . . . 280 N.C. at 77.

The evidence presented by the State tends to show that after defendant had forced Miss Wesley into the stall at knife point and forced her to remove part of her clothing, he forced her to sit on the commode and prop her feet on the walls of the stall. He then rubbed his genitalia against hers and thereafter forced the victim to perform oral sex. While there is no evidence that defendant actually attempted coition, defendant's actions were obviously designed to gratify some sort of sexual desire, and we are of the opinion that the evidence presented gives rise to a reasonable inference that the assault upon Miss Wesley was motivated, at some point, by an intent to commit rape. Such an inference is sufficient to withstand defendant's motion for nonsuit, and this assignment of error is, therefore, overruled.

[10] By his next two assignments of error, defendant contends that the trial court violated the requirements of G.S. 1-180 by failing to explain the law as it applied to his evidence and by giving unequal stress to the contentions of the State.

In recapitulating the evidence presented by defendant, the trial judge stated:

> The defendant's evidence tends to show that Ronnie McCullers, as he testified, was outside the Greyhound Bus Station at 2:45 to 3:00 o'clock on the morning of June 7, 1976; that Miss Wesley approached him, asked him for a match and stated that she would date him for $10.00; that McCullers told her that he didn't go that way; that McCullers then saw the defendant in the waiting room of the bus station talking with Miss Wesley; that he also saw Mickey Wilson in the station; that he also saw five or six people in that station that

he knew; that Mickey Wilson, as he testified, went to the Greyhound Bus Station with the defendant Darnell Banks at about two or three or four o'clock; that the defendant sat and rapped with Miss Wesley in the waiting room of the station; that Wilson then took a 15 minute nap and was waked up by the defendant and that he and the defendant left together out the front door to Jones Street at about 4:30 or 5:00 o'clock in the morning, after which each went his own way; that Wilson knows Franklin Cherry, the paper boy, and saw him at the Greyhound Station that night or possibly at the Trailway Station.

The trial judge must, without special request, charge the law applicable to the substantive features of the case arising on the evidence and apply the law to the essential facts of the case. Volume 7, Strong's North Carolina Index 2d, *Trial*, Section 33. However, it is error for the court to submit to the jury an issue based on evidence which raises a mere possibility or conjecture. *Lunsford v. Marshall*, 230 N.C. 610, 55 S.E. 2d 194 (1949).

Defendant's evidence as recapitulated by the trial judge was fairly and fully stated. In our opinion, this testimony at most amounts to a mere scintilla of evidence tending only to raise a suspicion that the victim consented to go to the restroom for the purpose of engaging in sexual intercourse with defendant. Thus, any finding by the jury that any of the acts committed by defendant were by and with the consent of the victim would have been based on speculation and conjecture. Therefore, the trial judge adequately explained the law and applied it to the facts as presented by the State and defendant.

Defendant's argument that the trial judge failed to give equal stress to his contentions cannot be sustained. In this connection, the court charged:

> The defendant contends that you should not so find the facts to be, members of the jury; that you should not believe the testimony of Miss Wesley; that upon your carefully weighing all of the testimony for both the State and the defendant and your drawing reasonable and proper inferences from that testimony, that you should not conclude that the facts are as the State contends you should find them to be beyond a reasonable doubt.

> The defendant contends that in any fair view of all of the evidence you should at least reasonably doubt that he is guilty of any of the four offenses charged against him.
>
> The defendant contends that you should have a reasonable doubt from the evidence of the State that the defendant intended to rape Miss Wesley.
>
> The defendant contends that you should have a reasonable doubt as to his guilt of any offense and that you should upon the law's presumption of innocence and upon such reasonable doubt return verdicts of acquittal as to each of the charges against him.

It is uncontradicted that when a trial judge elects to state the contention of one party, he must equally stress the contention of the opposing party. This does not mean that the statement of contentions of the respective parties must be of equal length for where one party's evidence is meager, his contentions must be few in contrast with those of an opposing party who offers a great volume of testimony which raises many pertinent contentions. *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962). Having decided that defendant's evidence failed to raise reasonable inferences of consent, the only remaining contentions to be stated were those raised by his plea of not guilty. These contentions were fully given by the court.

For reasons stated, these assignments of error are overruled.

[11] Finally, defendant argues that the trial judge erred in his charge on assault with intent to commit rape by failing to instruct the jury on the lesser included offenses of assault with a deadly weapon, assault upon a female and simple assault.

In ruling upon the necessity of submitting lesser included offenses for consideration by the jury, this Court, in *State v. Bell*, 284 N.C. 416, 419, 200 S.E. 2d 601 (1973), held:

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the in-

> dictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

See, generally, 4 Strong's North Carolina Index 3d, *Criminal Law*, Section 115 (1977).

An essential element of the crime of assault with a deadly weapon is the use of a deadly weapon, an element not found in the definition of assault with intent to commit rape. Accordingly, assault with a deadly weapon is not a lesser included offense of assault with intent to commit rape, and there was no error in failing to instruct the jury on the charge of assault with a deadly weapon. Neither did the trial judge err by failing to submit the charge of simple assault since all the evidence shows that if there was an assault, the assault was upon a female. *See, State v. Church*, 231 N.C. 39, 55 S.E. 2d 792 (1949).

It is clear that the crime of assault upon a female is a lesser included offense of assault with intent to commit rape, *State v. Gammons, supra*, and here there was evidence which would support either a conviction of assault with intent to commit rape or a conviction of assault upon a female. The factual element which distinguishes assault with intent to commit rape from assault upon a female is *intent* at the time of the assault, and when evidence of intent to commit rape is overwhelming or uncontradicted, it would not be error to submit only the greater offense. *See, e.g., State v. Armstong*, 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. den.*, 423 U.S. 918 (1975); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973) (holding no error in failing to submit the lesser included offenses of rape when all evidence reveals completed act of intercourse and the only disputed issue is consent). Here, however, the factual issue which separates the greater offense from the lesser, *i.e.*, intent, is not susceptible to clear cut resolution. Under these circumstances, the trial judge should have submitted to the jury the lesser included offense of assault upon a female.

For the reasons stated, there must be a new trial on the charge of assault with intent to commit rape. We have carefully

reviewed this entire record and find no error sufficient to warrant disturbing the verdicts and judgments rendered upon the charges of kidnapping, robbery with a dangerous weapon, and crime against nature.

In Case No. 76CR27432-A, robbery with a dangerous weapon—No error.

In Case No. 76CR27432-C, crime against nature—No error.

In Case No. 76CR27995, kidnapping—No error.

In Case No. 76CR27432-B, assault with intent to commit rape—New trial.

LEE-MOORE OIL COMPANY v. TERRANCE V. CLEARY AND WIFE, LYNN L. CLEARY

No. 63

(Filed 14 July 1978)

1. **Property § 1; Fixtures § 1— chattel affixed to another's realty—agreement that it remain the personal property of owner—subsequent purchasers**

An understanding between the owner of a chattel who affixes it to the land of another and the owner of the land to which it is affixed that the chattel shall remain the personal property of its original owner is binding on subsequent purchasers of the land who take with notice, actual or constructive, of the understanding.

2. **Property § 1; Fixtures § 1— chattel affixed to another's realty—oral agreement as to ownership**

An agreement between the owner of a chattel and the owner of the realty upon which the chattel is affixed that the chattel shall remain the personal property of the original owner need not be in writing and may be either express or implied.

3. **Property § 1; Fixtures § 1— gasoline dispensing equipment—personalty of original owner**

In an action to recover damages for conversion of gasoline dispensing equipment placed by plaintiff on realty which was owned by another and subsequently purchased by defendants, plaintiff's evidence was sufficient to permit the jury to find that the equipment was personal property belonging to the plaintiff where it tended to show (1) an agreement between plaintiff and

the owner of the realty at the time of installation that the equipment, even if affixed to the realty, was to remain the personal property of plaintiff, and (2) defendants had knowledge of such agreement at the time they purchased the realty.

ON petition for discretionary review of a decision of the Court of Appeals, 33 N.C. App. 212, 234 S.E. 2d 456 (1977), reversing judgment entered by *Pridgen, J.*, at the 2 April 1976 Session of LEE County District Court. Docketed and argued as No. 55 at the Fall Term 1977.

Harrington & Shaw by Gerald E. Shaw, Attorneys for plaintiff appellee.

Ray F. Swain, Attorney for defendant appellants.

EXUM, Justice.

This is a civil action for damages for conversion. Plaintiff claims that it is the owner of certain gasoline dispensing equipment—two gasoline pumps, one 3000-gallon gasoline storage tank, one 1000-gallon gasoline storage tank, and a one-half horsepower air compressor—located on defendants' real property consisting essentially of a grocery store and service station known as "Marley's Store." Defendants claim these items are fixtures, title to which passed to them when they purchased the realty on which the items are located. At the close of plaintiff's evidence the trial judge allowed defendants' motion for a directed verdict on the ground that "plaintiff's evidence itself showed that the equipment was attached to the real property and that the real property was conveyed to the defendant without reservation of any part of the real property." The Court of Appeals reversed and, as we understand its mandate, remanded the case for trial on all issues.[1] We affirm.

The basic question before us is whether plaintiff's evidence is sufficient to survive defendants' motion for directed verdict. This involves consideration of whether the evidence is sufficient to

1. While the language of the mandate might be interpreted to mean that the case is remanded only for trial on the damages issue, both parties agree that if remanded at all it should be for trial on all issues since defendants have had no opportunity to offer evidence.

permit a jury to find that the equipment in question is personal property belonging to the plaintff.[2] We think the evidence is sufficient.

The theory of plaintiff's action as revealed by its complaint filed in July, 1975, is that its equipment was installed by plaintiff under an oral agreement with the then owner and operator of the premises, that the equipment would remain the property of plaintiff but would be left on the premises "so long as the operator of Marley's Store purchased gasoline solely from the plaintiff." Marley and succeeding owners of the store complied with this agreement by purchasing gasoline solely from plaintiff. Defendants acquired the real property by deed recorded 28 May 1975 and elected to purchase gasoline from a source other than plaintiff. Plaintiff offered to remove its equipment and restore the real property to its original condition at its own expense or to sell the equipment to defendants at less than market value. Defendants have refused to purchase or surrender the equipment and have refused to permit plaintiff to go upon the premises to remove it. Plaintiff prays judgment for $1668.00 damages, which it says represents the fair market value of the equipment.

Defendants answered, admitting their refusal to permit plaintiff to remove the equipment but otherwise denying the material allegations of the complaint. Defendants allege affirmatively that at the time of their purchase of the real property this equipment was "firmly affixed" thereto and was "a part of the real property," that defendants had no notice of plaintiff's claim to it, and that any oral agreement with reference to the equipment is unenforceable under the statute of frauds. Defendant Terrance Cleary asserted a counterclaim against plaintiff for "wrongful interference with [his] right to carry on his lawful business."[3]

[1] "As a general rule, whatever is attached to the land is understood to be a part of the realty; but as this depends, to some extent, upon circumstances, the rights involved must always be subject to explanation by evidence. Whether a thing attached to the land be a fixture or chattel personal, depends upon the agreement of the parties, express or implied. (Citations omit-

2. Defendants do not contest on this appeal the sufficiency of plaintiff's evidence to show a conversion, assuming the property is plaintiff's personalty. Defendants seem to concede this much in their pleadings when they admit their refusal to permit plaintiff to remove the equipment. Neither the parties nor we have addressed this aspect of the case.

3. Terrance Cleary, however, took a voluntary dismissal of his counterclaim after the directed verdict against plaintiff was entered. This claim is not now before us.

ted.) A building, or other fixture which is ordinarily a part of the realty, is held to be personal property when placed on the land of another by contract or consent of the owner." *Feimster v. Johnson*, 64 N.C. 259, 260-61 (1870), quoted with approval in *Stephens v. Carter*, 246 N.C. 318, 98 S.E. 2d 311 (1957), and *Springs v. Refining Company*, 205 N.C. 444, 171 S.E. 635 (1933). A general statement of the law in this area is found in R. Brown, The Law of Personal Property 567 (3d ed. 1975) (footnotes omitted):

> "For present purposes, a licensee is one who is given a simple permission to erect buildings or make other improvements on the land of another, but is not granted any estate or term of years in the land. . . . Such licensees are given unusually favorable consideration in the United States. Buildings or other improvements erected by the licensee not only do not become the property of the landowner, but remain the personal property of the tenant, and are not forfeited to the landowner if not removed when the license is revoked, or where the licensee dies. The licensee may dispose of his improvements as his personal chattels, and as to them the forms of action relating to personal property are applicable. Since the landowner's consent that the licensee may erect the improvements on the land, and may remove them, creates no estate or interest in the land, such agreements may be oral and need not be in writing under the statute of frauds. Moreover, if consent is given to the placing of the fixtures on the land, then, without more, there is implied the consent that the licensee may remove them."

Such an understanding between the original owner of the personalty who affixes it to the land of another and the owner of land to which it is affixed is binding on subsequent purchasers of the land who take with notice, actual or constructive, of the understanding. *Railroad v. Deal*, 90 N.C. 110 (1884); *Hankins v. Luebker*, 224 Ark. 425, 274 S.W. 2d 356 (1955); *Workman v. Henrie*, 71 Utah 400, 266 P. 1033, 58 A.L.R. 1346 (1928); Annot., 58 A.L.R. 1352, 1357-59 (1929); R. Brown, *supra* § 16.16; *see also Causey v. Plaid Mills*, 119 N.C. 180, 25 S.E. 863 (1896).[4]

4. The case relied on by the Court of Appeals, *Standard Oil Co. of New York v. Dolgin*, 95 Vt. 414, 115 Atl. 235 (1921), seems to say that such an understanding between the original annexors would be binding even on an innocent subsequent purchaser. We need not take the rule so far in this case; for, as we shall show, the plaintiff's evidence tends to show that defendants had notice of plaintiff's claim to this equipment before they purchased.

In *Railroad v. Deal, supra*, the plaintiff, Western North Carolina Railroad, took possession of certain realty "under its charter and the verbal license of the defendant's ancestor." While in possession but apparently with no estate or leasehold interest in the land, the Railroad erected a depot on the land near its tracks. Thereafter the Railroad changed the location of its tracks and abandoned the depot. Two years later the defendant, who had acquired the realty "one-half by descent and the other half by purchase," took possession of the depot. The Railroad brought suit to replevy the depot. The defense was that it was a fixture. This Court held for the plaintiff, summarizing its decision, 90 N.C. at 115:

> "The house in question was not intended at the time it was built to become part of, or for the benefit of the land on which it was erected. It was erected by the plaintiff with a knowledge and assent of the ancestor of defendant, for the sole purpose of carrying on its business or trade. It is, therefore, personal property. No legal presumption of relinquishment or abandonment of the right to remove it, to the defendant, arises. The plaintiff is, therefore, entitled to have and remove it as it may see fit to do."

The Court also considered the defendant to have had notice of the understanding with which the depot was erected. It said the fact that the depot "was not intended to aid in the enjoyment of freehold, or to be . . . advantageous to the person entitled to the reversion or the inheritance" must have been plain "to everybody acquainted with the facts." 90 N.C. at 114.

[2] It is clear from the above authorities that an agreement between the owner of a chattel and the owner of the realty upon which the chattel is affixed, that the chattel shall remain the personal property of the owner, need not be in writing. Such an agreement may be "express or implied." *Feimster v. Johnson, supra.* The cases relied on by defendants for the proposition that such agreements must be in writing to be enforceable, *Fleishel v. Jessup*, 244 N.C. 451, 94 S.E. 2d 308 (1956) and *Horne v. Smith*, 105 N.C. 322, 11 S.E. 373 (1890), do not so hold. Both cases dealt with a situation where the owner of the realty installed certain manufacturing equipment thereon. In *Fleishel* the equipment was a planing mill, boilers, dry kilns and related equipment. In *Horne*

it was an engine, a boiler and a saw mill. In both cases the owners subsequently conveyed the real property. The question then arose whether these items were personalty or realty in the hands of the subsequent purchasers. The Court in *Horne* said, 105 N.C. at 324, 11 S.E. at 374:

> " 'It is a well settled principle of common law that everything which is annexed to the freehold becomes part of the realty. Although, when the ownership of the land and of the chattel is vested in the same person, or when the owners of both concur in a common purpose, the presumption that a chattel is made part of the land by being affixed to it may be rebutted, yet the evidence must, as it would seem, be in writing, under the statute of frauds, or else consist of facts and circumstances of a nature to render a writing unnecessary, by giving birth to an equity or an equitable estoppel.' "

In *Fleishel* the Court said, 244 N.C. at 455, 94 S.E. 2d at 311:

> "Nevertheless, if at the time of the purchase and sale the parties agree that the property or parts thereof affixed to the soil should be considered personal property, then under such circumstance the intent of the parties would prevail. However this intent could only be shown by writing."

In both *Fleishel* and *Horne* the Court was concerned with the rights arising between a vendor of real property who himself had affixed *his own* personalty thereto and the vendee of that property. The requirement of a writing was considered vis-a-vis the vendor's intent when he made the deed. Here we are concerned with the rights arising between the original owner of the personalty, who has no interest in the real property to which it was affixed, and a subsequent vendee of the owner of the realty. Dealings regarding personalty between the owner of the personalty and the owner of the realty, and knowledge thereof on the part of a subsequent purchaser of the realty, may be shown by parol.

In *Causey v. Plaid Mills, supra*, 119 N.C. 180, 25 S.E. 863, the action was for recovery of a certain "inspecting machine" and damages for its wrongful detention by defendant corporation. The defendant claimed the machine was a fixture and passed with the realty when defendant purchased it from a predecessor corporation which had dealt with the plaintiff when the machine was in-

stalled. Plaintiff claimed that he put the machine on the premises with a view to selling it to defendant's predecessor in title, if satisfactory, or, if not, plaintiff could remove it. Plaintiff claimed also that defendant had notice of his claim when defendant purchased the realty. At trial plaintiff offered parol evidence to show the understanding with which he installed the machine. The trial court excluded this evidence. On appeal, this Court held the evidence should have been admitted and awarded plaintiff a new trial because of its exclusion.

Stephens v. Carter, supra, 246 N.C. 318, 98 S.E. 2d 311 (1957), relied on by both plaintiff and defendants, was correctly distinguished by the Court of Appeals. There two gasoline storage tanks were installed underground at a filling station, one by Standard Oil Company and one by Dove, the owner of the station. The station was conveyed to Carter, then to Rabon, and then reconveyed to Carter. None of the deeds excepted the underground tanks. While Rabon owned the station he orally agreed to sell Stephens an air compressor, two gasoline pumps and the underground storage tanks. After the station was reconveyed to Carter, Stephens, who had already removed the pumps and the air compressor, sued to recover the tanks. On appeal this Court held that defendant's motion for nonsuit should have been allowed because the evidence showed the tanks to be part of the real property and not subject to transfer by oral agreement. The Court stated, 246 N.C. at 321-22, 98 S.E. 2d at 313:

> "In the instant case the small tank was affixed to the soil by the Standard Oil Company 30 years ago. No attempt was ever made by Standard to remove or to assign any right to remove. *The plaintiff does not allege this tank was installed with the intent or by agreement, either express or implied, that it ever be removed.* The owner himself installed the larger tank 18 years ago. . . . Neither Rabon who attempted to convey by parol, nor the plaintiff who attempted to buy by parol, ever occupied the land as tenant. The court attempted to extend to a former owner (Rabon) and to a stranger (the plaintiff) a right to remove a trade fixture which is reserved only to a tenant." (Emphasis supplied.)

Again, the rights asserted in *Stephens* were those arising between a subsequent owner of the realty and a purported pur-

chaser of the alleged personalty from a previous owner. The Court found significant the absence of any contention by the plaintiff that the small tank was installed under an express or implied agreement that it could be removed and the fact that Standard Oil, which installed the tank, had never asserted any right to remove it. It said, 246 N.C. at 320, 98 S.E. 2d at 312:

> "So far as the record discloses, neither the Standard Oil Company nor Mr. Dove has ever made any claim to either tank. Both have remained content to let the tanks pass by deed and go with the land."

[3] The questions, then, under the foregoing principles, are whether plaintiff has offered evidence sufficient to show (1) an understanding, express or implied, between it and the owner of the realty at the time of the installation that the equipment, even if affixed to the realty, was to remain the personal property of plaintiff and (2) defendant had knowledge of such an understanding at the time he purchased the real property. We think the evidence was sufficient.

Plaintiff's evidence tends to show that prior to March, 1969, P&N Oil Company claimed ownership of two 1000-gallon fuel storage tanks, two gasoline pumps and an air compressor on the premises of the grocery store and service station then owned and operated by Junius Marley. On 1 March 1969 P&N Oil Company merged with L. and M. Oil Company to form plaintiff Lee-Moore Oil Company, which retained assets of each predecessor company including the equipment at Marley's Store. Shortly thereafter plaintiff removed the gasoline pumps and the air compressor and installed a new 3000-gallon storage tank, two new pumps, and a new air compressor.[5] Truby Proctor, Jr., presently Secretary-Treasurer of plaintiff and an employee since about 1954, testified concerning the circumstances surrounding the installation of this new equipment, as summarized in the record:

> "When Mr. Proctor saw Mr. Marley in late January or early February of 1969, Mr. Marley was about to change

5. The record is not clear whether one of the old 1000-gallon storage tanks was removed and replaced by the new 3000-gallon tank. Apparently the old tank was removed since plaintiff's action is for damages arising from the alleged conversion of only two storage tanks.

gasoline companies or suppliers because Lee-Moore was letting him run out and Mr. Proctor went up to see him late one afternoon.

"Mr. Proctor had a conversation with Mr. Marley and as a result of his conversation with Mr. Marley, Lee-Moore Oil Company bought a 3000 gallon tank and had it delivered to Marley's property. Lee-Moore Oil Company bought a 3000 gallon tank and had it delivered to Marley's property and bought two new pumps to replace the two Lee-Moore Oil Company had there. Lee-Moore Oil Company put in the 3000 gallon tank to replace one of the 1000 gallon tanks which Lee-Moore Oil Company owned there. Mr. Proctor talked to Mr. Marley about a five year contract. Two new pumps and a new air compressor were placed on the premises at Marley's and Lee-Moore picked up the two old pumps and the old air compressor which Lee-Moore owned and the tanks were in the ground.

"Lee-Moore Oil Company continued to supply gasoline to Mr. Marley at Lee-Moore Oil Company's dealer tank wagon price. There is an established dealer tank wagon price for gasoline that Lee-Moore Oil Company sells. Lee-Moore has three different deals for supplying gasoline. One is when Lee-Moore owns the equipment and the operator owns the land and building. Lee-Moore bills all that gasoline at dealer tank wagon price. Lee-Moore has another deal where the operator owns the equipment, the land and building. Lee-Moore bills that gasoline at dealer tank wagon less the discount anywhere from one to two cents a gallon off the dealer tank wagon price. Lee-Moore has a third deal where Lee-Moore owns the property and also the equipment and has gasoline in the tanks and pays the dealer a commission.

"Mr. Marley was on a dealer tank wagon price, no discount. This price is offered to accounts where Lee-Moore owns the gasoline equipment. Lee-Moore furnishes the gasoline equipment, installs it and maintains it. Lee-Moore sells gasoline to those accounts at dealer tank wagon. That would be an account where the operator owns buildings and land."

Plaintiff's evidence further tends to show that none of the equipment in question was ever sold to Marley and that plaintiff continued to claim ownership of it, as was its custom when "pumps, tanks and other equipment are supplied to the independent service station operators."

According to the testimony of Henry Kimbrell, defendants' grantor, he was the half-brother of Junius Marley, who died 29 December 1972. Title to the station then passed to Kimbrell. Kimbrell operated the station for about two and one-half years. During this time plaintiff regularly delivered gasoline to the station and had possession of keys which operated locks on the pumps. Kimbrell did not have a key to the pumps and never claimed ownership of the gasoline dispensing equipment.

On 15 May 1975 Kimbrell and defendant Terrance Cleary executed a written contract whereby Kimbrell agreed to sell the service station property, reserving only the right to take water from a well on the premises. Thereafter Kimbrell conveyed the property to both defendants by warranty deed dated 20 May 1975. Sometime before these transactions, however, Kimbrell informed defendant Terrance Cleary orally that the gasoline dispensing equipment belonged to Lee-Moore Oil Company.

In May or June of 1975 plaintiff's operations manager Paul White and defendant Terrance Cleary were unable to reach agreement on the price of gasoline. Accordingly, "Cleary said if Lee-Moore Oil Company could not sell him gasoline that he could make money out of, that Lee-Moore Oil Company would just have to take its equipment out, to which Mr. White agreed." Ben Wimberly, an employee of plaintiff, then went to the service station and informed defendant he was there to pick up the equipment, but defendant refused to let him do so. About this time plaintiff and defendant also discussed a sale of the equipment, but it does not appear that any agreement was reached.

Allowing plaintiff every reasonable inference that may be drawn from this evidence, *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), we hold it sufficient to show an agreement between plaintiff and Junius Marley that the tanks, pumps and air compressor were to remain plaintiff's personal property notwithstanding affixation to the realty. It also appears that defendants knew of this understanding at the time they purchased the

store from Kimbrell. The trial court therefore erred in allowing defendants' motion for directed verdict. The decision of the Court of Appeals reversing the judgment of the trial court is accordingly affirmed, and the case remanded for trial on all issues.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES HUDSON

No. 18

(Filed 14 July 1978)

1. **Criminal Law § 21.1— preliminary hearing—purpose**

Discovery is not the purpose of a probable cause hearing, though such hearing may provide defendant an opportunity to discover the strengths and weaknesses of the State's case; rather, the function of a probable cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that defendant committed it. G.S. 15A-611(b).

2. **Criminal Law § 21.1— no preliminary hearing—no grounds for dismissal**

The trial judge correctly denied defendant's motion to dismiss made on the ground that he was denied a preliminary hearing, since probable cause that a crime was committed and that defendant committed it was twice established, once by the magistrate issuing the arrest warrants, and again by the grand jury which returned indictments against defendant; and defendant failed to carry the burden of showing a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing. G.S. 15A-1443.

3. **Constitutional Law § 50— speedy trial—relevant factors**

Factors to be considered in deciding whether a defendant has been denied his right to a speedy trial are the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to defendant resulting from the delay.

4. **Constitutional Law § 51— five months between arrest and trial—no denial of speedy trial**

Defendant was not prejudiced by a five month delay between his arrest and trial, since such delay was not so inordinately long as to give rise to a presumption that the State was guilty of bad faith and deliberate efforts to hamper defendant's defense; defendant failed to file a petition for speedy trial until eleven weeks after he could have done so; defendant presented no evidence that the delay of his trial caused him to lose possible witnesses or resulted in the loss of material information; and there was no evidence to show that the delay was due to the neglect or wilfulness of the prosecution or resulted from arbitrary or oppressive action on the part of the prosecution.

5. **Criminal Law § 66— in-court identification excluded—testimony as to skin color admissible**

Where the trial court conducted a voir dire hearing and excluded in-court identification testimony offered through a particular witness, it was not error for the court subsequently to permit the witness to testify as to the color of the skin of the man the witness saw fleeing from the crime scene.

6. **Criminal Law § 99.6— trial court's questioning of witnesses—no expression of opinion**

The trial court did not express an opinion in violation of G.S. 1-180 by asking the State's witness a number of questions since the questions either requested the witness to repeat a portion of his testimony or sought affirmation by the witness of the court's understanding of the witness's answer, and the trial judge could not hear the witness's answers and asked the questions in order that the court and jury might better understand the witness's testimony.

7. **Criminal Law § 102.6— district attorney's jury argument—no impropriety**

Comments by the district attorney in his jury argument with respect to the character of defendant's witnesses and defendant and with respect to ownership of a gun not introduced into evidence were based upon the evidence presented and were within the recognized bounds of propriety.

APPEAL by defendant from *Snepp, J.*, 15 August 1977 Criminal Session of IREDELL Superior Court.

Defendant was tried upon indictments, proper in form, charging him with armed robbery and first degree murder. Upon arraignment, defendant entered a plea of not guilty to each charge.

The State's evidence tends to show that at about 6:00 p.m. on 29 June 1972, Bob Cavin arrived at Lineberger's Service Station and Grocery Store located west of Mooresville, North Carolina. He observed a black man running out of the store. The man was wearing a plaid shirt, dungarees and a hat and was carrying a wallet in his hand. The man ran to a light blue Ford pickup truck, parked nearby, which was occupied by two other black men. The truck left the area at a high rate of speed. Mr. Cavin then went into the store where he found Lathan Lineberger, who was bleeding from a neck wound.

The State also offered evidence tending to show that a large amount of money was missing from the store and that Lathan Lineberger died as a result of a gunshot wound to the neck.

The State's primary witness was James Garris, a confessed accomplice in the crimes for which defendant was tried. Garris

testified that he, Earl Mackie, David Linder and defendant had all participated in the robbery. According to Garris, Linder had remained at another location while the other three men proceeded to the store. Mackie was armed with a .12 gauge shotgun while Garris and defendant were armed with pistols. After Mackie and defendant entered the store, Garris, who had remained in the pickup truck, heard Mr. Lineberger "begging to give up" and thereafter heard one shot. Mackie ran out of the store, carrying a .38 caliber pistol which he did not have when he first went inside. Garris further testified that as defendant ran out of the store a light colored car pulled up behind the truck. He stated that his share of the money taken was $60.00.

Upon cross-examination, Garris admitted that in return for his testimony he had been promised immunity from prosecution for his involvement in this and other crimes. It was stipulated that the witness had implicated two individuals in two other related crimes who were either dead or in prison at the time he said they joined him in the perpetration of those crimes.

David Linder, one of the men implicated by Garris as involved in the crimes in instant case, testified for defendant. Linder admitted knowing Mackie and Garris but denied having ever seen defendant before or being involved in the murder of Lathan Lineberger. Defendant testified on his own behalf. He denied knowing both Mackie and Linder and denied any involvement in the crimes for which he was being tried. Defendant also introduced the testimony of Mason White and Robert Williamson, both of whom had met Garris in the Iredell County jail. According to White, Garris had told him that the police wanted him (Garris) to "cop out" to a murder and robbery which he knew nothing about and further Garris wanted to know where Linberger's Store was. Williamson also testified that Garris had asked him about the location of the Linberger Store and that Garris had denied any knowledge of the robbery and murder.

In rebuttal, Garris testified that he had never talked with White and Williamson.

The jury returned verdicts of guilty of armed robbery and guilty of first degree murder. Defendant was sentenced to life imprisonment upon verdict of first degree murder, and the trial

court arrested judgment upon the verdict for armed robbery, the State having proceeded under the felony murder rule.

Other facts necessary to decision are set forth in the opinion.

Rufus L. Edmisten, Attorney General, by Norma S. Harrell, Associate Attorney, for the State.

C. David Benbow, for defendant appellant.

BRANCH, Justice.

Defendant assigns as error the failure of the trial court to allow his motion to dismiss on the ground that he had been denied a probable cause hearing.

After defendant's arrest on 4 March 1977, a probable cause hearing was scheduled to be held on 24 March 1977. The State was granted a one week continuance over defendant's objection, and on 31 March 1977, the prosecution informed defendant that the case would be bound over to superior court and there would be no probable cause hearing. On 16 May 1977, the grand jury returned true bills of indictment upon which defendant was tried. Defendant contends that the State deliberately prevented him from having a probable cause hearing thereby depriving him of a valuable tool of discovery.

[1] A probable cause hearing may afford the opportunity for a defendant to discover the strengths and weaknesses of the State's case. However, discovery is not the purpose for such a hearing. The function of a probable cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it. G.S. 15A-611(b). *See also, Vance v. North Carolina*, 432 F. 2d 984 (4th Cir. 1970). The establishment of probable cause ensures that a defendant will not be unjustifiably put to the trouble and expense of trial. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1965).

[2] In the case *sub judice*, probable cause that a crime was committed and that defendant committed it was twice established. Defendant was arrested upon warrants, and the magistrate issuing these warrants was required by statute to first determine the existence of probable cause. G.S. 15A-304(d). Further, defendant was tried upon indictments returned by a grand jury and that

body had the function of determining the existence of probable cause. G.S. 15A-628; *Beavers v. Henkel*, 194 U.S. 73, 48 L.Ed. 882, 24 S.Ct. 605 (1904); *U.S. v. Atlantic Commission Co.*, 45 F. Supp. 187 (E.D.N.C. 1942).

There is no constitutional requirement for a preliminary hearing, and it is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972).

We are aware of the provisions of G.S. 15A-605 which provide, in part, that the judge must schedule a preliminary hearing unless the defendant waives in writing his right to such a hearing and absent such waiver the district court judge must schedule a hearing not later than fifteen working days following the initial appearance before him. We are also aware of the provisions of G.S. 15A-1443 which apparently codifies existing case law. We quote a portion of that statute:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when 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. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

Here defendant has failed to carry the burden of showing a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing. In fact, he introduced no evidence to support this assignment of error except the record evidence as to the length of delay. We, therefore, hold that the trial judge correctly denied defendant's motion to dismiss on the ground that he was denied a preliminary hearing.

By his second assignment of error, defendant contends that his motion to dismiss should have been granted because he was denied his right to a speedy trial.

[3] Factors to be considered in deciding whether a defendant has been denied his right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976). The length of delay is not in itself determinative of the question of whether an accused has been denied a speedy trial, and all the factors above set forth must be weighed and balanced against each other in determining whether there was been a denial of a speedy trial. Undue delay which is arbitrary, oppressive or due to the prosecution's deliberate effort to hamper the defense violates the constitutional guarantee of a speedy trial. *Barker v. Wingo, supra; State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976).

[4] Here defendant was arrested on 4 March 1977 and tried at the 15 August 1977 Session of Iredell Superior Court. He filed a petition to dismiss because of denial of a speedy trial on 24 June 1977, sixteen weeks after his arrest and incarceration. The record discloses that there was only one term of criminal court in Iredell County after defendant filed his petition and before his trial at the August, 1977, term of Iredell Superior Court. Some degree of delay is of necessity inherent in every criminal trial, and the delay in instant case is not so inordinately long as to give rise to a presumption that the State was guilty of bad faith and deliberate efforts to hamper defendant's defense. Further, while this record does not disclose that defendant affirmatively waived his right to a speedy trial, his action in failing to file a petition for speedy trial until eleven weeks after he could have done so is a circumstance which may be considered in determining whether his right to a speedy trial has been denied. *Barker v. Wingo, supra.*

The most serious prejudice which can result from denial of a speedy trial is impairment of an accused's ability to prepare his defense. *Barker v. Wingo, supra.* In this connection, defendant has presented no evidence that the delay of his trial caused him to lose possible witnesses or resulted in the loss of material information. Neither has he offered evidence to show that the delay

was due to the neglect or wilfulness of the prosecution or resulted from arbitrary or oppressive action on the part of the prosecution.

We conclude that the delay in instant case, which was neither unreasonable nor prejudicial to defendant, did not result in the denial of a speedy trial.

Defendant's assignment of error that the trial court erred by refusing to allow defense counsel to examine ten photographs, later introduced as State's Exhibits 2 through 11, while they were being identified by the State's witness is without merit. The record clearly shows that before the photographs were introduced into evidence and before they were displayed to the jury, defense counsel was given adequate opportunity to examine them and to lodge any objections he might have. Under these circumstances, failure to allow defense counsel to examine the photographs while they were being identified by the witness in no way prejudiced defendant.

[5] Defendant assigns as error the trial judge's ruling which permitted the State's witness, Bob Cavin, to testify that on 29 June 1972, he saw a black man dressed in dungarees and a plaid shirt and carrying a wallet flee from Lineberger's store. The trial judge had previously conducted a *voir dire* hearing and excluded in-court identification testimony offered through the witness Cavin. The described clothing was never connected to defendant in any way. However, defendant argues that because he is a black man, this was also identification evidence which should have been excluded. We do not agree.

It is well established that a witness may testify to facts which are within his own personal knowledge, and particularly so with regard to what the witness may have actually seen. *See*, 81 Am. Jur. 2d, *Witnesses*, Sections 75, 76 (1976); 1 Stansbury's North Carolina Evidence, Section 122 (Brandis Rev. 1973).

Obviously, it is possible for a witness to observe the color of a person's skin without being able to make a positive in-court identification of that person. Here the trial judge conducted a *voir dire* hearing and heard the testimony as to the witness's opportunity and ability to observe the fleeing man. Without reciting that testimony, we think it sufficient to say that there was ample

evidence to support the trial judge's ruling excluding the in-court identification testimony and his later ruling which permitted the witness to testify as to the color of the skin of the fleeing man. There was no error in the admission of this testimony.

[6] Defendant next contends that the trial judge expressed an opinion in violation of G.S. 1-180 by asking the State's witness, James Garris, a series of questions. The following exchanges are illustrative of the questions of which defendant complains:

Q. Who was with you the third time you came to Lineberger's Store?

A. The third time Mackie, Linder and Hudson.

Q. Mackie, Linder and Hudson?

A. Yes, sir.

COURT: Mr. who?

A. Hudson.

* * *

Q. What happened?

A. I can't describe exactly what happened; all I know, I could hear a noise like fighting, I could hear—during the fight—

COURT: The jury can't hear you.

* * *

Q. Can you tell us whether or not you could see through the window at that point?

A. I could see through it, but couldn't see clearly. I could see movement in the store.

COURT: See what?

A. See movement in the store. I could see movement, people moving around.

Defendant argues that these and other questions tended to unduly emphasize the witness's testimony and were also prejudicial by virtue of their content and frequency.

It is well settled that a trial judge may not express an opinion as to the guilt or innocence of a criminal defendant, the

credibility of a witness, or any other matter which lies in the province of the jury. G.S. 1-180; *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378 (1946). An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, and this is so even when such expression of opinion is inadvertent. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410 (1971). However, it is equally well settled that the trial judge controls the course of the trial and may direct questions to a witness which are designed to clarify or promote a better understanding of his testimony. *State v. Freeman, supra; State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969).

Careful examination of the questions here challenged discloses that each of them either requested the witness to repeat a portion of his testimony or sought affirmation by the witness of the court's understanding of the witness's answer. We conclude that the trial judge could not hear the witness's answers and asked the questions in order that the court and jury might better understand the witness's testimony.

We find nothing in any of the questions excepted to which would indicate that a juror could have reasonably inferred from any one of the questions, or from all them, that the trial judge expressed an opinion as to the credibility of the witness or as to the guilt or innocence of defendant. This assignment of error is overruled.

[7] By his remaining five assignments of error, defendant contends that the district attorney's closing argument was so improper, inflammatory and prejudicial that it denied defendant a fair and impartial trial. Examples of some of the portions of the district attorney's argument to which defendant excepted are as follows:

> As [defense counsel] says, if you are going to try the devil, you have got to go to hell to get your witnesses. I'm not going to tell you Garris is any Sunday School teacher—he has been into plenty. That doesn't make any difference whether or not you believe what he has had to say about what happened June 29, 1972, down at Lineberger's Store in Mooresville.

* * *

I stand here and argue to you and [defense counsel] stands here for that man who is young; I say to you who is wicked, and who participated in the armed robbery and killing of a middle aged man. . . . James Hudson, the defendant seated over there with a shirt and tie on, look at him—he is mean—he is mean because of June 29, 1972—he participated in a killing and has the audacity, even though he has the right, to come in and say "No I didn't—prove it on me." . . .

* * *

You heard Garris say he got his pistol from Mackie as part of the proceeds, this very pistol. Now [defense counsel] said, "We don't know whose pistol"—let me tell you, law is common sense. . . . Now, if Mackie went into the station carrying a shotgun, that was all he had, and came out carrying a gun, I want to ask you whose gun this is. The State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but [defense counsel] didn't catch that either. . . . Now, the State said that this is Lathan Lineberger's gun. It was taken by Mackie, brought out of the store, Mackie gave it to Garris, Garris sold it to Lewis, Lewis, in jail, gave it to his wife, Cook got it from his wife. If I had to prove that about his wife, I didn't have her either, but [defense counsel] helped me prove it.

Defendant made no objections to the argument of the district attorney prior to the coming in of the verdicts.

Ordinarily, objections to argument of opposing counsel must be made at trial in order to give the trial judge an opportunity to stop the improper argument and to instruct the jury to disregard the prejudicial material. Nevertheless, we recognize that in capital cases, we may review the prosecution's argument even when timely objection to the argument is not made at trial. Even so, the impropriety of the argument must be flagrant in order for us to hold that a trial judge abused his discretion by not correcting, *ex mero motu*, an argument which defense counsel did not deem to be prejudicial. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *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).

Our careful review of the district attorney's argument in this case discloses that he fulfilled the obligation of his office with zeal. His argument was based upon the evidence presented and was within the recognized bounds of propriety. Further, we have heretofore considered comments similar in nature to those here specifically excepted to and found them to be without prejudicial error. *See, e.g., State v. Wortham,* 287 N.C. 541, 215 S.E. 2d 131 (1975); *State v. Stegman,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Noell, supra; State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Mullis,* 233 N.C. 542, 64 S.E. 2d 656 (1951). We find no prejudicial error in the argument of the district attorney.

We have carefully reviewed this entire record and find no error sufficient to warrant a new trial.

No error.

STATE OF NORTH CAROLINA v. HOWARD A. HEADEN

No. 51

(Filed 14 July 1978)

Criminal Law § 66.17— identification of defendant at courthouse—impermissibly suggestive—in-court identification not of independent origin

A pretrial identification of defendant by a deputy sheriff at the courthouse when both were there on unrelated business was impermissibly and unnecessarily suggestive where the deputy had previously been told defendant's name, had seen his picture and learned that he was a participant in the crime and where the deputy tentatively identified defendant and had his suspicions confirmed by another officer of the sheriff's department; such impermissibly suggestive pretrial identification procedure gave rise to a substantial likelihood of irreparable misidentification where the deputy testified that it was dark when he identified defendant at the crime scene, he paid little attention to defendant's features as his main concern was getting defendant into his patrol car, he was unable to identify a photograph of defendant and could give only a general description of the person he arrested, he was not sure of defendant's identity upon viewing him at the courthouse even though he had been shown a photograph of defendant, and the deputy did not actually identify defendant until he tentatively did so two years after the commission of the crime charged.

APPEAL by defendant pursuant to G.S. 7A-30(1) from *Godwin, J.*, at the 14 March 1977 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried and convicted of felonious breaking and entering, felonious larceny, and the misdemeanor of forcibly breaking and entering into coin-operated machines. He was sentenced to ten years in prison on the consolidated charges of breaking and entering and larceny and two years for breaking and entering coin-operated machines, these sentences to run consecutively.

Defendant appealed to the Court of Appeals and that court found no error in the trial. He appealed to this Court pursuant to G.S. 7A-30(1).

The evidence for the State tends to show that on the early morning of 27 January 1974 two white males broke into the Foosball Arcade in Summerhill Plaza shopping center, Cumberland County, and pried open several coin-operated concession machines in an attempt to take the coins contained therein. Deputy Sheriff E. E. Wiggs was on patrol that night and arrived on the scene at approximately 3:25 a.m. Noticing that the rear door of the Arcade was ajar, he entered the dimly lit establishment and apprehended the two men. Wiggs handcuffed one of the men, grabbed the other by the belt, and had the men walk out the back door in front of him. On arriving at the patrol car the deputy reached to unlock the car door, at which time the handcuffed male bolted and ran. Wiggs turned to run after him, and as he did the other individual likewise broke from him and escaped. Efforts made to recapture the two men failed. At trial Deputy Wiggs identified the defendant as one of the men he had apprehended at the Arcade on the early morning of 27 January 1974.

Arlen George testified that he was one of the men who broke into and attempted to rob the Foosball Arcade on 27 January 1974. He testified that the defendant had accompanied him, and that they both were captured by and escaped from Deputy Wiggs. George admitted on cross-examination that he was in prison for several breaking and entering convictions, and that he had been promised immunity from prosecution for the present offense in exchange for his testimony against the defendant.

The defendant offered no evidence. Other testimony relevant to the decision will be set forth in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General James E. Scarbrough for the State.

Nance, Collier, Singleton, Kirkman & Herndon by James D. Little and James R. Nance, Jr. for defendant appellant.

MOORE, Justice.

Defendant's sole assignment of error is to the admission, over his objection, of the in-court identification testimony of the witness Deputy Sheriff Wiggs. Defendant argues that this testimony was tainted by pretrial identification procedures which were so impermissibly suggestive and unnecessary as to be conducive to a mistaken identification, and that the admission of evidence regarding this pretrial identification, as well as the in-court identification itself, was a violation of due process.

It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined that the in-court identification is of an independent origin. *See State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974), and cases cited therein. Defendant's assignment of error presents, therefore, two questions. The first concerns the legality of the pretrial identification procedures, *viz.*, whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered negatively, our inquiry is at an end. *Cf. State v. Long,* 293 N.C. 286, 237 S.E. 2d 728 (1977). If answered affirmatively, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite,* 432 U.S. 98, 53 L.Ed. 2d 140, 97 S.Ct. 2243 (1977); *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Henderson, surpa.*

As a general rule evidence unconstitutionally obtained is excluded in both state and federal courts as essential to due process—not as a rule of evidence but as a matter of constitutional law. *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). However, as ap-

plied to unnecessarily suggestive identification procedures, this principle does not require a strict exclusionary rule. *See Manson v. Brathwaite, supra.* Instead, as the United States Supreme Court said in *Neil v. Biggers, supra*, the test for the admission or exclusion of such evidence is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. . . ." 409 U.S. at 199, 34 L.Ed. 2d at 411. As stated in *Manson v. Brathwaite, supra*, "[T]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. . . ." 53 L.Ed. 2d at 149.

The first question then is whether the pretrial identification procedure was unnecessarily or impermissibly suggestive. The facts of the pretrial identification are as follows: The alleged crimes were committed on 27 January 1974. Twenty months later, on 23 September 1975, Sgt. Jerome Levee, of the Cumberland County Sheriff's Department, showed Deputy Wiggs some fourteen photographs and asked him to look through them and see if he could identify any of them as one or both of the men he apprehended at the Arcade on 27 January 1974. From these photographs Wiggs identified State's witness Arlen George. He could not, however, identify defendant's photograph at that time. After Wiggs had failed to identify defendant's photograph, Sgt. Levee mentioned defendant's name and told Wiggs that the defendant was a participant. The photograph of the defendant shown to Wiggs had the name "Howard Headen" inscribed on the back, and at some time during the identification procedure Deputy Wiggs, for an unexplained reason, put his own initials and the date on the back of the photograph just under defendant's name.

Several months later, in the spring of 1976, Deputy Wiggs was at the courthouse on unrelated business, and at that time thought he saw the man he apprehended at the Arcade. At trial Wiggs testified:

> "When I saw him in the courthouse I heard his name but I was not sure that was him. I told Sgt. Levee this. I believe Sgt. Levee was in the courthouse the same day. I don't believe he was right here in the courthouse at that time.

Later on I saw him (Headen) again and Sgt. Levee was here and said, 'Yes, that is Alan Headen.' "

Wiggs further testified that he had some doubt as to the identity of the defendant, but that after he had talked with Sgt. Levee he was sure that the defendant was the man involved in the crimes.

Though this Court has held that an unarranged pretrial courtroom identification is not in itself, nothing else showing, an impermissibly suggestive identification procedure, *see State v. Long, supra*, the facts of this particular pretrial identification do indicate unnecessary and impermissible suggestiveness. It is not the fact that Wiggs identified the defendant in the courthouse while both were there on unrelated business that is impermissible or unnecessary; rather, it is what transpired between Officers Wiggs and Levee prior to and after Wiggs first saw the defendant in the courthouse that is both unnecessarily and impermissibly suggestive. The fact that Deputy Wiggs knew defendant's name, had seen his picture and learned that he was a participant, plus the fact that, on tentatively identifying defendant, Sgt. Levee confirmed Wiggs' suspicions regarding defendant, are specifics which, when combined, indicate conditions of impermissible suggestiveness. We believe and therefore hold that the totality of the circumstances leading up to the pretrial identification points toward procedures which are impermissibly and unnecessarily suggestive.

Given that the procedure was impermissibly suggestive, the second question to be dealt with is whether the suggestive procedure itself gives rise to a substantial likelihood of irreparable misidentification. *Neil v. Biggers, supra; Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). The central question then is whether, under the totality of the circumstances, the identification of defendant at trial was reliable and of independent origin even though the earlier confrontation procedure was suggestive. *See Manson v. Brathwaite, supra; Neil v. Biggers, supra; State v. Henderson, supra.* As stated by Mr. Justice Blackmun for the United States Supreme Court:

"[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set

out in *Biggers.* 409 U.S., at 199-200, 34 L.Ed. 2d 401, 93 S.Ct. 375. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." 53 L.Ed. 2d at 154. *See also State v. Henderson, supra.*

We compare then the facts in this case with the factors to be considered as set out in *Neil v. Biggers, supra:*

1. The opportunity to view: Wiggs testified that it was in the dark of night; there was some light in the place but he could not distinguish defendant's features. He could tell that he was a white male, but that was all he could tell. If he observed his features it was just momentarily.

2. The degree of attention: Wiggs testified: "I was not particularly looking for distinguishing features on either one of them. My only concern was to get them in the car and I was less concerned with their identification at that particular point in time. I was not particularly trying to pick out any identifying features on either individual at that particular point in time but was mainly concerned with keeping them under observation. I was not really paying too much attention to what their faces looked like or their clothing."

3. The accuracy of the description: Wiggs was unable to identify a photograph of defendant and could only give a general description as follows:

> "The individual who I first saw in the foosball place and put the handcuffs on was about 5'9" tall and was a white man. It was dark so I don't know what kind of clothing he had on but I do know that he had on cotton-type gloves. He was slender or medium build and I would say that he was possibly in his late teens, I was not able to observe whether he was clean shaven or had a moustache or beard. He had long hair kind of down below his ears. The hair was a dark color but I could not see whether it was black or dark brown."

4. The witness's level of certainty: Even after having seen the photograph which was identified by Sgt. Levee as being that of the suspect, when Wiggs first saw defendant in the courthouse he was not sure of defendant's identity until it was confirmed by Sgt. Levee.

5. The time between the crime and the confrontation: The crimes occurred on 27 January 1974. Wiggs was shown the photograph, which he failed to identify, on 23 September 1975, and he did not actually identify defendant until he did so tentatively in the spring of 1976 when defendant was pointed out by Sgt. Levee.

Weighing the facts in this case with the factors to be considered as delineated in *Neil v. Biggers, supra*, we are constrained to hold that Wiggs' testimony fails to meet the test of admissibility. There is some question here as to whether Wiggs' pretrial identification of the defendant was based on what he saw at the time of the robbery, or on events during and subsequent to the photographic lineup. We conclude, therefore, that under all the circumstances, the impermissibly suggestive pretrial identification procedures gave rise to a substantial likelihood of irreparable misidentification, and that defendant's objection to all identification testimony by Deputy Wiggs should have been sustained.

Under the standard for assessment of constitutional error set forth in *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967), we hold that the error was prejudicial, and that the defendant is entitled to a new trial. It is so ordered.

New trial.

NORMAN W. COCKRELL, ADMINISTRATOR OF THE ESTATE OF MARY LYNN COCKRELL v. CROMARTIE TRANSPORT COMPANY AND JOHNNY HAROLD CAVANAUGH

No. 53

(Filed 14 July 1978)

1. Automobiles § 89.1— last clear chance—failure to instruct erroneous

In a wrongful death action where deceased's automobile was struck by a truck driven by the individual defendant when deceased's car was stalled just over the center line in defendant's lane of travel, the trial court erred in denying plaintiff's request for an instruction on the doctrine of last clear chance since the evidence tended to show that the accident occurred at midday when the highway was free of defects and neither lane was burdened by other traffic; the southbound traffic lane in the vicinity of the collision was approximately 12 feet wide as was the west shoulder of the road; the westernmost gouge mark in the pavement, indicating the site of the left front portion of deceased's car at impact, was 6 feet 8 inches from the center line of the highway; the truck was 8 feet wide; though the shoulder of the road sloped off into a culvert running under the south driveway to a school, there were no obstructions on the shoulder south of the driveway which would have prevented a vehicle from parking there; defendant truck driver told the investigating highway patrolman that "he may have been running a little over the speed limit" at the time of the collision; and defendant had at least 395 feet from the north driveway of the school to deceased's location at the south driveway to observe that deceased's car was motionless and to take action to avoid the collision.

2. Automobiles § 89— last clear chance—instructions insufficient

Defendants' contention that even if the omission of a last clear chance instruction by name was error it was harmless because the instruction given amounted, in substance and effect, to a charge on that issue is without merit, since the court at no point informed the jury that, even if plaintiff had been contributorily negligent, he was nonetheless entitled to recover if defendant, having the ability to avoid the injury, had failed to exercise reasonable care to do so.

3. Automobiles § 89— death no result of defendant's negligence—failure to submit last clear chance—error not cured

Where the jury determined that (1) plaintiff's intestate was not killed as a result of the negligence of defendant truck driver but (2) that she, by her own negligence, contributed to her death, the erroneous refusal to instruct the jury that, under the doctrine of last clear chance, the truck driver's negligent acts, if any, could have been the efficient proximate cause of the deceased's death despite her having been contributorily negligent may have affected the jury's determination of the first issue; consequently, the jury's answer to that issue did not cure the trial court's error in omitting a charge on last clear chance.

4. Automobiles § 46— opinion evidence of speed—admissibility

In a wrongful death action arising from a collision between defendant's truck and plaintiff's intestate's stalled vehicle, the trial court erred in excluding a witness's opinion as to the speed of defendant's truck immediately prior to the collision since the witness had ample opportunity to observe the truck and to form an opinion as to its speed prior to the collision.

PLAINTIFF, the duly qualified administrator of the estate of his daughter, Mary Lynn Cockrell, commenced this civil action to recover damages for the wrongful death of his intestate. Trial was held before *Herring, J.*, at the 16 February 1976 Session, CUMBERLAND Superior Court, resulting in a verdict and judgment denying plaintiff's claim and awarding damages to defendants on their counterclaims. This judgment was affirmed by the Court of Appeals, 32 N.C. App. 172, 231 S.E. 2d 176 (1977). (*Hedrick, J.*, concurred in by *Parker* and *Clark, JJ.*). We allowed discretionary review 5 April 1977. This case was docketed and argued during Fall Term 1977 as No. 7.

Plaintiff's evidence tended to show the following: On 25 January 1973 at 12:40 p.m., the deceased, accompanied by Sally Brown was driving a 1961 Volkswagen headed north on U.S. Highway 421 in Sampson County. The two girls, then 17 years old, were students at Cape Fear High School in Cumberland County and were on their way to Sampson Technical Institute to visit the deceased's boyfriend. As the deceased attempted to execute a left turn into a driveway at the Institute, her car's engine stalled and the left front end drifted across the yellow line into the southbound lane, where it was struck by a truck owned by defendant Cromartie Transport Company and operated by defendant Johnny Harold Cavanaugh.

In the vicinity of the Institute, Highway 421 was a straight, two-lane paved road, about 24 feet in width, running north and south with a small knoll approximately 1300 feet north of the accident site and a gentle incline running toward the knoll. The Institute, situated on the west side of the road, had a marked pedestrian crosswalk running across the highway directly in front of it. Two driveways entered the grounds of the Institute from the southbound lane of the highway, one being 123 feet south of the crosswalk and the other 245 feet north of the crosswalk. A "Pedestrian Crossing" caution sign facing southbound traffic was

located 627 feet north of the crosswalk and 318 feet north of that sign was a "School" caution sign, facing the same direction, recommending 35 miles per hour as a safe speed. On the date of the accident, the road surface was dry, free of defects and clear of other vehicular traffic. Under these conditions, a southbound traveler on the knoll would have had unobstructed visibility for about 1300 to 1400 feet down the highway.

As the deceased approached the Institute, she slowed her vehicle almost to a complete stop before beginning her left turn into the south driveway. At this time her passenger had a clear view of the highway north of them all the way to the top of the rise and saw nothing in front of them in either lane. The Volkswagen stalled just as the deceased commenced her turn and the left front end crossed the yellow line into the southbound lane. While the deceased attempted to restart the car, her passenger turned, glanced behind them and saw no traffic. She turned, spoke to the deceased and then looked up to see a large truck approaching them at the north driveway of the Institute. Shortly thereafter, the truck collided with the front of the Volkswagen, at which point the left front tire of the car exploded, its hood flew up, its fuel tank lid flew off and gasoline began to flow everywhere. The car slid on its tire rim backward into the northbound lane, exploded into flames and rolled into a ditch on the shoulder of the northbound lane. The deceased remained inside the Volkswagen after the collision, but her passenger, who survived, was thrown from the car during the accident.

Another plaintiff's witness testified that he saw the truck for the first time near the "School" caution sign, at which time the Volkswagen was sitting still, somewhat off line as if it were turning into the driveway. When the truck reached the north driveway, this witness heard the Volkswagen's engine "turning over" as the deceased tried to start it. This witness further indicated that the truck did not swerve or deviate from a direct line of travel from the time he first observed it until it struck the Volkswagen.

A highway patrolman who investigated the accident testified that the operator of the truck at one point admitted that he may have been running a little over the speed limit prior to the wreck. The posted speed limit for trucks in the vicinity of the Institute was 50 miles per hour.

The evidence for defendants tended to show the following: The defendant operator had driven tractor tankers for defendant Cromartie Transport Company for 15 years and was so employed on the date of the accident. He had delivered a load of petroleum products in Raleigh that morning and was returning, empty, to Wilmington via U.S. 421, a route he traveled frequently.

As the truck approached the north driveway of the Institute, the truck driver saw the Volkswagen slowing down but he did not notice whether the car was going to turn. He did recall, however, that the Volkswagen's turn signal was not on. Just as the truck reached the north driveway the car began to turn, but it was not until the truck reached the crosswalk that he knew the Volkswagen had stalled. The truck driver then locked the brakes on the trailer, but the truck collided with the car.

On cross-examination, the truck driver stated that he did not swerve his truck to the right before striking the Volkswagen because he "didn't have time." The driver also testified that he did not know whether there had been enough room between the front of the Volkswagen and any obstacles to his right to have allowed him to pass by the car on that side.

The operator of the tanker further stated that he had accumulated 14 assorted speeding convictions in the 10 years immediately preceding the trial, as well as one conviction for driving while his license was suspended and another for following too closely.

A witness for defendants testified that he had been traveling north on U.S. 421 shortly before the accident and had observed a red Volkswagen "possibly 200 yards" ahead of him in the northbound lane. He had seen the brake lights of the Volkswagen come on about 100 feet before it reached the south drive of the Institute, but he had not seen a turn signal. This witness also saw the truck, which at that time was "about seventy-five or eighty feet away from the point of impact." He saw a puff of smoke and observed the two vehicles come to rest, then proceeded to the scene to render aid.

At the close of all the evidence, plaintiff specifically requested that the trial court instruct the jury on the doctrine of last clear chance and that an issue on last clear chance be submit-

ted to the jury. Both these requests were denied by the trial court. The jury returned the following answers to the issues submitted to it:

"1. Was Mary Lynn Cockrell killed as a result of the negligence of the Defendant, Johnny Harold Cavanaugh?

ANSWER: No.

2. Did Mary Lynn Cockrell by her own negligence contribute to her death?

ANSWER: Yes.

3. What amount of damages, if any, is Norman W. Cockrell, Administrator of the Estate of Mary Lynn Cockrell, deceased, entitled to recover by reason of the death of Mary Lynn Cockrell?

ANSWER: ____

4. Was the Defendant, Johnny Harold Cavanaugh, injured as a result of the negligence of Mary Lynn Cockrell?

ANSWER: Yes.

5. If so, what amount of damages is the Defendant, Johnny Harold Cavanaugh, entitled to recover for personal injuries sustained by him?

ANSWER: 5,000.00

6. Was the property of the Defendant, Cromartie Transport Company, damaged as a result of the negligence of Mary Lynn Cockrell?

ANSWER: Yes

7. If so, what amount of damages is the Defendant, Cromartie Transport Company, entitled to recover for property damage?

ANSWER: 10,000.00"

The trial judge entered judgment in accordance with the jury verdict and plaintiff appealed. As noted earlier, the Court of Appeals affirmed the trial court's judgment and we granted plaintiff's petition for discretionary review.

Additional facts pertinent to the decision are related in the opinion.

Downing, David, Vallery & Maxwell, by C. Douglas Maxwell, Jr., and Harold S. Downing, for plaintiff appellant.

MacRae, MacRae & Perry, by James C. MacRae for defendant appellees.

COPELAND, Justice.

The sole assignment of error properly preserved for our consideration on this appeal is the failure of the trial court to instruct the jury on the doctrine of last clear chance. In its decision, the Court of Appeals concluded that last clear chance did not apply unless both parties were found negligent and held that the jury's verdict in the instant case finding the operator of the truck not to be negligent mooted any possible error by the trial court in denying the requested instruction. We have determined that this holding was error; therefore, the decision of the Court of Appeals must be reversed.

When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. G.S. 1A-1, Rule 51; *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E. 2d 566 (1975); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). If a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. *See, Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977); *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970).

The doctrine of last clear chance, if properly raised, should be submitted to the jury when the evidence tends to show "that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and thereafter, the defendant having the means and the time to avoid the injury, negligently failed to do so." *Exum v.*

Boyles, 272 N.C. 567, 576, 158 S.E. 2d 845, 853 (1968); *accord, Vernon v. Crist, supra.*

[1] Applying these principles to the record of the case *sub judice*, we hold that the trial court erred in denying plaintiff's request for an instruction on the doctrine of last clear chance. The evidence, when viewed in the light most favorable to plaintiff, shows that the accident occurred at midday, when the highway was dry and free of defects and neither lane was burdened by other traffic. Moreover, the southbound traffic lane in the vicinity of the collision was approximately 12 feet wide, as was the west shoulder of the road; the westernmost gouge mark in the pavement, indicating the site of the left front portion of the Volkswagen at impact, was 6 feet 8 inches from the center line of the highway; and the truck was 8 feet wide. Although the shoulder of the road sloped off into a culvert running under the south driveway of the Institute, there were no obstructions on the shoulder south of the driveway which would have prevented a vehicle from parking there. In addition, the defendant truck driver told a highway patrolman investigating the accident that he "may have been running a little over the speed limit" at the time of the collision.

The defendant truck driver, in operating a motor vehicle upon the highway, was under a duty to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid a collision with other persons and vehicles using the road. *Black v. Gurley Milling Co., Inc.*, 257 N.C. 730, 127 S.E. 2d 515 (1962). The evidence in plaintiff's favor was sufficient to permit the jury to find, on proper instructions, that the deceased's Volkswagen was across the center line in the southbound lane, stalled and "sitting still", when the defendant truck driver reached the north driveway some 395 feet away; that at that time it should have been apparent to the operator of the truck that the occupants of the motionless car could not save themselves; and, at that time, that the truck driver (1) could have avoided colliding with the Volkswagen by stopping or driving off the road onto the shoulder of the highway but failed to do so, or (2) would have been able to avoid the car but deprived himself of the opportunity by his failure to maintain a lookout. Since the evidence was sufficient to invoke the principle of last clear chance, the trial court erred in

refusing, upon plaintiff's request, to include an instruction on this issue in its charge.

[2] Defendants contend that even if the omission of a last clear chance instruction by name was error, it was harmless because the instruction given amounted, in substance and effect, to a charge on that issue. The specific allegations against defendants upon which the trial court charged included (1) failure to keep a proper lookout; (2) failure to keep the truck under proper control; (3) exceeding a reasonable and prudent speed under the circumstances in violation of G.S. 20-141(a); (4) exceeding the posted speed limit; and (5) failure to reduce speed to avoid a collision. The trial court also properly instructed the jury that if they found "that the plaintiff's intestate was also negligent, contributorily negligent, . . . the plaintiff then would not be entitled to recover any sum whatever of the defendants" on the theory of defendants' negligence. Although the charge covered the specific negligent acts alleged by plaintiff, at no point did the court inform the jury that even if plaintiff had been contributorily negligent, he nonetheless was entitled to recover if defendant, having the ability to avoid the injury, had failed to exercise reasonable care to do so. These instructions, consequently, were not a complete explanation of the doctrine of last clear chance and did not cure the trial court's error in refusing the requested charge on this issue.

[3] As noted earlier, the Court of Appeals held that the jury verdicts on the issues submitted mooted the erroneous omission of the requested instruction. The pertinent issues submitted and the jury's answers were as follows:

"1. Was Mary Lynn Cockrell killed as a result of the negligence of the defendant, Johnny Harold Cavanaugh?

ANSWER: No.

2. Did Mary Lynn Cockrell by her own negligence contribute to her death?

ANSWER: Yes."

The Court of Appeals regarded "the jury's verdict finding Cavanaugh not to be negligent" as mooting this assignment of error. 32 N.C. App. at 173-174, 231 S.E. 2d at 178.

The jury's answer to one issue which determines the rights of a party may render exceptions concerning other issues moot. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967). "However, error relating to one issue may not be disregarded when it is probable that it affected the answer to another." *Nello L. Teer Company v. Dickerson, Inc.*, 257 N.C. 522, 533, 126 S.E. 2d 500, 508 (1962).

A close examination of the first issue submitted here reveals that the jury did not find that the operator of the truck was not negligent, but merely that the deceased was not "*killed as a result of the negligence of . . . Cavanaugh.*" (Emphasis added.) It is equally plausible that the jury's verdict reflects a determination that the negligence of the truck driver, if any, was not the proximate cause of the death of the deceased. The jury indeed may have found that the truck driver was negligent, but that the demise of plaintiff's intestate did not "result" from that neglect. The trial court instructed the jury that plaintiff should recover nothing of defendants should it be found that the contributory negligence of the deceased, if any, was a proximate cause of the collision. The jury therefore may have been misled to believe that a determination that the deceased's negligence was a proximate cause of the accident precluded a finding that her death resulted from the negligence, if any, of the truck driver. The fact that the jury answered the first issue "No" and the second issue "Yes", despite having been charged at three separate times to skip the second issue if the first issue was answered in the negative, evidences some degree of confusion on the jury's part in this regard. The erroneous refusal to instruct the jury that, under the doctrine of last clear chance, the truck driver's negligent acts, if any, could have been the efficient proximate cause of the deceased's death despite her having been contributorily negligent may have affected the jury's determination of the first issue; consequently, the jury's answer to that issue did not cure the trial court's error in omitting a charge on last clear chance.

The jury should have been allowed to consider the issue of defendant's negligence in light of a proper instruction on the doctrine of last clear chance. Moreover, although no assignment of error has been brought forward concerning these matters, there may be a serious question as to the sufficiency of the evidence to require the submission to the jury of the contributory negligence

issue and defendant's counterclaims. Plaintiff's evidence tends to show that the defendant truck driver need only have swerved his vehicle to the right in order to have avoided the collision entirely.

[4] Plaintiff contends in his second assignment of error that the trial court should have admitted the opinion evidence of Ricky Vann Williams as to the speed of defendant's truck immediately prior to the collision. Williams testified that he did have an opinion as to the speed of the tractor tanker but the trial court sustained defendant's objection to admission of that opinion. Because Williams' answer to the question was not preserved in the record, we have no basis for determining whether its exclusion prejudiced plaintiff. *Gower v. City of Raleigh*, 270 N.C. 149, 153 S.E. 2d 857 (1967). Nevertheless, since this question may recur at retrial, we note that the record, as it now stands, shows that Williams heard the vehicle approaching or clearing the top of the knoll, saw it at the "School" caution sign 750 feet from the point of impact, observed it again at the north driveway and then watched it from the time it passed him at the crosswalk until it struck the Volkswagen. The witness, on this record, had more than ample time to form an opinion as to the speed of the truck and, should he testify to substantially the same facts at retrial, his opinion of the truck's speed should be admitted. *Loomis v. Torrence*, 259 N.C. 381, 130 S.E. 2d 540 (1963).

For the reasons given, the decision of the Court of Appeals is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ALTON RAY CURMON

No. 77

(Filed 14 July 1978)

1. Criminal Law § 21 — right to communicate with friends — defendant not prejudiced

Defendant's contention that his case should have been dismissed because his arresting officers allegedly failed to inform him of his right to communicate with friends pursuant to G.S. 15A-501(5) is without merit, since defendant did

not specifically raise that issue in the trial court but instead alleged unspecified constitutional infringements; there was nothing in the record to show that defendant was not informed of his right to communicate with friends or that he was denied this opportunity; defendant did not show that he was actually prejudiced even if he was denied his right to communicate with friends since he was informed of his *Miranda* rights, waived those rights, and voluntarily submitted his statement to police; and defendant failed to show any evidence of a violation of his constitutional rights.

2. Criminal Law § 96— objectionable evidence—jury instructed to disregard—no mistrial required

In a prosecution for rape, burglary, armed robbery and assault with a deadly weapon where the prosecutor asked the doctor who had examined the victim to describe her condition generally, defendant was not prejudiced by the witness's unresponsive answer that the victim was "the most brutally beaten woman I have seen in my 19 years of doing Obstetrics and Gynecology," since the judge instructed the jury not to consider such testimony; the prosecutor's question was entirely proper; and there was no evidence that the question was asked in bad faith.

APPEAL by defendant from *Martin (Harry C.), J.*, at the 18 April 1977 Criminal Session of PITT Superior Court. This case was docketed and argued in this Court as No. 103 at the Fall Term 1977.

Defendant was tried and convicted upon bills of indictment, proper in form, of second degree rape, first degree burglary, armed robbery, and assault with a deadly weapon inflicting serious injury. He was sentenced to thirty years imprisonment for the conviction of second degree rape, and life imprisonment for the offense of first degree burglary. The charges of armed robbery and assault with a deadly weapon inflicting serious injury were consolidated for judgment and defendant was sentenced to a prison term of ten years. All sentences are to run consecutively.

Defendant appealed to this Court from the sentence of life imprisonment, and defendant's convictions of armed robbery, assault, and second degree rape were certified for initial appellate review by this Court pursuant to G.S. 7A-31(a).

The facts underlying this case are identical to those set forth in *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). Evidence for the State tended to show that the defendant is one of five men who broke into the home of Ms. Carolyn Lincoln in rural Pitt County on the night of 11 January 1977. Ms. Lincoln was raped

several times by each of the men, and was brutally assaulted by way of a Pepsi-Cola bottle being forced into her rectum. The defendant made the following confession upon his arrest:

> "I, Alton Ray Curmon, on January 11, 1977, while with Sylvester Joyner and Roy Ebron and Roy Lee Barnes and Roderick Joyner, assaulted and forcibly raped a white lady who was in a house off a dirt road, off Highway 43 North. I assaulted her by sticking a soft drink bottle approximately four inches into her rectum while Sylvester Joyner held her legs. I raped her by having sexual intercourse with her after hitting her, threatening to kill her, and against her will."

Since the evidence presented in this case is substantially the same as that set forth in *State v. Joyner, supra*, we will not recount further the horrible and disgusting details of the crimes, but instead will incorporate the facts as set forth in *Joyner.*

Attorney General Rufus L. Edmisten and Associate Attorney Amos Dawson for the State.

Dallas Clark, Jr. for defendant appellant.

MOORE, Justice.

[1] Under his first assignment of error defendant argues that the trial court committed prejudicial error (1) in failing to find facts, enter conclusions of law, and enter an order thereon upon defendant's motion to dismiss based on violations of defendant's rights under G.S. 15A-501, and (2) in denying defendant's motion to dismiss due to alleged violations of G.S. 15A-501. Defendant specifically argues that his case should have been dismissed because his arresting officers allegedly failed to inform him of his right to communicate with friends pursuant to G.S. 15A-501(5). That provision says:

> "Upon the arrest of a person, with or without a warrant . . . a law-enforcement officer:
>
> * * *
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so."

Prior to trial defendant submitted a written motion to dismiss for reasons (1) that his *Miranda* rights had been violated, (2) that certain physical evidence was taken from him without either his consent or a court order, and (3) "[t]hat the defendant's rights were unconstitutionally infringed upon and violated between the time of his arrest without a warrant and the time of defendant's initial appearance in Pitt County District Court." Several days prior to defendant's trial a hearing was held on this motion before Peel, J. After hearing evidence presented by both the State and defendant, Judge Peel found that various statements obtained from defendant were voluntarily made after he had been informed of and had waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and that certain physical evidence was lawfully obtained from the defendant. Judge Peel then denied defendant's motion to dismiss.

Defendant does not take issue with the specific findings and conclusions of law actually made by Judge Peel. Instead he attacks the court's order on grounds that the judge failed to find facts and enter conclusions of law concerning whether defendant was advised of his statutory right to communicate with friends upon his arrest. Defendant argues that the absence of such findings, plus the alleged failure of officers to so inform defendant of this right, now merits a reversal of his convictions.

Defendant argues that Paragraph 3 of his motion, *supra*, raised the question whether his G.S. 15A-501(5) rights were violated. A reading of Paragraph 3 does not, in fact, so indicate. Instead Paragraph 3 speaks of unspecified constitutional infringements. The trial court is under no duty to divine the meaning of such a vague assertion of violation of rights. This is especially so where defendant did not raise the issue at the hearing itself or later at trial. Defendant presented no evidence on this issue. There is nothing in the record to show that defendant was not informed of his right to communicate with friends or that he was denied this opportunity. It was defendant's duty under G.S. 15A-951(2) to state the grounds of the motion. Not having done so, the issue was not properly before the trial court.

Additionally, in view of the findings that defendant was informed of his *Miranda* rights, waived these rights, and voluntarily submitted his statement to police, we do not see how defendant could have suffered prejudice had he actually been denied his

statutory right to communicate with friends. A mere technical error will not entitle a defendant to a new trial; rather, it is necessary that the error be material and prejudicial. *See State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1967). This Court also has held that a violation of the procedures of G.S. 15-47, the predecessor to G.S. 15A-501, does not affect the validity of a subsequent trial. *See State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970); *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961). (But *cf. State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971).) Finally, G.S. 15A-954(a)(4) provides that the court must dismiss the charges against a defendant where "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." As stated in *State v. Joyner*, *supra*, "The provisions of G.S. 15A-954(a)(4) were intended to embody the holding of this Court in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971). *See* Official Commentary to G.S. 15A-954. As is indicated in the Official Commentary, since the provision contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly." In present case defendant has not only failed to show irreparable prejudice to the preparation of his case, but he has also failed to show any evidence of a violation of his constitutional rights. This assignment is therefore overruled.

[2] Under his next assignment defendant insists that the trial court erred in its failure to declare a mistrial following the testimony of Dr. G. S. Satterfield. Dr. Satterfield examined the victim soon after the crimes had been committed against her. At trial he testified in detail as to Ms. Lincoln's physical condition on the day of her examination. Thereafter the prosecutor asked the witness the following question: ". . . would you please describe her condition generally?" Counsel for defendant objected to the question and his objection was overruled. Dr. Satterfield then answered: "She was the most brutally beaten woman I have seen in my 19 years of doing Obstetrics and Gynecology." Defendant objected and moved to strike. Defendant's motion was granted. The trial judge then at length instructed the jury to disregard Dr. Satterfield's answer and not to consider it in their deliberations. Defendant thereupon moved for a mistrial. This motion was denied.

Defendant now contends that his objection to the question should have been sustained due to the prosecutor's bad faith in posing the question, and that his motion for mistrial should have been granted due to the insufficiency of the court's curative instruction in eradicating prejudice to the defendant. We find no merit in these arguments. The prosecutor's question was entirely proper and there is no evidence that it was asked merely to excite and prejudice the jury. The fact that this witness's answer to the question was unresponsive does not amount to a showing of bad faith. The question itself was proper in that it amounted to a request for a general explanation of the physical condition of the victim. Hence there was no error in the trial judge's overruling of defendant's objection to the question.

There is likewise no error in the trial court's denial of defendant's motion for mistrial. The allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court, "and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Pfeifer*, 266 N.C. 790, 147 S.E. 2d 190 (1966). No such abuse of discretion is shown in present case. The fact that the jury had already heard from Ms. Lincoln the gruesome details of the assaults upon her, which testimony was corroborated by Deputy Stocks' description of her physical condition and defendant's own confession, indicates that any prejudice done the defendant by the answer was, at most, minimal. The granting of defendant's motion to strike the answer and the proper curative instruction which ensued were sufficient to erase the prejudice, if any. For these reasons the trial court did not err in denying defendant's motion for mistrial.

Under his fourth and fifth assignments of error defendant argues that the trial court committed error in denying defendant's motions for nonsuit on the charges of armed robbery and assault with a deadly weapon inflicting serious injury. These same assignments were raised in *State v. Joyner*, *supra*, a companion case involving a co-perpetrator of the crimes. The arguments made by counsel for defendant in his brief are identical to those made by counsel in *Joyner*. The evidence against both men is substantially the same. Accordingly, on the basis of

the ruling and holdings of no error on these assignments in *State v. Joyner, supra*, these assignments are overruled.

Defendant finally presents several formal assignments; to wit, that the trial court committed error in denying defendant's motion to set the verdict aside, in denying defendant's motion in arrest of judgment, and in denying defendant's motion to dismiss. Defendant's motion to dismiss has been found to be without merit in the Court's discussion of this defendant's first assignment of error. A motion to set aside the verdict is addressed to the discretion of the trial court, and a denial of the motion is not reviewable in absence of an abuse of discretion. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). Defendant's motion to set aside the verdicts of guilty concern the assault and armed robbery charges. Since we have found no error in the court's denial of his motions for nonsuit on these two charges, we accordingly hold that defendant's motion to set aside these verdicts was properly denied. Finally, a motion in arrest of judgment is based on the allegation of a fatal defect appearing on the face of the record. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). When error does not appear on the face of the record the judgment will be affirmed. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). We have reviewed the record, and find no such fatal defects. Defendant's motion in arrest of judgment was therefore properly denied.

Our examination of the entire record discloses that defendant has had a fair trial, free from prejudicial error.

No error.

LENORA HUSKETH, PLAINTIFF v. CONVENIENT SYSTEMS, INC., D/B/A MAYBERRY ICE CREAM SHOPPE, DEFENDANT AND THIRD PARTY PLAINTIFF v. FOODCRAFT EQUIPMENT COMPANY, INC., THIRD PARTY DEFENDANT AND FOURTH PARTY PLAINTIFF v. L & B PRODUCTS CORPORATION, FOURTH PARTY DEFENDANT

No. 88

(Filed 14 July 1978)

1. Negligence §§ 6.1, 57.2— fall from barstool—res ipsa loquitur applicable

In an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's restaurant, *res ipsa loquitur*

was applicable to the facts of the case and the trial court erred in granting a directed verdict for defendant where plaintiff's evidence showed that, as she seated herself, the rotating top of the seat "went backwards" and flipped her onto the floor, whereupon she saw the top of the stool hanging from the pedestal; seating provided for use by customers of business establishments does not ordinarily collapse in the absence of negligent construction, maintenance or inspection; and plaintiff offered evidence that defects in other stools had been discovered by cursory inspections during the weekly cleanup operations.

2. **Negligence § 56— agent's post rem statement—admissibility**

In an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's restaurant where plaintiff testified that, on the day after the accident, the store manager told her that there had been problems with the stools which had been reported to the company but no corrective action had been taken, the trial court erred in limiting consideration of this evidence to corroboration or impeachment of the earlier testimony of the store manager, since evidence of *post rem* statements of an agent are competent against his principal to show knowledge, when relevant, of defective conditions.

THIS matter came before us on appeal from the decision of the Court of Appeals (35 N.C. App. 207, 241 S.E. 2d 100 (1978), *Hedrick, J., Britt, J.*, concurring; *Webb, J.*, dissenting), affirming the judgment of *Barbee, S.J.*, entered 29 September 1976, DURHAM Superior Court.

This action was commenced by plaintiff in an effort to recover damages for personal injuries allegedly suffered by her as a result of a fall from a barstool in defendant's ice cream parlor. Defendant, Convenient Systems, Inc., in its answer denied any negligence on its part and subsequently filed a third party complaint alleging that any injuries to plaintiff were caused by negligence and misrepresentations of Foodcraft Equipment Company, Inc., the supplier and installer of the stools. This third party defendant in turn filed a complaint against the manufacturer of the stools, L & B Products Corporation, alleging that the latter was responsible for any injuries to plaintiff.

At the conclusion of plaintiff's evidence at trial, defendant Convenient Systems, Inc., moved for a directed verdict pursuant to G.S. 1A-1, Rule 50. The trial court granted this motion and dismissed the action, including the third and fourth party claims. As noted above, this judgment was affirmed by the Court of Appeals, with one member of the panel dissenting.

Powe, Porter, Alphin & Whichard, P.A., by Willis P. Whichard and Charles R. Holton, for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

COPELAND, Justice.

The principal issue raised on this appeal is the propriety of the trial court's grant of a directed verdict against the plaintiff. For the reasons set out below, we have determined that this was error; therefore, the decision of the Court of Appeals must be reversed.

It is elementary that, in considering a defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to the plaintiff, resolving all conflicts in his favor and giving the plaintiff the benefit of every inference that reasonably can be drawn in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). Such a motion may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

[1] Plaintiff's evidence here tends to show the following:

On 2 September 1971, plaintiff and a friend entered the Mayberry Ice Cream Parlor in Durham to have lunch. The parlor was crowded at that time and, after waiting for a booth to become vacant, the pair elected to sit at the counter. As plaintiff seated herself on a barstool at the counter, the rotating top of the stool "went backwards" and flipped her onto the floor, where she landed on her back and buttocks. Plaintiff had observed nothing unusual about the stool before she sat on it and had seen another person sitting on it just prior to this incident. Following her fall, however, plaintiff noted that the top of the seat from which she had fallen was hanging at an angle on the pedestal.

Plaintiff, after being helped to her feet, moved to another seat at the counter and finished her lunch. Before leaving, she spoke with the store manager, who asked her to see a doctor and send the bill to the parlor.

The ice cream parlor where this accident occurred had opened in May of 1971. In midsummer of that year, the store manager had discovered during a routine cleaning that two stools at the counter were loose and had removed their tops immediately in order to prevent an accident. Workmen repaired these two shortly thereafter and inspected the remaining stools for defects. Other than weekly cleanings, the stools were not inspected between the date of these repairs and the accident.

Although he is not an insurer, it is the legal duty of the proprietor of a restaurant to exercise ordinary care to maintain his premises in such a condition that they may be used safely by his invitees in the manner for which they were designed and intended. *Sledge v. Wagoner*, 248 N.C. 631, 104 S.E. 2d 195 (1958). Moreover, invitees must be warned of any hidden dangers or unsafe conditions which have been or can be discovered by the proprietor in the course of reasonable inspection and supervision. *Long v. National Food Stores, Inc.*, 262 N.C. 57, 136 S.E. 2d 275 (1964).

Seating provided for use by customers of business establishments does not ordinarily collapse in the absence of negligent construction, maintenance or inspection. *Scheuler v. Good Friend North Carolina Corporation*, 231 N.C. 416, 57 S.E. 2d 324, 21 A.L.R. 2d 417 (1950); *Rose v. Melody Lane of Wilshire*, 39 Cal. 2d 481, 247 P. 2d 335 (1952); *See also*, Byrd, *Proof of Negligence in North Carolina, Part I. Res Ipsa Loquitur*, 48 N.C. L. Rev. 452, 459 (1970). In addition, a business proprietor retains exclusive control of such seating while it is being used by patrons for the purpose for which it was intended. *Schueler v. Good Friend North Carolina Corporation, supra; Gow v. Multnomah Hotel, Inc.*, 191 Or. 45, 224 P. 2d 552 (1950). Having established these factors, plaintiff made out a sufficient case for the jury on the issue of defendant's negligence under the doctrine of res ipsa loquitur. *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E. 2d 538 (1967).

The Court of Appeals held *res ipsa* to be inapplicable to the facts of the instant case, citing *Smith v. McClung*, 201 N.C. 648, 161 S.E. 91 (1931), and *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251 (1929). This finding was grounded on the conclusion by the Court of Appeals that the record was devoid of any evidence that the

stool was defective or that any existing defect could have been discovered by reasonable inspection, as well as its determination that defendant's negligence could not be said to be the more probable cause of plaintiff's fall. These observations overlook plaintiff's evidence that defects in other stools had been discovered by cursory inspections during the weekly cleanup operations. Moreover, plaintiff testified that as she seated herself, the rotating top of the seat "went backwards" and flipped her onto the floor, whereupon she saw the top of the stool hanging from the pedestal.

While not overpowering, this evidence is sufficient to support a reasonable inference that the stool was defective in some way, since properly designed and maintained counter stools, which are attached to the floor as these were, ordinarily do not tip over when sat upon by restaurant patrons. Further, a jury could reasonably find that mere weekly inspections when the pedestals were polished were insufficient to disclose defects in stools which were in constant use in a food service establishment such as this. *See, Rose v. Melody Lane of Wilshire, supra.* We therefore hold that the Court of Appeals erred in refusing to apply *res ipsa loquitur* to the facts of the instant case. Since this doctrine raises an inference of defendant's negligence, defendant's motion for directed verdict at the close of plaintiff's evidence should have been overruled.

[2] At trial, plaintiff testified on direct examination that she returned to the ice cream parlor the day after the accident to deliver her medical bill and while there was told by the store manager that "they had been having problems with the stools, and that the children came in and turned the tops. They had been having problems and she asked the company to fix them, and they hadn't done anything about them up until that time." Plaintiff contended before the Court of Appeals that the trial court erred in limiting consideration of this evidence to corroboration or impeachment of the earlier testimony of the store manager. Although plaintiff arguably failed to properly preserve this exception, we nonetheless shall consider the question since it may recur on retrial.

Evidence of *post rem* statements of an agent are competent against his principal to show knowlege, when relevant, of defec-

tive conditions. *Jones v. Raney Chevrolet Company*, 217 N.C. 693, 9 S.E. 2d 395 (1940); 2 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 169, Page 18, n. 53. Because testimony concerning the statement set out above was relevant for the non-hearsay purpose of establishing that defendant was aware of continuing defects in these counter stools, it should have been admitted as substantive evidence on this issue.

We have determined that the Court of Appeals erred in affirming the judgment of the trial court granting a directed verdict for defendant; therefore, the decision of the Court of Appeals is reversed and the cause remanded for additional proceedings not inconsistent with this opinion.

Reversed and remanded.

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

ALEXIOU v. O.R.I.P., LTD.

No. 157 PC.

Case below: 36 N.C. App. 246.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

DEW v. SHOCKLEY

No. 128 PC.

Case below: 36 N.C. App. 87.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

DOCKERY v. TABLE CO.

No. 145 PC.

Case below: 36 N.C. App. 293.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1978.

FONVIELLE v. INSURANCE CO.

No. 171 PC.

No. 54 (Fall Term).

Case below: 36 N.C. App. 495.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 14 July 1978.

GOODE v. TAIT, INC.

No. 154 PC.

Case below: 36 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

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

HOWARD v. MERCER

No. 132 PC.

No. 49 (Fall Term).

Case below: 36 N.C. App. 67.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1978.

JACOBS v. SHERARD

No. 133 PC.

Case below: 36 N.C. App. 60.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1978.

KLOSTER v. COUNCIL OF GOVERNMENTS

No. 155 PC.

Case below: 36 N.C. App. 421.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

LUCAS v. TRAILER SALES

No. 158 PC.

Case below: 36 N.C. App. 388.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1978.

MAZDA MOTORS v. SOUTHWESTERN MOTORS

No. 136 PC.

No. 51 (Fall Term).

Case below: 36 N.C. App. 1.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 14 July 1978. Motion of defendant to dismiss appeal for lack of substantial constitutional question denied 14 July 1978.

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

MOSLEY v. FINANCE CO.

No. 134 PC.

Case below: 36 N.C. App. 109.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 14 July 1978.

RIDGE v. WRIGHT

No. 113 PC.

Case below: 35 N.C. App. 643.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1978.

SAWYER v. COX

No. 164 PC.

Case below: 36 N.C. App. 300.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. BASS

No. 173 PC.

Case below: 36 N.C. App. 500.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. BOYD

No. 137 PC.

Case below: 36 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. BURDEN

No. 146 PC.

Case below: 36 N.C. App. 332.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. CARSWELL

No. 148 PC.

No. 53 (Fall Term).

Case below: 36 N.C. App. 377.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 14 July 1978.

STATE v. CHRISP

No. 168 PC.

Case below: 36 N.C. App. 387.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. COLLINS

No. 160 PC.

Case below: 36 N.C. App. 651.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. DONLEY

No. 153 PC.

Case below: 36 N.C. App. 387.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

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

STATE v. EASTERLING

No. 143 PC.

Case below: 36 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. EVANS

No. 149 PC.

Case below: 36 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. FORNEY

No. 150 PC.

Case below: 36 N.C. App. 388.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. HAIRSTON

No. 188 PC.

Case below: 36 N.C. App. 641.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. HOSKINS

No. 138 PC.

Case below: 36 N.C. App. 92.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

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

STATE v. JACKSON

No. 142 PC.

Case below: 36 N.C. App. 126.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. JACOBS

No. 169 PC.

Case below: 36 N.C. App. 387.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. JENKINS

No. 125 PC.

Case below: 35 N.C. App. 758.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. LOUCHHEIM

No. 131 PC.

No. 50 (Fall Term).

Case below: 36 N.C. App. 271.

On reconsideration, petition by defendant for discretionary review under G.S. 7A-31 and defendant's appeal allowed 14 July 1978.

STATE v. MOORE

No. 161 PC.

Case below: 36 N.C. App. 388.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978.

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

STATE v. NELSON

No. 159 PC.

Case below: 36 N.C. App. 235.

Petition by defendant for disretionary review under G.S. 7A-31 denied 14 July 1978.

STATE v. SNEED

No. 147 PC.

Case below: 36 N.C. App. 341.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 July 1978.

STATE v. TOWNSEND

No. 44.

Case below: 36 N.C. App. 388.

Motion of Attorney General to dismiss defendant's appeal allowed 5 July 1978.

WILLIAMS v. GREENE

No. 135 PC.

Case below: 36 N.C. App. 80.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1978. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 14 July 1978.

WILLIAMS v. POWER & LIGHT CO.

No. 139 PC.

No. 52 (Fall Term).

Case below: 36 N.C. App. 146.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 14 July 1978.

Blount v. Taft

MARVIN K. BLOUNT, SR., FLORENCE TAFT BLOUNT, NELSON BLOUNT CRISP, MARVIN K. BLOUNT, JR. AND WILLIAM G. BLOUNT v. E. H. TAFT, JR., HELEN F. TAFT, E. H. TAFT III, THOMAS F. TAFT, RUTH J. TAFT, THOMAS F. TAFT, TRUSTEE FOR MELANIE ANN TAFT, THOMAS F. TAFT, TRUSTEE FOR EDMUND HOOVER TAFT IV, AND FORD McGOWAN

No. 66

(Filed 29 August 1978)

1. **Corporations § 4.1— shareholders' agreement—attempt to conduct business as partnership**

In this action by minority stockholders to specifically enforce an alleged stockholders' agreement, the term "shareholders' agreement" refers to an arrangement whereby all the shareholders in a close corporation, the stock of which is not traded in markets maintained by securities dealers or brokers, seek to conduct their business as if they were partners operating under a partnership agreement. G.S. 55-73(b).

2. **Corporations § 4.1— shareholders' agreements authorized in N. C.**

N. C. authorized shareholders' agreements in the Business Corporation Act of 1955, codified as G.S. 55-1, *et seq.*

3. **Corporations § 4.2— bylaws—shareholders' agreement**

Article III, Section 7 of the bylaws of a close corporation adopted unanimously by the shareholders on 20 August 1971 was a shareholders' agreement within the meaning of G.S. 55-73(b), since the terms "bylaws" and "shareholders' agreement" are not mutually exclusive, and bylaws which are unanimously enacted by all the shareholders of a corporation are also shareholders' agreements.

4. **Corporations § 4.1— shareholders' agreement—construction and enforcement like contracts—intent of parties controlling**

Since consensual arrangements among shareholders are agreements—the products of negotiation—they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements, unless they violate the express charter or statutory provision, contemplate an illegal object, involve fraud, oppression or wrong against other shareholders, or are made in consideration of a private benefit to the promisor.

5. **Corporations § 4.2— bylaws as shareholders' agreement—method of amendment**

The entire bylaws, all of which were unanimously adopted as a whole by a close corporation, constituted an agreement among the shareholders of the corporation, and Article III, Section 4 of those bylaws authorized the repeal of the bylaws by a majority vote of the directors.

6. **Corporations § 4.2— shareholders' agreement as part of bylaws—method of amendment**

If a shareholders' agreement is made a part of the charter or bylaws, it will be subject to amendment as provided therein or, in the absence of an internal provision governing amendments, as provided by the statutory norms; therefore, where Section 7, dealing with the creation of an executive commit-

tee and employment of persons by a close corporation, and Section 4 providing for amendment or repeal of the bylaws by a majority of the directors, were unanimously incorporated into the bylaws at the same time, and there being no internal provision in Section 7 or elsewhere in the bylaws prohibiting its amendment except by unanimous consent of the shareholders, the parties intended Section 7 to be subject to amendment by the directors or shareholders according to the procedures applicable to the other bylaws.

7. Corporations § 4.2— shareholders' agreement—avoidance of majority rule—specificity required

Ordinarily, the function of a shareholders' agreement is to avoid the consequences of majority rule or other statutory norms imposed by the corporate form, and, since the purpose of such an arrangement is to deviate from the structures which are generally regarded as the incidents of a corporation, it is not unreasonable to require that the degree of deviation intended be explicitly set out.

ON petition for discretionary review of the decision of the Court of Appeals (reported in 29 N.C. App. 626, 225 S.E. 2d 583 (1976)), which reversed the judgment entered by *James, J.*, sitting without a jury at the 16 June 1975 Session of PITT Superior Court, docketed and argued as Case No. 11 at the Spring Term 1977.

Action by minority stockholders to specifically enforce an alleged stockholders' agreement.

Plaintiffs and defendants are the owners of all of the outstanding 578.5 shares of the capital stock of Eastern Lumber and Supply Company (Eastern), a closely held North Carolina corporation having its principal office in Winterville, North Carolina. Plaintiffs are all members of the Blount family. Together they are the direct or beneficial owners of 41% of the outstanding shares of Eastern. The defendant, E. Hoover Taft, Jr., and the three members of his family named in the caption as defendants also own 41% of Eastern's capital stock, and defendant McGowan owns the remaining 18%. At the time this action was instituted McGowan held the post of Treasurer and as such was the "chief operating officer" of Eastern. The parties stipulated that shares of Eastern's capital stock are not traded in the markets maintained by securities dealers and brokers.

In brief summary, plaintiffs' evidence, summarized except when quoted, tended to show:

In 1969 plaintiffs became concerned about "the nepotism situation which existed in Eastern." At a regular meeting of the

board of directors held on 4 December 1969, plaintiff William G. Blount made a motion that in the future unanimous approval of the stockholders be required before any relative or a stockholder could be employed by Eastern, and that unanimous approval of his continued employment be required annually. Defendant's evidence tended to show that although several other relatives of stockholders were employed by Eastern part-time during 1969, this resolution was primarily directed at the son of E. H. Taft, Jr., E. Hoover Taft III, the only relative then working full time for the Company. E. H. Taft, Jr., opposed the Blount motion, and it was defeated when McGowan voted with the Tafts.

Thereafter, no shareholders' or directors' meetings were held until 20 August 1971. At that time, Eastern was negotiating a $250,000 business expansion loan and the directors deemed it necessary to revise and update the old bylaws, to have more frequent meetings, and to conduct the corporation's business on a more orderly and formal basis. Accordingly, E. H. Taft, Jr., and Mrs. Nelson Blount Crisp, both of whom are attorneys, drafted new bylaws to be presented to the shareholders and directors for their approval at a special joint meeting held on 20 August 1971. This meeting was called primarily to gain director and stockholder approval for the $250,000 loan. A transcript of that meeting, introduced in evidence by plaintiffs, shows that the proposed bylaws were read, article by article; that discussion frequently followed the reading of an article; and that thereafter various changes were made in the proposals.

Article III, Section 7 of the bylaws (hereinafter referred to as Section 7), which is the subject of this action, as originally drafted and presented to the stockholders, read:

"Executive Committee. The Board of Directors may, by the vote of a majority of the entire board, designate three or more directors to constitute and serve as an Exeuctive Committee, which committee to the extent provided in such resolution, shall have and may exercise all of the authority of the Board of Directors in the management of the corporation."

Mrs. Crisp immediately proposed that the executive committee be composed of one member each from the Blount, Taft and McGowan families. E. H. Taft, Jr., expressed his approval of this proposal. Thereafter, during a prolonged discussion, the Blounts argued that the executive committee should not have the authori-

ty to bind the Corporation without express ratification of its acts by the board of directors.

Additional bylaws were read and discussed, including Article VIII, Section 4, which provided:

"Amendments. Except as otherwise provided, these bylaws may be amended or repealed and new bylaws may be adopted by the affirmative vote of a majority of the directors then holding office at any regular or special meeting of the Board of Directors." (Here it is noted that no provisions for amendments were "otherwise provided" in the bylaws adopted 20 August 1971.)

Finally, McGowan moved that the proposed bylaws be adopted as modified. Mrs. Crisp seconded the motion, but before a vote could be taken, the following exchange took place:

"M. K. BLOUNT, SR.: You haven't brought in some amendment—don't you know?

"NELSON CRISP: This was as to full-time employees, the approval of full-time employees.

"MARVIN BLOUNT, JR.: Why don't you put where you have 'executive committee represented by members of each family, and Ford,' that all employees be unanimously approved. Is there any objection?

"E. H. TAFT, JR.: I have no objection.

"NELSON CRISP: He just brought out something, and this was my feeling from the beginning, that probably we do not need that in the by-laws, but rather in the meeting and in the minutes of a meeting.

"MARVIN BLOUNT, JR.: Would it hurt to put it in the by-laws?

"JOHN CAMPBELL: No."

After further discussion and an addition suggested by Mr. McGowan, Section 7 was unanimously adopted in the following words:

"Executive Committee. The Board of Directors may, by the vote of a majority of the entire board, designate three or more directors to constitute and serve as an Executive Committee, which committee to the extent provided in such resolution, shall have and may exercise all of the authority of the Board of Direc-

tors in the management of the corporation. Such committee shall consist of one member from the family of M. K. Blount, Sr., one member from the family of E. H. Taft, Jr., and one member from the family of Ford McGowan. Minutes of all such meetings shall be kept and a copy mailed to each member of the Board of Directors and action of the committee shall be submitted to the Board of Directors at its next meeting for ratification.

"The Executive Committee shall have the exclusive authority to employ all persons who shall work for the corporation and that the employment of each individual shall be only after the unanimous consent of the committee and after interview."

Following this last amendment to Article III, Section 7, a motion that the bylaws be adopted as changed and read was seconded and unanimously approved by all the stockholders and directors.

At trial the testimony of plaintiffs' witnesses related mainly to their recollections of what took place at the 20 August 1971 meeting. All conceded that neither before or after the stockholders had achieved unanimity as to the terms of Section 7 did any stockholder refer to their final concurrence as "a stockholders' agreement"; that Section 7 was voted on as a part of the bylaws; and that no one had mentioned or suggested that Section 7 was not a bylaw or that it was not subject to amendment. However, Mr. Marvin K. Blount, Jr., testified that it was his "understanding" at the time that this section could not be amended except by the unanimous consent of the stockholders.

At a stockholders' meeting held on 13 September 1971 the minutes of the 20 August 1971 meeting were read and approved and upon "motion made, seconded, and unanimously carried," the bylaws were again approved. Thereafter the minutes of subsequent stockholders' and directors' meetings reveal continuous controversy between the Blounts and the Taft-McGowan group over McGowan's management of the company and the authority of the executive committee. In all controversial matters before the board of directors the Blounts were outvoted by the Tafts and McGowans.

Following a fire which destroyed the company's warehouse on 16 November 1973, a special meeting of the board of directors was called on 1 December 1973 to consider the future of the company. One of the options discussed was the liquidation of the cor-

poration. The Blounts continued their criticism of McGowan, who requested "to know what his position was with the company at this time." The meeting was adjourned without any action having been taken on either question. At the next meeting, held 5 December 1973, the directors resolved that the corporation should actively seek to rebuild its business, and McGowan "declared that the Board could count on anything he did to be in the best interest of the corporation" and that any mistakes would be unintentional.

At a meeting held on 6 February 1974 to hear proposals for securing bids and financing the new building, M. K. Blount, Jr., renewed a former criticism of the size of the accounts receivable. A dispute also developed as to whether the firm should hire a certified public accountant to take inventory after the fire, as the Blounts desired, or whether the less expensive services of a public adjuster would suffice. By the usual vote of five to four the board voted to hire the public adjuster.

Special meetings of the directors were held on 2 April and 9 May 1974 to consider matters relating to the fire and to decide from what lending institution Eastern should borrow the money to rebuild and reestablish the business. At the meeting on May 9th the directors considered the corporation's financial report, business statement, and other matters. As to each motion made at that meeting the minute entry shows, "There were five voting for the motion, none against, and four abstentions, those being M. K. Blount, Jr., Nelson B. Crisp, W. G. Blount and Florence T. Blount. The motion carried."

The minutes of the directors' meeting held on 9 May 1974 also show: "The President appointed a committee to study the bylaws and make a report at a later meeting. The committee was composed of M. K. Blount, Jr., Thomas F. Taft, and Ford McGowan."

On 20 June 1974, at a meeting of the board of directors called to consider the proposed new bylaws, Mr. M. K. Blount, Sr., the founder of the corporation and a nonvoting director, was hospitalized in Durham. His wife, Florence Blount, a voting director, was at the hospital with her husband. M. K. Blount, Jr., requested that the meeting be delayed until his father and mother could be present. This request was denied and the meeting was convened. Mr. Blount, Jr., again inquired whether Mr. Manning, who was present, "had been and was at this time advising Mr. Taft and

Mr. McGowan each individually as to matters concerning division of corporate interests belonging to the Taft-Blount-McGowan families." He was told that he was not entitled to an answer to that question. Thereafter the Blounts took part in the general discussion of corporate matters which followed, but they again abstained from voting on all matters concerning the company's business.

When the proposed new bylaws were distributed, the minutes show that M. K. Blount, Jr., protested they were an effort by the majority stockholders, particularly the Taft family, "to change the bylaws to the best interests of that family, particularly the Executive Committee provision." Also according to the minutes, Mr. Thomas Taft countered this charge with the assertion that the reason for the change in the Executive Committee was the Blount Family's lack of cooperation in the conduct of the affairs of the corporation "as is evidenced by their abstention on all questions brought before the Executive Committee as well as the full Board of Directors." Mr. Blount, Jr., also objected to changing the August 1971 bylaws, which had been agreed to by all the stockholders, at a directors' meeting.

Following extended discussion, the bylaws were adopted by a vote of six to three, the three votes contra being cast by M. K. Blount, Jr., Nelson B. Crisp, and W. B. Blount, Jr. The president then declared that henceforth the company would operate under the new bylaws. Whereupon, speaking in behalf of the Blount family, M. K. Blount, Jr., stated their contention that the old bylaws remained in force and that they would question and contest any actions taken under the authority of the new bylaws.

The bylaws adopted at the 20 June 1974 meeting are not in the record. However, from the statement of facts contained in the briefs of both plaintiffs and defendants we learn that "the amended bylaws did not contain the provisions of Art. III, Sec. 7 as adopted on August 20, 1971." Deleted were "the provisions of an Exeuctive Committee composed of a representative of each of the three families, and the provision for approval of full-time employees by the Exeuctive Committee." In lieu of the deleted provisions, "the defendants adopted over the objections of the plaintiffs who were present, a new Article III, Section 9, . . ." providing as follows:

"9. Executive Committee: The Board of Directors may, by resolution adopted by a majority of the number of directors fixed

by resolution under these bylaws, designate two or more directors to constitute an Executive Committee, which Committee, to the extent provided in such resolution, shall have and may exercise all of the authority of the Board of Directors in the management of the corporation."

Pursuant to the foregoing section, the Board of Directors adopted a resolution—"five for the motion and three abstentions"—appointing "an Executive Committee consisting of three members, E. H. Taft, Jr., Ford McGowan, and W. G. Blount."

Defendants' evidence consisted of the testimony of Ford McGowan, E. H. Taft, Jr., E. H. Taft III, and another. In essence their testimony tended to show that there had never been any discussion between them or anyone else as to whether Article III, Section 7 of the bylaws adopted on 20 August 1971 was an irrevocable shareholders' agreement.

At the close of all the evidence the judge announced that he would hold Section 7 to be a valid stockholders' agreement which could be amended only by a majority vote of the directors. Thereafter, he entered judgment in which he found facts consistent with the evidence summarized herein and adjudged, *inter alia*, (1) that Section 7 constituted "a valid and binding stockholders' agreement within the intent and meaning of N.C. Gen. Stats. § 55-73(b); (2) that the terms of Section 7 were clear and unambiguous and, "having been unanimously assented to, it was not and is not subject to amendment or repeal in any manner for a period not to exceed ten (10) years from August 20, 1971, except upon and by the unanimous assent of all the shareholders of Eastern Lumber and Supply Company"; (3) that Section 7 was not repealed or amended by the bylaws enacted by the board of directors on 20 June 1974; and (4) that with the exception of Section 7 the bylaws adopted August 20, 1971 were subject to amendment and were in fact, amended on June 20, 1974. (Enumeration ours.)

The court then ordered that plaintiffs have specific enforcement of Article III, Section 7. Defendants appealed and the Court of Appeals reversed, holding that there was no evidence in the record to support the conclusion of the trial court that Section 7 was a shareholders' agreement "which could not be amended as provided by Article VIII, Section 4, of the said bylaws or the conclusion that said Section 7 was not validly amended, as were

other bylaws, at the meeting of the board of directors on 20 June 1974." Plaintiffs' petition for discretionary review was allowed.

Haywood, Denny & Miller by Egbert L. Haywood and John C. Martin for plaintiff-appellants.

Manning, Fulton & Skinner by Howard E. Manning and Dan J. McLamb for defendant-appellee.

SHARP, Chief Justice.

This appeal presents a two-part question: Was Section 7 of Eastern's bylaws, adopted 20 August 1971, a valid shareholders' agreement; and, if so, was it subject to amendment under Section 4, which authorized amendment, repeal, or re-write of the bylaws by the affirmative vote of a majority of the stockholders?

The trial judge found as a fact that on 20 August 1971 all the shareholders of Eastern, by unanimous vote, adopted a set of bylaws. Among these was Section 7, which authorized the board of directors, by a majority vote, to designate an executive committee composed of three of its members—one from each of the three families who owned the stock of Eastern. This committee was given exclusive authority to select the company's employees but the unanimous consent of its members was required for the employment of any individual. This finding is supported by plenary competent evidence in the record and therefore may not be disturbed on appeal. *Cogdill v. North Carolina State Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971); 1 Strong's N. C. Index 3d, *Appeal and Error* § 57.2 (1976).

Defendants do not seriously question any of the trial judge's findings of fact. They do, however, dispute his conclusions of law (1) that Section 7, albeit incorporated in the bylaws of 20 August 1971 by unanimous consent of the stockholders, was a shareholders' agreement within the intent and meaning of G.S. 55-73(b); and (2) that Section 7 is binding upon the shareholders for a period not to exceed ten years from 20 August 1971 unless repealed or amended by the unanimous consent of all Eastern's shareholders. These conclusions of law are subject to appellate review, *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968), and we consider them seriatim.

[1] We shall here attempt no precise definition of a "shareholders' agreement." In a broad sense the term refers to

any agreement among two or more shareholders regarding their conduct in relation to the corporation whose shares they own. *See* N. C. Gen. Stats. § 55-73 (1975). The form and substance of such an agreement will vary with the nature of the business and the objectives of the parties. It may be an agreement between stockholders in a corporation the shares of which are publicly traded or one whose shares are closely held. However, "[a]greements among shareholders are primarily a feature of close corporations." 6 Cavitch, Business Organizations § 114.01 (1978). In the context of this case the term refers to an arrangement whereby all the shareholders in a close corporation, the stock of which is not traded in markets maintained by securities dealers or brokers, seek to conduct their business as if they were partners operating under a partnership agreement. G.S. 55-73(b).

By means of a shareholders' agreement a small group of investors who seek gain from direct participation in their business and not from trading its stock or securities in the open market can adopt the decision-making procedures of partnership, avoid the consequences of majority rule (the standard operating procedure for corporations), and still enjoy the tax advantages and limited liability of a corporation. Such businesses are, with reason, often called "incorporated parnerships." Cary, *How Close Corporations May Enjoy Partnership Advantages:* Planning for the Closely Held Firm. *See* 48 N.W. U.L. Rev. 427 (1953); 6 Cavitch, Business Corporations § 114.01 (1978).

In earlier years, when statutes and principles governing the law of corporations were principally concerned with corporations having publicly traded stocks, agreements among shareholders—whether taking the form of voting trusts, pooling agreements, or extrinsic contracts—confronted considerable judicial antipathy. Courts would invalidate such consensual arrangements on the grounds that they severed from the stock incidents of ownership, such as the rights of voting and alienation, or prevented stockholders from voting "in the best interests of the corporation," or were inconsistent with the principle of majority rule embedded in the statutory norms. 1 O'Neal, Close Corporations, §§ 5.04, 5.06 (2nd Ed. 1971). In connection with close corporations, agreements were also stricken if they violated the judicial doctrine, succinctly enunciated in *Jackson v. Hooper*, 76 N.J. Eq. 592, 599, 75 A. 568, 571, 27 L.R.A. (NS) 658, 663 (Ct. Err. & App. 1910), that shareholders "cannot be partners inter sese

and a corporation as to the rest of the world." *See Beintendi v. Keaton Hotel*, 294 N.Y. 112, 60 N.E. 2d 829 (1945).

Over the years, however, both courts and legislatures gradually changed their thinking about the relationship which incorporation created between the state and businessman and their attitutde toward shareholders' agreements. 1 O'Neal, *supra*, § 3.52. For example, subject to certain specified limitations, voting trusts were expressly authorized by statutes, and shareholders were also given wider authority to agree upon arrangements deviating from certain corporate norms. *See e.g.*, G.S. 55-§§ 16, 24, 28, 31, 56, 65, 66, and 72 (1975). As the number of closely held corporations increased, experience revealed that the problems of a corporation whose stock is not generally publicly traded are different from those of a publicly held corpration. The authorization of the shareholders' agreements was a recognition of the needs of stockholders in a close corporation to be able to protect themselves from each other and from hostile invaders. 6 Cavitch, *supra*, § 114.01; 1 O'Neal, *supra* at § 1.11.

In such a business, if the internal "government" of the corporation was conducted strictly by the vote of the majority of the outstanding shares, the largest shareholder(s) could dominate the policies of the corporation over the objections of other shareholders. "In a nutshell, Family A with 51% ownership of a close corporation can live in luxury off a profitable business while Family B starves with 49%." Undoubtedly, "Family B" would not have invested their money in a rarely traded stock if they had thought that they would be excluded from the decision making process and thereby the benefits of the business. *See*, Latty, *Close Corporations and the New North Carolina Business Corporation Act*, 34 N.C.L. Rev. 432, 435 (1956) (hereinafter cited as Latty); O'Neal, "Squeeze-Outs" of Minority Shareholders, § 2.10 (1975).

To protect their investment minority shareholders frequently resort to agreements (usually, and wisely, made at the time of incorporation) between themselves and the other shareholders which guarantee to the minority such things as restrictions on the transfer of stock; a veto power over hiring and decisions concerning salaries, corporate policies or distribution of earnings; or procedures for resolving disputes or making fundamental changes in the corporate charter. *See* 6 Cavitch, *supra*, §§ 114.02, 114.03[3]; Robinson, North Carolina Corporation Law and Practice § 7-7

(2d Ed. 1974). *See generally* 1 O'Neal, Close Corporations § 4.10 (2d Ed. 1971). The agreements may also require certain affirmative actions, such as the payment of dividends. *Geller v. Geller*, 32 Ill. 2d 16, 203 N.E. 2d 577 (1964); *Arizona Ins. Co. v. L. L. Constantin & Co.*, 247 F. 2d 388 (3rd Cir.), *cert. denied*, 355 U.S. 905 (1957). *See generally*, O'Neal, "Squeeze-Outs" of Minority Shareholders §§ 8.05-12 (1975). It has been said that "a well-drawn stockholders' agreement entered into contemporaneously with the formation of a corporation is the most effective means of protecting the minority shareholder." Elson, *Shareholders Agreements, a Shield for Minority Shareholders of Close Corporations*, 22 Bus. Lawyer 449, 457 (1967).

[2] North Carolina authorized shareholders' agreements in the Business Corporation Act of 1955, codified as G.S. 55-1, *et seq.* (1975). Professor O'Neal described this Act as "the first really extensive and imaginative statutory innovations on close corporations." 1 O'Neal, Close Corporations, § 1.14a, Ch. 1-p. 57 (1971). *See also* Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation*, 54 Geo. L.J. 1145, 1146 (1966).

With respect to close corporations, the heart of the North Carolina Act is G.S. 55-73. *See* Latty, *supra* 438-440. This statute labeled "Shareholders' Agreements," is divided into three sections. G.S. 55-73(a) validates and makes enforceable against its signatories for a limited period, a written "agreement between two or more shareholders" regarding the voting of their stock. *Stein v. Capital Outdoor Adv. Inc.*, 273 N.C. 77, 159 S.E. 2d 351 (1968). Section (c) of the statute provides that "an agreement between all or less than all of the shareholders" will not be invalidated as between the parties to it on the ground that it interferes with the discretion of the board of directors, but imposes upon the shareholder-parties liability for managerial acts similar to that which is imposed on directors. However, it is Section (b) of G.S. 55-73 which shareholders in a close corporation, whose stock is not generally traded in the markets maintained by securities dealers or brokers, regard as the most significant.

G.S. 55-73(b) provides, *inter alia*, that "no written agreement to which all of the shareholders have actually assented . . . which relates to any phase of the affairs of the corporation, . . . shall be invalid . . . on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to

arrange their relationships in a manner that would be appropriate only between partners." Such an agreement may be "embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto." This langauge has been widely borrowed for the close corporations statutes of several other jurisdictions. CAL. CORPORATIONS CODE ANN. § 300(b) (West 1977); DEL CODE ANN. tit. 8, § 354 (1975); FLA ST. ANN. § 607.107 (West 1977); KAN. STAT. § 17-7214 (1974); MD. CORP & ASS'NS CODE § 104 (1973); PA. STAT. ANN. tit. 15 § 1385 (Purdon Supp. 1978-79); S. C. CODE ANN. § 33-11-220 (1977). However, no decision from any of these jurisdictions involving the questions we consider here has been called to our attention.

[3] Counsel have debated at length the question whether Section 7 of Eastern's bylaws is a bylaw or a shareholders' agreement within the meaning of G.S. 55-73(b). In our view this debate is sterile, for these terms are not mutually exclusive. Bylaws which are unanimously enacted by all the shareholders of a corporation are also shareholders' agreements. Consensual agreements coming with G.S. 55-73(b) are shareholders' agreements whether they are embodied in the bylaws or in a duly executed side agreement. No particular title, phrasing or content is necessary for a consensual arrangement among all shareholders to constitute a "shareholders' agreement." Consequently, we hold that Section 7 of the bylaws adopted on 20 August 1971 is a shareholders' agreement within the meaning of G.S. 55-73(b). The decision of the Court of Appeals to the contrary is disapproved.

[4] However, contrary to the arguments of counsel, this holding does not determine this case. Since consensual arrangements among shareholders are *agreements*—the products of negotiation—they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements, unless they "violate the express charter or statutory provision, contemplate an illegal object, involve . . . fraud, oppression or wrong against other shareholders, or are made in consideration of a private benefit to the promisor. . . ." *Wilson v. McClenny*, 262 N.C. 121, 129, 136 S.E. 2d 569, 575 (1964). *Accord, Stein v. Capital Outdoor Adv., Inc., supra.*

[5] The trial judge ruled that Section 7, as a shareholders' agreement, was incapable of amendment or repeal for ten years except by unanimous assent of all the stockholders. Section 7, however, was only *one* of a complete set of bylaws, all of which—after a

section-by-section consideration which involved several revisions of Section 7—were unanimously adopted as a whole by a vote of all of Eastern's shareholders. Thus, the entire bylaws constituted an agreement among the shareholders. Article VIII, Section 4 of those bylaws (hereinafter "Section 4") authorized the repeal of "these bylaws" by a majority vote of the directors, except as otherwise provided therein. As we noted in the preliminary statement of facts, neither in Section 7 nor elsewhere in the bylaws was there any other provision regarding amendment or repeal of "these bylaws." Nothing else appearing, therefore, the presumption is that the parties intended Section 4 to apply to every section of the bylaws.

Plaintiffs argue, however, that because Section 7 is the only bylaw which "arranges [the shareholders'] relationships in a manner that would be appropriate only between partners," it alone should be treated as a shareholders' agreement and thus be the only bylaw not subject to amendment or repeal under Section 4. This contention misunderstands the significance of G.S. 55-73(b).

That section creates no distinctions between a shareholders' agreement in which the parties seek to deal with the corporation as a partnership and any other stockholders' agreement "which relates to any phase of the affairs of the corporation." It adds nothing, either expressly or impliedly, to the words of the agreement; nor does it suspend the rules of contract law relating to its construction, modification or rescission. G.S. 55-73(b) merely provides that a shareholders' agreement in which the parties seek to deal with affairs of the corporation in a manner "which would be appropriate only between partners" *is not invalid for that reason.* Section (b), like the other two sections of G.S. 58-73, simply abrogates, as to agreements within its purview, certain judicial doctrines which had formerly invalidated particular shareholders' agreements on those grounds which the statute now disallows. A shareholders' agreement is not valid and enforceable merely because it fits the specifications of G.S. 55-73. It can be invalidated under the law of contracts upon any ground which would entitle a party to such relief. *See Stein v. Capital Outdoor Ad., Inc., supra* at 84, 159 S.E. 2d at 356.

The reason for phrasing the provisions of G.S. 55-73 mainly in the negative was to provide latitude to both the shareholders who enter into agreements "which relate to . . . the affairs of the corporation" and to the courts which must construe and assess their

contracts. As pointed out by Professor Latty, the underlying purpose of the statute was to furnish shareholders "a legal framework within which partnership-like arrangements having a reasonable business purpose could be worked out with a substantial assurance of legal validity." Latty, *supra* at 439. The statute was not intended to, and it does not, define "shareholders' agreements" to mean only those arrangements which "are an attempt . . . to treat the corporation as if it were a partnership" or which "arrange . . . relationships in a manner that would be appropriate only between partners."

[6] G.S. 55-73(b) permits shareholders to embody their agreement "in the charter or the bylaws or in any side agreement in writing signed by all the parties thereto." Had Section 7 been a "side agreement" signed by all the stockholders, and not been made a part of the bylaws, it is plausible to argue that absent an internal provision governing its amendment it could be amended only by unanimous consent of all the stockholders. As the Court of Appeals noted in its opinion, "a shareholders' agreement may not be altered or terminated except as provided by the agreement, or by all parties, or by operation of law." *Blount v. Taft*, 29 N.C. App. 626, 630, 225 S.E. 2d 583, 586. Had Section 4 been omitted from the bylaws, the directors would have been precluded from amending Section 7 since it is a bylaw adopted by the shareholders. G.S. 55-16(a)(1). In the absence of a valid provision in the charter or bylaws controlling amendment, statutory or common law norms governing amendment apply. *See Webb v. Morehead*, 251 N.C. 394, 111 S.E. 2d 586 (1959). Similarly, when parties to a shareholders' agreement choose to embody it in the charter or bylaws, it must be concluded that they intended for these norms to apply absent an expressed intention to deviate from them.

"All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E. 2d 477, 482 (1969). Here Section 7 and Section 4 were unanimously incorporated into the bylaws at the same time. There being no internal provision in Section 7 or elsewhere in the bylaws prohibiting its amendment except by unanimous consent of the shareholders, we conclude that the parties intended Section 7 to be subject to amendment by the directors or shareholders according to the procedures applicable to the other bylaws. In any event, that is the

agreement they made. We hold, therefore, that if a shareholders' agreement is made a part of the charter or bylaws it will be subject to amendment as provided therein or, in the absence of an internal provision governing amendments, as provided by the statutory norms.

[7] Ordinarily the function of a shareholders' agreement is to avoid the consequences of majority rule or other statutory norms imposed by the corporate form. Since the purpose of these arrangements is to deviate from the structures which are generally regarded as the incidents of a corporation, it is not unreasonable to require that the degree of deviation intended be explicitly set out. Most commentators advise the draftsman of a shareholders' agreement to include a specific provision governing amendments. *See* McNulty, *Corporations and the Intertemporal Conflicts of Law*, 55 Cal. L. Rev. 12, 27 *et seq.* (1967); O'Neal, *Giving Shareholders Power to Veto Corporate Decisions; Use of Special Charter and Bylaw Provisions*, 18 Law and Cont. Prob. 451, 469 (1953); O'Neal, "Squeeze-Outs" of Minority Shareholders, § 8.12 (1975). Requiring the insertion of such an amendment provision works no undue hardship on the parties if all are agreed upon its inclusion. McNulty, 55 Cal. L. Rev., *supra.*

Having concluded that the shareholders made Section 7 subject to the amendment power conferred upon the directors by Section 4, it will be enforced unless enforcement would contravene some principle of equity or public policy. Plaintiffs have not alleged that the acts of defendant constituted oppression or a breach of a fiduciary duty imposed by G.S. 55-32, G.S. 55-73(c), or the common law. *See Goines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E. 2d 350 (1951); Note 35 N.C.L. Rev. 271 (1957); O'Neal "Squeeze Outs" of Minority Shareholders, §§ 902-905 (1975). Further the record before us discloses no violation of public policy. Plaintiffs can obtain no benefit under the provisions of G.S. 55-16(a)(2) now in effect, as Section 7 was both enacted and amended prior to the effective date of the 1973 amendment of that subsection (1 October 1973). 1973 N.C. Sess. Laws, c. 469, s. 4 and s. 47. Nor is Section 7 a provision to which an amendment would be declared unreasonable and invalid as a matter of law despite an express grant of power to amend. *See, e.g., Duffy v. Insurance Co.*, 142 N.C. 103, 55 S.E. 79 (1906); *Lambert v. Fisherman's Dock Cooperative, Inc.*, 61 N.J. 596, 297 A. 2d 566 (1972). *See generally,* 8 Fletcher, Cyclopedia of Corporations §§ 4177, 4184-192 (Rev. 1966).

This decision, of course, will expose plaintiffs as minority shareholders in a close corporation to a risk from which Section 7 for a while protected them. However, minority shareholders who would have protection greater than that afforded by Chapter 55 of the General Statutes and the judicial doctrines prohibiting breach of a fiduciary relationship must secure it themselves in the form of "a well drawn" shareholders' agreement.

For the reasons stated in this opinion the action of the Court of Appeals in reversing the judgment of the trial court is

Affirmed.

STATE OF NORTH CAROLINA v. SANDY DOUGLAS ROSS, JR.

No. 82

(Filed 29 August 1978)

1. **Criminal Law § 84— cross-examination of defendant—earlier search—exclusion of evidence on constitutional grounds not shown**

In a prosecution for possession with intent to sell and sale of MDA, defendant's contention that his cross-examination concerning various illegal drugs found in his home in a prior unrelated search was improper because the search leading to the discovery of those drugs was subsequently declared unlawful in district court is without merit, since the exclusionary rule concerning the inadmissibility for impeachment purposes of evidence unconstitutionally obtained applies, if at all, only where a search and seizure has been declared illegal for constitutional reasons, and defendant failed to offer evidence of the lower court's disposition of the case against him stemming from the earlier search and thereby failed to show that the evidence seized was excluded on constitutional grounds.

2. **Criminal Law § 88.4— impeachment of defendant—prior crimes and degrading conduct—cross-examination proper**

Cross-examination for impeachment purposes of a defendant as to his prior unrelated convictions and acts of misconduct does not place an unreasonable burden on defendant's right to testify, and therefore does not violate the Due Process Clause of the U. S. or N. C. Constitutions.

Justice EXUM dissenting.

Chief Justice SHARP and Justice LAKE join in the dissenting opinion.

ON defendant's appeal pursuant to G.S. 7A-30(1), and defendant's petition for discretionary review of the decision of

the Court of Appeals, reported in 35 N.C. App. 98, 239 S.E. 2d 843, which found no error in the trial before *Friday, J.*, at the 7 March 1977 Schedule "C" Criminal Session of MECKLENBURG Superior Court.

Defendant was tried and convicted of the possession with intent to sell methylenedioxy amphetamine (MDA), a controlled substance, and of the sale and delivery of MDA on 27 February 1975. From sentences imposed, defendant appealed to the Court of Appeals. That court found no error in the trial.

The State's evidence tended to show that on the night of 27 February 1975, R. T. Guerette, an undercover police officer, went to defendant's home in Charlotte and made a previously arranged purchase from defendant of two plastic bags containing MDA for $65.

Defendant testified and offered evidence by family members and employees of Carolina Fire Equipment Sales & Service, Inc., his place of employment. This testimony tended to show that on 26 February 1975 defendant was called by his father, the president of Carolina Fire Equipment Sales & Service, Inc., to come to Southport, North Carolina, to wire and hook up a burglar alarm system under a contract involving a nuclear power generating station. On 26 February defendant spent the night in a Wilmington motel. He checked out of the motel on the 27th and went to the Southport job site. Defendant testified that he worked at the site all day, and after completing his work drove back to Charlotte, arriving there sometime after daybreak on the 28th of February.

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

Attorney General Rufus L. Edmisten and Associate Attorney Jane Rankin Thompson for the State.

Rodney W. Seaford and Paul L. Whitfield for defendant appellant.

MOORE, Justice.

[1] Under his first assignment of error defendant argues that the trial court erred in allowing the district attorney to cross-examine him regarding drugs found in his home during a prior unrelated search by the police subsequently held to be unlawful.

At trial defendant testified in his own behalf. On cross-examination the prosecutor asked defendant if "on the 3rd day of January, 1975 . . . you did not have in your possession in your house in your room a zip-locked bag containing a total of 145 milligrams of white powder, that being cocaine?" Counsel for defendant immediately objected, and his objection was overruled. Defendant then answered in the negative. Several pages of transcript follow, wherein the defendant was asked numerous questions regarding various forms of narcotics found in his home on 3 January 1975. Throughout this testimony the defendant indicated that he was not at home when the contraband was found, and that if it was found, it did not belong to him. Defendant finally admitted that he had "found out that something was found in my house" but that he "didn't find out where it was." On redirect examination defendant testified that he had been prosecuted for the drugs found in his home on 3 January 1975, but that a district court judge "ruled that the search of my house was unlawful."

Defendant now insists, citing *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354 (1954), and *Agnello v. United States*, 269 U.S. 20, 70 L.Ed. 145, 46 S.Ct. 4 (1925), that the admission of this evidence was a violation of the Fourth Amendment exclusionary rule. Defendant did not raise this specific objection at trial; instead, he did little more than enter general objections to the prosecutor's questions. Likewise, the defendant did not argue this particular constitutional objection before the Court of Appeals. Ordinarily the Supreme Court will not pass upon a constitutional question which was not raised and passed upon in the court below. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967). We will, however, further consider defendant's argument for the purpose of noting additional defects in his appeal.

It is well established in this State that in the trial of every person charged with a crime, if the accused takes the stand in his own behalf he "shall be subject to cross-examination as other witnesses." G.S. 8-54. Any witness in a criminal case, including the defendant who testifies in his own behalf, may be cross-examined for purposes of impeachment with respect to prior convictions of crimes. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975), and cases cited therein at p. 517. Cross-examination for purposes of impeachment is not, however, limited to questions concerning prior convictions, but also extends to questions relating to specific acts of criminal and degrading conduct for which there has been no conviction. *State v. Monk, supra; State v.*

Foster, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). The scope of such cross-examination is normally subject to the discretion of the trial judge, and the questions must be asked in good faith. *State v. Williams, supra.* The purpose of this rule permitting such a wide scope for impeachment is that such evidence is a proper and relevant means of aiding the jury in assessing and weighing the credibility of the defendant.

Defendant now contends that his cross-examination concerning various illegal drugs found in his home was improper since the search leading to the discovery of those drugs was subsequently declared unlawful in district court. In *Agnello v. United States, supra*, the United States Supreme Court held that evidence unconstitutionally seized is not admissible in rebuttal of a defendant's testimony, where the defendant did not testify concerning such evidence on his direct examination and denied knowledge of it in answer to a question propounded on cross-examination over his objection. The *Agnello* rule was subsequently tempered somewhat in *Walder v. United States, supra*, where the highest court held that a defendant's assertion on direct examination that he never possessed any narcotics opens the door, solely for purposes of attacking his credibility, to evidence of narcotics unlawfully seized in connection with an earlier proceeding. The defendant argues that the exclusionary rule set forth in *Agnello*, and made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), applies in this instance since the defendant made no reference to his use or possession of drugs on his direct examination.

Since the Supreme Court's decision in *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), the continued efficacy and scope of the exclusionary rule set forth in *Agnello* and *Walder* has been questioned. *Cf.* Dershowitz and Ely, "*Harris v. New York:* Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority," 80 Yale Law Journal 1198 (1971). The Supreme Court's subsequent decisions in *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561, 94 S.Ct. 613 (1974), *United States v. Janis*, 428 U.S. 433, 49 L.Ed. 2d 1046, 96 S.Ct. 3021 (1976), and *Stone v. Powell*, 428 U.S. 465, 49 L.Ed. 2d 1067, 96 S.Ct. 3037 (1976), have further limited the scope of the exclusionary rule in certain Fourth Amendment cases.

The question of the applicability of the exclusionary rule does not, however, concern us in the present case, for there is nothing

in the record to show that the prior unrelated search of defendant's home was declared unlawful for *constitutional* reasons. The only mention in the record of the outcome of the prior proceeding in district court is defendant's assertion on redirect examination that a district court judge "ruled that the search of my house was unlawful," and the prosecutor's infelicitous assertion, overruled by the court, that the search was ruled illegal "because an officer put his hand on the door knob and twisted it too soon, even though he had a valid search warrant. . . ."

The *Agnello-Walder* exclusionary rule concerning the inadmissibility for impeachment purposes of evidence unconstitutionally obtained applies, if at all, only where a search and seizure has been declared illegal for constitutional reasons. The rule would not apply in those instances where there has been a violation of the statutory procedures regulating searches and seizures contained in Chapter 15A of the General Statutes, unless there has been a "substantial violation" of the statutory provisions under G.S. 15A-974. The record in present case gives no indication of the nature of the alleged illegality involved in the search of defendant's home in January 1975. It is the duty of the appellant to see that the record is properly made up and transmitted. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969). Where the defendant does not include in the record any matter tending to support his ground for objection, he has failed to carry the burden of showing error and has failed to make irregularity manifest. *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). An assignment of error based on matters outside the record is improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456, 156 S.E. 2d 833 (1967); *State v. Duncan, supra; State v. DeJournette*, 214 N.C. 575, 199 S.E. 920 (1938).

In the case at bar competent evidence of the lower court's disposition of the case against defendant stemming from the January 1975 search of his home is essential for review. Since the defendant has not included such evidence in the record, we cannot sustain his assignment of error concerning the admissibility of this impeachment evidence. This assignment is overruled.

[2] The defendant next contends that this Court should declare unconstitutional the cross-examination for impeachment purposes of a defendant as to his prior unrelated convictions and acts of misconduct. He argues that such cross-examination places an unreasonable burden on the defendant's right to testify, and

therefore violates the Due Process Clause of the Constitution of the United States and the Constitution of North Carolina. The United States Supreme Court has held in *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971); *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606, 87 S.Ct. 648 (1967); and *Michelson v. United States*, 335 U.S. 469, 93 L.Ed. 168, 69 S.Ct. 213 (1948), that introduction of evidence of prior crimes of a defendant for various purposes does not violate the Fifth or Fourteenth Amendment, so long as the jury is instructed to limit consideration of the evidence to its proper function.

This Court has declined similar requests to revise its rule regarding impeachment in *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); *State v. Foster, supra;* and *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). In *State v. Foster, supra*, the Court said, in justification of the rule, "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. . . ." Such continued support for the rule stems from the recognition that evidence of a witness's repeated violations of the law is relevant to the trustworthiness and credibility to be afforded him by the jury. Lack of trustworthiness may be evidenced by a witness's repeated and abiding contempt for the laws which he is legally and morally bound to obey. *Cf. State v. Duke*, 100 N.H. 292, 123 A. 2d 745 (1956). The probative value of evidence of prior crimes seems all the more relevant in the case of the witness who is also a defendant, for he, unlike a witness not on trial, has a direct interest in the outcome of the case, and there are therefore more substantial reasons for calling his credibility into account.

To be sure, a defendant with a prior record is put to a dilemma in deciding whether he should testify in his own defense. But the likelihood of undue prejudice accruing from the attempted impeachment of his testimony does not outweigh the court's substantial interest in arriving at the truth. Sufficient protection from undue prejudice is afforded by the court's instructions limiting consideration of the evidence of prior offenses to the matter of the defendant's credibility as a witness. Due process does not require more. *Cf. Spencer v. Texas, supra.* This assignment is overruled.

We have examined the entire record and find no prejudicial error. Hence the verdicts and judgment will be upheld.

No error.

Justice EXUM dissenting.

Believing defendant is entitled to a new trial because of improper cross-examination by the Assistant District Attorney, Mr. Irwin Coffield, I respectfully dissent.

The state's case rested entirely on the testimony of R. T. Guerette, an undercover police officer who testified that he purchased a controlled substance from defendant on the night of 27 February 1975 in Charlotte. Defendant testified and offered a number of corroborating witnesses to the effect that he was not in Charlotte at the time testified to by Guerette. It seems clear to me that the state then embarked on the improper, however successful, tactic of convicting defendant of the crime charged against him by trying him, in effect, for certain alleged past offenses of which he had been accused and acquitted.

Defendant testified that in the fall of 1974 he purchased a rather large single family dwelling on Briardale Drive in Charlotte. The dwelling consisted of four bedrooms, a basement, a downstairs den, a kitchen and two bathrooms. To help make payments on this home, defendant rented portions of the house to others. Several persons other than defendant were living there in January, 1975. Defendant himself, because of his job, spent much of his time away from home and on the road.

Apparently, according to the prosecutor's *questions*, a search of defendant's dwelling was conducted on 3 January 1975 at a time when defendant was not at home. Various illicit controlled substances, including cocaine, MDA, marijuana, phencyclidine, together with valium and tuinol were discovered during the search. Defendant was prosecuted in 1975 for possession of these substances. The charges against him, however, were dismissed in the District Court.

During the course of the prosecutor's cross-examination, defendant admitted two prior convictions for the possession of marijuana and amphetamines in Raleigh in 1973.

The district attorney then asked him whether on 3 January 1975 he possessed 150 milligrams of cocaine. Defendant denied that he did. The prosecutor then utilized, for eight pages in the record, what I consider to be an improper and highly prejudicial form of cross-examination. He asked defendant whether one M. B. Hinson entered his home on 3 January 1975 and found in defendant's room cocaine, 3.46 grams of MDA, 15.67 grams of mari-

juana, a tablet of phencyclidine, 1900 grams of MDA, valium tablets, and tuinol in defendant's room. To these questions defendant consistently replied that he was not at home on the occasion in question, and could not admit or deny what an officer who searched the premises might have found or where he might have found it. He denied any knowledge of the presence of the items in his room.

One example from the record will suffice to illustrate the nature of the cross-examination:

> "Q. Now, then Mr. Ross, on the 3rd day of January, 1975, I'll ask you, sir, if you did not have in your possession in your house in your room a zip-locked bag containing a total of 145 milligrams of white powder, that being cocaine?
>
> MR. WHITFIELD: OBJECTION.
>
> COURT: OVERRULED
>
> DEFENDANT'S EXCEPTION #16.
>
> A. No, sir.
>
> Q. You deny that Officer M. B. Hinson came into your house on that date, searched your room and found that quantity of cocaine? Do you deny that, sir?
>
> MR. WHITFIELD: OBJECTION.
>
> COURT: OVERRULED.
>
> DEFENDANT'S EXCEPTION #17.
>
> A. I don't deny that he came into my house and he found something, but I don't know where he found it but he didn't find it in my room. If he did, I didn't put it there."

Thereafter the prosecutor never asked defendant whether he on the occasion in question *possessed* controlled substances. He asked him merely whether Officer Hinson found these substances *in his room.* Again, samples from the record will suffice to illustrate the point:

> "Q. Do you deny that that [3.46 grams of MDA] was found in your room on that date at approximately 1310 hours, that being 1:10?
>
> MR. WHITFIELD: OBJECTION.

A. I was not there, so I can't say where it was found.

COURT: OVERRULED."

. . . .

"Q. I'll ask you, sir, if on the third day of January, 1975, if found in your room, pursuant to a search warrant, was 15.67 grams of a green vegetable material, that material being marijuana?

MR. WHITFIELD: OBJECTION as to that question.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #26.

Q. Was it found in your room, sir?

OBJECTION.

OVERRULED.

DEFENDANT'S EXCEPTION #27.

A. I don't know. To my knowledge, it couldn't have been.

Q. I'll ask you, sir, if on the third day of January, 1975, if found in your room was a zipped-locked bag containing a mottled orange tablet, that tablet analyzed as containing phencyclidine, otherwise known as PCP?

MR. WHITFIELD: OBJECTION.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #28.

A. No, sir.

Q. Is what you're telling this jury, sir, that you deny it being found there because you don't have any knowledge of it? Is that what you're saying?

OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION #29.

A. Yes, sir.

Q. So you really have no basis for the denial on what you have stated in this courtroom. Is that right?

OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION #30.

A. Just the same thing I have said. I wasn't there so I don't know whether it was found in my room or not."

. . . .

"Q. How about four yellow capsules marked 18904, Tuinol, found in the dresser? Is it possible that you remember those being there on 3 January, '75, sir?

MR. WHITFIELD: OBJECTION.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #42.

A. No, sir.

Q. You don't deny, of course, that they were found there, do you?

MR. WHITFIELD: OBJECTION.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #43.

A. Like I said, I wasn't there. I don't know what was found there unless I stood there and watched somebody.

Q. You found out subsequently?

MR. WHITFIELD: OBJECTION.

COURT: OVERRULED.

DEFENDANT'S EXCEPTION #44.

A. Yes sir. I found out that something was found in my house. I didn't find out where it was."

The impropriety of this form of cross-examination is obvious. To inquire of defendant what some other person might have found in his room in a house where he and others were living is not, first of all, an inquiry concerning defendant's misconduct. Defendant would be guilty of misconduct only if he knowingly

possessed these controlled substances.[1] Second, the inquiry related to matters not within the knowledge of the defendant and were framed in such a way that defendant could not appropriately respond. The questions were not propounded in good faith. The cross-examination was a calculated attempt by the prosecutor to get before the jury evidence supplied by the questions themselves rather than by the witness' responses. Finally, this cross-examination inquired into criminal charges of which the defendant had earlier been acquitted and amounted to no more than questions about prior criminal accusations.

This kind of cross-examination was condemned in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). In a carefully considered opinion by Chief Justice Bobbitt, the Court overruled earlier cases which permitted cross-examination of a defendant regarding past accusations of crime. The Court concluded, 279 N.C. at 675, 185 S.E. 2d at 181:

> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Patterson*, 24 N.C. 346 (1842); *State v. Davidson*, 67 N.C. 119 (1872); *State v. Ross*, 275 N.C. 550, 553, 169 S.E. 2d 875, 878 (1969). Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here 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 original.)

Cross-examination of a defendant regarding his past use of heroin was sustained in *State v. McAllister*, 287 N.C. 178, 184, 214 S.E. 2d 75, 81 (1975), because "the questions related to the matters within the knowledge of the witness, not to accusations of any kind made by others, and were competent for the purpose of impeachment."

1. The fact that these substances might have been found in defendant's room would, of course, be some evidence that he knowingly possessed them if defendant were on trial for these earlier possessions. The point is that defendant was *not* on trial for these possessions. When cross-examining a witness for impeachment purposes the examiner is bound by the witness' answers, although the cases permit some "sifting" of the witness. *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972). Such cross-examination must not, however, be permitted to evolve into a mini-trial on the question of defendant's guilt of the collateral misconduct. *See State v. Monk*, 286 N.C. 509, 517, 212 S.E. 2d 125, 132 (1975); 1 Stansbury's North Carolina Evidence § 112 (Brandis rev. 1973). It did so evolve in this case to the prejudice of defendant.

Nor do I believe this Court has carried this impeachment rule so far as to permit cross-examination about past criminal conduct for which a defendant has been tried and acquitted. The majority would extend the rule this far. I cannot agree to such an extension. The Court of Appeals has correctly held that a witness may not be impeached by cross-examination relating to a controlled substance charge which was later dismissed. *State v. Sharratt*, 29 N.C. App. 199, 223 S.E. 2d 906 (1976), *cert. denied*, 290 N.C. 554, 226 S.E. 2d 512 (1976), relying on *State v. Williams*, *supra*.

The kind of tactic used here by the prosecutor was considered at length in *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). In *Phillips* the prosecutor persisted in asking the defendants on cross-examination about various prior acts of misconduct which they consistently denied having committed. The court characterized the cross-examinations as an attempt by the state to put before the jury through its questions "supposed facts of which there is no evidence" and found the tactic sufficiently prejudicial to warrant a new trial. The questions put to the defendant in the case *sub judice* were even more vicious than those in *Phillips*. At least in *Phillips* the defendants could either admit or deny the accusations of the prosecutor. Here, however, the questions were asked about matters which defendant could neither admit nor deny. Defendant argues in his brief:

> "The defendant respectfully contends that there is a clear distinction between asking a defendant about previous degrading acts of conduct, or of matters within his own knowledge, and in asking questions with regard to activities of the police outside of the presence of the defendant, and in which the defendant took no part, and of which the defendant had no personal knowledge."

I fully agree and believe our cases require us to concede the correctness of this argument. Defendant should be granted a new trial.

Chief Justice SHARP and Justice LAKE join in this dissenting opinion.

REBECCA SUMNER WOODS EXECUTRIX OF THE ESTATE OF JOHN C. WOODS, DECEASED v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 67

(Filed 29 August 1978)

1. **Insurance § 6.1— construction of policy**

Where an insurance policy defines a term, that definition is to be used in construing the policy; if no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended.

2. **Insurance § 6.1— construction of policy**

The various terms of an insurance policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder, but if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written.

3. **Insurance § 68.8— family automobile policy—three automobiles—injury to nonrelative driving owned automobile—medical payments provision—recovery only for occupied vehicle**

Where a family automobile policy covering three automobiles provided medical payments coverage for nonrelatives of the named insured for bodily injury "caused by accident, while occupying the owned automobile" with the permission of the named insured, a nonrelative who was injured while driving an "owned automobile" was not entitled to recover the $1,000 medical payments limit for each automobile for which separate premiums had been paid but could recover only up to the $1,000 limit for the owned automobile she *occupied* at the time of the collision, notwithstanding the policy contained a clause stating that the terms thereof "apply separately" to each automobile insured therein.

4. **Insurance § 68.8— family automobile policy—two automobiles—injury to family member—medical payments provision—recovery for each insured automobile**

Where a family automobile policy covering two automobiles provided medical payments coverage to the named insured and his relatives for bodily injury "caused by accident while occupying or being struck by an automobile," and the policy provided that the terms thereof "apply separately" to each automobile insured therein, an insured who paid medical bills for a family member injured in an automobile accident in excess of the $500 coverage provided for each insured automobile was entitled to stack or aggregate the medical payments coverage for which he qualified up to the $500 limit for each car on which he paid a premium, notwithstanding the policy also provided that the insurer's liability for one accident was limited to $500 per person.

ON petition for discretionary review of the decision of the Court of Appeals (reported without published opinion in 31 N.C. App. 156, 228 S.E. 2d 785 (1976)), which affirmed the judgment in

favor of defendant entered by *Long, J.*, at the 16 February 1976 Session of GUILFORD Superior Court. Docketed and argued as case No. 42 at the Spring Term 1977.

Plaintiff's intestate, John C. Woods (Mr. Woods), instituted this action on 26 January 1974 to recover sums allegedly due him under the medical payment provisions of two separate family automobile policies issued by defendant, Nationwide Insurance Company. Mr. Woods died on 6 August 1975, and on 15 September 1975 his executrix, Rebecca Sumner Woods, was substituted as plaintiff in this action. The facts in the case were stipulated. The questions before the Court involved the proper interpretation of the medical payment provisions of defendant's two policies.

On 27 April 1973 Mr. Woods' daughter, Cynthia Woods, was severely injured while she was driving a Volkswagen automobile belonging to Harold Lee Spencer (Spencer). In consequence Mr. Woods incurred hospital, medical, and other related expenses for his daughter in an amount in excess of $4,000. The Volkswagen was one of three automobiles owned by Spencer, all of which were covered by Family Automobile and Comprehensive Liability Policy No. 61B 323-248 (Spencer policy) issued to him by defendant. Mr. Woods was the "named insured" in Family Automobile and Comprehensive Liability Policy No. 61B 130-165 (Woods policy) issued to him by defendant. This policy covered two automobiles owned by Mr. Woods.

At the time of Miss Woods' accident both the Spencer policy and the Woods policy were in full force and effect and both "named insureds" had performed all the conditions of their respective policies. As executrix of Mr. Woods' estate, plaintiff sues to recover from defendant the sum of $4,000 – $3,000 under the medical payments provision of the Spencer policy and $1,000 under the Woods policy.

The declarations page of the Spencer policy shows various coverages for the three different automobiles, including the 1961 Volkswagen in which Miss Woods was injured. The first paragraph of this page provides: "The insurance afforded is only with respect to such of the following coverages for the indicated automobile for which a specific premium is shown. The limit of the Company's liability under each such coverage and for the indicated automobile shall be as stated herein, subject to all the terms of this policy having reference thereto."

The coverage with which we are concerned is "Medical Payments each Person." Following this designation there are two columns for each vehicle. The first column is headed "Limits of Liability" and the second column is headed "Premiums." In these two columns under each automobile appear, respectively, "$1,000" and "INCL." The letters "INCL" appear in the Premiums column for each automobile and for every coverage provided. The insured paid a separate premium for each type of coverage for each automobile but the amount is not specified. The complaint simply alleges that the amount of premiums paid for the medical payments coverage was "unknown."

Subsequent provisions of the Spencer policy pertinent to this appeal are the following:

> "Nationwide Mutual Insurance Company agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:
>
> * * *
>
> "PART III—EXPENSES FOR MEDICAL SERVICES
>
> "Coverage G—Medical Payments—Automobile
>
> . . .
>
> "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:
>
> "Division 1—to or for the Named Insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident,
>
> (a) while occupying the owned automobile,
>
> (b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or

(c) through being struck by an automobile or by a trailer of any type;

"Division 2—to or for any other person who sustains bodily injury caused by accident, while occupying

(a) the owned automobile, while being used by the Named Insured, by any resident of the same household or by any other person with the permission of the Named Insured; or . . .

* * *

"*Definitions*

" 'Owned automobile' means

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded, . . .

* * *

" 'Non-owned automobile' means an automobile or trailer not owned by or furnished for the regular use of either the Named Insured or any relative, other than a temporary substitute automobile;

* * *

"*Limit of Liability*

"The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease as the result of any one accident.

* * *

"CONDITIONS

* * *

"4. Two or More Automobiles (Coverages A, B, C, D, E and G)

"When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. . . ."

Under the schedule of coverages, the Spencer policy provides for "coverage G—medical payments—$1,000 each person."

The declaration page of the Woods policy, which covers Mr. Woods' two vehicles, varies from the Spencer policy as to the vehicles covered and the amount of the coverage. With reference to "automobile medical payments, each person," this page shows that separate premiums were paid for this type of coverage on each of the two vehicles, with a limit of liability on each vehicle of $500 for each person.

To recover on the Woods policy plaintiff relies upon the following provisions:

"PART III—EXPENSES FOR MEDICAL SERVICES

"Coverage G—Medical Payments—Automobile

. . .

"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

"Division 1—to or for the Named Insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile;

* * *

"*Limit of Liability*

"The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease as the result of any one accident.

* * *

"CONDITIONS

"4. Two or More Automobiles (Coverages A, B, C, D, E, and G)

"When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. . . ."

Defendant has admitted liability to plaintiff under the Spencer policy for the payment of $1,000 and under the Woods policy for $500. These amounts have been paid to the plaintiff without prejudice to the plaintiff's right to maintain this action. Plaintiff brought this suit to compel payment of an additional $2,000 under the Spencer policy and an additional $500 under the Woods policy.

The trial judge heard the case without a jury, found the facts, which were undisputed, and adjudged that plaintiff is entitled to recover nothing from defendant. On appeal the Court of Appeals affirmed, and we allowed certiorari.

Bencini, Wyatt, Early & Harris by William E. Wheeler for plaintiff-appellant.

Young, Moore, Henderson & Alvis by B. T. Henderson II and Joseph C. Moore III; Robert R. Gardner, of Counsel, for defendant appellees.

SHARP, Chief Justice.

Condition 4 of both the Spencer and Woods policies provides that the medical provisions of Part III "apply separately" to each automobile insured therein. Relying upon this provision plaintiff contends that as to each policy she is entitled to treat the applicable limit on medical payments liability as applying to each car for which separate premiums have been paid, and to compute the amount recoverable by multiplying the respective liability limitation by the number of "owned automobiles." Thus, she argues, she is entitled to payments of $1,000 for each of the three cars covered by the Spencer policy and $500 for each of the two cars named in the Woods policy, a total of $4,000. Conceding its liability for $1,000 and for $500 under the respective policies, defendant has paid plaintiff $1,500. She now seeks to recover the $2,500 she contends is still owing.

[1, 2] The general principles of construction employed to divine the meaning of an insurance contract are well summarized in *Wachovia Bank & Trust Company v. Westchester Fire Insurance Company*, 276 N.C. 348, 354-55, 172 S.E. 2d 518, 522-23 (1970), a case in which the parties argued contentions very similar to those of the parties in this case. As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be

used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein. Plaintiff's appeal must be considered with these principles of construction in mind.

In its unpublished decision the Court of Appeals accepted the defendant's contention that this case is controlled by *Wachovia Bank & Trust Company v. Westchester Fire Insurance Company*, supra (hereinafter cited as *Wachovia v. Insurance Co.*) and concluded that "the judgment appealed from is consistent with the holding . . . in that case. . . ." Accordingly, it affirmed the trial court. Plaintiff apparently concedes the application of *Wachovia v. Insurance Co.* to the interpretation of the Spencer policy, but urges this Court to reconsider that opinion. She also contends that the policy provision construed in *Wachovia v. Insurance Co.* is entirely different from the one in the Woods policy under which she claims. We will consider each of these arguments in turn.

[3] Although the Spencer policy is practically identical with the one construed by this Court in *Wachovia v. Insurance Co.*, a brief review of that case will demonstrate that it need not be reconsidered to resolve plaintiff's claim under the Spencer policy. In *Wachovia v. Insurance Co.* the plaintiff was the administrator of the estate of Herbert Barnes, the named insured to whom defendant Westchester Fire Insurance Company had issued a comprehensive automobile policy covering two vehicles, a Pontiac automobile and a Ford pickup truck. Separate premiums were paid for the coverage on each vehicle and both qualified as "owned automobiles" within the meaning of the policy. A provision of that policy purported to limit medical payments liability to $5,000, but it also included an "apply separately" clause (Condition 4 in that policy too).

Barnes died from injuries received in a head-on collision with another vehicle while he was driving the "named" Pontiac. In a suit on the medical payment provisions of the policy the plaintiff, Barnes' executor, argued that the "apply separately" language could reasonably be construed as creating two independent, identical contracts for each vehicle for which separate premiums had been paid, and that the limitation provision applied separately to claims under each of these contracts. Had Barnes had two separate policies identical to the one issued by that defendant, he would have qualified under Division 1 of each of those contracts for medical payments coverage, thus the plaintiff there sought to aggregate, or "stack," the limitation provisions so as to render the defendant liable for the sum of the medical payments protection provided by each hypothetical policy. This Court rejected the independent contract construction on the facts of that case.

The faulty reasoning underlying plaintiff's claim under the Spencer policy can best be demonstrated by assuming, *arguendo,* that in *Wachovia v. Insurance Co.* this Court had adopted the construction of the "apply separately" clause put forward by the plaintiff in that case, that is, that the "apply separately" provision created independent identical contracts for each car for which separate premiums had been paid. On the facts in this case Cynthia Woods was neither the "named insured" nor his relative. She was, however, operating the Volkswagen, with the permission of the "named insured." Further, the Volkswagen, by virute of the separate premiums paid, was an "owned automobile" within the meaning of the Spencer policy.

Under Division 2, subsection (a) of this contract, defendant agreed to extend medical payments coverage to nonrelatives of the "named insured" for bodily injury "caused by accident, *while occupying the owned automobile*" with the permission of the "named insured." (Emphasis added.) Thus, the coverage extended by this provision is explicitly limited to that purchased for the "owned automobile" *occupied* at the time of collision. One cannot construe this language to mean that nonrelatives receive protection by virtue of the premiums paid for the other vehicles mentioned in the policy which were not occupied by the injured party. There is nothing ambiguous about this language; it ties coverage to specific vehicles. Plaintiff, therefore, is not entitled to collect additional payments under the Spencer policy.

Wachovia v. Insurance Co. has no application to plaintiff's claim under the Spencer policy. Had Spencer obtained three

separate, identical insurance policies for each of his vehicles, still claimant could recover medical payment expenses only under the Volkswagen policy up to the applicable limit of $1,000. She could *not qualify* for coverage under the policies issued for the other cars for the simple reason she could occupy only one owned automobile at a time. Hence, no issue of limitation would arise as to those claims. Plaintiff here has overlooked this distinction between qualifying for coverage under a policy in the first instance, and being bound by subsequent limitations imposed upon the coverage extended.

[4] Cynthia Woods' relationship to the "named insured" in the two policies involved here is quite different, and different policy provisions bear upon her right to medical payments. As a member of the "named insured's" family within the meaning of the Woods policy (Part III, Coverage G, Division 1), Cynthia Woods was entitled to medical payments for bodily injury "caused by accident while occupying or being struck by *an* automobile." (Emphasis added.) Clearly, this provision does not tie coverage for her medical payments to a specific vehicle.

Since the medical payments coverage purchased for each of Woods' two vehicles also extended medical coverage to a family member accidentally injured while occupying a non-owned automobile, it would be impossible to attribute liability for medical payments coverage to either car to the exclusion of the other. Obviously, each premium which was paid for medical coverage under the Woods policy bought the same protection with respect to accidental injuries sustained by a family member while occupying a non-owned automobile. Where coverages derived from two separate premiums overlap so completely, and where the provisions of the policy are said to "apply separately" to each vehicle insured, the policyholder may reasonably conclude that his double payment of premiums provides double coverage. Otherwise, he would receive no consideration for his second premium.

"The test in construing the language of the contract [an insurance policy] is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 143, 217 S.E. 2d 551, 565 (1975). The natural construction of the language of the Woods policy is that when a member of the insured's family is injured in an automobile accident, and the insured has paid medical bills in excess of the coverage provided for each insured

automobile, he is entitled to stack or aggregate the medical payments coverage for which he qualifies up to the limit for each car on which he has paid a premium.

In reaching the conclusion that plaintiff is entitled to the benefit of the medical coverage provided for each vehicle named in the Woods policy we are not unmindful of its limitation of liability provision, which states that the insurer's liability for one accident shall not exceed $500 per person. This language, when read in conjunction with the "apply separately" clause, becomes ambiguous. As pointed out above, this ambiguity is particularly evident when a "Division 1" beneficiary sustains injuries while occupying a non-owned automobile. Suppose, for example, that the named insured had purchased medical payments coverage in varying amounts for multiple vehicles named in a single policy. In such a case it would be impossible to determine the applicable limitation when, as here, the family member is injured while occupying a non-owned vehicle and neither of the owned vehicles is involved. Absent express language in the policy that the "per accident" limitation applies without regard to the number of vehicles covered by the policy, the ambiguity must be resolved against the insurer, who drew up the contract. *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 210 S.E. 2d 187 (1974). Since it is stipulated that plaintiff has complied with all the conditions precedent to recovery under the Woods policy, we therefore hold that she is entitled to collect medical payments for each car on which her testate paid premiums.

This holding does not conflict with the result in *Wachovia v. Insurance Co.* Although in that case we also analyzed the extent of coverage under "Division 1" provision relating to members of the "named insured's" family, the language in that contract (identical to Division 1 of the Spencer policy) differs markedly from that employed in the Woods policy. In rejecting the plaintiff's argument in *Wachovia v. Insurance Co.* that the "apply separately" clause should be construed as creating independent contracts for the vehicles for which separate premiums had been paid, we specifically distinguished cases from five other jurisdictions which had allowed the "stacking" of medical payments claims under policies whose coverage "was afforded to the policyholder and members of his family 'while occupying or through being struck by an automobile.' " 276 N.C. at 360, 172 S.E. 2d at 526. *See Kansas City Fire and Marine Ins. Co. v. Epperson*, 234 Ark. 1100, 356 S.W. 2d 613 (1962); *Government Employers Ins. Co. v. Sweet*, 186

So. 2d 95 (Fla. App. 1965); *Travelers Indemnity Co. v. Watson*, 111 Ga. App. 98, 140 S.E. 2d 505 (1965); *Southwestern Fire and Casualty Co. v. Atkins*, 346 S.W. 2d 892 (Tex. Civ. App. 1961); *Central Surety and Indemnity Corp. v. Elder*, 204 Va. 192, 129 S.E. 2d 651 (1963). The basis for distinguishing the policy involved in *Wachovia v. Insurance Co.* from those construed by the other courts was that in the latter, there was "'no way to relate coverage to either' automobile of the policyholder. . . ." *Id.* at 360, 172 S.E. 2d at 526. By contrast, the terms of the policy in *Wachovia v. Insurance Co.* tied coverage to the specific car which the injured family member was *occupying* at the time of the accident. When, as in the Woods policy, no such limitation appears in Division 1 of the policy being construed, the reasoning of the courts in the cases cited above is persuasive.

The judgment of the Court of Appeals affirming the judgment of the Superior Court that "plaintiff recover nothing from defendant in his action" is affirmed as it relates to the claim under the Spencer policy; it is reversed as it relates to the claim under the Woods policy. This cause will be remanded to the Superior Court of Guilford County, High Point Division, for the entry of judgment that plaintiff recover of defendant the additional sum of $500, plus interest and costs.

Affirmed in part;

Reversed in part.

STATE OF NORTH CAROLINA v. JAMES BUDDY WALKER

No. 45

(Filed 29 August 1978)

1. Criminal Law § 7— elements of entrapment

The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) the criminal design originated in the minds of government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

2. Criminal Law § 7.1— entrapment—insufficient evidence to require instruction

In a prosecution for possession of heroin with intent to sell and sale of heroin in 1976, the trial court properly refused to charge the jury on the

defense of entrapment where the following evidence relevant to entrapment was presented: (1) defendant, while on work release during a prison term on an unrelated drug charge, met with the N.C. Attorney General to discuss supplying information on area drug traffic, and the Attorney General agreed to inform the parole board if information supplied by defendant proved useful; (2) defendant then gave information to the Attorney General which did prove useful; (3) while still in prison, defendant met with an SBI agent, who told him about two heroin sales defendant had made to an undercover agent in 1975 and, according to defendant's testimony, informed him of the undercover agent's name; (4) defendant left the latter meeting with the understanding that charges concerning the 1975 sales would be dropped if he would associate and deal with people in the drug trade and continue to supply information; (5) when the undercover agent came to defendant's house in 1976, defendant recognized him as such and got drugs for the agent because he was under the impression that he was supposed to do so in order to get the 1975 drug charges dropped; (6) defendant admitted that, on the basis of his meetings with the Attorney General and the SBI agent, he did not feel that he had a license to go out and sell heroin; (7) the Attorney General testified that he did not authorize defendant to work as an undercover agent; (8) defendant testified that he had not dealt in drugs after his release from prison, other than the sales to the undercover agent, and that when a person once had been in the drug business there was no problem getting information; (9) and defendant neither contacted nor supplied information to any law enforcement official from the time of his meeting with the SBI agent until his sale of heroin to the undercover agent some five months after his release from prison.

Justice EXUM dissenting.

ON indictments proper in form, defendant was charged with and convicted of two counts each of felonious possession of heroin with intent to sell and felonious sale of heroin. The Court of Appeals, 34 N.C. App. 501, 238 S.E. 2d 322 (1977), (*Parker, J.*, concurred in by *Morris* and *Clark, JJ.*, reported under Rule 30(e)), found no error in defendant's trial before *Bailey, J.*, 6 November 1976 Session, WAKE Superior Court. We allowed discretionary review 24 January 1978.

The State's evidence tended to show the following facts:

On 26 August 1976, James W. Lewis, an undercover drug agent for the State Bureau of Investigation, went to defendant's residence in Raleigh to find out if defendant was selling drugs and while there purchased two packages of heroin from him for $25.00 each. At the time of this transaction, defendant told Lewis that "the dope won't that good" and stated that if Lewis would return the next day, he would give him an extra package free. Lewis returned to defendant's home on 14 September 1976, at which time defendant sold him two more twenty-five-dollar packages of heroin and gave him a third package free, saying it

was the one he had promised Lewis earlier. The sales on these two dates are the subjects of the indictments on which the instant convictions are based. Agent Lewis had made two previous heroin buys from defendant in early 1975, including one in April of that year, when he first became acquainted with defendant.

Defendant's evidence tended to show that:

In 1975, defendant, on charges unrelated to the sales to Agent Lewis, pleaded guilty to selling heroin and was sentenced to two years imprisonment which commenced on 25 April of that year. While on work release during this imprisonment, defendant was employed at a Howard Johnson Restaurant on Glenwood Avenue. On defendant's request, his supervisor at the restaurant, who was a friend of North Carolina Attorney General Rufus Edmisten, arranged a meeting between the Attorney General and defendant in November or December of 1975. At this meeting, the Attorney General agreed that if defendant provided information on area drug traffic he would inform the parole board that defendant had been helpful. Defendant then gave information to the Attorney General which did prove useful. At a later date, defendant met with SBI Agent Joseph Freeman, who informed him of the two heroin sales defendant had made to Agent Lewis earlier in the year. Defendant testified that he left this meeting with an understanding that if he would associate and deal with people in the drug trade and continue to supply information, charges concerning the two 1975 sales would be dropped. Defendant subsequently was released from prison on 30 March 1976. Defendant further testified that he procured and sold the heroin to Agent Lewis in August and September of 1976 because he had been told by Agent Freeman that Lewis was an SBI Agent and it was his understanding that this was what he was supposed to do in order to erase the two 1975 charges.

On rebuttal, SBI Agent Freeman testified that he made no promises to defendant during their 1975 meeting, nor did he tell defendant who had made the undercover drug purchases from him in early 1975. In addition, two of defendant's neighbors testified that during the spring and summer of 1976, they observed defendant frequently hiding and retrieving small packages outside his home and that people often left defendant's house in a drugged or intoxicated condition.

Additional facts relevant to the decision are set out in the opinion.

Joseph Reichbind for defendant appellant.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch for the State.

COPELAND, Justice.

The sole assignment of error brought forward by defendant on this appeal challenges the refusal of the trial court to charge the jury on the defense of entrapment. We have determined that this assignment is without merit; therefore, decision of the Court of Appeals must be affirmed.

It appears that the first reported consideration of the question of entrapment is found in *Genesis* 3:13 in which the Creator rejected the plea of Eve, offered in defense of having eaten of the tree of knowledge, that, "The serpent beguiled me, and I did eat."

[1] This Court has earlier held that, "Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E. 2d 191, 197 (1955). The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. *Sherman v. United States*, 356 U.S. 369, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958); *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Burnette, supra.* In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485 (1967); *State v. Burnette, supra.*

[2] The evidence in the instant case relevant to the entrapment issue is as follows: (1) defendant, while on work release from

prison during a term imposed on an unrelated drug charge, met with Attorney General Rufus L. Edmisten to discuss supplying information on area drug traffic; (2) the Attorney General agreed to inform the parole board of defendant's help if the information supplied by defendant proved useful; (3) while still in prison, defendant met with SBI Agent Freeman, who told him about the two heroin sales defendant had made to an undercover agent in early 1975 and, according to defendant's testimony, informed him that the undercover agent who had purchased the drugs was James Lewis; (4) defendant left this latter meeting with an understanding in his own mind that he was to associate and deal with people in the drug trade and provide more information; (5) when Agent Lewis came to defendant's house in August of 1976, defendant recognized him as an undercover agent and got drugs for Lewis because he was under the impression that he was supposed to do so in order to get the 1975 drug charges dropped; (6) defendant admitted on cross-examination that he did not feel that, on the basis of his meetings with the Attorney General and Agent Freeman, he had a license to go out and sell heroin; (7) the Attorney General, testifying as a witness for defendant, indicated that at no point did he authorize defendant to work as an undercover agent; (8) on further cross-examination, defendant stated that, although he had sold drugs prior to his 1975 convictions, he had not dealt in drugs after his release from prison in March of 1976, other than the sales to Agent Lewis, and that when a person once had been in the drug business, there was no problem getting information.

Defendant's position here is that he understood from his discussions with the Attorney General and SBI Agent Freeman that he was to remain in contact with people in the drug trade and supply information on drug traffic to state law enforcement officials in order to have the 1975 heroin charges dropped. From this defendant asserts that a jury could conclude that when Agent Lewis came to his home and asked defendant to get some heroin for him, defendant, having recognized Lewis as an undercover agent, felt that he was acting in accord with some sort of perceived agreement with the Attorney General and Agent Freeman in procuring the heroin and selling it to Lewis and, consequently, that defendant was entrapped into committing the crimes charged in the indictments here. Nowhere in defendant's account of these two meetings, however, is there any indication that either of the officials with whom defendant spoke suggested

that he sell heroin in the course of his continued association with drug figures. Indeed, as noted above, defendant conceded that he did not feel that he had a license to sell heroin. Defendant further stated that once a person had been in the drug business, there was no difficulty in getting information on the trade. In addition, defendant's testimony discloses that he neither contacted nor supplied information to any law enforcement official from the time of his November 1975 meeting with Agent Freeman until the day in August of 1976, some five months after defendant's release from prison, when Agent Lewis appeared at defendant's residence in his undercover capacity seeking to purchase drugs.

It is our conclusion that this evidence is simply insufficient to permit a jury to reasonably infer that any undue persuasion, trickery or fraud was practiced by government agents upon defendant to induce him to carry out the alleged heroin sales in question. The discussions related by defendant concerned only the supplying of information on activities within the drug trade and not active participation by defendant therein. Defendant does not contend that it was necessary for him to involve himself in drug sales in order to obtain knowledge to be transmitted to the authorities. He clearly conceded that information was available to him merely by virtue of his past involvement in the drug business; yet, other than one unsuccessful attempt, defendant failed to seek to communicate with any official so as to supply that which he asserts was the *quid pro quo* of his alleged agreement with the State.

Activity on the part of law enforcement agents which brings about the commission of a criminal act by a defendant *as a result of the persuasion* of the agents constitutes entrapment under our law. *State v. Stanley, supra.* Defendant's own evidence here, however, indicates that the earlier persuasion exercised by the State was directed explicitly to a quest for information and that the actions of Agent Lewis on the dates of the purchases were merely in the nature of providing an opportunity for criminal conduct and not excessive inducement. Merely affording opportunities or facilities for the commission of a crime, however, does not amount to entrapment. *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932). We therefore hold that the trial court did not err in refusing to submit an instruction on entrapment to the jury and defendant's assignment of error to the contrary is overruled.

For the reasons stated, the decision of the Court of Appeals finding no error in defendant's trial and conviction is

Affirmed.

Justice EXUM dissenting.

I vote for a new trial for failure of the trial court to submit the defense of entrapment to the jury. The legal definition of entrapment is correctly stated in the majority opinion. Defendant's evidence makes out a classic entrapment defense under this definition. It shows, or provides bases for reasonable inferences, that the crimes charged were induced by the actions of law enforcement officials, that the 1976 sales to James Lewis, an undercover agent with the State Bureau of Investigation (SBI), originated with agents of the state and not the defendant, and that these sales were a product of overtures by Lewis and other officials to defendant rather than defendant's criminal inclinations.

The evidence is undisputed that defendant sold heroin to Lewis while Lewis was an undercover agent for the SBI in March and April, 1975. Defendant had also made other sales in 1975 to which he pleaded guilty and for which he was sentenced to two years imprisonment. Immediately prior to the inception of his prison term he made the sales to Lewis. He was not indicted for these 1975 sales to Lewis until February, 1976. He was arrested therefor in February or March, 1976, and immediately acquired counsel to represent him. While defendant was required to post a $10,000 appearance bond on the charges being tried here, he was released on his own recognizance on the charges arising out of the 1975 sales to Lewis. These charges were pending when defendant dealt with Lewis in August and September, 1976. So far as the record reveals they had not been disposed of at the time of defendant's trial on the instant charges in November, 1976.

Defendant testified that he understood these indictments for the 1975 sales to Lewis would be dropped if he continued to cooperate with the SBI in its undercover drug operations. The attorney representing him on these charges, Mr. Douglas DeBank, corroborated his testimony. Mr. DeBank testified that the Attorney General agreed to recommend to the Wake County District Attorney that these charges be dropped in return for defendant's help. Defendant said he became aware in November,

1975, that the state knew of these 1975 sales to Lewis. He testified:

> "I met with Mr. Freeman [Special Agent and Assistant Supervisor with the SBI] in the last of November. Well, he made me aware of the two sales and asked me did I remember a Mr. James W. Lewis at the time. Mr. Lewis is that gentleman there. He did not tell me what I was going to be charged with those two sales. I was under the impression that if I continued giving them information that the two charges were supposed to be dropped.
>
> COURT: Did he say that?
>
> A. Yes, sir. He said that he would see what he could do about it."

Defendant further testified that when Lewis approached him on 17 August 1976 he told Lewis that he had nothing to sell. Lewis then asked, "[W]ould I get something for him and I told him yes I would. I had the impression that that was what I was suppose [sic] to do. When he requested me to get drugs for him I knew that he was an SBI agent. I got it for him because I was under the impression that that was what I was suppose [sic] to do."

Defendant readily admitted selling heroin to Lewis on 26 August 1976 and 14 September 1976. His entire defense rested on entrapment. He testified that on 14 September 1976 he was in the presence of a drug dealer when Lewis came to make the purchase. He said, "Lewis gave me the money, I gave it to the guy and I gave him the drugs. Lewis gave me the money, I gave it to the dealer and the dealer gave me the drugs and I handed it to him. I felt I was suppose [sic] to help him. The dealer who was at my house on September 14th was 'Shaky'. I don't know his last name." Defendant further said, "But I felt like you were trying to make a bust, but I had no idea that he would bust me with it."

Defendant's testimony itself tends to show he was induced to make the 1976 sales to Lewis by agents of the state and that the sales were the product of the creative activity of these agents rather than defendant. Lewis, according to defendant, did more than merely give defendant an opportunity to commit a crime. His words and actions together with defendant's earlier conversations with other officials made defendant believe he had to comply with Lewis' request as a part of his earlier agreement to cooperate with the authorities.

The majority, however, concludes that the contacts made with defendant by the authorities furnished no reasonable basis for defendant's belief that he was expected by them to sell heroin to Lewis in August and September, 1976. I strongly disagree with this assessment of the evidence relating to these contacts. The Attorney General testified that in November or December, 1975, he talked personally with defendant. While making it clear that he made no promises to defendant, the Attorney General did say he agreed to accept information from defendant. He said further, "Mr. Walker gave us certain knowledge, certain information. The information did prove helpful. . . . Q. Did you anticipate further information from Mr. Walker? A. I am sure that I was hoping there would be."

Freeman testified for the state in rebuttal. He admitted talking with defendant while defendant was in prison in November or December, 1975. He said he requested defendant to cooperate with the SBI in its undercover drug operations and to help it in gathering information. Freeman also admitted that he told defendant "that our agent had purchased heroin from him and that he would be indicted for that." Freeman denied mentioning Lewis' name to defendant and said, "I did not know if [defendant] ever knew who James Lewis was."

It is true that no one, including defendant, testified that any person in an official capacity told defendant expressly that he was to sell drugs to Lewis or to anyone else. Defendant conceded that he had no license to sell heroin generally and that he had avoided doing so since being released from prison. He was, however, supposed to "cooperate" with the state and to assist it in gathering information about illicit drug traffic. Moreover, and most importantly, he says he knew in August and September, 1976, that Lewis was an SBI undercover agent, having been advised of Lewis' identity by Freeman in November, 1975. Whether Freeman in 1975 expressly advised defendant of Lewis' identity, it seems reasonable to assume that defendant knew Lewis' identity at least as early as February or March, 1976, when he was indicted, arrested and acquired counsel in connection with the 1975 sales to Lewis.

These arrangements for defendant's cooperation together with his knowledge of Lewis' identity form a reasonable, if not a compelling, basis for defendant's belief that he was supposed to comply with Lewis' request to acquire and deliver heroin to Lewis. "Cooperation" can take many forms. Defendant's realiza-

tion that he had no license to sell heroin generally does not detract from his stated belief that he was supposed to cooperate with Lewis whom he knew to be an undercover agent. If defendant, experienced in illicit drug traffic, knew in August and September, 1976, that Lewis was an undercover SBI agent, it is inconceivable that he would have dealt with him other than under the belief that he was expected to do so by the authorities.

The question, in essence, is not what the Attorney General, Freeman, and Lewis subjectively intended defendant to do or not to do. The question is what their words and actions might have reasonably led him to believe he was supposed to do. Whether defendant in fact knew Lewis' identity, whether he sold to Lewis believing this was what the authorities intended him to do, and the reasonableness of defendant's belief under the circumstances, are crucial factual questions which the jury under proper instructions, and not this Court, should resolve.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION, TWO-WAY RADIO OF CAROLINA, INC. (PROTESTANT), AND TARHEEL ASSOCIATION OF RADIO-TELEPHONE SYSTEMS, INC. (INTERVENORS) v. WILLIAM D. SIMPSON, "RADIO COMMON CARRIER SERVICE"

No. 59

(Filed 29 August 1978)

1. Utilities Commission § 3— "public" utility—factors considered

Whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied but depends on the regulatory circumstances of the particular case. Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

2. Utilities Commission § 20— radio communications service for doctors—public utility

A medical doctor who provides a two-way radio service for ten doctors in his county medical society for compensation is operating a "public" utility within the meaning of G.S. 62-3(23) and G.S. 62-119(3) and is, therefore, subject to regulation by the Utilities Commission where the doctor serves over 45 percent of the available market in the county; the radio common carrier industry is a small one whose users fall into definable classes; and if prospective offerors of radio services are allowed to approach these separate classes without

regulation the industry could easily shift from a regulated one to a largely unregulated one with the burdensome, less profitable service left on the regulated portion.

Justice MOORE dissenting.

ON petition for discretionary review of a decision of the Court of Appeals in which the opinion of the court was rendered by *Arnold, J.*, and concurred in by *Brock, C.J.*, and *Parker, J.*, and which affirmed an order of the North Carolina Utilities Commission. The decision is reported at 32 N.C. App. 543, 232 S.E. 2d 871 (1977). The case was argued as No. 39 at the Fall Term 1977.

Edward B. Hipp, Commission Attorney, and Theodore C. Brown, Jr., Assistant Commission Attorney, for plaintiff appellee.

Reynolds & Howard, by Ted R. Reynolds and E. Cader Howard, Attorneys for protestant appellees.

Hamrick, Mauney & Flowers, by Joe Mauney, Attorneys for defendant appellant.

EXUM, Justice.

Dr. William D. Simpson, a physician engaged in the practice of medicine in Shelby, Cleveland County, filed application with the Utilities Commission on 21 February 1975 requesting a hearing to determine whether a two-way radio communication service he was operating in conjunction with a telephone answering service was a public utility. Two-Way Radio of Carolina, Inc., and Tarheel Association of Radio-Telephone Systems, Inc., were permitted to intervene. The Commission's hearing examiner treated the application as one for an exemption from regulation and recommended that it be denied. The Commission denied the application and the Court of Appeals affirmed. Largely for the reasons and authorities given in its opinion we affirm the decision of the Court of Appeals.

[2] The question presented is whether Dr. Simpson's two-way radio service, which he offers to members of his County Medical Society as an adjunct to a telephone answering service, is a public utility within the meaning of General Statutes 62-3(23) and 62-119 and therefore subject to regulation by the Utilities Commission. The answer is yes.

Dr. Simpson owns a telephone answering service in Shelby that has over 60 subscribers. As an adjunct to this service he

operates a mobile radio system. The base station for the system is an 80-watt, two-way radio and a 70-foot tower. The mobile units are seven portable two-way radios and three radio pagers or "beepers." When a subscriber to the radio system cannot be reached by telephone, an operator at the answering service will contact him and relay a message by radio. Dr. Simpson has a Federal Communications Commission license for this system that at present limits his operation to ten mobile units.

Subscribers to the radio system are Dr. Simpson and nine other Cleveland County physicians. Dr. Simpson testified that he was offering the service exclusively to members of the Cleveland County Medical Society, a group of some 55 to 60 persons. There was some evidence that in the past other persons had been allowed to use the system, but at the time of the application all subscribers were physicians. Subscribers to the radio service are charged fees in addition to any they might pay for the answering service although, according to Dr. Simpson, these fees are intended only to recapture his costs over a five-year period and not to generate a profit.

Two-Way Radio of Carolina, Inc., an intervenor and protestant in this action, operates a certificated radio common carrier service in several western North Carolina counties including Cleveland County. At the hearing the evidence was that it had 12 subscribers to its Cleveland County service, none of whom were physicians.

General Statute 62-30 gives the Utilities Commission the power "to supervise and control the public utilities of the State." The definition of "public utility" relevant here is found in General Statute 62-3(23)a.6:

> " 'Public utility' means a person . . . owning or operating in this State equipment or facilities for . . . 6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is *offered to the public* for compensation." (Emphasis supplied.)

The Commission also has general regulatory power over "radio common carriers" under General Statutes 62-119 through 62-124. A "radio common carrier" is defined as a person who is engaged in "owning, operating or managing a business of *providing or offering a service for hire to the public* of one-way or two-way radio

or radiotelephone communications . . . ." G.S. 62-119(3). (Emphasis supplied.)

No one disputes that Dr. Simpson is transmitting messages by way of radio communication for compensation. The question is whether he is offering this service to the "public." Giving meaning to this term, which is not defined in Chapter 62 of the General Statutes, is therefore necessary for appropriate resolution of the case. "The public does not mean everybody all the time." *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 255 (1916). The problem here really is whether a medical society of 55 to 60 members is so much less than "everybody all the time" that it falls without the meaning of "public" as that term is used in the governing statutes. Dr. Simpson contends that it is and argues that in order for a service to be offered to the "public" it must be offered to an indefinite class or to the community at large. The Utilities Commission and the protestant contend, on the other hand, for a more flexible definition of "public" that focuses on the preservation of the legislatively mandated regulatory framework. On balance, the Utilities Commission and the protestant have the better legal position.

Only one prior North Carolina case has attempted to define "public" in the utilities context. *Utilities Comm. v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). In that case the applicant sought to set up a mobile radio telephone service for the Kinston area. He obtained a Federal Communications Commission construction permit that would allow his facility to serve 45 customers. A survey of the area indicated that he could actually expect 33 subscribers. Despite the small size of his planned operation and the fact that it was limited to one community, this Court held that it was a public utility, saying, *id.* at 268, 148 S.E. 2d at 109:

> "One offers service to the 'public' within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier."

In *Telegraph Co.* the applicant did, in fact, offer his service to anyone who applied for it to the limit of its capacity. This Court held that to be an offering of the service to the "public." This

Court did not, however, foreclose consideration of whether a service offered only to a selected class of persons might also be considered an offering to the "public." *Telegraph Co.*, therefore, is merely the beginning and not the end of our inquiry.

Courts in several other jurisdictions have dealt with similar problems in interpreting their public utility statutes, and their decisions can provide us with some guidance. In *Terminal Taxicab Co. v. District of Columbia*, supra, 241 U.S. 252, the United States Supreme Court concluded that a taxicab company was a common carrier offering its services to the public even though the service was, by contract, limited to the patrons of several hotels and a railroad station. The Court said, *id.* at 255: "The [taxicab] service affects so considerable a fraction of the public that it is public . . . ." A similar test was applied and a similar result reached in *Surface Transportation Corp. v. Reservoir Bus Lines*, 271 App. Div. 556, 67 N.Y.S. 2d 135 (1946). There defendant offered bus service only to tenants of certain apartments pursuant to contracts it had entered into with their landlords. The applicable regulatory statute reached bus operations "for public use." The court found defendant to be serving the public, saying, *id.* at 560, 67 N.Y.S. 2d at 139: "Its service affects so considerable a fraction of the public [in the area that it served] that it is public in the same sense in which that term is applied to any other service." In *Iowa State Commerce Comm. v. Northern Natural Gas Co.*, 161 N.W. 2d 111 (Iowa 1968), defendant, a natural gas pipeline company, offered direct pipe line taps to selected retail customers, numbering 1740 domestic (most of whose land was crossed by the pipeline) and 93 commercial and industrial users. Defendant argued that it was not furnishing service to the "public" because it was not offering service to the public at large. The court disagreed, however, and concluded that the phrase "to the public" in the applicable regulatory statutes meant "sales to sufficient of the public to clothe the operation with a public interest and . . . not . . . willingness to sell to each and every one of the public without discrimination." *Id.* at 115. In the foregoing cases offers of service were made to some subclassification of the general populace; nevertheless the offers were uniformly held to be made to the "public."

A seemingly different result was reached in *Drexelbrook Associates v. Pennsylvania Public Utility Comm.*, 418 Pa. 430, 212 A. 2d 237 (1965). The enterprise in question there was furnishing gas, water and electric service to tenants of a large apartment

complex it owned. It bought these services at a reduced rate from a utility company serving the area and resold them to its tenants at retail rates. The Pennsylvania Supreme Court held that the enterprise was not furnishing services "to or for the public," stating: "Here . . . those to be serviced consist only of a special class of persons—those to be selected as tenants—*and not a class opened to the indefinite public.* Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature." *Id.* at 436, 212 A. 2d at 240. (Emphasis supplied.)

[1] We have no quarrel with the result in any of the cited cases. All seem correctly decided. Their teaching is that whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied. What is the "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances, and as already noted by the Court of Appeals, accomplish "the legislature's purpose and comport with its public policy." 32 N.C. App. at 546, 232 S.E. 2d at 873.

This kind of ad hoc approach has been adopted by the Supreme Courts of Iowa and New Mexico. Both have refused to endorse inflexible definitions of "public," identifying instead as the standard "sales to sufficient of the public to clothe the operation with a public interest." *Griffith v. New Mexico Public Service Comm.*, 86 N.M. 113, 116, 520 P. 2d 269, 272 (1974); *Iowa State Commerce Comm. v. Northern Natural Gas Co., supra*, 161 N.W. 2d at 114. It is this type of flexible interpretation that is necessary to comport legislative purpose with the variable nature of modern technology.

Our legislature by enacting General Statutes 62-119 through 62-124 clearly intended to regulate radio common carriers which offered for hire services consisting of radio or radio-telephone communications to the public. The industry in North Carolina is a small one. The record indicates that there are only 3000 to 3500 subscribers to such a service in the entire state. The kind of per-

sons who use the service can also be identified with a fair degree of certainty. They are, in the main, doctors, realtors, and builders. Doctors are especially prominent users of the service. One operator testifying before the hearing examiner indicated that 24 percent of his subscribers were medical personnel; another, that 68 of the 80 users of her paging service were doctors. The experience of protestant, Two-Way Radio, is further illustrative. In Cleveland County where it operates in competition with Dr. Simpson, none of its 12 subscribers are doctors. In Mecklenburg County, by comparison, 113 of its 450 subscribers are doctors.

The radio common carrier industry is therefore a small one whose users fall into definable classes. Were a definition of "public" adopted that allowed prospective offerors of services to approach these separate classes without falling under the statute, the industry could easily shift from a regulated to a largely unregulated one. A service could be operated for doctors or realtors or builders, escape regulation and still capture a substantial portion or even a majority of the market. For example, while Dr. Simpson is offering the service to only ten subscribers, the record indicates there are only 22 radio common carrier subscribers in the whole of Cleveland County. Dr. Simpson is therefore serving over 45 percent of the available market. The end result of the kind of exemption Dr. Simpson argues for could well be that the only subscribers left in the regulated market would be those who fit in no easily definable class. Even if this extreme situation were not reached, unregulated radio services might focus on classes which are easier and more profitable to serve. The result would be to leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service.

[2] We hold, therefore, that in the regulatory circumstances of this case Dr. Simpson is offering a service to the public within the meaning of General Statutes 62-3(23) and 62-119. Consequently he is subject to regulation by the Utilities Commission. The decision of the Court of Appeals is

Affirmed.

Justice MOORE dissenting.

I do not believe that Dr. Simpson was operating a public utility. I therefore respectfully dissent.

In this day and age of increasing government regulation by both federal and state agencies, rather than expand definitions to bring more activities under regulation I believe we should seek to restrict regulation to those activities clearly requiring it.

The majority opinion cites several cases holding that one who offers services to a limited subclass of the general populace can still be serving the "public." Two of these cases, *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, and *Surface Transportation Corp. v. Reservoir Bus Lines*, 271 App. Div. 556, are distinguishable from present case in that they involve the supplying of transportation services to a large and varying subclass of individuals, none of whom directly contracted with the transportation services involved. In present case "so considerable a fraction of the public . . ." is not directly affected by the service offered, but rather only those few physicians who contracted for the service. The third case cited by the majority in its favor, *Iowa State Commerce Comm. v. Northern Natural Gas Co.*, 161 N.W. 2d 111, involved the supplying of natural gas pipeline taps to over 1800 retail customers, a "considerable fraction" of the public by anyone's determination. Furthermore, all three cases involve the supplying of those sorts of services (transportation and fuel) which are of a more substantial public interest in that they involve a much greater immediate effect on the general populace as a whole than does the supplying of telephone paging services.

I do not think Dr. Simpson intended to or was in fact operating a public utility. To the contrary, he was offering at cost a private service to his colleagues in the medical profession only, and not to the public at large.

G.S. 62-3(23)a.6 provides:

> " 'Public utility' means a person . . . owning or operating in this State equipment or facilities for: . . . 6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is *offered to the public* for compensation." (Emphasis added.)

In interpreting this statute in *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966), we said: "One offers service to the 'public' within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities." Dr. Simpson only offered to serve his fellow doctors—not all those who applied.

In my opinion, the rule adopted by the Supreme Court of Pennsylvania, as quoted in the majority opinion, is preferable to a more inclusive one. That court, in holding that the enterprise in question was not furnishing service "to or for the public," stated: "Here . . . those to be serviced consist only of a special class of persons—those to be selected as tenants—and not a class opened to the indefinite public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature."

I see no real danger, as the majority apparently does, that other such small identifiable groups could organize so as to be unregulated rather than regulated. In the event such development does occur and is found to be undesirable, it can always be corrected by the General Assembly.

The wording of the statute which defines a public utility is plain, that is, ". . . where such service is offered to the public . . . ." I do not believe the service offered by Dr. Simpson falls within the scope of that definition.

I vote to reverse.

Justice LAKE and COPELAND join in this dissent.

ELVA L. LITTLE v. ANSON COUNTY SCHOOLS FOOD SERVICE AND TRAVELERS INSURANCE COMPANY

No. 8

(Filed 29 August 1978)

1. Master and Servant §§ 67.1, 94.1— workmen's compensation—injury to spinal cord—compensation for partial loss of use of back improper

Where the uncontradicted evidence tended to show that plaintiff suffered an injury to her spinal cord which resulted in weakness in all of her extremities and numbness or loss of sensation throughout her body, and that she suffered diminished mobility and had "difficulty with position sense and with recognition of things in her hands when objects are placed in her hands," the Industrial Commission could not limit plaintiff to an award under G.S. 97-31(23) for partial loss of use of her back but instead should have taken into account all compensable injuries resulting from the accident.

2. **Master and Servant § 67.3— workmen's compensation—pre-existing conditions of age, education, work experience**

If pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health.

3. **Master and Servant § 93.2— evidence not presented—reliance on deputy commissioner's representation—right to present evidence abridged**

When a claimant refrains from presenting evidence in reliance on an inaccurate statement by a deputy commissioner of the Industrial Commission that a certain matter is uncontested, the right to testify and present evidence guaranteed by G.S. 97-84 has been abridged and the claimant's failure to present such evidence may not be used against him; therefore, before the Commission may determine that plaintiff is not entitled to compensation for permanent total disability, she must be afforded an opportunity to present evidence relevant to her capacity to work and earn wages.

4. **Master and Servant § 69— workmen's compensation—extent of incapacity for work as criterion**

The criterion for compensation in workmen's compensation cases covered by G.S. 97-29 or -30 is the extent of the claimant's "incapacity for work." Physicians' estimates of plaintiff's disability which referred only to the degree of loss of use of her nervous system and to the impairment of her ability to carry out "total life functions" were insufficient to support the Commission's finding that plaintiff was entitled to compensation for permanent partial disability or loss of use of her back and not to benefits for total incapacity to work, since a person may be wholly incapable of working and earning wages even though her ability to carry out normal life functions has not been wholly destroyed and even though she has not lost 100 percent use of her nervous system.

5. **Master and Servant § 94— employee's average weekly wage—stipulation—binding effect**

A stipulation between the parties in a workmen's compensation case as to the plaintiff's average weekly wage was approved by the Industrial Commission and was binding absent a showing of error due to fraud, misrepresentation, undue influence or mutual mistake, and no such showing or allegation was made by plaintiff. G.S. 97-17.

ON certiorari to review decision of the Court of Appeals affirming the award of the North Carolina Industrial Commission, 33 N.C. App. 742, 236 S.E. 2d 801 (1977).

The facts pertinent to decision in this workmen's compensation case are narrated below:

1. On 20 November 1973 plaintiff was injured under compensable circumstances when she fell over a mop bucket and landed

in a sitting position. The fall resulted in a significant injury to her spinal cord in the mid-cervical region.

2. On 24 January 1974 Dr. Jerry Greenhoot performed an anterior cervical fusion and discectomy in an attempt to decompress the spinal cord. Plaintiff reached maximum improvement on 3 July 1974 and was discharged from Dr. Greenhoot's care. The operation did not repair the spinal cord damage and produced no significant improvement in plaintiff's condition. Dr. Greenhoot testified that nothing further can be done medically to alleviate plaintiff's spinal cord injury, which has resulted in incomplete use of her extremities and weakness of grip. He rated plaintiff's physical disability at 50 percent. He emphasized, however, that this estimate of disability "is not related to work," but rather refers to the diminution of plaintiff's ability to carry out "total life function." He further testified that in his opinion plaintiff was wholly incapable of resuming her former employment as a laborer.

3. On 16 April 1974 the parties signed an agreement providing, in pertinent part, that plaintiff's injury occurred under compensable circumstances, that her average weekly wage including overtime and all allowances was $62.40, and that defendants would pay compensation at the rate of $41.60 per week "for necessary weeks."

4. On 19 September 1974 plaintiff was examined by Dr. Stephen Mahaley, a neurosurgeon at Duke Hospital. This doctor found that she had a generalized weakness in both arms and both legs, loss of mobility, numbness to pin prick "throughout her body on right and left sides," and had difficulty with tactile recognition of objects placed in her hands. Dr. Mahaley testified that in his opinion plaintiff had suffered an injury to her spinal cord in the neck area; that she had a pre-existing arthritic condition in her neck which was activated by the trauma of her fall; that "further medical treatment will not change her neurological condition"; and that she has suffered a 40 percent disability to the neurological system. When asked concerning plaintiff's ability to work, Dr. Mahaley replied: "I think there are some gainful occupations that someone with this degree of neurological problem could pursue."

Following the evidentiary hearings, Deputy Commissioner Dandelake found, *inter alia*, that plaintiff's average weekly wage

at the time of her injury was $58.31 and that she had suffered "an average permanent partial disability of 45% or loss of use of her back." Accordingly, he awarded compensation at the rate of $38.87 per week for 135 weeks commencing 8 August 1974 pursuant to G.S. 97-31(23).

On appeal the full Industrial Commission, by majority vote, affirmed the Deputy Commissioner's findings except for his calculation of plaintiff's average weekly wage, which was found to be $62.40 instead of $58.31. Plaintiff's weekly compensation was increased accordingly to $41.60. Plaintiff appealed to the Court of Appeals and that Court affirmed the Commission's decision in all respects. We allowed certiorari to review the decision of the Court of Appeals.

Henry T. Drake, attorney for plaintiff appellant.

B. Irvin Boyle and Norman A. Smith of Boyle, Alexander and Hord, attorneys for defendant appellees.

HUSKINS, Justice.

[1] By her first, second and fourth assignments of error plaintiff challenges the correctness of the decision of the Court of Appeals affirming the Commission's determination that she has suffered a "permanent partial disability of 45% or loss of use of her back" which entitles her to receive compensation equal to two-thirds of her average weekly wage for a period of 135 weeks pursuant to G.S. 97-31(23).

G.S. 97-31 provides in pertinent part: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit: . . . (23) For the total loss of use of the back, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss . . . ."

We have reviewed the testimony of Drs. Greenhoot and Mahaley and find no support for the conclusion that plaintiff has suffered a 45 percent loss of use of her back and nothing more. Rather, the physicians indicate that an injury to plaintiff's spinal

cord has resulted in weakness *in all of her extremities*, and numbness or loss of sensation *throughout her body*. The doctors further testify that she has suffered diminished mobility and has "difficulty with position sense and with recognition of things in her hands when objects are placed in her hands." All of this testimony is uncontradicted. Under such circumstances the Commission may not limit plaintiff to an award under G.S. 97-31(23). The impairments described above are compensable under other sections or subsections of the Workmen's Compensation Act and are not subsumed under the provisions of subsection (23) which provides compensation only "for loss of use of the back." If the Commission determines plaintiff has suffered these impairments, as the uncontradicted evidence tends to show, the award must take into account these and all other compensable injuries resulting from the accident. "[T]he injured employee is entitled to an award which encompasses all injuries received in the accident." *Giles v. Tri-State Erectors,* 287 N.C. 219, 214 S.E. 2d 107 (1975).

For the reasons given, this case must be remanded to the Industrial Commission for further proceedings. However, because of the substantial likelihood that other questions will arise again during these further proceedings, we deem it appropriate to address certain matters raised by plaintiff's brief and by the opinion of the Court of Appeals.

[2] Both the full Industrial Commission and the Court of Appeals overruled plaintiff's contention that she is entitled to benefits for total incapacity for work by referring to the testimony of Dr. Mahaley that "there are some gainful occupations that someone with [plaintiff's] degree of neurological problem could pursue," and to the absence of any testimony that she is totally disabled.

We first note that Dr. Mahaley's quoted statement is an oblique generality which sheds no light on plaintiff's capacity to earn wages. Uncontradicted evidence establishes that she is over fifty years of age, somewhat obese, has an eighth grade education, and at the time of her accident had been working as a laborer earning less than $2.00 per hour. The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity. In *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951), Justice Ervin, writing for the Court, noted: "While there seems to be no case on the specific point in this

State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person." Similarly, if other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health. *See* A. Larson, *Workmen's Compensation* § 57.51, at nn. 96-97 (1976), and cases collected therein. Dr. Mahaley's testimony sheds no light on plaintiff's capacity to pursue gainful employment. Consequently his testimony affords no basis for the Commission to conclude plaintiff has not suffered total incapacity for work.

[3] Nor may plaintiff be denied benefits for total disability by reason of her failure thus far to present evidence that she is in fact totally disabled. In workmen's compensation cases a claimant generally bears the burden of proving the extent or degree of disability suffered. *Hall v. Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). *Compare Larson, supra* § 57.61, at nn. 24-34 (1976). In the present case, however, the record shows that plaintiff sought to present her own testimony on this subject, but refrained from doing so when Deputy Commissioner Dandelake stated that her testimony would pertain to an uncontested issue and was unnecessary. Under G.S. 97-84 a party to workmen's compensation proceedings is afforded the right to testify and present such relevant evidence as he may choose. "[T]he determinative facts upon which the rights of the parties must be made to rest must be found . . . after all parties have been given full opportunity to be heard." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E. 2d 777 (1953). When a claimant refrains from presenting evidence in reliance on an inaccurate statement by a deputy commissioner that a certain matter is uncontested, the right guaranteed by G.S. 97-84 has been abridged and the claimant's failure to present such evidence may not be used against him. Accordingly, before the

Commission may determine that plaintiff is not entitled to compensation for permanent total disability, she must be afforded an opportunity to present evidence relevant to her capacity to work and earn wages.

[4] We think it appropriate to emphasize again that the criterion for compensation in cases covered by G.S. 97-29 or -30 is the extent of the claimant's "incapacity for work." Here, the physicians' estimates of plaintiff's disability do not refer to the diminution of plaintiff's wage earning capacity because of her injury, but refer only to the degree of loss of use of her nervous system (Dr. Mahaley) or the impairment of her ability to carry out "total life functions" (Dr. Greenhoot). A person may be wholly incapable of working and earning wages even though her ability to carry out normal life functions has not been wholly destroyed and even though she has not lost 100 percent use of her nervous system. *See* cases collected in 99 C.J.S., Workmen's Compensation, § 295, n. 18 (Cum. Supp. 1978).

So the ultimate question remains: To what extent is plaintiff now able to earn, in the same or any other employment, the wages she was receiving at the time of her injury? If she is unable to work and earn *any* wages, she is totally disabled. G.S. 97-2(9). In that event, unless all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to an award for permanent total disability under G.S. 97-29. If all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to compensation exclusively under G.S. 97-31. This is true from the language of the statute itself. *See Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942). *Compare* Larson, supra, § 58.20, n. 34 *et seq.*

If she is able to work and earn *some* wages, but less than she was receiving at the time of her injury, she is partially disabled. G.S. 97-2(9). In that event she is entitled to an award under G.S. 97-31 for such of her injuries as are listed in that section, and to an additional award under G.S. 97-30 for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule in G.S. 97-31. *See Morgan v. Norwood*, 211 N.C. 600, 601-02, 191 S.E. 345, 346 (1937). *See generally* W. Schneider, Workmen's Compensation Text § 2318 (1957).

[5] By her fifth assignment of error plaintiff contends the Commission erred in its calculation of her average weekly wage. The

record shows that plaintiff and defendants entered into a stipulation that "the average weekly wage of the employee at the time of said injury, including overtime and all allowances, was $62.40." This stipulation was approved by the Commission and is binding absent a showing that "there has been error due to fraud, misrepresentation, undue influence or mutual mistake . . . " G.S. 97-17; *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E. 2d 355 (1976). No such showing or allegation has been made.

For the reasons given the judgment of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for remand to the Industrial Commission for further proceedings in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES H. BERRY

No. 62

(Filed 29 August 1978)

1. **Criminal Law § 90— no impeachment by State of own witness**

The State did not impeach its own witness when an eleven-year-old witness first testified that he did not see defendant on the day in question and did not know him, the district attorney conferred with the witness in private, and the witness was recalled and testified that, on the day of the shooting, he saw defendant take a gun out of a truck, load it, and walk out of sight, and that he thereafter heard "shots," since whatever initial confusion existed in the witness's mind was apparently dissipated during the conference with the district attorney, and the State did not attempt to discredit any testimony which the witness gave after being recalled.

2. **Criminal Law § 87.1— leading question—youthful witness**

The district attorney was properly allowed to ask an eleven-year-old witness several leading questions on direct examination when the witness had difficulty understanding questions because of his age or immaturity.

3. **Criminal Law § 99.5— instruction to counsel not to interrupt witness—no expression of opinion**

The trial judge did not express an opinion in violation of G.S. 1-180 when he sustained the State's objection to defense counsel's interruption of a witness, instructed defense counsel to let the witness finish his answer, and responded in the negative when defense counsel complained that the witness was "throwing in something extra besides what I'm asking him."

4. **Homicide § 24.1— instructions—presumptions of unlawfulness and malice**

The trial court's instruction that the jury could infer that a killing was unlawful and with malice if the State proved beyond a reasonable doubt that defendant intentionally killed deceased with a deadly weapon or intentionally inflicted a wound upon deceased with a deadly weapon that proximately caused his death comported with the decision of *Mullaney v. Wilbur*, 421 U.S. 684 and was not improper.

5. **Homicide § 32.1— definition of involuntary manslaughter—error cured by verdict of first degree murder**

Defendant was not prejudiced by the trial court's instruction erroneously defining involuntary manslaughter as the "intentional," rather than "unintentional," killing of a human being by an unlawful act not amounting to a felony where defendant was convicted by the jury of first degree murder.

6. **Criminal Law § 130— motion for mistrial—communications with jury**

The trial judge did not err in failing on his own motion to declare a mistrial "for improper communication with the jury during deliberations" where the jury, during its deliberations, opened the jury room door and requested that it be allowed to review a certain exhibit, the bailiff reported this request to the trial judge, and the trial judge then properly instructed the jury on the point.

7. **Constitutional Law § 28— due process—hostile audience—admonishing audience to be quiet**

Defendant was not denied due process because of hostile sentiment against him by the courtroom audience during the trial where the record shows only three instances where the trial judge admonished those present in the courtroom to be quiet.

BEFORE *Small, J.*, at the 28 February 1977 Criminal Session of WASHINGTON Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of first degree murder and sentenced to life imprisonment. He appeals under General Statute 7A-27(a). This case was argued as No. 53 at the Fall Term 1977.

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

LeRoy Scott and Stephen A. Graves, Attorneys for Defendant.

EXUM, Justice.

Defendant brings forward six assignments of error relating to the admission of evidence, incidents in the courtroom that defendant claims improperly influenced the jury, and the instructions to the jury. We find no error entitling defendant to a new trial.

The state offered evidence tending to show that on 12 December 1976 Willie Lee Moore, Alton Norman and defendant were playing poker at the Shady Rest Inn, a business Moore operated near Plymouth. An argument over the poker game arose between Norman and defendant, and they went outside for about five minutes. Norman came back inside and walked over to a counter where some men were talking together. Defendant went to his truck, took out a rifle, loaded it, and came back inside with the rifle. He said, "I want my money," whereupon Norman grabbed Andy Barnes, age fifteen, and held him as a shield while he backed behind the counter. Norman then shoved Andy Barnes under the counter. Defendant immediately fired two or three shots at Norman, who fell face down on the floor.

After the shots were fired, Moore came over to Norman, shook him and said, "Berry, I believe you killed that man." Defendant denied it and then said, "Now I'm going to shoot you because you'll call the cops." Moore and defendant struggled over the rifle until James Johnson came to Moore's assistance and wrested the rifle away from defendant.

Police were summoned to the scene of the shooting. On arrival they found Norman inside, lying face down in a pool of blood, a .22 caliber rifle with a scope propped against the wall, two .22 caliber cartridges on the floor, and a .38 caliber pistol on top of a refrigerator. James Johnson identified the rifle at trial as the one he had taken from defendant.

Norman was taken to the hospital and subsequently pronounced dead. An autopsy showed the cause of death to have been a gunshot wound to the left forehead. One .22 caliber bullet was removed from his brain.

Special Agent Frank Satterfield of the State Bureau of Investigation testified as an expert in firearms identification. In his opinion the two cartridges found on the floor at the scene of the shooting were fired from the rifle taken from defendant.

Defendant testified that he had won about $60 in the poker game with Moore and Norman. On the last hand, which defendant won, Norman grabbed the pot and said, "You won't get this damn money . . . . You want to fight about it?" Defendant replied that he did not. Defendant picked up $5.00 Norman had left on the table and started to walk out. Looking behind him, he saw Norman pointing a gun at his back. Defendant became frightened,

walked to his truck and took out his rifle to "scare off" Norman. Norman ran back inside and defendant followed to demand his money. He walked toward the spot where Moore was standing. Norman suddenly "come up from behind the bar" and shot at defendant. As defendant pointed his rifle in the direction of the shot, Moore grabbed the barrel and the weapon discharged.

Defendant denied he had loaded his rifle when he took it from the truck and insisted he had no intention of harming Alton Norman. He also testified that the rifle fired only once.

[1] By his first assignment of error defendant challenges the admission into evidence of the testimony of state's witness Kelvin Ray Perkins. Perkins was an eleven year old boy who testified, in essence, that on the day of the shooting he, while playing near the Shady Rest Inn, observed defendant take a "long" gun out of a truck, load it, and walk with the gun away from the truck "around the house" and out of view. After observing this incident, Perkins testified, he heard "shots."

When Perkins was first called to the stand, he testified that he had not seen defendant on the day in question and did not know him. The record reflects only that Perkins was immediately "recalled" as a witness and then gave the testimony of which defendant now complains. All the record reveals about what transpired in the hiatus between Perkins being first called as a witness and then being "recalled" is given in his testimony during cross-examination by defendant:

> "Yes sir, I do remember when I first went on the stand that Mr. Griffin [the district attorney] asked me if I saw Mr. Berry at any time on December 12, 1976. Yes sir, I do remember I told him no. Yes sir, that is right.
>
> "Yes sir, then I went back in the back room and talked to Mr. Griffin and Mr. Young. Mr. Young, the one without the glasses talked to me. Yes sir, I talked to him. We talked about Mr. Berry. Mr. Young asked me did I see Mr. Berry on December . . . No sir, I cannot finish. I don't even know."

Defendant says in his brief that after Perkins initially denied seeing or knowing defendant, "[t]he District Attorney requested and was granted a short recess. During this recess, the District Attorney, along with SBI Agent Lewis Young, conferred with Kelvin Ray Perkins in private. After the recess, Kelvin Ray

Perkins was recalled to the witness stand and testified to seeing the defendant on December 12, 1976, and proceeded to describe the events of that day." We do not know why Perkins initially made statements that seem to conflict with this testimony upon being recalled. On this record it is probable that, as a result of his youth and his unfamiliarity with courtroom surroundings, he simply became confused upon taking the stand and failed to apprehend that "the defendant, James Berry," as the question was first put, was the same person he thereafter identified as "the man sitting down there at the end of the table, the man with the glasses," as the question was subsequently put. In all likelihood the purpose of the recess and conference with the witness was to clear up, if possible, this confusion. In any event defendant did not object at trial, nor does he complain of the recess or what transpired during it.

Defendant complains here rather of the state's being permitted to "impeach" this witness by asking him leading questions. This, however, is not a case where the state attempted to impeach its own witness. Whatever initial confusion existed in the witness' mind was apparently dissipated during the out-of-court conference with the district attorney. There was no attempt by the state to discredit any testimony which this witness gave after being recalled.[1] The jury, furthermore, was fully apprised of the fact of the conference and the manner in which the witness gave his testimony.

[2] It is true that the trial judge did permit several leading questions during Perkins' direct examination. Most of the questions, however, were not leading, and the trial judge was alert to sustain an objection to a question which he deemed to be unnecessarily leading.[2] "[I]t is firmly entrenched in the law of this

1. *Compare State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975) in which the State did attempt impeachment of one of its witnesses by showing prior statements made by the witness inconsistent with his trial testimony. The rules regarding this kind of impeachment are ably discussed therein in an opinion by Chief Justice Sharp.

2. A representative sample of the direct examination is reproduced in the record as follows:

"Q. After the truck backed out of Mrs. Moore's driveway, what did you see then?

MR. SCOTT: Objection.

COURT: Overruled.

A. Took out his gun.

. . . .

"Q. After you saw the gun, what did you see then? Did you see what he did with the gun?

MR. SCOTT: Objection.

State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974); *accord, State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). It is usually permissible to lead a witness on direct examination when the witness has difficulty in understanding questions because of age or immaturity. *State v. Greene, supra; State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116

COURT: Overruled.

A. Loaded it up.

. . . .

"Q. What direction, what direction was he going in at the time you saw him going around the side of the house?

MR. SCOTT: Objection.

COURT: Overruled.

"Q. Was he, tell us whether or not he was walking toward this Shady Rest piccolo place?

MR. SCOTT: Objection.

COURT: Sustained.

"Q. Could you tell where he went? Could you see where he went?

MR. SCOTT: Objection.

COURT: Overruled.

A. Around the house.

. . . .

"Q. After you last saw him Kelvin, did you hear anything?

MR. SCOTT: Objection.

COURT: Overruled.

A. Yes sir.

"Q. What did you hear?

MR. SCOTT: Objection.

COURT: Overruled.

A. Shots.

"Q. How many shots did you hear?

MR. SCOTT: Objection.

COURT: Overruled.

A. Three.

"Q. Could you see anything at that time, could you see the place where the pool table is, the piccolo place, the Shady Rest, at that time from where you were?

MR. SCOTT: Objection.

COURT: Overruled.

A. No sir."

(1971); 1 Stansbury's North Carolina Evidence § 31 (Brandis rev. 1973) (hereinafter Stansbury). The trial judge's rulings on this aspect of the case were well within his discretion. This assignment of error is overruled.

[3] Defendant next assigns as error a remark made by the trial court during defendant's cross-examination of the state's witness Andy Barnes. The witness was interrupted by Mr. Scott, defendant's counsel, who was cross-examining him; and the state lodged an objection to the interruption. The following then occurred:

> "COURT: Sustained. Now Mr. Scott, you've asked the witness a question and you've interrupted him. I'll have to let the witness when there's an objection answer the question. Let him finish answering the question.
>
> MR. SCOTT: Your Honor, he's throwing in something extra besides what I'm asking him.
>
> COURT: No sir."

Defendant contends these statements by the trial judge constituted an expression of opinion in violation of General Statute 1-180. He argues that the trial judge "unnecessarily belittled the defendant's counsel in his remarks" and that "when he responded in an emphatic negative manner to defendant's counsel's complaint . . . [t]his remark clearly implied to the jury that the State's witness' testimony was credible . . . . "

We find this contention without merit. Although it does not appear what question he had asked the witness, defendant's counsel clearly interrupted his answer. There is nothing to suggest the trial judge improperly sustained the district attorney's objection or that he was unnecessarily harsh in instructing defense counsel to let the witness finish his answer. Nor does the record show that the trial court's negative response to counsel's complaint was "emphatic." Even had it been, we fail to perceive how the jury could possibly have understood such a remark as an expression of opinion on the credibility of the witness. None of the cases cited by defendant contain any suggestion that such straightforward statements, relating solely to the manner of cross-examination by counsel, fall within the proscription of General Statute 1-180. This assignment of error is overruled.

[4] Defendant next contends the trial judge committed error prejudicial to him in the following portion of his charge to the jury:

"If the State proves beyond a reasonable doubt that the defendant intentionally killed Alton Norman with a deadly weapon or intentionally inflicted a wound upon Alton Norman with a deadly weapon that proximately caused his death, you may infer that the killing was unlawful and second that it was done with malice, but you are not compelled to do so. You may consider this, along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. A 22 caliber rifle is a deadly weapon."

Defendant argues that this instruction employs an unconstitutional presumption of malice and unlawfulness proscribed by *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There is no merit in this contention.

In *State v. Hankerson*, 288 N.C. 632, 649-51, 220 S.E. 2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977), we said:

"The Mullaney ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams*, *supra*, to remain and be weighed against contrary evidence if it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful.

. . . .

"If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumption of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts proved may be weighed against this evidence."

Accord, State v. Hammonds, 290 N.C. 1, 224 S.E. 2d 595 (1976). The instructions complained of comport with *Mullaney* as we understand it.

[5] Defendant next assigns as error the trial court's instruction defining involuntary manslaughter: "Involuntary manslaughter is the *intentional* killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminal, negligent way." (Emphasis supplied.) The instruction is, of course, erroneous. The word "intentional," if not an error in transcription, must have been used inadvertently. Earlier in his instructions the trial judge correctly defined involuntary manslaughter as "the unintentional killing of a human being by an unlawful act not amounting to a felony . . . . " Since defendant, however, was convicted of first degree murder, this *lapsus linguae* could not have been prejudicial. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Lipscomb*, 134 N.C. 689, 697, 47 S.E. 44, 46 (1904); *State v. Munn*, 134 N.C. 680, 47 S.E. 15 (1904); *see also State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *compare State v. Brown*, 207 N.C. 156, 176 S.E. 260 (1934) (first degree murder conviction; error in instructions on second degree murder not cured by verdict).

[6, 7] We have carefully considered defendant's remaining two assignments of error (1) that the trial judge failed on his own motion to declare a mistrial "for improper communication with the jury during the deliberations" and (2) that the defendant was denied due process because of "hostile sentiment in the audience of the courtroom against the defendant during . . . the trial." It is enough to say that these contentions are simply without foundation in the record. As to the first the trial court conducted a full inquiry. It disclosed only that the jury during its deliberations opened the jury room door and requested that it be allowed to review a certain exhibit that had been offered in evidence. The bailiff reported this request to the trial judge, who in turn properly instructed the jury on the point. In support of the second

contention defendant brings forward only three instances in the record where the trial judge admonished those present in the courtroom to be quiet.

The jury has resolved evidentiary conflicts against the defendant. In the trial there is

No error.

WILLIAM CORBIE DAUGHTRY, JR. v. WILLIAM FRANKLIN TURNAGE AND J. A. EUBANKS AND SON, INC.

No. 95

(Filed 29 August 1978)

Automobiles § 76.1 — tractor-trailer — following too closely — no contributory negligence as matter of law

In an action to recover damages to plaintiff's tractor-trailer which occurred when defendant's fertilizer truck blocked the road ahead of plaintiff's agent and plaintiff's agent drove the tractor-trailer into a ditch to avoid hitting a pickup truck he was following, plaintiff's evidence did not show that his agent was contributorily negligent as a matter of law in failing to keep a proper lookout or in following too closely.

THIS case is before us, pursuant to G.S. 7A-30(2), on appeal of the decision of the Court of Appeals, 35 N.C. App. 17, 239 S.E. 2d 709 (1978), (opinion by *Hedrick, J.*, concurred in by *Morris, J.*, with *Arnold, J.*, dissenting), reversing the judgment of *Clark, J.*, 23 August 1976 Civil Session, CUMBERLAND County Superior Court.

Plaintiff instituted this action seeking to recover damages to his 1972 GMC tractor-trailer allegedly resulting from the negligence of defendant William Franklin Turnage, the agent of defendant J. A. Eubanks and Son, Inc. The trial court submitted issues of negligence and contributory negligence to the jury. Damages were set at $7,500.00 by stipulation of counsel. The jury found that plaintiff's damages were caused by the negligence of defendant and that plaintiff was not contributorily negligent. Defendant appealed from the judgment of the trial court entered on this verdict and the Court of Appeals reversed, holding that plaintiff's evidence established his contributory negligence as a matter of law and that a verdict consequently should have been directed for defendant.

Bowen and Lytch, P.A., by R. Allen Lytch, for plaintiff appellant.

McLeod & Senter, P.A., by William L. Senter, for defendant appellee.

COPELAND, Justice.

The sole question presented for our consideration on this appeal is whether the trial court erred in denying defendant's motion for a directed verdict. In passing upon a motion for a directed verdict under G.S. 1A-1, Rule 50, the trial court is confronted with substantially the same question as was formerly presented by a motion for judgment of involuntary nonsuit. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In this situation, the court must consider the evidence in the light most favorable to the non-movant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the non-movant the benefit of all inferences reasonably to be drawn in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. *Brown v. Hale*, 263 N.C. 176, 139 S.E. 2d 210 (1964). We have determined that the evidence of plaintiff's contributory negligence, while strong, is not so overpowering as to preclude all reasonable inferences to the contrary; therefore, the decision of the Court of Appeals reversing the trial court's denial of defendant's motion for a directed verdict must be reversed.

When considered in the light most favorable to him, plaintiff's evidence tends to show the following:

On 1 May 1974 at approximately 12:00 noon, plaintiff's tractor-trailer truck, driven by his agent, was traveling east on N.C. Highway 55 near the community of Seven Springs. In this vicinity, Highway 55 is a two-lane paved road. The weather on this occasion was clear, with no fog, rain or overcast.

As plaintiff's truck was leaving a school zone just outside Seven Springs and approaching the city limits, it was following an eastbound pickup truck which had pulled out in front of it one-half mile earlier. The speed limit in the school zone was 35 miles per hour and plaintiff's truck was traveling at that speed when it ex-

ited the school zone. At this time, plaintiff's agent observed defendant's tractor-trailer truck some 900 to 1000 feet away, loaded with fertilizer and traveling toward him in the opposite lane at a moderate rate of speed. The next time plaintiff's agent noticed defendant's vehicle, it was about 500 feet away and had begun to cross the yellow line and move into the eastbound lane. When plaintiff's vehicle approached to within 300 feet of defendant's truck, the latter abruptly whipped completely over into the eastbound lane, apparently seeking to swing out in order to make a righ turn into a nearby private driveway.

Plaintiff's agent had maintained a following distance of 150 feet between himself and the pickup from the time it had pulled out in front of him and had held his speed at 35 miles per hour after his initial sighting of defendant's truck; however, when he saw defendant's truck drive completely into the eastbound lane, he slowed to approximately 30 miles per hour, as did the pickup. Defendant's truck suddenly stopped, blocking the entire road. At this point the pickup truck, still some 150 feet in front of plaintiff's vehicle, began to stop. Plaintiff's agent locked all his brakes and, finding that he could not stop in time to avoid striking the pickup and pushing it into the load of fertilizer, steered his vehicle off the road to the right and into the side ditch in order to avoid colliding with the pickup. As plaintiff's vehicle proceeded down the side ditch, it struck a 55 miles per hour speed limit sign and then collided with a concrete culvert, damaging the right front wheel area of the tractor and turning the trailer over on its side. The pickup, meanwhile, managed to stop without hitting defendant's truck.

As plaintiff's truck, loaded with approximately 70,000 pounds of wood chips, had approached the scene of the accident, it had been coming out of a slight curve, and, according to the record, traveling down a 34 to 40 degree hill.

Plaintiff's agent had been driving a truck over this same route for 10 years prior to the accident and was very familiar with the area. In addition, plaintiff's agent testified on cross-examination that he could have stopped if his truck had been empty or if he had been running slower. Plaintiff's agent also indicated that to his knowledge it was not unusual for a tractor-trailer truck to have to swing out wide to make a sharp turn.

An operator of a motor vehicle must exercise reasonable care to protect his own safety, keep a proper lookout and proceed as a

reasonably prudent person under the circumstances. *Privette v. Lewis*, 255 N.C. 612, 122 S.E. 2d 381 (1961). Moreover, under a motorist's general common law duty to exercise the degree of care of a reasonably prudent person, he must avoid following another vehicle too closely. *Black v. Gurley Milling Co., Inc.*, 257 N.C. 730, 127 S.E. 2d 515 (1962). Nonetheless, a driver ordinarily is not bound to anticipate negligence on the part of another motorist, nor is he required, in an emergency, to follow the wisest course of conduct. *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513 (1961).

A following driver is not an insurer against rear end collisions, especially when faced with an emergency created by an oncoming driver, because his following distance may be reasonable under the existing conditions and still be insufficient to permit a safe stop under all eventualities. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966); *Soudelier v. Johnson*, 95 So. 2d 39 (La. App. 1957). In the case under consideration, plaintiff's evidence showed that his agent had to leave the road in order to avoid colliding with the rear of the pickup truck, which was stopping because defendant's truck was blocking both lanes of the highway. If plaintiff's vehicle had collided with the rear of the pickup, this would have furnished some evidence that plaintiff's agent had been negligent in following too closely or in failing to keep a proper lookout; however, the fact that a following vehicle has collided with a preceding one does not compel either of these conclusions, but instead merely raises a question for determination by the jury. *Ratliff v. Duke Power Company*, 268 N.C. 605, 151 S.E. 2d 641 (1966). There was no collision here between any of the vehicles involved, although plaintiff's damages admittedly arose out of action taken to avoid such a collision; thus, these facts are no more compelling on the question of contributory negligence than those held to have presented a mere jury question in *Ratliff v. Duke Power Company, supra.*

Defendant relies upon *Black v. Gurley Milling Co., Inc., supra*, in support of his contention that the evidence here establishes plaintiff's contributory negligence as a matter of law. The plaintiff there was the owner of a tractor-tanker which was damaged when the plaintiff's agent had to drive off the road to aovid striking the rear of a preceding tanker which in turn had stopped to avoid colliding with a truck owned by defendant that had been standing still in the middle of the highway. We held in that case that the only reasonable inference supported by the

evidence was that the plaintiff's agent had been following the preceding tanker too closely under the circumstances and that the trial court had acted properly in granting a judgment of involuntary nonsuit for the defendant. The plaintiff's agent in *Black*, however, was operating an oil tanker loaded with 5700 gallons of gasoline and was following another tanker carrying 6800 gallons of gasoline. In addition, the scene of the accident was adjacent to a school yard in which some children were playing. At the conclusion of the opinion in *Black*, we found that the fact that the plaintiff's agent was operating an oil tanker filled with gasoline rendered that case distinguishable from one involving the question of whether a passenger automobile was following too closely because the former vehicle might well have exploded in a collision with disastrous consequences not only to the driver, but also to others nearby.

The instant case falls between these two extremes in that plaintiff's truck was not carrying a potentially explosive cargo, such as gasoline, but it did present a more substantial danger than a passenger automobile in the event of a rear end collision because of its greater size and the substantial weight with which it was loaded. Still, the element of danger to bystanders is not present here, as it was in *Black*, and plaintiff's agent was confronted with a sudden emergency not of his own making when defendant's truck swung across the highway to make its turn and then came to a complete stop. In view of these facts, we cannot say that the inference that plaintiff's agent was contributorily negligent is the only one which reasonably could be drawn from the evidence; consequently, the trial court acted properly in denying defendant's motion for a directed verdict.

For the reasons stated, the decision of the Court of Appeals reversing the trial court's denial of a directed verdict for defendant is

Reversed.

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

AIRPORT AUTHORITY v. IRVIN

No. 201 PC.

Case below: 36 N.C. App. 662.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

AUMAN v. EASTER

No. 192 PC.

Case below: 36 N.C. App. 551.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

BROOKS v. BROWN

No. 208 PC.

Case below: 36 N.C. App. 738.

Petition by defendants for discretionary review under G.S. 7A-31 denied 29 August 1978.

BUYING GROUP, INC. v. COLEMAN

No. 198 PC.

No. 98 (Fall Term).

Case below: 37 N.C. App. 26.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 29 August 1978.

CARDWELL v. WARE

No. 167 PC.

Case below: 36 N.C. App. 366.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

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

CARROLL v. INDUSTRIES, INC.

No. 191 PC.

No. 95 (Fall Term).

Case below: 37 N.C. App. 10.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978.

CARROLL v. ROUNTREE

No. 152 PC.

Case below: 36 N.C. App. 156.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

CRAIG v. KESSING

No. 189 PC.

Case below: 36 N.C. App. 389.

Motion of plaintiff to dismiss defendant's appeal for lack of substantial constitutional question allowed 29 August 1978. Petition by defendant for discretionary review under G.S. 7A-31 allowed for limited purpose of determining whether Court of Appeals erred in deciding parol evidence was inadmissible to show instrument in question had been altered or added to after its execution.

FINANCE CO. v. FINANCE CO.

No. 176 PC.

Case below: 36 N.C. App. 401.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

HAMILTON v. HAMILTON

No. 204 PC.

No. 99 (Fall Term).

Case below: 36 N.C. App. 755.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978.

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

IN RE HILL

No. 207 PC.

Case below: 36 N.C. App. 765.

Petition by defendants for discretionary review under G.S. 7A-31 denied 29 August 1978.

IN RE SARVIS

No. 196 PC.

No. 97 (Fall Term).

Case below: 36 N.C. App. 476.

Petitions by plaintiff Sarvis and defendant Sprinkler Co. for discretionary review under G.S. 7A-31 allowed 29 August 1978.

JOHNSON v. TOWN OF LONGVIEW

No. 206 PC.

Case below: 37 N.C. App. 61.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 29 August 1978.

LAIL v. WOODS

No. 181 PC.

Case below: 36 N.C. App. 590.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

MCBRIDE v. CAMPING CENTER

No. 163 PC.

Case below: 36 N.C. App. 370.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

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

MILLS v. ENTERPRISES, INC.

No. 186 PC.

Case below: 36 N.C. App. 410.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

MONTFORD v. GROHMAN

No. 56.

Case below: 36 N.C. App. 733.

Motion of defendant to dismiss plaintiff's appeal for lack of substantial constitutional question allowed 29 August 1978.

MURPHY v. EDWARDS AND WARREN

No. 205 PC.

Case below: 36 N.C. App. 653.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

POPE v. WRIGHT

No. 195 PC.

Case below: 36 N.C. App. 651.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

PRICE v. DEPT. OF MOTOR VEHICLES

No. 203 PC.

Case below: 36 N.C. App. 698.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion for Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

READY MIX CONCRETE v. SALES CORP.

No. 183 PC.

No. 94 (Fall Term).

Case below: 36 N.C. App. 778.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 29 August 1978.

REALTY CO. v. TRUST CO.

No. 175 PC.

No. 93 (Fall Term).

Case below: 37 N.C. App. 33.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978.

SLOAN v. WELLS

No. 6 PC.

No. 102 (Fall Term).

Case below: 37 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978.

STATE v. ABERNATHY

No. 193 PC.

Case below: 36 N.C. App. 527.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

STATE v. BLACK

No. 185 PC.

Case below: 36 N.C. App. 651.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

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

STATE v. BRAY

No. 180 PC.

Case below: 37 N.C. App. 43.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. BROGDEN

No. 215 PC.

Case below: 36 N.C. App. 118.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 29 August 1978.

STATE v. BRYANT

No. 4 PC.

Case below: 37 N.C. App. 232.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

STATE v. CHAPPEL

No. 47.

Case below: 36 N.C. App. 608.

Motion of Attorney General to dismiss defendant's appeal for lack of substantial constitutional question allowed 29 August 1978.

STATE v. COX

No. 3 PC.

Case below: 37 N.C. App. 457.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

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

STATE v. CREECH

No. 172 PC.

Case below: 36 N.C. App. 651.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. CREECH

No. 59.

Case below: 37 N.C. App. 261.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 29 August 1978.

STATE v. HALL

No. 211 PC.

Case below: 36 N.C. App. 652.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. HAMILTON

No. 187 PC.

Case below: 36 N.C. App. 538.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. HEBERT

No. 199 PC.

Case below: 36 N.C. App. 783.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

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

STATE v. HILL

No. 214 PC.

Case below: 36 N.C. App. 652.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 29 August 1978.

STATE v. LANE

No. 209 PC.

Case below: 36 N.C. App. 565.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. LEWIS

No. 2 PC.

Case below: 37 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

STATE v. McLEOD

No. 162 PC.

Case below: 36 N.C. App. 469.

Petition by defendants for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. MARTIN

No. 217 PC.

Case below: 37 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

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

STATE v. MONDS

No. 210 PC.

Case below: 36 N.C. App. 510.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. PASSMORE

No. 202 PC.

Case below: 37 N.C. App. 5.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978.

STATE v. PEARCE

No. 194 PC.

No. 96 (Fall Term).

Case below: 36 N.C. App. 652.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 29 August 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

STATE v. SPENCE

No. 166 PC.

Case below: 36 N.C. App. 627.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

THOMPSON v. WARD

No. 182 PC.

Case below: 36 N.C. App. 593.

Petition by defendants for discretionary review under G.S. 7A-31 denied 29 August 1978.

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

TRUST CO. v. MURPHY

No. 178 PC.

Case below: 36 N.C. App. 760.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 August 1978. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 29 August 1978.

WYATT v. IMES

No. 170 PC.

Case below: 36 N.C. App. 380.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

ZAHREN v. MAYTAG CO.

No. 7 PC.

Case below: 37 N.C. App. 143.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 29 August 1978.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1978

STATE OF NORTH CAROLINA v. KENNETH D. WILKERSON

No. 84

(Filed 17 October 1978)

1. Criminal Law § 53 — expert medical testimony — test for admissibility

In determining whether expert medical opinion is to be admitted into evidence, the inquiry should not be whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

2. Criminal Law § 53.1 — expert medical testimony — battered child syndrome

In this prosecution for the second degree murder of a two-year-old child, the trial court properly allowed a pediatrician to state his opinion that bruises on the child's chest did not form the typical bruising pattern normally sustained by children in day to day activities based on the pediatrician's observation of lesions and bruises about children which had occurred in the normal course of events. Furthermore, the court properly permitted a pathologist to give his opinion that the child was a "battered child," to explain that term, and to give his opinion that the "battered child syndrome" usually results from the use of excessive force in a disciplinary situation by a parent, guardian or other custodian of the child where the pathologist's testimony was based on his experience and his knowledge of the subject as contained in medical literature.

3. Criminal Law § 85.2 — character witness — cross-examination — specific acts of misconduct by defendant

The trial court in a homicide case erred in permitting the prosecuting attorney to cross-examine defendant's mother, who testified as a character witness for defendant, as to whether defendant had previously participated in two gang shootings, since a character witness may not be cross-examined as to

specific acts of misconduct on the part of the defendant. However, defendant was not prejudiced by such error where the witness, while admitting some knowledge of the incidents, denied defendant's involvement therein and offered a plausible exculpatory explanation of the misconduct suggested by the prosecutor's questions, and where there was plenary evidence in the case strongly suggesting defendant's guilt.

4. **Criminal Law § 99.2— manner of submitting verdicts—no expression of opinion**

The trial judge did not improperly convey his opinion to the jury that defendant had to be guilty of something by the manner in which he submitted to the jury the alternative verdicts of murder in the second degree, voluntary manslaughter, involuntary manslaughter, and not guilty.

5. **Homicide § 5— second degree murder—intent to kill—malice**

While an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death.

6. **Homicide § 5— second degree murder—malice**

Statements in prior cases that "an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree" and that "second-degree murder imports a specific intent to do an unlawful act" are not universally applicable. It is more fundamentally sound to say that any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there be no intention to injure a particular person, is sufficient to supply the malice necessary for second degree murder.

7. **Homicide § 26— second degree murder—no intentional act—erroneous instruction—harmless error**

In a prosecution for the second degree murder of defendant's two-year-old child, the jury could not have been misled to defendant's prejudice by the trial court's erroneous instruction that second degree murder could exist "where there is no intentional act" where, considered in context, it appears that the court used this phrase in the sense of a specific intent to kill; the court correctly charged the jury on the necessity to find that the *acts* committed by defendant against the child were intentional; and the court further correctly charged the jury that in order to return a verdict of guilty of second degree murder, it had to find "an act of culpable negligence which causes danger to another and the act is so recklessly or wantonly done as to indicate a total disregard for human life."

8. **Homicide §§ 5, 21.7— second degree murder—malice—disregard for human life**

An act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder.

9. **Homicide §§ 5, 6.1— culpable negligence—second degree murder—involuntary manslaughter**

An act of culpable negligence, standing alone, will support at most a conviction of involuntary manslaughter, but when an act of culpable negligence also imports danger to another and is done so recklessly or wantonly as to

manifest depravity of mind and disregard for human life, it will support a conviction of second degree murder.

10. **Homicide § 6.1 — involuntary manslaughter — intentional act**

While involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is accomplished by means of some intentional act.

11. **Homicide §§ 6.1, 27.2 — involuntary manslaughter — violation of child abuse statute**

An intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death can support a conviction of involuntary manslaughter. Therefore, the trial court properly instructed the jury that defendant could be found guilty of involuntary manslaughter of his two-year-old child if the child's death resulted from defendant's intentional infliction of injuries on the child in violation of provisions of the child abuse statute, G.S. 14-318.2.

12. **Homicide § 27.1 — voluntary manslaughter — intentional assault — erroneous instruction**

The trial court erred in instructing the jury that defendant would be guilty of voluntary manslaughter if he intentionally assaulted the two-year-old victim "with his hands, fists or feet, but you do not find beyond a reasonable doubt that the force he used was . . . likely to cause death . . . but that death did occur as the direct result of the use of that force," since such a state of facts would render defendant guilty at most of involuntary manslaughter.

13. **Homicide § 32.1 — submission of voluntary manslaughter — error cured by verdict**

In this prosecution for the second degree murder of defendant's two-year-old child, the trial court erred in instructing the jury on voluntary manslaughter where there was no evidence that defendant killed under the heat of passion raised by sudden provocation and no evidence of self-defense. However, defendant was not prejudiced by the erroneous submission of voluntary manslaughter since he was convicted of second degree murder.

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

BEFORE *Godwin, J.*, at the 28 February 1977 Criminal Session of CUMBERLAND Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of second degree murder and sentenced to life imprisonment. He appeals under General Statute 7A-27(a). This case was argued as No. 48 at the Fall Term 1977.

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

William Wicker and Deno G. Economou, Attorneys for defendant.

EXUM, Justice.

The homicide victim in this tragic affair was Kessler Wilkerson, the two-year-old son of defendant and his wife, Nancy. The state's evidence tended to show, and the jury apparently believed, that the child's death was the result of physical abuse inflicted upon him by his father. On his appeal defendant contends the trial court erred in (1) admitting into evidence expert medical opinion having to do with the "battered child" syndrome; (2) permitting cross-examination of defendant's mother as to acts of misconduct earlier committed by defendant; and (3) improperly instructing the jury, principally by failing properly to define the crimes of second degree murder, voluntary manslaughter and involuntary manslaughter. With regard to the first contention, we find no error. We agree with defendant that the cross-examination of his mother was improper; but we also conclude under the circumstances that no prejudice resulted. As to the third contention the error committed was favorable to defendant.

The state's evidence, in summary, is as follows: On 16 October 1976 around 10:30 a.m., neighbors heard loud sounds "like something was being throwed inside the trailer" coming from the Wilkersons' mobile home, the voice of a little boy crying, and defendant shouting at him to shut up. Mrs. Wilkerson appeared at the door of the trailer, said, "Hurry up, Kenny, hurry up," and slammed the door closed. Pursuant to a call an ambulance arrived at the Wilkerson trailer at 12:42 p.m. Defendant delivered the child's limp body to ambulance attendants and told them he had choked on some cereal, swallowed some water, and stopped breathing. Cardiopulmonary resuscitation was applied unsuccessfully en route to the hospital. The child was dead on arrival there. The emergency room physician who examined the child found no fluid in his lungs or other signs of drowning. Bruises were present on his chest, shoulders, upper arm and forearm. Upon being informed that his son was dead, defendant appeared "quite calm and told his wife something to the effect that it's done, it's over, there's nothing we can do about it now." An autopsy revealed, externally, multiple bruises all over the child's body and, internally, significant bleeding and a deep laceration of the liver. Cause of death was abdominal hemorrhage from a ruptured liver.

Other evidence for the state, consisting of defendant's pretrial statement made to investigating officers and the testimony of other witnesses who had observed defendant in his relationship with his son, tended to show the kind of disciplinary methods defendant customarily used with the child. According to this evidence defendant frequently kicked the child and on occasion made him stand "spread eagle" against a wall for long periods of time. One such occasion was 14 October 1976, two days before the boy died. Defendant at that time kicked him with such force that his chest hit the wall. One witness testified that defendant had said the little boy had no manners and that he was determined to teach him some manners and bring him up to be a man the way that "his [defendant's] mother has raised him, that his mother put him through hell." When asked why he wanted to repeat his mother's treatment, defendant "said that he didn't really approve of it or like it but it made him a man, and that's the way his son was going to be."

Defendant testified that his relationship with his son had been close. Although admitting disciplining his son and occasionally spanking him with a belt, defendant denied ever hitting or kicking him. He also denied that he was punished excessively as a child or that he ever talked with state's witnesses about his childhood. He said that on the morning of 16 October the child had wet himself on the floor. Defendant spanked him with his wife's belt and then ran some water in a tub and made him get in whereupon the child began "gasping for air and choking." Defendant searched his throat for possible obstructions, patted him on his back, and applied mouth-to-mouth resuscitation, all without any success. On cross-examination defendant admitted spanking his son on 16 October "hard enough to make him cry as long as I beat him."

Several witnesses testified that the relationship between defendant and his son was good and that they had never seen defendant abuse the child in any way. Defendant's mother testified that defendant treated his younger brothers and sisters in a kind manner while growing up in Philadelphia and that she had never beaten defendant severely or seen him abuse any child.

Defendant first assigns as error the testimony of two medical witnesses—Dr. Casey John Jason, a pediatrician who first exam-

ined the child at the emergency room of Womack Army Hospital, and Dr. John Edward Grauerholz, who performed the autopsy. Specifically, defendant complains of Dr. Jason's testimony that the bruises he observed on the child were not "the typical bruising pattern that is normally sustained by children in [their] normal day-to-day life." Defendant likewise complains of the testimony of Dr. Grauerholz, a pathologist, who after describing at some length his findings on autopsy testified in part as follows:

"DR. GRAUERHOLZ: All right, I made a diagnosis.

MR. GREGORY: And what was that diagnosis, Doctor?

MR. DOWNING: Object.

COURT: Overruled.

DR. GRAUERHOLZ: Battered child.

MR. DOWNING: Move to strike.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 2.

MR. GREGORY: Dr. Grauerholz, what do you mean by the term 'battered child'?

DR. GRAUERHOLZ: I mean a child who died as a result of multiple injuries of a non-accidental nature.

MR. GREGORY: Can you explain what you mean by 'non-accidental nature'?

DR. GRAUERHOLZ: Yes. That these injuries were inflicted by someone other than the child upon the child.

MR. DOWNING: Move to strike.

COURT: Denied.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 3.

MR. GREGORY: Is the term 'battered child' a relatively new term in the field of medicine?

MR. DOWNING: Objection.

COURT: Overruled.

DR. GRAUERHOLZ: It's been around for a while. I think probably in the last ten years or so it has become very well established.

MR. GREGORY: Dr. Grauerholz, without referring to any particular person, can you describe for us about the battered child?

MR. DOWNING: Objection.

COURT: Overruled. You are seeking an explanation of the term 'battered child'?

MR. GREGORY: Yes sir.

COURT: Overruled. You may give your explanation, Doctor.

DR. GRAUERHOLZ: These are children who suffer multiple injuries inflicted by others. The injuries are multiple in terms of distribution on the body and in time of infliction in certain cases. They are seen in children who have been perhaps over-zealously disciplined or have in other ways upset or run afoul of their guardians or their caretakers or usually some adult who is in relation to the child. By 'relation' I mean physical relation.

MR. DOWNING: Move to strike.

COURT: Denied.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 4.

DR. GRAUERHOLZ: They show essentially such things as abdominal injuries or fractures or other damage that is inconsistent with an accidental origin by virtue of the distribution of the injury. There are certain places where children classically do injure themselves when they fall, they run along and they fall, they bang their knees, they fall on their hands and so forth and these children, however, show injuries in noncharacteristic places, across the back, places where they could not spontaneously fall with sufficient force to produce that sort of injury, deep injuries in the abdomen, again which would necessitate a force being directed to the abdomen. One of the classic findings in a lot of these children

are multiple fractures of varying ages. The bruising I observed in the chest area of the child were those bruises were not bruises characteristic of the everyday life of a child, of being a child from day to day and falling. In my opinion an external striking or compressive force of some sort applied to the abdomen would produce the laceration to the liver.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 5.

. . . .

MR. GREGORY: My question is, without all the paraphrasing, Your Honor, under what circumstances does the battered child syndrome occur?

COURT: Overruled. You may move to strike. The ruling of the Court does not foreclose your opportunity to move to strike. Go ahead, Doctor.

DR. GRAUERHOLZ: The syndrome usually occurs in a disciplinary situation involving the child and some guardian or custodian, a parent, a relative, a babysitter, someone who has physical custody of the child at that time. The injuries are usually inflicted as a disciplinary measure upon the child.

MR. DOWNING: Move to strike.

COURT: Denied.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 6.

MR. GREGORY: Now when you say in disciplining the child, what are you talking about, Dr. Grauerholz?

MR. DOWNING: Objection.

COURT: Overruled.

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 7.

DR. GRAUERHOLZ: I am talking about punishment in the sense that one might spank a child for misbehaving. In that sort of situation. A question of corporal punishment. In these cases the punishment is excessive in its result if not necessarily in its intent."

Defendant contends that to permit Dr. Grauerholz to give an opinion that the child was a victim of the battered child syndrome, to explain what this syndrome means, and "to theorize . . . that the child was killed by a parent, a guardian or caretaker who used more force than was called for in a disciplinary situation" was, in effect, to permit the doctor to testify "as to the ultimate fact of the defendant's guilt or innocence" and therefore was improper. Defendant makes no argument in his brief to support his assignment of error with regard to Dr. Jason's testimony. We conclude that all of this testimony was properly admitted.

Defendant relies on the principle that an expert witness should not express an opinion on the very issue to be decided by the jury and thereby invade the jury's province. As this Court has noted before, this principle "is not inflexible, is subject to many exceptions, and is open to criticism." *Patrick v. Treadwell*, 222 N.C. 1, 4, 21 S.E. 2d 818, 821 (1942), quoted with approval in *Bruce v. Flying Service*, 234 N.C. 79, 66 S.E. 2d 312 (1951). "It is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science or skill." *State v. Powell*, 238 N.C. 527, 530, 78 S.E. 2d 248, 251 (1953). In *Powell* the defendant was charged with the murder of his wife. The state's evidence tended to show that the defendant intentionally shot his wife with a pistol, the bullet having penetrated his wife's ring finger on her right hand and entered her skull, causing death. The defendant contended and testified that after he and his wife had gone to bed he was awakened by someone pulling at the pistol which he had earlier placed under his pillow. When he raised up his wife "was getting hold of the pistol, he grabbed, and got hold of it, and then it fired." The state's case rested in part on crucial testimony of the physician who performed the autopsy. He testified that it was his opinion based upon his examination of the deceased that when the fatal bullet was fired her "hand was somewhere in front of the face in this particular area (indicating)," and that it "was turned—in other words like that, to her face (indicating)." On appeal and against the defendant's contention that this testimony invaded the jury's province, this Court found no error in the admission of the testimony. Parker, J., later C.J., writing for the Court, said, 238 N.C. at 530, 78 S.E. 2d at 250-51:

> "This witness spoke from a professional and personal examination of the body of Bessie Rector Powell, and the

answers, to our minds, were clearly within the domain of expert opinion. The witness had testified in minute detail as to the penetration of the bullet through the ring finger of the right hand into the skull and brain of Bessie Rector Powell, and also the powder burns on her hand and forehead. His opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession. The questions and answers are approved and upheld, we think, in *S. v. Jones*, 68 N.C. 443 (opinion of doctor who saw deceased as to his posture and position when shot); *S. v. Fox*, 197 N.C. 478, 149 S.E. 735 (opinion of doctor that deceased was lying down when he received the fatal wound); *S. v. Stanley*, 227 N.C. 650, 44 S.E. 2d 196 (physician testified that deceased was in a prone position when fatal injuries inflicted); *McManus v. R.R.*, 174 N.C. 735, 94 S.E. 455 (physician testified the intestate was lying down at the time of injury); *George v. R.R.*, 215 N.C. 773, 3 S.E. 2d 286 (similar opinion testimony as in *McManus case*)."

Expert medical opinion has been allowed on a wide range of facts, the existence or non-existence of which is ultimately to be determined by the trier of fact. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) (sanity of the defendant); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974) (sanity of defendant and competence of defendant to stand trial); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971) (probable date of death); *State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958) (death caused by exertion, fear and anger, rather than blows); *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903) (contusion caused by blow with a blunt, covered instrument); *but see State v. Griffin*, 288 N.C. 437, 219 S.E. 2d 48 (1975), *death penalty vacated*, 428 U.S. 904 (1976) (psychiatric definition of "intent" properly excluded in murder case); *State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928) (testimony that deceased could not have fired the shot that killed him where defense was suicide was erroneously admitted). *See generally* 1 Stansbury's North Carolina Evidence § 135 (Brandis rev. 1973).

[1] We conclude, therefore, that in determining whether expert medical opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether

the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact. The test is as stated in *State v. Powell, supra*, 238 N.C. at 530, 78 S.E. 2d at 250, whether the "opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession."

[2] The opinions expressed by the physicians in this case fall well within the bounds of permissible medical expert testimony. The basis for Dr. Jason's opinion, that the bruises on the child's chest did not form the typical bruising pattern normally sustained by children in day to day activities, was given in his earlier testimony in which he said:

> "In my work in pediatrics I have had the occasion to work with numerous children. At Johns Hopkins I would say somewhere in the neighborhood of five hundred children total. Many times I have had occasion to observe lesions or bruises about children that have occurred in the normal course of events. A child frequently falls on his knees or bang what we call the tibial surfaces, the area underneath the knee, and, of course, bang their elbows and skin their hands and occasionally even fall and hit their heads and in that case get a bruise similar to the one that Kessler had on the front of his head.
>
> MR. GREGORY: Have you had a chance in your work in pediatrics to observe the chests of children?
>
> DR. JASON: Oh, of course, of course."

Likewise, Dr. Grauerholz' opinion that this child was a "battered child" and his explanation of that term were based on his experience as a physician and a pathologist who had at the time of the trial performed over 150 autopsies, and on the fact that the "battered child" syndrome has been a recognized medical diagnosis for over ten years. For a history of the development of this diagnosis and its ultimate recognition in the medical community *see* McCoid, The Battered Child and Other Assaults Upon the Family: Part One, 50 Minn. L. Rev. 1, 3-19 (1965). Dr.

Grauerholz' opinion regarding the usual cause of the syndrome, again, was based on his expertise in the area and his knowledge of the subject as contained in the medical literature.

Contrary to what defendant seems to argue, neither physician testified, nor should he have been permitted to do so, that the battered child syndrome from which this victim suffered was in fact caused by any particular person or class of persons engaging in any particular activity or class of activities. Nowhere in the record did either physician express or purport to express an opinion as to defendant's guilt or innocence. On these kinds of factual questions the physicians would have been in no better position to have an opinion than the jury.

Upholding the admission of similar testimony, the California Court of Appeals in *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971) said:

> "A finding, as in this case, of the 'battered child syndrome' is not an opinion by the doctor as to whether any particular person has done anything, but, as this doctor indicated, 'it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that we had' by accidental means. In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months."

As far as our research reveals, all courts which have considered the question, including our own Court of Appeals, have concluded that such expert medical testimony concerning the battered child syndrome as was offered in this case is properly admitted into evidence. *State v. Periman*, 32 N.C. App. 33, 230 S.E. 2d 802 (1977); *State v. Loss*, 295 Minn. 271, 204 N.W. 2d 404 (1973);

People v. Henson, 33 N.Y. 2d 63, 304 N.E. 2d 358 (1973); *State v. Best*, 232 N.W. 2d 447 (S.D. 1975).

The cases relied on by defendant, *Hill v. R.R.*, 186 N.C. 475, 119 S.E. 884 (1923); *Mule Co. v. R.R.*, 160 N.C. 252, 75 S.E. 994 (1912); *Summerlin v. R.R.*, 133 N.C. 551, 45 S.E. 898 (1903), are readily distinguishable. In each of these cases the difficulty was that the medical expert was permitted to testify that a certain event had in fact caused the injuries complained of. The court in each case pointed out that it would have been proper to have asked the expert whether the event could or might have caused the injury, but not whether it in fact did cause it. (There may be questions of cause and effect, however, about which an expert should be permitted to give, if he has one, a positive opinion. *Mann v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973).) The Court in *Summerlin* also relied on the rule that an expert must base his opinion upon facts within his own knowledge or upon facts put to him in a properly phrased hypothetical question.

Defendant's first assignment of error is overruled.

[3] Defendant's next assignment of error relates to the district attorney's cross-examination of Mrs. Gracie Wilkerson, defendant's mother. On direct examination Mrs. Wilkerson described defendant's good relationships with the younger children in the family and testified that she had never seen him abuse any child. The record then reveals these pertinent portions of the cross-examination:

"MR. GREGORY: Well, have you ever heard of your son being involved in a gang and abusing people?

MR. DOWNING: Objection.

COURT: Overruled.

MRS. WILKERSON: No, not really. I've known him to be in fights with people standing around looking.

MR. GREGORY: Yes ma'am. But August 25, 1970 Mr. Wilkerson was in and out of your home wasn't he?

MRS. WILKERSON: Yes.

MR. GREGORY: Have you ever heard the name Wallace Bridges?

MR. DOWNING: Object.

COURT: Overruled.

A. No I haven't.

MR. GREGORY: Is it your testimony then that you have never even heard about your son participating in a gang on or about August 25, 1970 in which a boy named Wallace Bridges was shot and killed?

MR. DOWNING: Objection. Move to strike.

COURT: Overruled. Motion denied.

A. I am not aware of who Wallace Bridges is but if that's what I'm thinking it is, as you know Kenneth was the only one that they, that the person, if this is correct, if it is what you are talking about, it was a handicapped boy that was shot and killed, is this what you are speaking in terms of?

MR. GREGORY: I'm speaking about a young man whose name was Wallace Bridges that was shot and killed on or about August 25, 1970.

A. Right.

MR. DOWNING: Objection.

COURT: Overruled.

A. Kenneth was known not to be there, not by my say-so or anyone that knew Kenneth, this was the cousin to the boy that was shot and killed, he could testify to everybody but he also testified that my son was not there at the time this boy was shot and killed. If that's his name. I don't know his name. Kenneth was not too good on gangs. He always picked one boy at a time and if that boy didn't prove out to be all he thought he was he would let him go.

. . . .

MR. GREGORY: Is it your testimony then that you never even heard about Mr. Wilkerson being involved with a gang shooting on or about January 1, 1972?

MR. DOWNING: Objection.

COURT: Overruled.

MR. GREGORY: May I complete the question? In which the victim was permanently paralyzed? Is that your testimony?

MR. DOWNING: Objection.

COURT: Overruled.

A. Well, the victim is not permanently paralyzed and Kenneth was not involved in that particular incident. It was my son Joseph Wilkerson. On July 11, 1972 I believe Kenneth was living with my mother at that time in Philadelphia, two and a half blocks away. When he was living with my mother, if matters of serious nature occurred in his life I imagine I would have known about that.

MR. GREGORY: Is it your testimony that you never even heard then about your son Kenneth Wilkerson being involved in a gang shooting in which a member of a rival gang was shot at?

MR. DOWNING: Objection.

COURT: Overruled.

A. No I don't. I don't recall at this time."

Both the state and defendant argue that Mrs. Wilkerson was, in part at least, a character witness for defendant. The state contends that since defendant offered her testimony to show his good character, it was entitled to cross-examine her to show his bad character. Accepting this analysis of the parties, we conclude that it was error to permit this kind of cross-examination. We hold, however, because of the answers given and the presence in the case of evidence quite persuasive of defendant's guilt, that the error was not prejudicial.

The controlling rules as to character evidence are summarized in *State v. Chapman*, 294 N.C. 407, 416, 241 S.E. 2d 667, 673 (1978), *quoting State v. Green*, 238 N.C. 257, 258, 77 S.E. 2d 614, 615 (1953):

"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."

Defendant's objections to the questions set out should therefore have been sustained.

We fail to perceive, however, any prejudice to defendant in the admission of this testimony. The witness, while admitting some knowledge of the incidents, denied defendant's involvement therein. Each denial was accompanied by a plausible exculpatory explanation of the misconduct suggested by the district attorney's question. We are bolstered in our conclusion that no prejudice resulted because there is in this case plenary evidence strongly suggesting defendant's guilt. Where the state's contentions are so strongly supported by competent evidence, it is less likely that evidentiary errors will actually affect the verdict. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). "Unless there is a reasonable possibility that the erroneously admitted evidence might have contributed to the conviction, its admission constitutes harmless error." *Id.* at 228, 192 S.E. 2d at 288. We find no such reasonable possibility in this case. Accordingly, this assignment of error is overruled.

[4] Under his third assignment of error defendant argues a number of unrelated questions directed to the trial court's instructions to the jury. By arguing unrelated questions under one assignment of error, defendant has ignored Rule 28(b)(3) of the Rules of Appellate Procedure. Nevertheless, we have considered thoroughly each of his arguments. The first relates to the manner in which the trial judge submitted the alternative verdicts of murder in the second degree, voluntary manslaughter, involuntary manslaughter, and not guilty to the jury. Defendant contends the method adopted by the trial judge improperly conveyed his opinion to the jury "that the defendant had to be guilty of something." No authority is cited in support of his argument. We have examined these portions of the instructions and find defendant's contention without merit and undeserving of discussion.

Defendant next contends that the instructions do not properly define the various degrees of homicide submitted to the jury. The pertinent instructions were given as follows (Those portions actually excepted to are in italics. According to the bill of indictment and the court's instructions elsewhere, Kessler Wilkerson was sometimes known as "Kessler Patterson."):

"*Second degree murder may also exist where there is no intentional act where there is an act of culpable negligence which carries danger to another and the act is so reckless or wantonly done as to indicate a total disregard for human life, and death proximately results from the act. So if in this case the defendant intentionally assaulted Kessler Wilkerson with his hands, fists or feet, and used such force that under the circumstances that force was likely to cause death and that death directly and naturally and proximately resulted from the use of that force, the defendant would be guilty of murder in the second degree.*

. . . .

"And I instruct you that voluntary manslaughter differs from murder in the second degree in that malice is not an essential element of voluntary manslaughter. Voluntary manslaughter is the intentional, unlawful killing of a human being without malice and without premeditation or deliberation. I have already defined the term 'intentional' for you in connection with my discussion of the crime of murder in the second degree and I will not do so again here because it would simply be repetitious to do so. As in the case of murder in the second degree, it is not essential that there be a specific intent to kill. There must, however, be an intent to do an unlawful act which naturally and directly results in the death of a human being. *So, if the defendant intentionally assaulted Kessler Patterson with his hands, fists or feet, but you do not find beyond a reasonable doubt that the force he used was such that it was likely to cause death under the circumstances, but that death did occur as the direct result of the use of that force, under those circumstances the defendant would be guilty of voluntary manslaughter.*

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 21.

"Voluntary manslaughter requires an intentional act that directly results in death, but not such an act that under the circumstances appeared likely to cause death.

. . . .

"So I will now discuss with you the crime of involuntary manslaughter.

"I instruct you that if the defendant undertook to act in the place of a parent to Kessler Patterson and in doing so was so grossly careless and negligent in his treatment of the child as to show a wanton and reckless behavior and a total disregard for the rights and safety of the child, although his conduct was not such as to show an utter disregard for human life, and if death directly resulted from that conduct, then he would be guilty of involuntary manslaughter. Mere carelessness or negligence is not enough to carry criminal responsibility but if carelessness or negligence is accompanied by wanton or reckless behavior showing a total disregard for the rights and safety of others, it is culpable negligence, for which one may be criminally responsible.

"The intentional violation of a statute, a law, enacted for the protection of life or limb, is culpable negligence, and if death directly results from the intentional violation of such a statute, of such a law, that is involuntary manslaughter.

"It is the law of this state that if a person providing care for a child under sixteen years of age—that statute may have now been amended to raise it to eighteen years—inflicts physical injury on such child by other than accidental means, he is guilty of the misdemeanor of child abuse. *So if in this case the defendant was providing care for Kessler Patterson, who the evidence tends to show was the child of his wife and who lived with him and his wife and who the defendant's testimony tends to show was his natural child, so if the defendant was providing care for Kessler Patterson and in doing so he intentionally inflicted injury upon that child and the child, Kessler, was under the age of sixteen years, and if his death directly resulted from that injury, the defendant under those circumstances would be guilty of involuntary manslaughter.*"

EXCEPTION. THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 23.

Defendant's argument, more precisely, seems to be that the trial judge failed to distinguish properly the various degrees of homicide for the jury. Defendant argues that the definitions of second degree murder and involuntary manslaughter are "virtually synonymous." He says further that an "intentional act" can never be an element of involuntary manslaughter; and that insofar as the trial judge instructed that such an act could be the basis for both voluntary and involuntary manslaughter, he failed to distinguish properly between these degrees of homicide.

Time and again this Court has had occasion to define the various degrees of homicide prevailing under the common law of our state. Repetition of these definitions must be the beginning of our analysis. We find *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971), particularly helpful. Defendant in *Wrenn* shot his wife to death with a shotgun. The state's evidence was sufficient to support a verdict of either first or second degree murder. These alternatives and not guilty were the only permissible verdicts given by the trial judge. The question on appeal was whether the defendant's evidence, which tended to show an accidental discharge of the gun, was sufficient if believed to support, and therefore require, an instruction on involuntary manslaughter. A majority of the Court thought that it was. Justice, now Chief Justice, Sharp disagreed and dissented. It is apparent, however, that her disagreement with the majority centered on the application of the law of homicide to the facts—not on the legal principles to be applied. Thus, both the majority and dissenting opinions are helpful elucidations of the law of homicide and directly applicable to the facts in the present case.

Justice Huskins, writing for the majority in *Wrenn*, set out our time-honored definitions of homicide as follows, 279 N.C. at 681-82, 185 S.E. 2d at 132:

> "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm*, 232 N.C. 402, 61 S.E. 2d 188 (1950). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E.

2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to kill or inflict serious bodily injury. State v. Foust, supra*; *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930)."

Justice, now Chief Justice, Sharp pointed out in her dissent in *Wrenn* that the difference between second degree murder and manslaughter is that malice, express or implied, is present in the former and not in the latter. She wrote, further, 279 N.C. at 686-87, 185 S.E. 2d at 135:

"Malice has many definitions. To the layman it means hatred, ill will or malevolence toward a particular individual. To be sure, a person in such a state of mind or harboring such emotions has actual or particular malice. *State v. Benson*, 183 N.C. 795, 111 S.E. 869. In a legal sense, however, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse; 'whatever is done "with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means constitutes legal malice." ' *State v. Knotts*, 168 N.C. 173, 182-3, 83 S.E. 972, 976. It comprehends not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.' 21 A. & E. 133 (2d Edition 1902). *Accord, State v. Long*, 117 N.C. 791, 798-9, 23 S.E. 431.

"This Court has said that '[m]alice does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.' *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629; *State v. Lilliston*, 141 N.C. 857, 859, 54 S.E. 427. In such a situation

'the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.' 1 Wharton, Criminal Law and Procedure § 245 (Anderson, 1957)."

This Court has also said, "[a]n intent to inflict a wound which produces a homicide is an essential element of murder in the second degree," *State v. Williams*, 235 N.C. 752, 753, 71 S.E. 2d 138, 139 (1952), quoted with approval in *State v. Phillips*, 264 N.C. 508, 513, 142 S.E. 2d 337, 340 (1965), and "second degree murder . . . imports a specific intent to do an unlawful act." *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793, 803 (1970).

Manslaughter is of two kinds—voluntary and involuntary. Generally voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter. *See generally State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death penalty vacated*, 428 U.S. 903 (1976); *State v. Wrenn, supra*, 279 N.C. 676, 185 S.E. 2d 129 (Sharp, J., now C.J., dissenting).

"Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony *or naturally dangerous to human life*, or (2) by an act or omission constituting culpable negligence. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889; *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485; *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155. In *Foust*, it is said that ordinarily an unintentional homicide resulting from the reckless use of firearms 'in the absence of intent to discharge the weapon, or in the belief that it is not loaded, *and* under circumstances *not evidencing a heart devoid of a sense of social duty*, is involuntary manslaughter.' *Id.* at 459, 128 S.E. 2d at 893. (Emphasis added.) When the circumstances do show a heart devoid of a sense of social duty, the homicide cannot be involuntary manslaughter." *State v. Wrenn, supra*, 279 N.C. at 687-88, 185 S.E. 2d at 136

(Sharp, J., now C.J., dissenting); (*Foust* was also quoted with approval on this point by the majority in *Wrenn*, 279 N.C. at 683, 185 S.E. 2d at 133). Culpable negligence as an element of involuntary manslaughter may also arise from the "intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in . . . death." *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933); *State v. Jones*, 32 N.C. App. 408, 413, 232 S.E. 2d 475, 478 (1977).

In *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977), the question before the Court was whether a mother who had dropped her infant on the floor shortly after its birth could be found guilty of involuntary manslaughter. Concluding that the evidence in the case would not support a finding of criminal responsibility the Court, in an opinion by Justice Moore, said, 291 N.C. at 702, 231 S.E. 2d at 606:

> "Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others."

Applying these principles to the instructions under consideration, we conclude: (1) It was error to instruct that "second-degree murder may . . . exist where there is no intentional act," but that when this expression is considered in context of the entire instruction on this point, the jury could not have been misled by it and no prejudice to defendant resulted. (2) The instructions on murder in the second degree and involuntary manslaughter are, otherwise, correctly stated and properly differentiate these crimes. (3) The instructions on voluntary manslaughter should not have been given since this offense was not supported by the evidence, but the giving of these instructions could not have prejudiced defendant.

[5, 6] While an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death. *State v. Wrenn, supra*, 279 N.C. 676, 185 S.E. 2d 129 (Sharp, J., now C.J., dissenting); *State v. Benton, supra*, 276 N.C.

641, 174 S.E. 2d 793; *State v. Phillips, supra*, 264 N.C. 508, 142 S.E. 2d 337; *State v. Williams, supra*, 235 N.C. 752, 71 S.E. 2d 138. We question the universal applicability of the statements in *Williams*, quoted in *Phillips*, that "an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree," and in *Benton* that "second-degree murder . . . imports a specific intent to do an unlawful act." It is more fundamentally sound to say, as did Justice, now Chief Justice Sharp in her dissent in *Wrenn*, that any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.

[7, 8] Here, the trial judge instructed the jury that second degree murder could exist "where there is no intentional act." This, taken out of context, is as we have shown a misstatement of the law. In context, however, the judge seems to be using this phrase in the sense of a specific intent to kill. All the evidence showed that the *acts* committed by defendant against the child were intentional, whatever might have been defendant's intent regarding the *result* of those acts. The trial judge correctly charged the jury on the necessity to find this general intent when he said in the next sentence, "so if in this case the defendant *intentionally assaulted* Kessler Wilkerson. . . ." (Emphasis supplied.) He further charged the jury that in order to return a verdict of guilty of second degree murder, it had to find "an act of culpable negligence which causes danger to another and the act is so recklessly or wantonly done as to indicate *a total disregard for human life*. . . ." (Emphasis supplied.) Considered in its entirety, the instruction properly informed the jury of the elements necessary for a conviction. An act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder. *State v. Wrenn, supra*, 279 N.C. at 687, 185 S.E. 2d at 135 (Sharp, J., now C.J., dissenting). The jury thus could not have been misled to defendant's prejudice by the erroneous instruction on the absence of an "intentional act."

[9] The trial judge was correct in the distinction he drew between involuntary manslaughter and second degree murder. Both can involve an act of "culpable negligence" that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, as the judge here instructed, an act of culpable negligence also "imports danger to another [and] is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life," it will support a conviction for second degree murder. *Id.*, *quoting State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925).

[10] Next, while involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is, notwithstanding defendant's argument to the contrary, accomplished by means of some intentional act. Indeed without some intentional act in the chain of causation leading to death there can be no criminal responsibility. Death under such circumstances would be the result of accident or misadventure. *State v. Everhart*, supra, 291 N.C. 700, 231 S.E. 2d 604; *State v. Church*, 265 N.C. 534, 144 S.E. 2d 624 (1965).

[11] An intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death can support a conviction of involuntary manslaughter. *State v. Cope*, *supra*, 204 N.C. 28, 167 S.E. 456. It is clear in this case that when the trial judge instructed the jury that if defendant while caring for the child "intentionally inflicted injury upon that child . . . under the age of sixteen years, and if his death directly resulted . . . defendant . . . would be guilty of involuntary manslaughter" he was referring to just such a violation of General Statute 14-318.2 which provides:

> "Child abuse a general misdemeanor.—(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.
>
> "(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a)."

[12, 13] Finally, we note that the trial judge should not have instructed the jury on voluntary manslaughter. There is, in this case, no evidence to support such a verdict. There is no evidence that defendant killed under the heat of passion raised by sudden provocation and nothing that raises the issue of self-defense. Where there is no evidence of a killing under such circumstances a possible verdict of voluntary manslaughter should not be submitted. *State v. Ward, supra*, 286 N.C. 304, 210 S.E. 2d 407. The trial judge charged the jury that if defendant "intentionally assaulted Kessler Patterson with his hands, fists or feet, but you do not find beyond a reasonable doubt that the force he used was . . . likely to cause death . . . but that death did occur as the direct result of the use of that force . . . defendant would be guilty of voluntary manslaughter." The instruction is incorrect. Such a state of facts would render defendant guilty at most of involuntary manslaughter. If the assault were committed under such circumstances as to indicate a total disregard for human life, it would support a finding of implied malice and a verdict of second degree murder, as the judge earlier so instructed and the jury apparently so found. It follows from what we have already said, however, that a mere assault which proximately results in death, but which does not indicate a total disregard for human life and is committed with no intent to kill or to inflict serious bodily injury, will support, at most, a verdict of involuntary manslaughter.

Since defendant was convicted of second degree murder, he could not have been prejudiced by the erroneous submission of voluntary manslaughter, a lesser included offense not raised by the evidence. *State v. Accor*, 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968). If anything, the error was in defendant's favor. It gave the jury an opportunity, which legally the jury should not have had, to find defendant guilty of a lesser offense.

No error.

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

STATE OF NORTH CAROLINA v. ALFONZA LE-VEGAS MASON

No. 1

(Filed 17 October 1978)

1. **Constitutional Law § 30— right to interview prospective witnesses—no obstruction by prosecution**

An assertion unsupported by evidence by defendant's counsel that various officers had told him that they could not discuss the case with him because they had been told not to discuss it was insufficient to show that defendant was denied his right to attempt to interview any witnesses he desired, including prospective State witnesses, free from obstruction by the prosecution.

2. **Criminal Law § 91.6— continuance to examine evidence—denial proper**

The trial court did not err in denying defendant's motion for continuance made that he might have time to investigate certain materials submitted and expected to be submitted to him by the State pursuant to his motion for discovery, since defendant was given ample time and opportunity to investigate the evidence in question; he had the cooperation of the State; he had full knowledge of all facts essential to any investigation; and there was no showing that defendant was unduly prejudiced in any manner by the judge's denial of his motion.

3. **Criminal Law § 98.2— sequestration of witnesses—time of making motion as basis for denial—error not prejudicial**

The trial court erred in denying defendant's motion to sequester the witnesses made at the beginning of the trial on the ground that defendant had made the motion at the wrong time, but such error was not prejudicial where defendant offered no reason for his motion to sequester; the record disclosed no reason for sequestration; and nearly all the witnesses testified to different facts and circumstances of the crimes, and each account given was sufficiently different from the others so as to indicate an absence of collusion or the parroting of another's testimony.

4. **Criminal Law § 89.8— cross-examination of accomplice—expected punishment—questions improper**

The trial court did not err in sustaining the State's objections to questions put to defendant's accomplice on cross-examination with respect to the nature of the sentence which he might receive for his participation in the crimes, since the questions did not concern a promise of or the accomplice's just expectation of pardon or parole as the result of his testifying for the State, but instead apparently asked of the witness his understanding of the laws concerning parole in this State, and, as such, called for the legal knowledge of a lay witness.

5. **Criminal Law § 89.10— impeachment—question about street gang operations improper**

The trial court properly sustained the State's objection to a question, asked for impeachment purposes, as to whether the witness had been involved in "street gang operations in New York," since the question did not refer to a

particular act of misconduct on the part of the witness and thus was not a proper question for impeachment purposes.

6. **Criminal Law § 157.1— witness's excluded answers not placed in record—no error**

The trial court did not err in refusing to permit defendant to put into the record the responses which a witness would have given had he been permitted to testify, since the court had correctly sustained the State's objections to the questions, and since defendant made his request after the witness had stepped down.

7. **Criminal Law § 115— judge's statement about jury instructions—no instruction on lesser offense—no prejudice**

The trial judge's ambiguous statement, made just prior to the jury arguments, as to what offenses he would charge on was not prejudicial to defendant, though the court referred only to second degree rape but subsequently instructed on first degree rape, since defendant was indicted for first degree rape and arraigned on first degree rape at the beginning of trial; all the evidence showed that the rape was consummated by the use of a deadly weapon; defendant contended that he did not commit the rape at all; and, even if counsel did believe that the judge would not instruct on first degree rape, such belief could not have affected the content of his argument to the jury.

8. **Criminal Law § 138.9— sentence—credit for time served**

Defendant was entitled to credit for pretrial time spent in custody under the provisions of G.S. 15-196.1 through -196.4.

9. **Criminal Law § 50.2— bloodstains—nonexpert opinion evidence admissible**

A police officer and an accomplice to a rape were properly permitted to identify stains on the back seat of defendant's car as bloodstains.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Bailey, J.*, at the August 1977 Session of DURHAM Superior Court.

Defendant was tried and convicted of first degree rape, kidnapping, and three counts of armed robbery. The three armed robbery convictions were consolidated for judgment, and defendant was sentenced to three consecutive life sentences for robbery, first degree rape and aggravated kidnapping.

Evidence for the State may be summarized as follows: On 28 June 1977 Nancy Ann Oakley, prosecutrix, was manager of the Cricket Inn on Hillandale Road in Durham. At about 11:30 p.m. that evening, Tony Binion, an employee of the motel, reported to Ms. Oakley the presence of two black men in the parking lot. Ms. Oakley, accompanied by David Womack and Ronnie McSwain, two motel guests, went out to the lot to investigate. As they ap-

proached, the shorter of the two men pointed a shiny revolver at the trio and threatened to kill them. The three were ordered to turn around. Upon doing so, Ms. Oakley was blindfolded by the shorter man and pushed into the back seat of a black and gold Buick Riviera. Her watch, ring and flashlight were taken from her. The shorter man also put the gun to McSwain's back, and took from him his room key, pocket change, and a billfold containing a twenty dollar bill and several singles. One of the men took Womack's room key from his pocket. Both Womack and McSwain identified the defendant as the shorter man who held the gun on them. Tony Binion, an employee of the motel, also identified the defendant as one of the men.

Ms. Oakley was driven by the men some distance to a service road off Morreene Road. There she was forced to remove her clothes and was raped by both men. Ms. Oakley testified that she did not see the face of either man.

Anthony Hunter testified that he was with defendant on the night of 28 June 1977 in defendant's black and gold Riviera. Both he and defendant pulled into the Cricket Inn parking lot and were in the process of breaking into a soda machine when approached by a woman and two men. Defendant drew a gun on the group, went through their pockets, and put the woman in the back seat of the car. Some minutes later Hunter rode off with defendant to a spot where both men raped the woman. Hunter testified that he had pled guilty to second degree rape and kidnapping.

Other evidence for the State tends to show that defendant was stopped at 2:00 a.m. on the morning of 29 June in an automobile answering descriptions given by the various victims. A nickel-plated .32-caliber revolver was found under the driver's seat, and a twenty dollar bill and four singles were found on defendant's person. A lady's wristwatch was found on the turn signal of the car and stains appearing to be the effects of blood were found in the back seat. A thumbprint lifted from the interior of the automobile matched a print taken from Ms. Oakley. At the place where the rape allegedly occurred the investigating officer found a pair of lady's pantyhose, McSwain's billfold, property McSwain identified as the contents of his billfold, and a motel key for McSwain's room, number 154.

The defendant testified in his own defense. He said that he did not rape Ms. Oakley and in fact had never seen her prior to

trial. At the time of the offense he was in Chapel Hill with a girl, Delores Wiggins. He and his attorney had attempted to locate Ms. Wiggins but could not find her.

Other facts pertinent to decision will be set out in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney Thomas F. Moffitt for the State.

Richard N. Weintraub for defendant appellant.

MOORE, Justice.

[1] Under his first assignment of error defendant contends that the trial court erred in denying defendant's motion requesting the court to direct the State to rescind any orders or suggestions made to potential or actual witnesses to refuse to discuss the case with defendant's attorney. The record discloses that a hearing was held on this motion a week prior to trial. At the hearing, defendant's attorney stated that police officers and detectives had refused to discuss the case with him, and had told him that they had been instructed not to discuss it. The district attorney stated at the hearing that no such orders had been given to the officers, and that officers had been told that they could discuss the case with defendant's attorney if they wished. After hearing, defendant's motion was denied.

Several federal cases hold that a defendant has the right to attempt to interview any witness he desires, including prospective State witnesses, free from obstruction by the prosecution. *Gregory v. United States*, 369 F. 2d 185 (D.C. Cir. 1966); *Byrnes v. United States*, 327 F. 2d 825 (9th Cir. 1964); *McCabe v. State of North Carolina*, 314 F. Supp. 917 (M.D.N.C. 1970); *Coppolino v. Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967). In addition, ABA Standards Relating to the Prosecution Function, § 3.1(c), says: "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has the right to give." *See* ABA Standards Relating to the Administration of Criminal Justice, p. 88 (1974). This requirement that a prosecutor not instruct prospective

witnesses not to talk with defense counsel has been implicitly recognized by this Court in another context. In *State v. Covington*, 290 N.C. 313, 343, 226 S.E. 2d 629, 649 (1976), the Court said: " . . . Defendant had the right to examine proposed State's witnesses in order to amplify the clearly stated charge contained in the bill of indictment. . . ."

The rule, however, does not impose any obligation upon a prosecutor to disclose the identity of prospective witnesses. *See State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). Nor does the duty prohibit a prosecutor from informing prospective State witnesses that they have the right to refuse to be interviewed. *United States v. White*, 454 F. 2d 435 (7th Cir. 1972). Finally, reversal on this ground requires a clear showing that the prosecutor instructed a witness not to cooperate with defendant. *United States v. White, supra.* In the present case the evidence is to the contrary. The district attorney stated at the hearing that he had given no instructions to any witnesses not to discuss the case with defendant's counsel. Defendant offered no evidence, by way of testimony or affidavit, that such instruction had been given. All we have is an assertion by defendant's counsel that various officers had told him they could not discuss the case because they had been told not to discuss it. Since there is nothing but this unsubstantiated claim in the record, defendant's assignment is held to be without merit.

[2] Defendant next argues that the trial court erred in denying defendant's motion for continuance. On 12 August 1977, ten days prior to trial, defendant submitted a written motion requesting that his case be continued until 19 September 1977, in order that he might investigate certain materials submitted and expected to be submitted to him by the State pursuant to his motion for discovery. This motion was heard before Fountain, J., and that judge granted defendant a continuance of one week, but denied defendant's motion for any further continuance. Defendant orally renewed his motion for continuance on the first day of trial, arguing that he had first received certain fingerprint evidence that very day and required time to investigate it. After hearing arguments by both sides, the trial court denied defendant's motion.

A motion to continue is ordinarily addressed to the sound discretion of the trial court, and his ruling thereon will not be disturbed except upon a showing that he abused his discretion. However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). Defendant contends that denial of his motion prevented him from exercising his Sixth Amendment right to effective assistance of counsel and his right to cross-examine State's witnesses. The question presented is therefore one of law rather than discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

Implicit in the constitutional guarantees of assistance of counsel and of confrontation of one's accusers and witnesses are the requirements that defendant's attorney have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed, and whether a defendant is denied due process must be determined under the circumstances of each case. *State v. McFadden, supra; State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Farrell*, 223 N.C. 321, 26 S.E. 2d 322 (1943).

In present case defendant was arrested on 29 June 1977 and was indicted on 5 July 1977. The record reveals that defendant's counsel was appointed sometime prior to 12 July 1977. His counsel made motion for discovery under G.S. 15A-901 et seq., and the State first produced materials in response to this motion on 10 August 1977, twelve days prior to trial. The week before trial defendant's counsel was given written notice of the fingerprint evidence the State intended to introduce, and was given oral notice regarding the location of the fingerprints, the type of prints taken, who took them, who processed them, and those who would testify. Defendant's counsel actually saw these items on Friday, three days prior to trial. What he did not see, because they were not available until the day of the trial, were photographic blowups of the prosecutrix's thumbprint and codefendant's palmprint. He did, however, see the prints from which the blowups were made at least three days prior to trial, and may have had the opportunity to see them even before then. Finally, defendant was aware of the fact that the State would try the case on 22 August, for his initial motion to continue the case beyond this date had been denied at least a week prior to trial.

Given these facts, we cannot see that defendant was denied the opportunity to prepare his defense. He was given ample time and opportunity to investigate these prints, he had the cooperation of the State, and he had full knowledge of all facts essential to any investigation. Additionally, there is no evidence in the record indicating that defendant was unduly prejudiced in any manner by the trial judge's denial of his motion. Defendant's assignment is hence without merit.

[3] Under his third assignment defendant argues that the trial court erred in denying his motion to sequester the State's witnesses, made at the beginning of the trial. The trial judge denied it, saying that it was not the time to make the motion. Though defendant concedes that sequestration of witnesses is a matter of the trial court's discretion, he contends that the denial of his motion amounts to a manifest abuse of discretion. Defendant argues that the grounds on which the trial judge denied his motion indicate that the trial judge refused to consider the motion on its merits; that this amounts to a refusal by the trial judge to use his discretion and thus to an abuse of such discretion.

It is the usual practice in this State, in both criminal and civil cases, to separate witnesses and send them out of the hearing of the court when request is made. 1 Stansbury, North Carolina Evidence § 20 (Brandis rev. 1973). Sequestration of witnesses is not, however, a matter of right, but is a matter of discretion on the part of the trial court, *State v. Cross*, 293 N.C. 296, 237 S.E. 2d 734 (1977); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *Annot.*, 32 A.L.R. 2d 358, and a denial of a motion to sequestrate will be reviewed only where there has been an abuse of discretion. *State v. Cross, supra.*

We have discovered no law which holds that a motion to sequester cannot be made after the jury panel is called into open court and just prior to the State's calling its first witness. A motion to sequester is not among those motions listed in G.S. 15A-952(b) which must be made at or before the time of arraignment. Hence, it would appear that the trial court's stated reason for denial of defendant's motion to sequester is inapposite. When, however, there is nothing in the record which would tend to indicate that the defendant was prejudiced by the refusal of the

trial court to exclude witnesses from the courtroom, any error will be held nonprejudicial. *Mitchell v. United States*, 126 F. 2d 550 (10th Cir. 1942), *cert. den.*, 316 U.S. 702, 86 L.Ed. 1771, 62 S.Ct. 1307 (1942). *See also Swartz v. State*, 121 Neb. 696, 238 N.W. 312; *Music v. Commonwealth*, 186 Ky. 45, 216 S.W. 116; *People v. Winchester*, 352 Ill. 237, 185 N.E. 580. In present case defendant offered no reason to the court for his motion to sequester. Furthermore, the record discloses no reason for sequestration. *Accord, State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). Nearly all the witnesses testified to different facts and circumstances of the crimes, and each account given is sufficiently different from the others so as to indicate an absence of collusion or the parroting of another's testimony. The failure of the trial court to sequester witnesses could not thus have prejudiced the defendant. This assignment is therefore without merit.

Under Assignments Nos. 5-8, defendant contends that the trial court erred in sustaining State's objections to questions put to Anthony Hunter, an accomplice, on cross-examination. Defendant contends that this constitutes a denial of his constitutional rights to confront and cross-examine State's witnesses.

[4] Defendant first argues that the trial judge committed error by limiting his cross-examination of Hunter as to the nature of the sentence which he might receive for his participation in the crimes. During cross-examination of this witness, the following transpired:

"MR. WEINTRAUB: Did you make an arrangement—Is there an arrangement made as to what the largest sentence you could get would be?

MR. HUNTER: Yes.

Q. Could you tell us what that is?

A. Life imprisonment.

Q. One life imprisonment term, is that correct?

COURT: How many can you do?

MR. WEINTRAUB: Do you understand if you're sentenced to life imprisonment you can—

MR. STEPHENS: Objection.

COURT: Sustained.

MR. WEINTRAUB: Your Honor, I'd like to clarify that a person can do more.

COURT: Sustained. Sustained."

In *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971), Justice Branch, speaking for the Court, said:

> "It is recognized that it is proper on cross-examination to test a witness as to bias concerning a promise of or his just expectation of pardon or parole as the result of his testifying for the State. *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277. However, this rule must be applied in connection with the equally well recognized rule that the legitimate bounds of cross-examination are largely within the discretion of the trial judge, so that his ruling will not be held as prejudicial error absent a showing that the verdict was improperly influenced thereby. [Citation omitted.]"

Unlike questions posed to witnesses in *Chance* and *Roberson, supra*, the question put to witness Hunter in present case does not concern "a promise of or his just expectation of pardon or parole as the result of his testifying for the State." Instead, the question apparently asks of the witness his understanding of the laws concerning parole in this State. Since such question calls for the legal knowledge of a lay witness, it was proper for the trial judge, in his discretion, to sustain the State's objection to the question. *Accord, State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). This is a matter which defense counsel could more properly address in his argument to the jury.

[5] Under this same assignment defendant further argues that the trial court erred in sustaining the State's objection to a question, asked for impeachment purposes, concerning prior misconduct by this same witness. Defense counsel asked the witness: "Were you involved in what you call street gang operations in New York?" Counsel for the State objected, and this objection was sustained. Defendant correctly states the law when he argues that, for impeachment purposes, it is proper to ask a witness both questions concerning prior convictions and questions concerning

his prior *specific acts* of misconduct for which there has been no conviction. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). *See* 1 Stansbury, North Carolina Evidence §§ 43 and 111 (Brandis rev. 1973). A question referring to involvement in "street gang operations" does not, however, concern a *particular act* of misconduct, but rather is a general and oblique allusion to a class of activities. The trial judge thus acted well within the bounds of his discretion in sustaining the State's objection. The record does not disclose any attempt by defense counsel to rephrase his question such that it would focus on specific acts of misconduct by the witness. We can only interpret this failure as an indication that counsel abandoned this line of inquiry.

Defendant's next argument under this assignment is equally without merit since it concerns the sustaining of an objection to a clearly argumentative question asked of State's witness Hunter, after Hunter had responded "No" to two successive questions concerning whether he took his shirt off when he got into the car. The trial judge acted within his discretion by limiting this manner of cross-examination. *See* 1 Stansbury, North Carolina Evidence § 31 (Brandis rev. 1973); *In re Will of Kemp*, 236 N.C. 680, 73 S.E. 2d 906 (1953).

[6] Defendant finally argues under this assignment that he was prejudiced by the trial court's refusal to permit him to put into the record the responses witness Hunter would have given to the questions discussed under this assignment. Defense counsel's request to do so was made when the State had rested its case, after witness Hunter had stepped down and four subsequent witnesses had testified. Since we have held that the trial judge correctly sustained State's objections to these questions, the trial judge's refusal could not have prejudiced defendant. Furthermore, since the request was made after the witness had stepped down, the trial judge acted within his discretion in denying the request.

[7] At the close of all testimony, and just prior to the parties' arguments to the jury, the trial judge said to the attorneys: "For the information of you gentlemen, as to aggravated kidnapping, kidnapping, no lesser included; second degree rape, no lesser included; armed robbery, no lesser included. That will be the nature of the charge." After jury arguments, the trial judge instructed the jury on first degree rape, and the jury returned a verdict of first degree rape. Defendant argues that the trial court erred in

instructing on and in entering a judgment of guilt for first degree rape after having been advised that such charge would not be given to the jury. We disagree.

The trial judge's statement to the attorneys is ambiguous. It is not clear whether he was giving them an exhaustive listing of all offenses on which he would charge, or whether he was merely informing the lawyers as to the lesser degrees on which he would charge. If, at trial, defendant interpreted the statement as implying that there would be no instruction on first degree rape, there is nothing in the record which would indicate his confusion. Likewise, there is nothing in the record which would indicate prejudice. Defendant was indicted for first degree rape and he was arraigned on first degree rape at the beginning of trial. All the evidence shows that the rape was consummated by the use of a deadly weapon. Defendant made no motion for nonsuit on the charge of first degree rape. It is, in fact, apparent that defendant did not base his defense on the absence or nonuse of a deadly weapon. Defendant's testimony reveals that his defense was not that he did not use a weapon, but that he did not commit rape at all since he was not present when the crime occurred. This being his defense, even if counsel did believe that the judge would not instruct on first degree, such belief could not have affected the content of his argument to the jury.

Counsel for defendant failed to include in the record the jury arguments and the trial judge's instructions to the jury. The record does not show that defendant was confused by the judge's statement or that he objected to the judge's instructions on first degree rape. Defendant has therefore failed to carry his burden of showing that the alleged error was prejudicial. This assignment is overruled.

[8] Defendant next insists that the trial judge, in passing judgment, failed to give him credit for pretrial time spent in custody. Defendant is unquestionably entitled to this credit under the provisions of G.S. 15-196.1 through -196.4. This is, however, a matter for administrative action, as provided by G.S. 15-196.4, rather than a subject to be considered on this appeal.

[9] Ms. Oakley testified that after being raped by the defendant in the back seat of his car, she felt a wetness, which may have been blood, running down her legs. Dr. Lawrason testified that

Ms. Oakley had a laceration in the back of her vagina that was bleeding when he examined her shortly after the rape. Officer Hayes and Anthony Hunter, the accomplice, testified that they saw stains on the back seat of defendant's car. Officer Hayes said that the stains "appeared to be blood stains or some type stains." Hunter testified that he "saw some blood in the back seat."

Defendant contends that Hayes and Hunter, being lay witnesses, should not have been allowed to identify blood or bloodstains, this being a matter of lay opinion concerning scientific matters. There is no merit to this assignment. In *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977), Chief Justice Sharp, speaking for the Court, said:

> "The average layman is familiar with bloodstains; they are a part of common experience and knowledge. When a witness says he saw blood he states an opinion based on his observations, and most likely it would be exceedingly difficult for him to describe the details which led him to conclude that the stains were blood. When he testifies they looked like blood to him he has stated his conception. 'This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.' *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975). *See* 1 Stansbury's North Carolina Evidence § 125 (Brandis rev. ed. 1973). . . ."

This assignment is overruled.

Defendant has been convicted in a trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. FREDDY VANCE LOWE

No. 2

(Filed 17 October 1978)

1. **Rape § 3— first degree rape—abbreviated indictment—sufficiency to charge crime**

An indictment drawn under G.S. 15-144.1 which omitted averments that the offense was perpetrated with a deadly weapon or by inflicting serious bodily injury or that defendant's age was greater than sixteen was nevertheless sufficient to charge him with first degree rape under G.S. 14-21, since it was within the legislature's prerogative to prescribe an abbreviated form of indictment for rape, and an indictment drawn in the abbreviated form sufficiently informed defendant of the accusation against him.

2. **Rape § 5— first degree rape—use of deadly weapon—sufficiency of evidence**

In a prosecution for first degree rape evidence was sufficient to show that defendant procured the victim's submission through the use of a deadly weapon where such evidence tended to show that defendant had a butcher knife visible on his person when he was in the victim's car; the victim testified that defendant put it to her stomach and that it remained there until they reached the isolated spot where the rape occurred; only then did defendant lay the knife down on the car's floorboard; and while the victim temporarily obtained possession of the knife and moved it without defendant's knowledge to the other side of the car, this action alone was inadequate to deprive him of access to the weapon because, within the close confines of the car, the knife was still within arm's reach of defendant.

3. **Rape § 6.1— difference between first and second degree rape—erroneous jury instruction corrected**

Though the trial court inaccurately stated the difference between first degree rape and second degree rape upon the jury's request for additional instructions, defendant was not prejudiced since the judge immediately clarified his explanation and eliminated any error and confusion.

4. **Criminal Law § 118.2— first degree rape—State's contention about deadly weapon—jury instruction proper**

The trial court in a first degree rape prosecution did not err in instructing that it was the State's contention that defendant's use of a knife induced fear in the prosecuting witness, since this contention was clearly supported by the evidence.

APPEAL by defendant from *McKinnon, J.*, 3 October 1977 Session of ALAMANCE Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment, returned 3 October 1977, which charged that on or about 23 June 1977 he, "with force and arms, at and in the county

aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know Edna Ann Hamby a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the state. The submission of Edna Ann Hamby was procured by the use of a deadly weapon, to-wit: a knife."

The State's evidence tended to show:

On the evening of 23 June 1977 the prosecutrix was 31 years of age, weighed 125 pounds, was married and was living with her husband. The prosecutrix was not acquainted with defendant and first saw him that evening at about 6:00 p.m. standing in a phone booth outside a convenience store where she had shopped. Neither she nor defendant spoke to each other.

At about 9:30 p.m. that same evening she returned to the store to purchase a snack for her husband, and again she saw defendant standing in the phone booth. As she was getting back into her car after making a purchase, defendant left the booth and approached her on the car's passenger side. Saying that he knew her husband, defendant opened the car door and sat down in the passenger seat. As prosecutrix started her car, defendant placed a butcher knife against her stomach. Keeping the knife at her stomach, he forced her to drive to a deserted spot, a one-lane dirt road between two fields.

At that spot defendant compelled the prosecutrix to smoke marijuana with him. He also ordered her to undress. When she refused, he threatened to kill her if she did not cooperate. She then removed her pants and underpants. Defendant, who had already undressed, placed the butcher knife on the car's floorboard and attempted to get on top of the prosecutrix. While he was doing so, the prosecutrix managed to reach the knife on the floor and take possession of it. She sat up and told defendant that she needed to "use the bathroom". Holding the knife and her clothes, she attempted to open the car door on the driver's side. Defendant told her that he was not going to be fooled by that trick, grabbed her around the neck and ordered her into the backseat. She was scared, and without having attempted to use the knife to defend herself, dropped it beside the seat on the driver's side. As she began crawling over the seat, defendant

grabbed her again and managed to pull her and himself over the seat and into the rear of the car.

Defendant then had intercourse with the prosecutrix. He also forced her to have oral sex with him. She testified that she did not consent to these acts but that she did not resist defendant or struggle with him as she was afraid that he would hurt her.

The prosecutrix then climbed back into the front seat, dressed, and drove the car to a self-service gas station near the store where defendant had gotten into the car. He got out and began looking for the knife. She told him to forget about the knife as she had to get home. He closed the door and she drove off.

Medical testimony offered by the State tended to show both anal and vaginal intercourse. The State's expert witness, who examined the prosecutrix at the local hospital shortly after the incident, testified that she had no cuts, scratches or bruises. Her clothes were not torn.

Defendant's evidence tended to show:

Defendant, who was 26 years old and had one arm crippled by childhood polio, testified that he had met the prosecutrix on the day prior to the alleged rape, that she had told him her name was Gail, and that during the course of a 10-15 minute conversation and a short automobile ride on this occasion she had asked him if he had any "pot". Before departing she asked him to meet her the following afternoon at the convenience store.

Defendant first saw the prosecutrix on the following day between 8:00 and 8:30 p.m. He was standing in a telephone booth at a convenience store where he had agreed to meet her. He walked over to her car and talked to her briefly. She told him that she had to take her daughter home and would return to the store in about thirty minutes.

Prosecutrix returned in about thirty minutes as agreed. She opened the passenger-side door of the car and allowed the defendant to enter. After a brief conversation they drove to an isolated spot on a dirt road. Defendant told her how to get there as he was familiar with the area. At this spot the two of them smoked marijuana together. They then undressed each other and had sexual relations on the backseat of the car. Defendant stated that the prosecutrix was a willing and responsive partner.

Defendant testified that he had a butcher knife with him as he had been fishing and had used the knife to cut a pole. The knife was carried in his belt and was visible; however, he did not take it out and show it to the prosecutrix, threaten her with it or use it to force her to have intercourse with him. He did remove the knife from his belt when he undressed. He put it on the floorboard of the car where it would be out of the way. He did not think about the knife again.

After having intercourse with him, prosecutrix said she had to go home. She drove the defendant to a self-service gas station where he got out of the car. She asked to see him again. He agreed and kissed her goodbye. No attempt to find the knife was made as he was not thinking about it.

The jury returned a verdict of guilty of first-degree rape and from judgment imposing a life sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

Frederick J. Sternberg for the defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends that the indictment upon which he was tried is insufficient to charge him with first-degree rape under G.S. 14-21 and that his motion in arrest of judgment was therefore improperly denied. He argues that G.S. 15-144.1, a newly enacted statute which purports to prescribe the essentials for a bill of indictment for rape, must be construed to require allegation of each statutory element of the degree of rape sought to be charged under G.S. 14-21 if the indictment is to be saved from constitutional infirmity. He contends that an indictment which does not allege every element of the charged offense is constitutionally inadequate as it fails to give notice of the offense sufficient to enable a defendant to prepare his defense and to protect him from double jeopardy.

G.S. 15-144.1, which became effective 1 July 1977, provides:

> § 15-144.1. Essentials of bill for rape.—(a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment,

> after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, assault with intent to commit rape or assault on a female.

This statute, enacted after the 1973 revision of G.S. 14-21 which divided rape into degrees, clearly authorizes an indictment for first-degree rape which omits averments (1) that the offense was perpetrated with a deadly weapon or by inflicting serious bodily injury or (2) that the defendant's age is greater than sixteen. Proof of these two elements is essential to a conviction for first-degree rape. G.S. 14-21.

While we have not previously passed upon the constitutional validity of the abbreviated form of indictment for rape authorized by this statute, we have long approved G.S. 15-144, a similar statute authorizing a short-form indictment for homicide and the model upon which G.S. 15-144.1 was drafted. *State v. Moore*, 104 N.C. 743, 10 S.E. 183 (1890); *State v. Brown*, 106 N.C. 645, 10 S.E. 870 (1890); *State v. Arnold*, 107 N.C. 861, 11 S.E. 990 (1890). Discussing that earlier modification of the common law rules governing indictments, this court said:

> . . . The indictment would not be good at the common law, because it does not charge the means whereby the prisoner slew the deceased, nor the manner of the slaying, but it is in every material respect such as the statute (Acts 1887, ch. 58) prescribes and declares shall be sufficient. It is, in substance an effect, a formal accusation of the prisoner of the crime specified. It was presented by a grand jury; it shows upon its face the facts that gave the court jurisdiction; it charges, in words having precise legal import, the nature of the offense charged; it specifies with certainty the person charged to have been murdered by the prisoner. By it he was put on

notice and could learn of the charge he was called upon to answer; he could learn from it how to plead and make defense. The reasons of the perpetration of the crime and the manner of its perpetration are of the incidents—not of the substance—of the crime charged. To charge them might facilitate the defense, but this is not essential to it; it is essential that the substance of the crime shall be charged; this gives sufficient notice to put the prisoner on inquiry as to all the incidents and every aspect of it. Nor does this in any degree abridge or militate against the provisions of the Constitution (Art. I, sec. 12), which provides that "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment presentment or impeachment." The mere form of the indictment—any particular form—is not thus made essential. The purpose is to require that the party charged with crime by indictment shall be so charged by a grand jury as that he can learn with reasonable certainty the nature of the crime of which he is accused and make defense. As we have said, it is not necessary in doing so to charge the particular incidents of it—the particular means employed in perpetrating and the particular manner of it—and thus compel the State to prove that it was done with such particular means and in such way, and in no other. Such particularity might defeat or delay justice in many cases, as, indeed, it has sometimes done.

The Constitution (Art. IV, sec. 12) confers upon the General Assembly power to regulate and prescribe criminal as well as civil procedure, not inconsistent with its provisions, "of all the courts below the Supreme Court." The form of the indictment prescribed by the statute (Acts 1887, ch. 58) is not inconsistent with any provision of the Constitution. It is sufficient to serve the purpose intended by it, and it is not our province to determine that it is better or worse than the common-law indictment in such cases. . . . *Moore, supra* at 750-751.

This rationale is persuasive in our consideration of G.S. 15-144.1, but standing alone it cannot control our decision. *Moore* did not relieve the State of the burden of alleging each element of murder; rather it eliminated the requirement that the means by which the decedent was slain be alleged. The case was decided

before the adoption in this State of a statute dividing murder into degrees. Absent such a statute all murder was defined as killing with *malice aforethought*. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Thus, the Act of 1887, c. 58, now G.S. 15-144, required the allegation of malice aforethought as well as allegation of every other element of the common law crime of murder.

In the Act of 1893, cc. 85 and 281, however, the legislature divided murder into degrees. Section 3 of the Act provided that the new murder statute should not be construed to require any alteration or modification of the form of indictment for murder. In construing this new murder statute it was said that the common law definition of murder was still applicable to murder in the second degree, but that an additional element—that the killing be willful, premeditated and deliberate—must be proven to convict a defendant of murder in the first degree. *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899).

Despite the statutory addition of this new element, indictments for first-degree murder under the form provided in G.S. 15-144 have been upheld. In doing so the court has relied on the legislative mandate of Chapter 85, Section 3 of the 1893 Session Laws. *State v. Covington*, 117 N.C. 834, 23 S.E. 337 (1895); *State v. Kirksey*, 227 N.C. 445, 42 S.E. 2d 613 (1947). It is now clear that by virtue of G.S. 15-144 premeditation and deliberation do not have to be alleged in an indictment for first-degree murder. *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972). Nor can the term "malice aforethought", which is used in an indictment conforming to G.S. 15-144, "be held to import into the definition [of first-degree murder] the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose." *State v. Smith*, 221 N.C. 278, 290, 20 S.E. 2d 313 (1942); *State v. Hightower*, 226 N.C. 62, 36 S.E. 2d 649 (1946); 6 Strong's Index 3d, Homicide § 4, pp. 530-531.

This form of indictment has also been held sufficient to support a conviction for felony murder, *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), or for conspiracy to commit murder, *State v. Graham*, 24 N.C. App. 591, 211 S.E. 2d 805, *cert. denied*, 287 N.C. 262, 214 S.E. 2d 434 (1975).

Read together, *Moore*, *Covington*, and the subsequent cases upholding the validity of indictments under G.S. 15-144 implicitly affirm the power of the legislature to relieve the State of the common law requirement that every element of the offense be alleged. The decisions in those cases, and likewise, our decision in the case *sub judice*, are grounded on the proposition that within constitutionally mandated parameters the legislature has the power to prescribe the form of a bill of indictment. *State v. Harris*, 145 N.C. 456, 59 S.E. 115 (1907); *State v. Holder*, 153 N.C. 606, 69 S.E. 66 (1910). In *Harris*, the court stated this rule explicitly: "The General Assembly has the undoubted right to enact legislation of this character, to modify old forms of bills of indictment, or to establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. 'To be informed of the accusation against him' is the requirement of our Bill of Rights, and unless such legislation is in violation of this principle or in contravention of some express constitutional provision, it should and must be upheld by the courts." Harris, *supra* at 457-458.

In enacting G.S. 15-144.1 the legislature prescribed a new form of indictment for rape. Prior to this enactment it was necessary that an indictment for rape contain allegations of every element of the offense. *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). G.S. 15-144.1, in which the legislature explicitly states that "[i]n indictments for rape it is not necessary to allege every matter required to be proved on the trial," eliminates that requirement. This action is within the legislature's prerogative so long as the newly prescribed indictment still complies with the constitutional requirement that the defendant be informed of the accusation against him. We believe that it does.

An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977); *State v. Russell*, 282 N.C. 240, 192 S.E. 2d 294 (1972); *State v. Dorsett* and *State v. Yow*, 272 N.C. 227, 158 S.E. 2d 15 (1967);

State v. Burton, 243 N.C. 277, 90 S.E. 2d 390 (1955); *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953); N.C. G.S. 15-153; 7 Strong's N.C. Index 3d, Indictment and Warrant § 9.1. Furthermore, a defendant who feels that he may be taken by surprise at trial may ask for a bill of particulars to obtain information in addition to that contained in the indictment which will clarify the charge against him. *State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767 (1964).

Like G.S. 15-144, the homicide indictment statute, G.S. 15-144.1, requires the State to allege the defendant's name, the victim's name, the date of the offense, and the county wherein the alleged offense was committed. In addition it must allege that the defendant with force and arms "unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will." Like the short-form homicide indictment approved in *Moore, supra*, indictments under this statute show on their face facts that give the court jurisdiction. In words having precise legal import, the charged offense is specified. With certainty, both the defendant and victim are named. This indictment form charges the substance of the crime and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated.

The indictment under which defendant was tried is in compliance with G.S. 15-144.1. Defendant was sufficiently informed of the accusation against him. His motion in arrest of judgment based on insufficiency of the indictment against him was properly denied.

In his second assignment of error defendant asserts that the trial judge erred in denying his motion for a directed verdict. In his third assignment he asserts that the court erred in refusing to set aside the verdict as being against the weight of the evidence. Because resolution of both of these assignments requires an examination of the evidence presented at trial, we shall deal with them together.

A motion for a directed verdict has the same effect as a motion for nonsuit and the test of the sufficiency of the evidence to withstand either motion is the same. *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). A directed verdict for the defendant "is properly denied when there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State." *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). There must be substantial evidence of all material elements of the charged offense. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Where the victim is 12 years of age or older, the elements of first-degree rape are: (1) carnal knowledge of a female person, (2) by force, (3) against the will of the victim, (4) by a defendant over the age of 16, (5) who procures the submission or overcomes the resistance of the victim by the use of a deadly weapon or the infliction of serious bodily injury. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); G.S. 14-21.

[2] Defendant does not seriously challenge the sufficiency of the evidence offered to prove the first four above-enumerated elements. Clearly there is ample evidence from which the existence of those elements could have been inferred by the jury. The record reveals that the prosecutrix was 31 and the defendant was 26. Defendant admitted that he had intercourse with the prosecutrix. She stated unequivocally that the sexual acts to which she submitted were done by defendant without her consent. Further, she declared that she submitted out of fear that defendant would hurt her if she resisted.

Defendant strenuously contends, however, that the evidence was insufficient to allow the jury to infer the existence of the fifth element. The central thrust of his argument is that prosecutrix rather than defendant had possession of the knife at the time the intercourse occurred and that her consent could not therefore have been procured by the use of a deadly weapon. Thus, he argues that it was improper to submit first-degree rape to the jury as an essential element of that crime was not supported by the evidence. Likewise, he contends that a verdict of guilty of first-degree rape is against the weight of the evidence. We find no merit in either of these contentions.

To convict the defendant of first-degree rape the procuring cause of the victim's submission must be the use of a deadly

weapon or the infliction of serious bodily injury. *State v. Dull*, 289 N.C. 55, 220 S.E. 2d 344 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1211 (1976). It is sufficient that the defendant display the weapon to the victim, threatening her by brandishment or otherwise, and that she knows, or reasonably believes, that the weapon remains readily accessible to him. *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976).

In the case at hand defendant admittedly had the knife with him when he was in the car with the prosecutrix. She testified that he put it to her stomach and that it remained there until they reached the isolated spot where the rape occurred. Only then did defendant lay the knife down on the car's floorboard. While the prosecutrix temporarily obtained possession of the knife and moved it without defendant's knowledge to the other side of the car, this action alone was inadequate to deprive him of access to the weapon. Within the close confines of the automobile the knife was still within arm's reach of defendant.

We find this evidence, viewed in the light most favorable to the State, sufficient to support an inference by the jury that the submission of the victim was obtained by the use of a deadly weapon. The trial judge correctly submitted this issue to the jury.

We also hold that the trial judge did not err in refusing to set aside the jury's verdict. After a verdict has been rendered by the jury it is within the trial judge's discretion to grant a motion to set aside the verdict as against the weight of the evidence. Absent an abuse of discretion, his ruling on such a motion is not reviewable on appeal. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The evidence in this record supports the jury's verdict. We find no abuse of discretion.

[3] In his fourth assignment of error defendant contends that the court erred in instructing the jury upon second-degree rape following the jury's request for additional instruction on first and second-degree rape. The court instructed as follows:

> Second degree rape differs from first degree rape only in that it is not necessary that it be proved that a deadly weapon was used to overcome her resistance. There must have been force used or the threat of force sufficient to overcome her resistance, but it need not have been with a deadly

weapon. So for you to find the defendant guilty of second degree rape the State must prove four things. First, that the defendant had sexual intercourse with the prosecuting witness. Second, that he used or threatened to use force sufficient to overcome any resistance. And third, that she did not consent and that it was against her will. Also, the element of the defendant being over sixteen is not an essential element of second degree rape. So those are the requirements for the two crimes and the difference being that for second degree rape there need not be proof that the defendant was over sixteen years of age or that he used a deadly weapon to procure her submission.

When the entire paragraph is read in context, and in view of the evidence in this case, the challenged instruction is a clear and correct explanation of the differences between the charges of first and second-degree rape. While the first sentence of this instruction, standing alone, inaccurately states the applicable law, the trial judge immediately within the same paragraph of the charge clarified his explanation and eliminated any error or confusion. In this action we find no prejudice to the defendant. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973).

[4] In his final assignment of error defendant contends that the court should not have instructed the jury that it was the State's contention that defendant's use of a knife induced fear in the prosecuting witness and caused her to submit. He argues that this contention is not supported by the evidence.

We disagree. The evidence reviewed earlier in this opinion clearly is supportive of such a contention. A statement of a valid contention based on competent evidence is not error. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). Furthermore, the clear rule is that contentions which are thought to be objectionable by one of the parties must be brought to the attention of the trial judge so that he may correct any inadvertent misstatement and thereby avoid the necessity for a new trial. Failure to do so constitutes a waiver of such objections. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

In defendant's trial and the judgment appealed from, we find

No error.

STATE OF NORTH CAROLINA v. BARRY DALE HOLCOMB

No. 9

(Filed 17 October 1978)

1. **Criminal Law § 75.13— conversation between defendant and his uncles at sheriff's office—no custodial interrogation—admission of statements not prejudicial error**

A conversation between defendant and his uncles at the sheriff's office which resulted in defendant's assistance in finding the murder weapon did not constitute a "custodial interrogation" so as to require the Miranda warnings, and the weapon and evidence of its location were properly admitted in defendant's murder trial even though defendant had not been given the Miranda warnings, where the conversation occurred with the permission of the police but there was no questioning initiated by the police, and there was no evidence that defendant's uncles were acting as agents of the police when they talked to defendant about the murder weapon. Furthermore, the admission of evidence of defendant's assistance in finding the weapon did not negate defendant's defense of insanity where the record shows that defendant had great difficulty directing officers to the area where he left the weapon, and the admission of such evidence was not prejudicial to defendant in light of the overwhelming evidence of defendant's guilt of the crime charged.

2. **Homicide § 30.2— first degree murder trial—failure to submit manslaughter**

In this prosecution for the first degree murder of defendant's father, the trial court did not err in failing to submit voluntary manslaughter as a possible verdict where the State's evidence tended to show that defendant saw his father sitting in a chair in the living room of his home, that defendant obtained a gun from his car, loaded it and returned to the carport door which led to the living room and shot his father, and that there had been no trouble between defendant and his father on the day of the shooting, and where defendant offered no evidence to rebut the State's evidence as to the nature of the crime but offered evidence tending to support only his plea of not guilty by reason of insanity.

3. **Criminal Law § 122.2— urging verdict before evening is over—no coercion of verdict**

The trial judge did not improperly coerce a verdict in this first degree murder case when he stated to the jury that the following day was Thanksgiving and that "If at all possible I would like to, in consideration of all concerned, have you reach a verdict before the evening is over, if you can," where the judge was careful to point out that he was not "attempting to rush you in any way or to try to dictate to you what you should or should not do."

4. **Criminal Law § 122.2— urging jury to resolve differences—no coercion of verdict**

The trial judge did not improperly coerce a verdict by his instruction, "If at all possible, you should resolve any differences and come to a common con-

clusion so that this case may be completed," where the judge also emphasized that he was not endeavoring to inject his ideas into the minds of the jurors and stated that no jurors "should surrender their honest convictions."

APPEAL by defendant from *Kivett, J.*, at the 21 November 1977 Criminal Session of YADKIN County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first degree murder of his father, Charles D. Holcomb, Sr. He entered pleas of not guilty and not guilty by reason of insanity.

The events which transpired on the day of the killing are uncontradicted.

On 8 May 1977, defendant was living with his parents and a brother and sister. Another brother, Benny, who lived in Greensboro, arrived at the home shortly before noon. Benny and defendant had lunch together, and before they finished eating, their father came into the house. When the two boys finished lunch, they went out into the yard. About fifteen minutes later, Benny came back into the living room where his father was seated. Mrs. Audrey Holcomb, defendant's mother, testified that she looked out the kitchen window and saw defendant walking towards the house with a gun. A shot was fired from the carport into the living room striking Mr. Holcomb in the head. Benny Holcomb testified that after his father was shot, he had a glimpse of a person in the door leading from the living room to the carport; and immediately thereafter, he saw Barry leaving in his truck. He had not authorized Barry to use the truck.

There was medical testimony that Mr. Holcomb's death was due to a gunshot wound to the head.

Defendant was arrested in Wilkes County later that afternoon by Bob Gregory of the Wilkes County Sheriff's Department. Gregory later turned defendant over to Deputy John Hicks, who immediately advised him of his rights. Defendant told Hicks that he understood his rights and did not want to make a statement until he had talked to his lawyer. Hicks then transported defendant to the Yadkin County Sheriff's office.

Bobby Smith and James Smith, defendant's uncles, were at the sheriff's office when defendant arrived. The two men had

been at the Holcomb residence when they learned that defendant had been arrested and was being taken to the sheriff's office. The testimony indicated that the men went to the sheriff's office because they felt that someone should be there to be with defendant and to "console" him.

At the trial, defendant's mother, brother, and sister, and other acquaintances testified for the defendant. This lay testimony was to the effect that defendant, who had been a normal and outgoing young man, had become withdrawn and on occasions exhibited abnormal behavior. Some of these witnesses related statements made by defendant which indicated that he was subject to hallucinations.

Dr. Royal, a psychiatrist who was responsible for defendant's evaluation and care at Dorothea Dix Hospital, testified that, in his opinion, defendant did not know right from wrong on the day of the shooting.

Dr. Rollins, Clinical Director of the Forensic Unit at Dorothea Dix Hospital, testified, in rebuttal, that he was not able to reach a conclusion as to whether or not defendant knew the difference between right and wrong on the day in question.

Other pertinent facts will be set out in our consideration of defendant's assignments of error.

The court instructed the jury that they could return a verdict of guilty of first degree murder, guilty of second degree murder, not guilty, or not guilty by reason of insanity. The jury returned a verdict of guilty of first degree murder.

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

N. Lawrence Hudspeth, III, and Larry G. Reavis, attorneys for defendant appellant.

BRANCH, Justice.

[1] Defendant by his first assignment of error contends that the trial judge erred by denying his motion to suppress evidence concerning the location of the murder weapon and by ruling that the weapon was admissible into evidence.

Defendant argues that the dialogue between defendant and his uncles at the sheriff's office which resulted in his assistance in finding the murder weapon constituted a "custodial interrogation" which was conducted without the warnings or procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966).

In *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. denied*, 396 U.S. 934 (1969), we stated:

> *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, lays down the governing principle that as a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial police interrogation, the suspect must be advised in unequivocal terms (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation; and (4) that if he is an indigent a lawyer will be appointed to represent him. . . .

These "Miranda warnings" are only required when an accused is about to be subjected to "custodial interrogation." *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). "Custodial interrogation" is a questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom. *Miranda v. Arizona, supra*; *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973).

This record discloses that defendant's uncles Bobby Lee Smith and James Smith were at the Charles Holcomb homeplace when they heard that defendant had been taken into custody. They immediately went to the sheriff's office in Yadkin County for the purpose of "consoling" defendant. At the sheriff's office, Bobby Lee asked Deputy Hicks if he had the weapon with him; and Hicks replied, "No, and he didn't tell me where it was." The uncles obtained permission from the police officers to talk with defendant in hopes of locating the apparently valuable rifle which belonged to deceased. After some conversation between them, defendant agreed to carry them to the place where he had left the rifle.

In our opinion, the discovery of the murder weapon did not result from "custodial interrogation." It is true that defendant

was in police custody, but there was no questioning *initiated by the police* concerning the murder weapon. Rather the conversation between defendant and his kinsmen grew out of a natural concern by defendant's uncles for the plight of defendant and occurred only with the permission of the police. Neither do we find merit or support in this record for defendant's contention that his uncles were acting as agents of the police when they talked with him concerning the murder weapon. Even had the evidence of the discovery of the weapon and the admission of the weapon into evidence been erroneous, we do not believe that the admission of this evidence would have contributed to defendant's conviction, particularly in light of the overwhelming evidence elicited from defendant's own family that he shot and killed his father with a gun. *State v. Fletcher* and *State v. St. Arnold, supra.* Nevertheless, defendant's counsel in his oral argument before this Court advanced, for the first time, the theory that the admission of this evidence weakened defendant's defense of insanity because his ability to lead others to the place where he had concealed the murder weapon was inconsistent with the evidence of insanity. The record does not lend support to this rather slender reed upon which defendant now relies for support. To the contrary, the record shows that defendant had difficulty directing the officers to the area where he left the weapon. He remembered only that he hung the gun on a tree limb, and he had a vague recollection of a rock quarry. It was only after his uncles and a deputy sheriff had driven through Wilkesboro to the Kerr Scott Dam area, then back toward Yadkin County, where some local men directed them to the rock quarry road, that the sheriff noticed some tracks going up a bank which led him to the weapon. We find little in this evidence which would negate defendant's defense of insanity.

We hold that the trial judge did not err when he denied defendant's motion to suppress evidence concerning the location of the murder weapon and that he correctly ruled that the gun was admissible into evidence.

[2] Defendant assigns as error the failure of the trial judge to submit voluntary manslaughter to the jury as a possible verdict.

Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967).

Manslaughter is a lesser included offense of murder in the second degree. However, instructions on a lesser included offense are required only when there is evidence which would permit the jury to find that such included crime of lesser degree was committed by the accused. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977); *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

In the case before us, the State's evidence tends to show that defendant saw his father sitting in his rocker-recliner chair in the living room of his home. Defendant thereupon went to his car, obtained a gun, loaded it and returned to the carport door which led into the living room and shot his father. There was evidence that defendant and his father did not get along very well, but there had been no trouble between them on the day of the shooting. The State's evidence made out a case of murder in the first degree, and defendant offered no evidence to rebut the State's evidence as to the *nature* of the crime. Defendant's evidence tended to support only his plea of not guilty by reason of insanity.

This record discloses no evidence which would support a verdict of manslaughter, and we, therefore, hold that the court properly refused to charge on that lesser included offense. We note, in passing, that defense counsel specifically requested the trial judge not to instruct on manslaughter. Ordinarily, one who causes the court to commit error is not in position to repudiate his action and assign it as grounds for a new trial. *State v. Payne*, 280 N.C. 170, 185 S.E. 2d 101 (1971); *Sumner v. Sumner*, 227 N.C. 610, 44 S.E. 2d 40 (1947).

[3] By his final assignment of error, defendant contends that portions of the trial judge's instructions improperly coerced the jury into returning a verdict. Prior to dinner recess between 6:00 p.m. and 7:00 p.m., the trial judge stated:

> . . . Tomorrow is Thanksgiving. If at all possible, I would like to, in consideration of all concerned, have you reach a verdict before the evening is over, if you can. I want it to be clearly understood that the court is not, in any way, attempting to rush you in any way or to try to dictate to you as to what you should or should not do; but you have the responsibility to decide on the verdict in this case; and I'll not try to rush that or hamper you in any way in arriving at what

you consider to be a just verdict under the instructions I have given you.

On numerous occasions, this Court has said that 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. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *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).

In instant case, Judge Kivett was careful to point out to the jury that he was not "attempting to rush you in any way or to try to dictate to you what you should or should not do. . . ." In light of this cautionary language, we do not feel that this instruction improperly coerced the jury.

Defendant also challenges an instruction the trial judge gave the jury after bringing them into the courtroom at 9:55 p.m. to inquire whether they felt they were making any progress. Upon being told that they were "sort of hung up," Judge Kivett instructed in part:

> These matters are mentioned now because some of them may not have been in your thoughts. This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion or opinions of other jurors or because of the importance of arriving at a decision. This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candidness. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.
>
> You may be as leisurely in your deliberations as the occasion may require and take all the time that you feel necessary. The giving of this instruction at this time in no way means it is more important than any other instructions. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.

[4] Defendant contends that the jury was improperly coerced by that portion of the charge in which the court instructed, "If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed." We disagree. In *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966), Chief Justice Parker quoted with approval from 89 C.J.S., Trial, § 481, p. 128:

> What amounts to improper coercion of a verdict by a trial court necessarily depends to a great extent on the facts and circumstances of the particular case and cannot be determined by any general or definite rule. . . . In urging the jury to agree on a verdict, the court should emphasize that it is not endeavoring to inject its ideas into the minds of the jurors and that by such instruction the court does not intend that any juror should surrender his own free will and judgment, and these ideas should be couched in language readily understood by the ordinary lay juror.

In instant case, the court did emphasize that it was not endeavoring to inject its ideas into the minds of the jurors and expressly stated the language approved in *McKissick* to the effect that no juror "should surrender their honest convictions."

A contextual reading of the charge discloses that the trial judge did not improperly coerce the jury to return a verdict.

No error.

STATE OF NORTH CAROLINA v. WILLIE SNEAD, JR.

No. 19

(Filed 17 October 1978)

1. Automobiles § 127.1 — driving under the influence — sufficiency of circumstantial evidence

In a prosecution for driving under the influence, circumstantial evidence was sufficient to permit a reasonable inference that defendant was intoxicated at the time of an accident where such evidence tended to show that a patrolman went to the scene of the accident in response to a call over the radio in his patrol car; when he arrived on the scene, he found defendant's car

in a ditch and several people milling around the automobile; defendant admitted that he was driving and that he had wrecked the car; a fellow passenger had just been taken to the hospital; the accident occurred on a rural paved road, and the officer had to appoint a bystander to direct traffic around the accident; and the patrolman thought defendant was intoxicated at the time of his arrival and had his suspicions confirmed by a subsequent breathalyzer test.

2. **Criminal Law § 96— defendant's statement—no waiver of counsel shown—evidence withdrawn—admission not prejudicial error**

Though the trial court in a prosecution for driving under the influence erred in allowing into evidence statements made by defendant without a prior showing that he waived his right to counsel at the interrogation, defendant was not prejudiced in the light of the judge's extensive instructions to the jury that they disregard the incompetent evidence, the fact that such evidence was limited in scope and was not repeated or re-emphasized before the jury, the relatively prompt withdrawal of the evidence from the jury's consideration, and the substantiality of other competent evidence indicating defendant's intoxication at the time of the accident.

3. **Automobiles § 129— driving under the influence—lesser offense of reckless driving—no instruction required**

Where the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser offense of reckless driving provided for in G.S. 20-140(c), the trial court correctly refused to submit the requested instructions with respect to reckless driving.

APPEAL by defendant, pursuant to G.S. 7A-30(2), of the decision of the Court of Appeals, which affirmed the verdict and judgment entered after jury trial before *McLelland, J.*, at the 16 May 1977 Session of JOHNSTON Superior Court.

The defendant was charged by warrant with the offense of unlawfully and willfully operating a motor vehicle while under the influence of intoxicating liquor. The arresting officer, Patrolman W. M. Sykes, testified that he went to the scene of an accident in response to a radio message. Several people were milling around a wrecked 1965 Oldsmobile when he arrived. The defendant admitted to the officer that he was driving the wrecked vehicle, and explained that he had swerved to avoid colliding with another vehicle. A passenger in defendant's vehicle had been injured and carried to the hospital. Officer Sykes detected alcohol on defendant's breath and told defendant to get into the patrol car. After conducting a brief investigation of the scene, Sykes informed defendant that he was under arrest. He read defendant his *Miran-*

da rights, and then drove to the Smithfield Police Station. Sykes and defendant engaged in irrelevant conversation en route to the station. Sykes testified that defendant's manner of speech was "mush mouthed" and "slurred."

At the station Sykes administered certain coordination tests to defendant, and defendant had difficulty performing all of them. Defendant was very unsteady on his feet and was staggering. Defendant also made a statement to Officer Sykes. Sykes testified that, in his opinion, defendant was under the influence of intoxicating beverages at the time of his arrest.

Patrolman A. J. Renfrow testified that he administered a breathalyzer test to defendant, and that the test indicated .21 of one percent blood alcohol. Officer Renfrow testified that, in his opinion, defendant's mental and physical capacities were appreciably impaired.

The defendant offered no evidence.

Attorney General Rufus L. Edmisten by Assistant Attorney General Isaac T. Avery, III and Associate Attorney David Roy Blackwell for the State.

James E. Floors and James W. Narron for defendant appellant.

MOORE, Justice.

[1] Defendant assigns as error the denial of his motion for nonsuit at the close of the State's evidence and the denial of his motion to set aside the verdict as against the weight of the evidence. Defendant insists that although there was evidence that defendant was under the influence of some intoxicating beverage at the time of his arrest, there is no evidence as to his condition while driving.

Upon defendant's motion for judgment as of nonsuit in a criminal case, the question for the court is whether there is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. A motion to nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of the warrant or bill of indictment,

considering the evidence in the light most favorable to the State, and giving it the benefit of every reasonable inference fairly deducible therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Corl*, 250 N.C. 252, 108 S.E. 2d 608 (1959).

Circumstantial evidence, or evidence of facts from which other matters may be fairly and sensibly deduced, is competent evidence, and is properly considered in passing on a motion for nonsuit. *Cf. State v. Cummings*, 267 N.C. 300, 148 S.E. 2d 97 (1966). The test of the sufficiency of the evidence to withstand a motion for nonsuit is the same whether the evidence is circumstantial, direct or both. *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971). When a motion for nonsuit questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that defendant is guilty. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

In present case, Patrolman Sykes testified that he went to the scene of the accident in response to a call over the radio in his patrol car. When he arrived on the scene he found defendant's car in a ditch and several people milling around the automobile. Defendant admitted that he was driving and that he had wrecked the car. A fellow passenger had just been taken to the hospital. The accident occurred on a rural paved road, and the officer had to appoint a bystander to direct traffic on the road around the accident scene. Sykes found defendant to be intoxicated at the time of his arrival, and his suspicions were confirmed by a subsequent breathalyzer reading.

We believe that this circumstantial evidence is sufficient to permit a reasonable inference that defendant was intoxicated at the time of the accident. The presence of a crowd at the scene and the necessity of appointing a bystander to direct traffic would indicate that the road was reasonably well-traveled, and that the accident was of recent origin. Further, as we said in *State v. Cummings*, supra, "a driver who . . . has a collision isn't likely to hurry off for more intoxicants to make his condition more noticeable and his breath more 'odoriferous.'" This would

especially seem to be the case where a fellow passenger has sustained injuries requiring hospitalization. Taking the evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference fairly deducible therefrom, we are of the opinion, and so hold, that "[t]he jury was fully justified in finding that the defendant, when seen by the officer, and later tested by the Breathalyzer, was, if anything, less intoxicated than at the time of the collision." *State v. Cummings, supra.* Defendant's motion for nonsuit was therefore properly denied.

The motion to set aside the verdict is addressed to the discretion of the trial court and is not reviewable in the absence of abuse of discretion. *State v. McKenzie,* 292 N.C. 170, 232 S.E. 2d 424 (1977); *State v. Lindley,* 286 N.C. 255, 210 S.E. 2d 207 (1974). No abuse appears here. This assignment is overruled.

[2] At the trial the State offered testimony by W. M. Sykes, the arresting officer, concerning a statement made by defendant while in custody. A *voir dire* hearing was held concerning this statement, and the trial judge ruled that evidence of the statement was admissible. The officer then testified before the jury that he had asked defendant certain questions contained on an A.I.R. form. In response to the questions defendant had indicated that he did not know what highway he was on when the accident occurred, that he did not know the time when he started driving, that he had drunk two beers, and that he "could be" under the influence of alcohol. To a question concerning whether he had had any alcoholic beverages since the accident, defendant had answered "No."

Officer Sykes then stepped down and the court recessed for lunch. When the court reconvened counsel for defense moved that defendant's statement to Officer Sykes be suppressed on grounds that the State did not show that defendant had waived his right to counsel at the interrogation. Defense counsel also moved for a mistrial. The motion for a mistrial was denied, but the motion to suppress was allowed. The trial judge then instructed the jury that he had committed error in permitting Officer Sykes to testify concerning the confession. The jurors were directed to disregard this testimony, to put it entirely out of their minds, and to allow none of the answers to affect their deliberations and verdict.

Defendant now argues that this, or any, instruction was not sufficient to undo the damage done, and that the trial court erred in not granting his motion for mistrial. Defendant especially contends that, given the (alleged) absence of *other* evidence tending to show that defendant was drinking before the time of the accident and was under the influence at the time of the accident, the effect of the erroneous admittance of defendant's admission that he had not had anything to drink since the time of the accident could not have been cured by correcting instructions, and could only have adversely affected the jury verdict.

We do not agree. If evidence which is erroneously admitted is later excluded by the court, and the jury is instructed to disregard the evidence, ordinarily the error in admitting it will be regarded as harmless. 1 Stansbury, North Carolina Evidence § 28 (Brandis rev. 1973); *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948).

In *State v. Strickland, supra*, the Court said:

> "In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. [Citations omitted.]"

Furthermore, unless prejudice appears or is shown by the appellant in some way, the law will presume that the jury followed the judge's instructions. *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972); *State v. Lane*, 166 N.C. 333, 81 S.E. 620 (1914).

Evidence that defendant was intoxicated at the time of his arrest is overwhelming. Evidence that he was intoxicated at the time of the accident, though not as marked, is nonetheless substantial. After consideration of the competent evidence in this

case, we believe that one is compelled to draw the obvious inference that defendant was intoxicated at the time of the accident. The State's case is not significantly more persuasive with the addition of the erroneously admitted testimony. *Cf. Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972). Given the judge's extensive instructions to the jury that they disregard the incompetent evidence, the fact that such evidence was limited in scope and was not repeated or re-emphasized before the jury, the relatively prompt withdrawal of the evidence from the jury's consideration and, finally, the substantiality of other competent evidence indicating defendant's intoxication at the time of the accident, we believe that the prejudicial effect of the stricken evidence was so insignificant as to be harmless beyond a reasonable doubt. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *modified on other grounds*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3205 (1976); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970); *State v. Battle*, 269 N.C. 292, 152 S.E. 2d 191 (1967). This assignment is overruled.

[3] The trial judge instructed the jury that it could return a verdict of guilty of driving a motor vehicle upon a public highway while under the influence of intoxicating liquor, a violation of G.S. 20-138(a); guilty of driving while blood alcohol was 0.10% or more by weight, a violation of G.S. 20-138(b); or not guilty. Defendant made a timely request that the trial judge also charge on the lesser offense of reckless driving after consumption of alcohol, under the provisions of G.S. 20-140(c). This request was denied. Defendant assigns this denial as error.

G.S. 20-140(c) provides:

> "Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

The clear wording of this statute makes the offense described therein a lesser included offense of driving under the influence of intoxicating liquor.

It is well settled in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense. Further, when there is evidence to support the milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). However, where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, this principle does not apply. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). The court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the warrant or indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime. *State v. Harvey, supra*; *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966).

In present case the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser degree of reckless driving. Consequently, under the circumstances of this case, we think the trial judge correctly refused to submit the requested instructions with respect to reckless driving.

The decision of the Court of Appeals sustaining defendant's conviction of operating a motor vehicle upon a public highway while under the influence of some intoxicating beverage is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. DENNIS DEAN MATHIS

No. 85

(Filed 17 October 1978)

1. Searches and Seizures § 34— automobile—rifle in plain view—subsequent warrantless search of automobile

A sawed-off rifle seized without a warrant from the automobile in which defendant had been riding during a high speed chase by police officers was properly admitted in a prosecution for armed robbery where the evidence tended to show that the rifle was in plain view of an officer who was standing outside the automobile looking in its open door; it was not clear from the record whether the door was left open by the fleeing occupants or whether it was pushed open by a collision with a patrol car; there was nothing in the record that remotely suggested that the collision was a subterfuge designed by the officers to get at the contents of the car; and the officers could properly search the vehicle since there was no indication that it was incapable of movement and the officers had a right to seize the vehicle and deny all access to it, a corollary of that power of seizure being the power to search.

2. Arrest and Bail § 3.6— robbery—warrantless arrest—legality

An officer had probable cause to believe that a felony had been committed and that defendant had committed it and defendant's warrantless arrest was therefore legal where the officer had been informed of the robbery in question; he knew that suspects had eluded capture and escaped into woods less than a mile from the spot he was patrolling; he had been given a rough description of one of the suspects; the officer first saw defendant on a bank near a wooded area; defendant's appearance matched the description the officer had received of the robbery suspect; and defendant's appearance gave rise to a reasonable inference that he had been through a wooded area.

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

APPEAL by defendant from *Howell, J.*, at the 11 April 1977 "Schedule B" Session of MECKLENBURG Superior Court. Defendant was convicted of armed robbery and sentenced to life imprisonment. Docketed and argued as No. 101 at the Fall Term 1977.

Rufus L. Edmisten, Attorney General, by Donald W. Grimes, Associate Attorney, for the State.

Michael S. Scofield, Grant Smithson, Attorneys for defendant appellant.

EXUM, Justice.

Defendant's assignments of error challenge (1) the admissibility of a sawed-off rifle obtained as a result of an allegedly unconstitutional search of an automobile, and (2) the admission of testimony concerning identifications of defendant at a showup and a lineup, both of which he claims were tainted by his allegedly illegal arrest. We find no merit in either assignment and no error in the trial.

The State's evidence tended to show that Jewel H. Robbins was the owner and manager of the Bel-Air Motel in Charlotte. At about 2:00 a.m. on 29 November 1976, Mrs. Robbins answered the doorbell of the motel office and admitted two black males who inquired about a room. As Mrs. Robbins engaged them in conversation, one of the men, whom Mrs. Robbins subsequently identified as defendant, pulled out a sawed-off rifle and told her, "This is a hold up." Mrs. Robbins then set off a silent burglar alarm. She gave the two men money from her cash drawer, about $235.00. One of them said she had better come up with more money. She went with them into her bedroom behind her office where they took $40.00 from her pocketbook and tied her up. Shortly thereafter, she untied herself, got her gun, went out her front door and shot at a Volkswagen that was leaving the motel.

At about the same time, Officer B. R. Pence, responding to a dispatch he had received concerning a robbery alarm there, was approaching the Bel-Air Motel. He observed a Volkswagen with no lights on heading south on North Tryon Street near the motel, thought it looked suspicious and followed it. He decided to stop the car, turned on his blue lights and his spotlight, and, with his lights on, was able to see three black males in the car. The car did not stop, and Officer Pence pursued it for two or three miles at speeds up to 70 miles per hour. The car left North Tryon Street and then turned into Sugar Creek Road and Rolling Hills Drive, successively. At this point, the car pulled off the road into a field, and its three occupants, one of whom was later identified by Officer Pence as defendant, jumped out and ran into the woods. Officer Pence gave chase, was unable to catch any of the three, and then returned to his car.

By the time Officer Pence returned, there were 10 to 15 police cars gathered in the field in response to his call for

assistance. One of the cars had struck the Volkswagen, the passenger side door of which was standing open. It is not entirely clear from the record whether this door had been left open by the occupants or knocked open by the impact with the police car. Standing outside the car and looking in the open door, Officer Pence was able to see a sawed-off rifle, which he then seized.

Defendant was arrested around 4:15 a.m. on the morning of 29 November, about two hours after the conclusion of the chase. The arrest was made by Officer Madison M. Hunter, who was patrolling on North Tryon Street approximately one mile from the field where the chase had ended. Officer Hunter was aware of the events that had occurred earlier that evening and had received a description of the suspects. He arrested defendant when he saw him come off a bank that led to a wooded area and start walking down North Tryon Street. He then took defendant back to the field in which the automobile chase had ended, where Officer Pence identified him as one of the occupants of the Volkswagen.

Defendant testified that he was walking home from a friend's house at the time of his arrest. He said he was walking on the bank in order to avoid walking in the street. Although at one point in his testimony he placed himself on North Tryon Street at 4:20 a.m., he later stated that his arrest took place at 1:00 a.m. on the morning of 29 November. Defendant denied any involvement in the robbery of the Bel-Air Motel.

[1] Defendant's first assignment of error relates to the admission into evidence of the sawed-off rifle that Officer Pence took from the Volkswagen. In essence, defendant argues that this rifle was acquired as a result of an unreasonable search and seizure and consequently falls under the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961). We find defendant's assignment of error without merit and hold that the rifle was properly admitted into evidence.

When Officer Pence first saw the rifle, he was standing outside the Volkswagen looking in its open door. The rifle was clearly within his view. "It has long been settled that objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be introduced into evidence." *Harriss v. United States*, 390 U.S. 234, 236 (1968);

accord State v. Small, 293 N.C. 646, 239 S.E. 2d 429 (1977). Defendant concedes the rifle was in Officer Pence's plain view. He contests, however, the officer's "right to be in a position to have that view." The basis of defendant's argument is that the door was open because of the collision between it and a police car. According to defendant, "Plain view in no way encompasses a situation where the police first use a patrol car as a battering ram to expose the contents inside an unoccupied vehicle."

Defendant's argument is unpersuasive. In the first place, it is not clear from the record whether the door was open because the occupants left it open or because of the collision. Officer Pence testified only that he believed the impact had pushed the door of the Volkswagen open. Assuming that the open door was a result of the collision, we still cannot accept defendant's argument. If the police had, as defendant's choice of words suggests, intentionally rammed their car into the Volkswagen for the purpose of exposing its contents, then perhaps the "plain view" doctrine would not apply. Here, however, the collision occurred in a field at the end of a 70 mile per hour chase through the city of Charlotte. There is nothing in the record that remotely suggests the collision was a subterfuge designed by the officers to get at the contents of the car. We therefore see no reason not to apply the plain view doctrine to these circumstances.

An alternative ground for upholding the seizure of the rifle, recognized by the trial judge, is that the automobile was a "fleeting target for a search." "[A] warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant." *State v. Allen*, 282 N.C. 503, 512, 194 S.E. 2d 9, 16 (1973). There can be no dispute here that the police had probable cause to search the vehicle. There had been a robbery, this vehicle had been observed near the scene, it had failed to stop for a police blue light and it had fled at high speed.

Defendant contends, however, that there were no exigent circumstances (1) because of the automobile's damaged condition, and (2) because of the large number of police officers in the vicinity. Replying to defendant's first argument, we think it enough to note that although the evidence tends to show the Volkswagen

was damaged, there is no indication that it was incapable of movement. In reply to his second argument, we turn to *Chambers v. Maroney*, 399 U.S. 42, 52 (1970):

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

Here the officers had a right to seize the vehicle and deny all access to it. A corollary to that power of seizure under the *Chambers* language is the power to search. It is true that the United States Supreme Court rulings on vehicle searches since *Chambers* do not fall into a clear pattern. For a discussion of these cases, see *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Allen, supra*, 282 N.C. 503, 194 S.E. 2d 9. We are confident, however, that the *Chambers* rule still applies "where an automobile is stopped on or near a public street or highway and there is probable cause to search at the scene. . . ." *State v. Jones, supra*, 295 N.C. at 354, 245 S.E. 2d at 716.

Defendant's first assignment of error is overruled.

[2] Defendant's second and third assignments of error relate to the admission of testimony concerning Officer Pence's identification of him on the morning of 29 November and a lineup identification of him by Mrs. Robbins at 11:00 a.m. on that same day. Defendant does not contend that either of these identifications is itself constitutionally suspect; instead, he claims that both were impermissibly tainted by his allegedly illegal arrest. These assignments thus present the issue of the legality of defendant's arrest.

Under General Statute 15A-401(b)(2), when a felony offense has been committed out of an officer's presence the officer may arrest without a warrant any person who he has probable cause to believe committed it. "A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon." *State v.*

Shore, 285 N.C. 328, 335, 204 S.E. 2d 682, 686 (1974). This standard is the same as that required by the United States Constitution. *See McCray v. Illinois*, 386 U.S. 300, 304 (1967).

We think on these facts there was probable cause for defendant's arrest. Officer Hunter, who made the arrest, was aware that there had been a robbery at the Bel-Air Motel. He was aware that suspects in that robbery had eluded capture and escaped into the woods less than a mile from the spot he was patrolling. Hunter had been given a rough description of one of the suspects as a black male wearing dark clothing and about 18 or 19 years old. The description also gave an approximate height of the suspect, but the record does not disclose what that height was.

Officer Hunter first saw defendant at around 4:15 to 4:20 a.m. on the morning of 29 November. At that time he saw defendant come onto North Tryon Street off a bank or hill that led into a wooded area. Defendant roughly matched the description of one of the suspects. Officer Hunter stopped defendant. On closer examination, he saw that defendant was wet all over and soaking wet from mid-thigh to his feet. Officer Hunter also testified that defendant was covered with grass and "beggar-lice." Officer Hunter placed defendant under arrest and then took him to Officer Pence for identification.

In summary, Officer Hunter first saw defendant on a bank near a wooded area. Defendant matched the general description he had received of a robbery suspect. Defendant's appearance gave rise to a reasonable inference that he had been through a wooded area. Under these circumstances, we think Officer Hunter had probable cause to believe that a felony had been committed and that defendant had committed it. Defendant's arrest was therefore legal.

Even had defendant's arrest been illegal, he has not made a sufficient showing to justify exclusion of the identification testimony. Under our decision in *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), an illegal arrest does not make inadmissible per se otherwise competent identification testimony. Under *Finch*, an illegal arrest will lead to suppression of identification testimony only if it "created a likelihood that the pretrial confrontation was so 'conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and

justice.' " *Id.* at 139, 235 S.E. 2d at 823, *quoting State v. Henderson*, 285 N.C. 1, 9, 203 S.E. 2d 10, 16 (1974); *see also United States v. Young*, 512 F. 2d 321 (4th Cir. 1975), *cert. denied*, 424 U.S. 956 (1976), and other cases cited and relied on in *Finch*; *but see Crews v. United States*, --- A. 2d ---, 23 Crim. L. Reptr. 2381 (D.C. 1978). Defendant does not claim that his arrest had any such effect on either of the pretrial confrontations about which testimony was introduced.

Defendant's second and third assignments of error are overruled.

No error.

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

STATE OF NORTH CAROLINA v. CARL HUBERT ALSTON, JR.

No. 21

(Filed 17 October 1978)

1. Criminal Law §§ 75.7, 76.5— voir dire hearing—general on-the-scene question—immaterial discrepancy in testimony— findings not required

Voir dire testimony by a police officer that he had not asked defendant any questions when he saw defendant enter a hospital emergency room with his wife and subsequent conflicting voir dire testimony by the officer that he had asked defendant "what happened" when he saw him enter the emergency room did not require the court to make findings of fact before admitting defendant's statement to the officer in the emergency room that he had stabbed the man who had cut his wife, since a question by the officer as to "what happened" would constitute a general on-the-scene question not requiring the *Miranda* warnings, and the conflict in the voir dire evidence was thus immaterial and had no effect on the admissibility of defendant's statement.

2. Criminal Law § 75.13— confession to hospital worker

Defendant's statement to a hospital worker that "a man that would do something like that deserved killing and he was going back out there" was admissible where it was made on defendant's own initiative.

3. 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: defendant and deceased engaged

in a fight, at which time defendant's wife was apparently cut; defendant chased deceased toward a street where a witness saw a stabbing take place; another witness saw deceased lying in that street; an officer saw defendant come into a hospital later that night with his wife who was bleeding from a cut on her face; and defendant told the officer that a man had cut his wife and he had stabbed him and left him out there.

4. **Criminal Law § 112.4— instruction on circumstantial evidence**

The trial court's instruction that in order to rely on circumstantial evidence the jury must "be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State consistent with the defendant being guilty but that it is inconsistent with his being innocent" was a sufficient charge on the intensity of proof required when the State relies on circumstantial evidence without containing a statement that circumstantial evidence "must point unerringly to defendant's guilt and exclude every other reasonable hypothesis."

5. **Homicide §§ 26, 27— instructions defining second degree murder and voluntary manslaughter**

The trial court's instructions defining second degree murder and voluntary manslaughter were not deficient in failing to require that the killing be intentional, since a specific intent to kill is not an element of either of those crimes.

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

APPEAL by defendant pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 35 N.C. App. 691, 242 S.E. 2d 523 (1978) (*Hedrick, J.*, concurred in by *Britt, J.*, with *Webb, J.* dissenting). That court found no error in the defendant's trial before *Judge Robert A. Collier, Jr.*, 30 May 1977 Criminal Session of GUILFORD Superior Court.

The defendant was indicted and convicted of the second degree murder of Edward Alexander Barnhardt. He received a sentence of imprisonment for not less than thirty-five (35) nor more than forty (40) years.

The State's evidence tended to show the following:

On the evening of 16 January 1977, defendant, his wife and the deceased were at the Carlotta Supper Club located on East Market Street in Greensboro. After the deceased and defendant's wife danced together, they had a disagreement. The deceased left the club. A fight between defendant and the deceased ensued outside, at which time defendant's wife was apparently cut. The deceased ran, and defendant followed.

A witness for the State testified that she was driving on East Market Street near the Carlotta Supper Club on the night of 16 January 1977 with her sister. She saw a man in the road being stabbed continuously by another man straddled over him. Another witness said at trial that she saw the deceased lying in the street near the club after she had observed the defendant chase him following the fight.

Officer James E. Joyner of the Greensboro Police Department testified that he was at the emergency room of Moses Cone Hospital in Greensboro on 16 January 1977 investigating the report of an animal bite. He observed the defendant enter the emergency room with his wife who was bleeding profusely from a laceration on the right side of her face. At that time, defendant stated that a man had cut his wife, and he had stabbed him repeatedly and left him. Officer Joyner followed the defendant outside the hospital to defendant's car where the policeman saw a closed knife with fresh blood on it. There was also blood on the seat and the floor of the passenger side of the car.

Dr. Harry Lester Johnson, Jr. stated that in his opinion, Edward Alexander Branhardt died as a result of stab wounds to the neck and face.

The defendant presented no evidence.

Additional facts relevant to the decision are related in the opinion below.

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

Assistant Public Defender D. Lamar Dowda for the defendant.

COPELAND, Justice.

After reviewing the defendant's many assignments of error both to this Court and to the Court of Appeals, we have concluded that there was no error in the trial below.

[1] Defendant first contends that the court erred in failing to find facts after conducting a *voir dire* examination at trial.

Officer Joyner took the stand and testified that he was at Moses Cone Hospital on the night of 16 January 1977 and saw the defendant enter the emergency room with a woman who was bleeding from her face. After he was asked what the defendant said, but before the officer answered, the defendant objected. The jury was excused, and a *voir dire* hearing was held.

On *voir dire* the policeman testified that the defendant stated he stabbed the man who had cut his wife. On direct examination Joyner said that he had not asked the defendant any questions, but on cross-examination the officer stated that he first asked the defendant "what happened" when he entered the emergency room. The defendant contends that this discrepancy requires findings of fact by the judge before the defendant's statement could be properly admitted into evidence.

In *State v. Riddick*, 291 N.C. 399, 408-09, 230 S.E. 2d 506, 512-13 (1976), Justice Huskins, speaking for this Court, aptly stated the law on this point:

> "The general rule is that the trial judge, at the close of the *voir dire* hearing, *should* make findings of fact to show the bases of his ruling. If there is a *material* conflict in the evidence on *voir dire* he *must* do so in order to resolve the conflict . . . . If there is a conflict in the evidence which is *immaterial* and has no effect on the admissibility of the confession, it is not error to admit the confession without findings because the purpose of specific findings of fact is to show, for the benefit of the appellate court on review, the factual bases of the trial court's determination of admissibility . . . . [I]t is always the better practice to make findings." (Citations omitted.) (Emphasis supplied.)

This case falls into the last category. Even if we assume that Officer Joyner did ask the defendant "what happened" when he came into the emergency room, this fact does not affect the admissibility of defendant's statement.

It is clear that incriminating statements made in response to general on-the-scene police questioning are admissible. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968). *Miranda* warnings need not be given:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Miranda v. Arizona*, 384 U.S. 436, 477, 16 L.Ed. 2d 694, 725, 86 S.Ct. 1602, 1629 (1966).

As the situation in this case falls within the category of permissible general questions by officers of the law, this assignment of error is overruled.

[2] At the conclusion of the *voir dire* hearing, the trial judge stated that none of defendant's statements could be admitted "except what he said when he first walked in the door." Defendant complains that the judge then admitted his statement to the desk clerk that "a man that would do something like that deserved killing and he was going back out there." It is well settled that incriminating statements made to persons unconnected with law enforcement are admissible as long as they were made freely and voluntarily. *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967), *remanded*, 392 U.S. 649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290 (1967), *rev'd on other grounds*, 274 N.C. 536, 164 S.E. 2d 593 (1968). As the evidence showed that defendant made this declaration to the hospital worker on his own initiative, this argument is without merit.

The Court of Appeals found that no findings of fact were required by the trial judge because no *voir dire* hearing was necessary in this case. We base our opinion, however, on the reasons set out above.

[3] Defendant's second assignment of error to this Court concerns the trial judge's denial of his motions for nonsuit at the close of the State's evidence and at the close of all the evidence.

It is well settled that in order to rule on motions for judgment of nonsuit, the evidence for the State is to be taken as true, and every reasonable inference favorable to the State is to be drawn therefrom. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972).

If taken as true, the evidence in this case showed that on 16 January 1977, the defendant and the deceased got into a fight, at which time defendant's wife was apparently cut. The defendant

chased the deceased out toward East Market Street where a witness stated she saw a stabbing take place. Another witness saw the deceased lying in East Market Street. Officer Joyner saw the defendant come into Moses Cone Hospital later that night with his wife who was bleeding from a cut on her face. The defendant stated that a man had cut his wife and he had stabbed him and left him out there.

Taken as a whole with the benefit of all reasonable inferences, this evidence is clearly sufficient to go to the jury. Consequently, the motions for nonsuit were properly denied.

[4] The defendant next argues that the trial judge erred in his instruction to the jury on circumstantial evidence. The portion of the charge conplained of is as follows:

> "Circumstantial evidence is recognized and accepted proof in a court of law. However, before you may rely upon the evidence to find the defendant guilty, you must be satisfied *beyond a reasonable doubt* that not only is the circumstantial evidence relied upon by the State consistent with the defendant being guilty but that it is inconsistent with his being innocent." (Emphasis added.)

Evidently the defendant contends that the error lies in the judge's failure to include the magic words, "that circumstantial evidence must point unerringly to defendant's guilt and exclude every other reasonable hypothesis." *State v. Beach*, 283 N.C. 261, 272, 196 S.E. 2d 214, 222 (1973), quoted in *State v. Hood*, 294 N.C. 30, 44, 239 S.E. 2d 802, 810 (1978). It is clear, however, that there is no set formula that a charge on circumstantial evidence must follow. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965).

The defendant relies on *State v. Lowther*, *id.* at 316, 144 S.E. 2d at 66, in which the instruction stated merely that "the circumstances and conditions relied upon must be such as are not only consistent with guilt, but must be inconsistent with innocence." We held this charge to be prejudicial error.

Although the charge complained of in this case and the one in *Lowther* are similar, this instruction went the required step further. The jury was informed that not only must the circumstantial evidence presented at trial be consistent with guilt and inconsis-

tent with innocence, but they were told that it must be consistent with the defendant's guilt *beyond a reasonable doubt* and inconsistent with the defendant's innocence *beyond a reasonable doubt.* We find this charge to be substantially identical in meaning to the instruction that the evidence must point unerringly to the defendant's guilt, excluding all other reasonable hypotheses. This assignment of error is overruled.

[5] In his seventh assignment of error to the Court of Appeals, defendant excepts to certain portions of the judge's instructions to the jury. Specifically, the defendant argues that the definitions below were prejudicially deficient in that they did not require that the killings be intentional:

> "Second degree murder is the unlawful killing of a human being with malice.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation."

In *State v. Mercer,* 275 N.C. 108, 120, 165 S.E. 2d 328, 337 (1969), this Court stated:

> "The record shows the court defined murder in the second degree as the unlawful and *intentional killing* of a human being with malice. Although not assigned as error, it seems appropriate to point out again that '(a) specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter.' (Citation omitted.) An *unlawful killing* with malice is murder in the second degree." (Emphasis supplied.)

We have also defined manslaughter as being "the unlawful killing of a human being without malice and without premeditation or deliberation." *State v. Benge,* 272 N.C. 261, 263, 158 S.E. 2d 70, 72 (1967).

Thus, had the able trial judge defined either crime in terms of intentional killings, as the defendant contends he must, the charge would have been incorrect. The defendant evidently is confusing the definitions of these crimes with the permissible inference of malice from proof of an intentional killing with a deadly weapon. This argument is without merit.

The defendant requested that we consider all the other assignments of error submitted to the Court of Appeals that are incorporated into defendant's appeal to this Court. Although defendant failed to discuss them further in either his brief or his argument before this Court, we have fully considered all the other assignments and find them without merit.

For the reasons stated above, the decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. STEPHEN KARL SILHAN

No. 30

(Filed 17 October 1978)

1. **Criminal Law § 75.11— in-custody interrogation—no effective waiver of counsel**

Defendant did not make an effective waiver of his rights to remain silent and to have an attorney present during in-custody questioning where defendant answered negatively when asked whether he wanted "any individual or person present," officers asked defendant to sign a waiver of rights form only after he had made incriminating statements, and defendant crossed out the word "not" in the waiver form so that he signed a form stating, "I do want a lawyer present."

2. **Criminal Law §§ 146, 149— State's appeal of motion to suppress—death or life sentence—jurisdiction of Supreme Court**

The State's appeal from an order granting a motion to suppress pursuant to G.S. 15A-979(c) is properly made to the Supreme Court, rather than to the Court of Appeals, where the punishment for the crime charged is either death or life imprisonment. G.S. 7A-27(a).

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

APPEAL by the State pursuant to G.S. 15A-979(c) from *Clark, J.*, 12 December 1977 Criminal Session of CUMBERLAND Superior Court.

Upon indictments proper in form, defendant was charged with first degree murder, first degree rape and assault with a

deadly weapon with intent to kill inflicting serious injury. The defendant moved to suppress oral statements made by him, which motion was granted before trial.

The defendant was arrested on 20 September 1977 for the offenses named above that were allegedly committed on 13 September 1977. He was advised of his rights and indicated a desire to talk with an attorney. The arresting officers, Conerly and Byrd, asked no questions, but they told the defendant that unless he told his side of the story, they "could only believe that he was the fiend."

On 21 September 1977, the Office of the Public Defender was appointed to represent the defendant, and this fact was made known to the Sheriff of Cumberland County, the Fayetteville Police Department and the respective detective divisions. Counsel for the defendant also advised these officials that the defendant did not wish to answer any questions without the presence of his attorney.

That very evening Detective Byrd attempted to question the defendant alone, but he stated that he would talk only if his attorney, Mr. Deno Economou from the Office of the Public Defender, were contacted. On 27 September 1977, Detective Byrd again tried to interrogate the defendant alone, and the defendant again indicated that he did not wish to discuss the case with him.

On 14 October 1977, the defendant was convicted in Chatham County of kidnapping, assault and crime against nature. After he was returned to his cell in Cumberland County, Officers Conerly and Byrd began questioning the defendant once more. The defendant was taken by the detectives to the jailor's dining room in the Law Enforcement Center where he was advised of his rights, which defendant indicated he understood. After he was told he had the right to have an attorney present, the defendant was informed by the officers that his appointed attorney, Deno Economou, was leaving the Office of the Public Defender and probably would not be representing him at trial. He was then asked if he wanted to talk to any "person or individual," and the defendant replied no.

The interrogation between the defendant and the officers lasted approximately three and one-half hours. At the beginning

the defendant told the officers that he was scared of the police, and throughout the conversation he seemed visibly upset and experienced fits of crying. He refused any offer of food, claiming that he was sick and could not keep anything on his stomach.

At the conclusion of the interrogation, after the defendant had made incriminating statements to the officers, he was asked to sign a written waiver of his constitutional rights. He refused because of the sentence located thereon that read: "I do not wish to have a lawyer present." The defendant then marked out the word "not" so that the statement read: "I do wish to have a lawyer present," and he signed the form.

Judge Clark granted defendant's pre-trial motion to suppress the introduction of his 14 October 1977 statements into evidence at trial. In his order at the conclusion of the hearing, the judge found that "such statements were not freely, voluntarily and understandingly made by the defendant after he had freely, voluntarily and understandingly waived his rights under the Constitutions of the United States of America and the State of North Carolina, to remain silent and to have the assistance of counsel at the time of making said statements." This conclusion of law was based on findings of fact substantially similar to the facts disclosed above.

Attorney General Rufus L. Edmisten by Assistant Attorney General Joan H. Byers for the State.

Public Defender Mary Ann Tally for the defendant.

COPELAND, Justice.

[1] We have reviewed the State's contention that Judge Clark erred in suppressing from evidence the defendant's oral statements made to Detective Conerly and Byrd on 14 October 1977. We conclude that the judge was correct in allowing the defendant's motion.

The United States Supreme Court laid down the guidelines for what constitutes waiver of the rights to counsel and to remain silent during in-custody interrogation in the landmark decision of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). It is clear that a defendant does not waive the right to an

attorney if he merely fails to request one on his own initiative. *Id.* at 470, 16 L.Ed. 2d at 721, 86 S.Ct. at 1626. Similarly, the Court stated:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L.Ed. 2d 70, 77, 82 S.Ct. 884, 890 (1962), quoted in 384 U.S. at 475, 16 L.Ed. 2d at 724, 86 S.Ct. at 1628.

On numerous occasions this Court has interpreted and applied the dictates of *Miranda.* In *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), the defendant was given his full *Miranda* warnings, he understood his right to counsel, and he did not request an attorney. We held that "[t]his, however, is not sufficient to make the defendant's in-custody statements admissible in evidence." *Id.* at 48, 185 S.E. 2d at 127. Last term we followed the *Blackmon* decision in *State v. Butler*, 295 N.C. 250, 244 S.E. 2d 410 (1978), and held that a defendant's waiver of counsel must be "specifically made." In other words, there must be some *positive* indication by the defendant that he does not wish to have an attorney present during the questioning.

In this case the officers asked whether defendant wanted "any individual or person present." Defendant's negative response to this question cannot be deemed a positive and specific waiver of counsel under the circumstances here disclosed. The detectives did not ask the defendant to sign a waiver form before interrogation began. They waited until after "the mule was out of the stable," and the defendant had already made incriminating statements. Furthermore, the defendant crossed out the word "not" in the waiver form so that he signed a paper stating: "I do want a lawyer present." This act is strong evidence negating any waiver of counsel. Thus, we find that defendant did not make an effective waiver of his rights to remain silent and to have an attorney present during the questioning.

[2] The State appealed this case pursuant to G.S. 15A-979(c), which provides:

"An order by the superior court granting a motion to suppress prior to trial is appealable to the *appellate division* of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case." [Emphasis added.]

We note that this section does not specify whether an appeal lies to the Court of Appeals or to the Supreme Court. General Statute 7A-27(a), however, stipulates that there is an appeal of right to the Supreme Court from a superior court judgment imposing a sentence of death or life imprisonment. When these two statutes are considered together, we determine that it is proper to appeal directly to this Court if the punishment for the charge(s) is either death or life imprisonment.

For the reasons set out above, the order of Judge Clark is in all respects.

Affirmed.

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

STATE OF NORTH CAROLINA v. LEE MAXWELL HEWETT, JR.

No. 8

(Filed 17 October 1978)

Criminal Law § 118.1— charge on contentions of State—failure to state defendant's contentions

Prejudicial error is committed when the trial judge in his charge to the jury in a criminal case gives the contentions of the State but fails to give any contentions of the defendant.

THE State appeals from the unpublished decision of the Court of Appeals awarding defendant a new trial upon defendant's appeal from judgment of *Bailey, J.*, March 1977 Criminal Session, BRUNSWICK Superior Court.

In two cases, consolidated for trial, defendant was convicted of maiming and disfiguring Ronnie Gross and Shean Gross, ages five and three respectively, by scalding and disfiguring the legs, feet and toes of each child.

The State's evidence tends to show that Sharon Hewett was the mother of three children by a previous marriage, including the two victims here. On 28 May 1976 she and her husband, Lee Maxwell Hewett, Jr., and the children, were living in Brunswick County, North Carolina, with defendant's mother. On that date Ronnie and Shean Gross were severely burned by scalding water, each sustaining second and third degree burns around their genitals, thighs and buttocks. As a result several toes on Shean's foot had to be amputated. Both children required extensive hospitalization.

Ronnie Gross and his mother Sharon Hewett both testified that defendant forcibly held the two children in the bathtub containing scalding water and ignored their screams until Sharon Hewett and defendant's mother intervened.

Defendant testified that he had seen the two children get in the bathtub from time to time, turn on the water and wash themselves; that the tub had glass doors around it with a handle "which you can open from the inside and if the doors were closed the only way you could open it would be from the outside and if you tried to open it from the inside the door would fall off the rollers." Defendant further testified that on 28 May 1976 he first saw the children in the hot water when his mother, Charlotte Hewett, yelled for him and he entered the bathroom, broke the glass out of the doors on the bathtub, grabbed the youngest child out of the tub and gave him to Charlotte Hewett, and then grabbed the oldest child and took him to the bedroom. Defendant denied that he turned on the hot water or that he ever held the children in the tub of hot water. He admitted on cross-examination that he had been convicted of robbery, assault, destroying personal property, and escape.

The testimony of defendant's mother, Charlotte Hewett, in large measure corroborates defendant's testimony.

The jury found defendant guilty as charged in each case and he was sentenced to consecutive terms of "not less than 10 years in the custody of the Commissioner of the Department of Correction." Defendant appealed to the Court of Appeals and that court awarded a new trial for failure of the trial judge in his charge to state any contentions of the defendant after fully stating the con-

tentions of the State. Judge Mitchell dissented and the State appealed as of right to the Supreme Court.

Rufus L. Edmisten, Attorney General, by Christopher S. Crosby, Associate Attorney, for the State, appellant.

D. F. McGougan, Jr., attorney for defendant appellee.

HUSKINS, Justice.

This appeal turns on answer to the following question: Is prejudicial error committed when the trial judge in his charge to the jury in a criminal case gives the contentions of the State but fails to give any contentions of defendant? The answer is yes.

It 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. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). The rule is otherwise, however, where the trial judge in his charge states fully the contentions of the State but fails to give *any* contentions of the defendant. In that event the party whose contentions have been omitted is not required to object or otherwise bring the omission to the attention of the trial court. *State v. Crawford*, 261 N.C. 658, 135 S.E. 2d 652 (1964); *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962).

G.S. 1-180 requires the trial judge (1) to declare and explain the law arising on the evidence in the case, (2) to state the evidence to the extent necessary to explain the application of the law thereto, *Sugg v. Baker*, 258 N.C. 333, 128 S.E. 2d 595 (1962); *State v. Fleming*, 202 N.C. 512, 163 S.E. 453 (1932), and (3) to give equal stress to the State and defendant in a criminal action.

This statute creates a substantial legal right, *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332 (1953); its provisions are mandatory; and a failure to comply with them is prejudicial error for which a new trial must be ordered. *Therrell v. Freeman*, 256 N.C. 552, 124 S.E. 2d 522 (1962); *State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961); *Godwin v. Hinnant*, 250 N.C. 328, 108 S.E. 2d 658 (1959).

The trial judge is not required by G.S. 1-180 to state the *contentions* of litigants, *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976), although the practice has developed in our courts as a helpful and accepted procedure and as a convenient method of presenting to the jury the matters at issue. *Trust Co. v. Insurance Co.*, 204 N.C. 282, 167 S.E. 854 (1933). Therefore, failure to state the contentions of the parties is not error, but failure to give equal stress to the State and defendant in a criminal action is error. So, when the judge states the contentions of one party he must also give the pertinent contentions of the opposing party. Many decisions of this Court are to like effect including *State v. Crawford, supra; State v. King, supra; State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768 (1956); *State v. Robbins*, 243 N.C. 161, 90 S.E. 2d 322 (1955); *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196 (1954); *In re Will of West*, 227 N.C. 204, 41 S.E. 2d 838 (1947); *State v. Colson*, 222 N.C. 28, 21 S.E. 2d 808 (1942). Obviously equal stress is absent when the contentions of the State are fully stated and the contentions of the defendant are not stated at all. This requires a new trial.

It should be noted that G.S. 1-180 has been repealed by Chapter 711, section 33, of the 1977 Session Laws, effective 1 July 1978. However, in lieu thereof the General Assembly enacted 15A-1222 and 15A-1232. G.S. 15A-1222 prohibits expression of opinion by the judge in the presence of the jury at any stage of the trial on any question of fact to be decided by the jury. G.S. 15A-1232 reads as follows: "In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved." While this section restates the substance of G.S. 1-180 it will be observed that the language requiring the judge to "give equal stress to the State and defendant in a criminal action" has been omitted. Even so, the Official Commentary explains the omission as follows: "The Commission found to be unnecessary the proviso in G.S. 1-180 requiring the judge to 'give equal stress to the State and defendant in a criminal action' because this is a duty imposed on the judge by general requirements of fairness to the parties; it is not necessary that it be explicitly stated." Thus what was

heretofore explicit is now implicit and the law remains essentially unchanged.

For the reasons stated, the decision of the Court of Appeals awarding defendant a new trial is

Affirmed.

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

AMDAR, INC. v. SATTERWHITE

No. 45 PC.

Case below: 37 N.C. App. 410.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

ARCHER v. NORWOOD

No. 11 PC.

Case below: 37 N.C. App. 432.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 October 1978.

BANK v. CRANFILL

No. 10 PC.

No. 114 (Fall Term).

Case below: 37 N.C. App. 182.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 October 1978.

CITY OF WINSTON-SALEM v. CONCRETE CO.

No. 13 PC.

Case below: 37 N.C. App. 186.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978.

ENGLE v. INSURANCE CO.

No. 1 PC.

Case below: 37 N.C. App. 126.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1978.

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

GARRISON v. BLAKENEY

No. 17 PC.

Case below: 37 N.C. App. 73.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1978.

GRIMES v. GUARANTY CO.

No. 31 PC.

Case below: 37 N.C. App. 457.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978.

HAYMORE v. HAYMORE

No. 12 PC.

Case below: 37 N.C. App. 232.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

IN RE DEW

No. 16 PC.

Case below: 37 N.C. App. 232.

Petition by petitioner for discretionary review under G.S. 7A-31 denied 4 October 1978.

IN RE DUKE POWER CO.

No. 20 PC.

Case below: 37 N.C. App. 138.

Petition by High Rock Lake Assoc. for discretionary review under G.S. 7A-31 denied 4 October 1978. Motion of Utilities Commission and Duke Power Co. to dismiss appeal for lack of substantial constitutional question allowed 4 October 1978.

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

IN RE PALMER

No. 15 PC.

No. 115 (Fall Term).

Case below: 37 N.C. App. 220.

Petition by the State for writ of certiorari to the North Carolina Court of Appeals allowed 4 October 1978.

MATTHEWS v. TRANSIT CO.

No. 212 PC.

Case below: 37 N.C. App. 59.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1978.

MORAN v. SLUSS

No. 19 PC.

Case below: 37 N.C. App. 232.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978.

MUNCHAK CORP. v. CALDWELL

No. 37 PC.

Case below: 37 N.C. App. 240.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1978.

PHILLIPS v. PHILLIPS

No. 46 PC.

Case below: 37 N.C. App. 388.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 October 1978.

PLUMBING CO. v. ASSOCIATES

No. 21 PC.

Case below: 37 N.C. App. 149.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 October 1978.

RIGGS v. COBLE, SEC. OF REVENUE

No. 36 PC.

Case below: 37 N.C. App. 266.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 October 1978.

SCHELL v. RICE

No. 38 PC.

Case below: 37 N.C. App. 377.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978.

SELF v. SELF

No. 22 PC.

Case below: 37 N.C. App. 199.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STALLINGS v. STALLINGS

No. 197 PC.

Case below: 36 N.C. App. 643.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

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

STANBACK v. STANBACK

No. 44 PC.

No. 119 (Fall Term).

Case below: 37 N.C. App. 324.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 October 1978.

STATE v. ALFORD

No. 93 PC.

Case below: 38 N.C. App. 236.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 October 1978. Appeal dismissed ex mero motu for lack of substantial constitutional question 17 October 1978.

STATE v. BOARD

No. 50 PC.

No. 120 (Fall Term).

Case below: 37 N.C. App. 581.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 October 1978.

STATE v. BOYD and PILKINGTON

No. 137 PC.

Case below: 36 N.C. App. 155.

Petition by defendant Pilkington for writ of certiorari to the North Carolina Court of Appeals denied 4 October 1978.

STATE v. COX

No. 67.

Case below: 37 N.C. App. 356.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 October 1978.

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

STATE v. DAVIS

No. 8 PC.

Case below: 37 N.C. App. 173.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. HALL

No. 111.

Case below: 37 N.C. App. 616.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 October 1978.

STATE v. HARRIS

No. 190 PC.

No. 113 (Fall Term).

Case below: 36 N.C. App. 652.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 October 1978.

STATE v. LANCASTER and FLACK

No. 49 PC.

Case below: 37 N.C. App. 528.

Petition by defendant Flack for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. MCCARN

No. 9 PC.

Case below: 37 N.C. App. 458.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

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

STATE v. McGILL

No. 76 PC.

Case below: 38 N.C. App. 29.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 11 October 1978.

STATE v. MILLER

No. 30 PC.

Case below: 37 N.C. App. 163.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. MONTGOMERY

No. 29 PC.

Case below: 37 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. MOORE and JAMES

No. 32 PC.

Case below: 37 N.C. App. 248.

Petition by defendant Moore for writ of certiorari to the North Carolina Court of Appeals denied 4 October 1978. Petition by defendant James for discretionary review under G.S. 7A-31 denied 4 October 1978. Motion of Attorney General to dismiss appeal of defendant James for lack of substantial constitutional question allowed 4 October 1978.

STATE v. NORMAN

No. 25 PC.

Case below: 37 N.C. App. 458.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

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

STATE v. RICH

No. 60 PC.

Case below: 37 N.C. App. 458.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. RILEY

No. 23 PC.

Case below: 37 N.C. App. 213.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 October 1978.

STATE v. SCARBORO

No. 57 PC.

Case below: 38 N.C. App. 105.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. THOMPSON

No. 42 PC.

Case below: 37 N.C. App. 444.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1978.

STATE v. WATSON

No. 68.

Case below: 37 N.C. App. 399.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 22 September 1978.

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

STONE v. HOMES, INC.

No. 14 PC.

Case below: 37 N.C. App. 97.

Petitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 4 October 1978.

THIGPEN v. PIVER

No. 41 PC.

Case below: 37 N.C. App. 382.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978.

VAUGHN v. DEPT. OF HUMAN RESOURCES

No. 24 PC.

No. 116 (Fall Term).

Case below: 37 N.C. App. 86.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 October 1978.

vanDOOREN v. vanDOOREN

No. 34 PC.

Case below: 37 N.C. App. 333.

Petition by Peter vanDooren for discretionary review under G.S. 7A-31 denied 4 October 1978.

WILLIAMS v. DAMERON

No. 40 PC.

Case below: 37 N.C. App. 491.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 October 1978. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 4 October 1978.

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

WOOD v. WOOD

No. 39 PC.

No. 118 (Fall Term).

Case below: 37 N.C. App. 570.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 October 1978.

STATE OF NORTH CAROLINA v. JAMES CALVIN WILLIAMS

No. 89

(Filed 28 November 1978)

1. **Kidnapping § 1; Criminal Law § 26.5 — felonies as purpose of kidnapping — conviction of felonies and kidnapping**

The principle that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both offenses did not prohibit the punishment of defendant for two offenses of kidnapping and for robberies and other felonies which constituted the purposes for removal of the victims, since in order to prove kidnapping it was only necessary to prove a *purpose* of robbery or the other felonies and not the commission of the felonies themselves.

2. **Indictment and Warrant § 9.3 — allegation of matter not element of crime — surplusage**

Allegation of matter which, in law, is not an element of the crime and not necessary to be proved may be treated as surplusage even if the State and the trial judge mistakenly believe the matter to be an essential element.

3. **Kidnapping § 1; Criminal Law § 26.5 — single offense of kidnapping — mitigating factors — punishment for kidnapping, assault and rape — no double jeopardy**

Although the State and the trial judge treated "serious injury" arising out of the felonious assault of one victim and the "sexual assault" arising out of the rape of the second victim as elements, respectively, of kidnappings of the two victims, the punishment of defendant for the kidnappings and also for the felonious assault and the rape did not offend the Double Jeopardy or Law of the Land Clauses since (1) G.S. 14-39 creates only a single offense of kidnapping, and the felonious assault and rape were not elements of kidnapping, and (2) the factors listed in G.S. 14-39(b) — release in a safe place and absence of sexual assault or serious injury — are mitigating rather than aggravating and result in a lesser rather than more severe sentence.

4. **Kidnapping § 2 — jury determination of guilt — determination of mitigating factors by judge**

Normally, a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in G.S. 14-39(a), and the existence or non-existence of the factors set forth in G.S. 14-39(b) should be determined by the trial judge.

5. **Kidnapping § 2 — mitigating factors — evidence at trial — sentencing hearing**

The trial judge in a kidnapping case may make a determination as to whether the statutory mitigating factors exist from evidence adduced at the trial or at the sentencing hearing provided for in G.S. 15A-1334 following the trial, or at both proceedings.

6. Kidnapping § 2— punishment—mitigating factors—burden of proof—findings

If evidence of the existence of mitigating factors has been presented either at the kidnapping trial or at both proceedings, and the judge is satisfied by a preponderance of the evidence, the burden being upon the defendant to so satisfy him, that the kidnapping victim was released in a safe place and was neither sexually assaulted nor seriously injured, he shall so find and may not impose a sentence on the kidnapping conviction of more than 25 years or a fine of up to $10,000, or both. If the judge is not so satisfied, he must so state on the record, in which case he may impose a sentence of not less than 25 years nor more than life imprisonment.

7. Kidnapping § 2— punishment—absence of evidence of mitigating factors

If no evidence at the kidnapping trial or at the sentencing hearing is adduced tending to show the existence of the statutory mitigating factors, then the judge, without making findings, may proceed to impose a sentence of not less than 25 years nor more than life imprisonment.

8. Kidnapping § 2— punishment—stipulation of mitigating factors

In any kidnapping case, the State may stipulate to the presence of all the mitigating factors and thereby avoid determination of the question.

9. Kidnapping § 2; Constitutional Law § 28— determination of sentence—sentencing hearing—findings by court—due process

A defendant convicted of kidnapping is accorded due process on the question of sentencing by the procedures prescribed for the sentencing hearing in G.S. 15A-1334(b) and the requirement that the trial judge make findings as to mitigating factors in imposing the sentence.

10. Kidnapping § 2; Constitutional Law § 57— punishment—mitigating factors—no right to jury trial

A defendant in a kidnapping case is not entitled to a jury trial on the question of mitigating factors under either the State or Federal Constitution, since the factors to be found relate solely to the severity of the sentence and not to any element of the offense itself.

11. Kidnapping § 2; Constitutional Law § 28— punishment—mitigating factors—burden of proof—due process

It is not violative of due process to place the burden of persuasion as to the existence of mitigating factors in a kidnapping case upon the defendant, since proof of these factors does not negate any element of the crime of kidnapping which the State must prove.

12. Kidnapping § 2— punishment—mitigating factors—separate criminal offenses—hearing not required

When the question of the existence of mitigating factors in a kidnapping case has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty of the separate charges, there is no need for the judge to make separate findings, since the non-existence of mitigating factors will already have been determined beyond a reasonable doubt.

13. Constitutional Law § 79— cruel and unusual punishment—sentence within statutory maximum

A sentence within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional.

14. Constitutional Law § 81— cruel and unusual punishment—consecutive sentences

The imposition on defendant of consecutive sentences of life imprisonment for rape, life imprisonment for kidnapping, life imprisonment for armed robbery, 40 years for another armed robbery and 20 years for felonious assault did not constitute cruel and unusual punishment and did not deny defendant equal protection of the laws.

15. Criminal Law § 102.6— remark by private prosecutor—no denial of fair trial

Where the results of tests performed on the State's physical evidence in Raleigh were inconclusive, the physical evidence was excluded upon objection by defendant, and the private prosecutor properly objected to defense counsel's jury argument concerning the absence of such physical evidence from the trial, the private prosecutor's additional inaccurate remark, "Nothing was sent to Raleigh," did not deny defendant a fair trial by suggesting the existence of other incriminating evidence, since the jury could have inferred from the remark the non-existence of other evidence as easily as the existence of such evidence, the remark was not extreme or clearly calculated to prejudice the jury, and defendant failed to object or request that the jury not consider it.

16. Criminal Law § 122.9— jury argument—coaching by defense counsel—impropriety cured by court's instruction

Any impropriety in the private prosecutor's remark during jury argument that "the defense lawyer must have had some sessions with him, because he handled himself . . ." and in his remark after defendant's objection that a defense lawyer would be remiss if he hadn't talked with his client was cured when the court instructed the jury to disregard such remarks.

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

BEFORE *Howell, J.*, at the 23 May 1977 Schedule "B" Criminal Session of MECKLENBURG Superior Court and on bills of indictment formally sufficient defendant was tried and convicted of first degree rape, two counts of kidnapping, two counts of armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily injury. He received sentences of life imprisonment for the rape, one of the kidnappings and one of the armed robberies, a sentence of 40 years for the other armed robbery, and a sentence of 20 years for the felonious assault, all to be served consecutively. He also received a life sentence for the

other kidnapping to be served concurrently with the first kidnapping sentence. He appeals under G.S. 7A-27(a), and we allowed his motion to bypass the Court of Appeals in the robbery and assault cases. This case was argued as No. 119 at the Fall Term 1977.

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

Michael J. Blackford, Attorney for defendant.

EXUM, Justice.

The state's evidence tends to show that on 12 January 1977 defendant kidnapped Jessie King Harrison, Jr., and Marilyn Walters as they were leaving work around 6:40 p.m. in Charlotte. After taking them to a deserted place defendant robbed both victims at gunpoint, shot Harrison twice causing serious injury but not death, and raped Walters. The defense was alibi.

The most important question presented is whether it is permissible under our kidnapping statute, G.S. 14-39,[1] to sentence this defendant for the rape of Walters, the felonious assault against Harrison and each of the armed robberies, while at the same time sentencing him to life imprisonment for the kidnappings of Walters and Harrison, without violating the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and the Law of the Land Clause of the North Carolina Constitution. We conclude that it is. Other questions raised are whether defendant's sentences are violative of the Cruel and Unusual Punishment Clause of the Eighth Amendment

1. The statute reads, in relevant part, as follows:

"Kidnapping.—(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a) was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court."

and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We conclude they are not. Less significant questions, easily answered against defendant upon well-established legal principles, are whether defendant was denied a fair trial by remarks made by a privately employed prosecutor—one during defendant's closing argument to the jury and another during the prosecutor's own summation.

I

Both kidnapping indictments charge that defendant kidnapped his victims for the "purpose of facilitating the commission of a felony, armed robbery." The Harrison indictment adds "and doing serious bodily harm to him." The Walters indictment adds "and rape and terrorizing her."[2] One of the essential elements of kidnapping under G.S. 14-39 is that the confinement, restraint, or removal be for the purpose of, among other alternatives, "facilitating the commission of any felony." In accordance with this requirement, the trial judge instructed the jury in the Harrison kidnapping case that it must find, among other elements, a "purpose of facilitating commission of a robbery or doing serious bodily harm" and, in the Walters kidnapping case, a "purpose of facilitating the commission of a robbery or a rape."

[1] Defendant argues that under the statute the armed robberies, the felonious assault and the rape were essential elements of the kidnapping charges. Relying on the principle that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both offenses,[3] he

2. The indictments read in full as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 12th day of January, 1977, in Mecklenburg County James Calvin Williams unlawfully and wilfully did feloniously kidnap *Jessie King Harrison*, a person who had attained the age of sixteen years, by unlawfully confining him and restraining him and removing him from one place to another, without his consent, and for the purpose of facilitating the commission of a felony, armed robbery, and doing serious bodily injury to him. The person kidnapped was seriously injured during the kidnapping and not released in a safe place following the kidnapping."

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 12th day of January, 1977, in Mecklenburg County James Calvin Williams unlawfully and wilfully did feloniously kidnap Marilyn Lewis Walters, a person who had attained the age of sixteen years, by unlawfully confining her and restraining her and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony, armed robbery and rape and terrorizing her. The person kidnapped was *sexually assaulted during* the kidnapping and not released in a safe place following the kidnapping."

3. This principle is frequently applied in felony-murder cases when the underlying felony is used as an essential element of first degree murder. In such cases punishment for the murder precludes punishment also for the underlying felony. *See, e.g., State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972). The principle, however, is not limited to felony-murder, but applies in any situation in which one criminal offense is in its entirety an essential element of another offense. *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967). The basis for each application is the constitutional prohibition against double jeopardy. Amendments V and XIV, U.S. Const.; Art. I, § 19, N.C. Const. *See* cases cited in 4 N.C. Index 3d, Crim. Law, §§ 26-26.9.

contends that he may not be punished for both the kidnapping offenses and the other offenses which constituted the purposes for the removals. This same argument was raised and rejected in *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). In *Dammons*, the defendant was convicted of both felonious assault and kidnapping. He moved for an arrest of judgment on the assault charge, arguing that it was an essential element of the kidnapping. The Court found no error in the convictions and sentences for the two separate offenses, stating, *id.* at 275, 237 S.E. 2d at 842-843:

> "In the kidnapping case the felonious assault was alleged in the indictment as being one of the purposes for which defendant removed the victim from one place to another. The felonious assault itself is, therefore, not an element of the kidnapping offense. It was not necessary for the state to prove the felonious assault in order to convict the defendant of kidnapping. It need only have proved that the *purpose* of the removal was a felonious assault. The assault itself vis-a-vis the kidnapping charge is mere evidence probative of the defendant's purpose. The purpose proved would, without the assault itself, sustain conviction under the kidnapping statute but not under the assault statute. The felonious assault is, consequently, a separate and distinct offense. The fact that it was committed during the perpetration of a kidnapping does not deprive it of this character. *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966); *see also State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971)."

Here the same considerations apply. The kidnapping indictments charge that defendant confined, restrained and removed his victims from one place to another for the purpose of facilitating the commission of robberies and other felonies. In order to prove kidnapping it was only necessary to prove a *purpose* of robbery or the other felonies and not the commission of the felonies themselves. The principle relied on by defendant simply does not apply in this context.

[3] Defendant's next argument has not yet been considered by this Court.[4] It arises from the allegations in the Harrison indict-

4. It was not considered in *Dammons* where error was found in the kidnapping case and a new trial awarded. If it was argued we did not so perceive it.

ment that the "person kidnapped was seriously injured" and in the Walters indictment that the "person kidnapped was sexually assaulted." The trial judge instructed the jury that in order to convict defendant of "aggravated" kidnapping[5] of Harrison it must find, among other things, that Harrison "had been seriously injured." Similarly the trial judge instructed that in order to convict defendant of the "aggravated" kidnapping[6] of Walters it must find, among other things, that Walters "had been sexually assaulted." Defendant argues that the state by its allegations and the trial judge by his instructions have, in effect, made the felonious assault on Harrison and the rape of Walters an essential element of the kidnapping offense in which each, respectively, was the victim. Therefore, under the principles discussed above defendant contends that he cannot be sentenced separately for the rape of Walters and the felonious assault of Harrison and that judgment in these cases must be arrested if the sentences on the kidnapping convictions are to stand.

We recognize that infliction of serious injury may occur under circumstances not amounting to a felonious assault;[7] and, likewise, a "sexual assault" need not necessarily be a rape.[8] Nevertheless it seems clear that the serious injury referred to in the Harrison kidnapping and the sexual assault in the Walters kidnapping were in fact the same incidents upon which the sentences for the felonious assault and the rape convictions were, respectively, imposed. In *State v. Midyette, supra* n. 3, 270 N.C. 229, 154 S.E. 2d 66, two indictments were consolidated for trial. In Case No. 483 defendant was charged with assault with a deadly weapon upon one Robertson on 25 June 1966 by shooting him with a .22 caliber pistol with intent to kill inflicting serious injuries. In Case No. 484 defendant was charged with resisting a public officer, to wit, Robertson, in the discharge of his duty, namely, attempting to arrest the defendant, by firing at and hitting the officer with bullets from a .22 caliber pistol. Defendant was convicted and sentenced on both offenses. On appeal this Court held that judgment in the resisting arrest case, No. 484,

5. The only kidnapping offense with reference to Harrison submitted to the jury.

6. Again the only kidnapping offense with reference to Walters submitted to the jury.

7. For example, an assault inflicting serious injury without more is a misdemeanor under G.S. 14-33(b)(1).

8. For example, an assault with intent to commit rape under G.S. 14-22.

must be arrested. The Court said, 270 N.C. at 233-34, 154 S.E. 2d at 70:

> "The defendant was convicted and sentenced in Pamlico County Case No. 483 for the crime of assault with a deadly weapon upon W. I. Robertson, on 25 June 1966, by shooting him with a .22 caliber pistol. He could not thereafter be lawfully indicted, convicted and sentenced a second time for that offense, or for any other offense of which it, in its entirety, is an essential element. *State v. Birckhead*, 256 N.C. 494, 497, 124 S.E. 2d 838, 6 A.L.R. 3rd 888.
>
> "By the allegations it elects to make in an indictment, the State may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery. In such case, a showing that the defendant has been previously convicted, or acquitted, of the robbery so charged will bar his prosecution under the murder indictment. *State v. Bell*, 205 N.C. 225, 171 S.E. 50.
>
> . . . .
>
> "In the present instance, the State has, by the allegations in the indictment in Pamlico County Case No. 484, made the identical assault for which the defendant was convicted in Case No. 483, an element of the offense, resistance of a public officer, charged in the second indictment. It has alleged this same assault was the means by which the officer was resisted. Under this indictment, the State could not convict the defendant of resistance of a public officer in the performance of his duty without proving the defendant guilty of the exact offense for which he has been convicted and sentenced in Case No. 483, the shooting of W. I. Robertson with bullets from a .22 caliber pistol on 25 June 1966."

[2] The state here included the "serious injury" arising out of the felonious assault and the "sexual assault" arising out of the rape as elements, respectively, of the Harrison and Walters kidnappings and the trial judge treated them as such. The question still remains whether they were necessary elements of kidnapping under G.S. 14-39(a). We recognize that this Court said in *Midyette*: "By the allegations it elects to make in an indictment,

the State may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery." This language does not mean, however, that every matter in an indictment is a necessary element of the crime merely because it is alleged to be so. Allegation of a matter which, in law, is not an element of the crime and not necessary to be proved may be treated as surplusage even if the state and the trial judge mistakenly believe the matter to be an essential element. *See State v. Stallings*, 267 N.C. 405, 148 S.E. 2d 252 (1966). The language in *Midyette* instead refers to those situations in which the state elects to prosecute on a legal theory which necessarily includes another criminal offense as an element of the crime being prosecuted although some other theory might have been, theoretically at least, available (the most common example being when a first degree murder prosecution proceeds on a felony-murder theory rather than a theory involving premeditation and deliberation).

Therefore, defendant's argument must rest not only on the proposition that the state and the trial judge treated the infliction of serious injury and the sexual assault as necessary elements, respectively, in the two kidnapping cases but also on the proposition that G.S. 14-39 mandates this treatment. Defendant argues that the statute creates two kidnapping offenses: simple kidnapping, the punishment for which may not exceed 25 years, and aggravated kidnapping, the punishment for which is not less than 25 years nor more than life. He contends that to prove aggravated kidnapping so as to subject defendant to a punishment of life imprisonment the state must prove not only restraint, confinement or removal for one of those purposes designated in the statute but it must also prove that the person kidnapped was either sexually assaulted, seriously injured, or not released in a safe place. Support for this construction abounds everywhere but in the language of the statute itself. It has recently been adopted by a divided panel of the Court of Appeals in *State v. Gunther*, 38 N.C. App. 279, 248 S.E. 2d 97 (1978). The state's trial judges have incorporated a variation of it in their pattern jury instructions for criminal cases. N.C.P.I.—Crim. 210.10.[9] This Court has itself used

9. The instruction divides kidnapping into two degrees: "Kidnapping and mitigated kidnapping." In order to prove kidnapping, according to this instruction, the state must prove, among other things, that the victim was either "released in an unsafe place," "sexually assaulted," or "had been seriously injured." These matters are not necessary to be proved for a conviction of "mitigated kidnapping."

the term "aggravated kidnapping" in prior cases. *State v. Dammons, supra*, 293 N.C. 263, 237 S.E. 2d 834; *State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977). We did say, however, without comment or elaboration, in *State v. Banks*, 295 N.C. 399, 406-07, 245 S.E. 2d 743, 749 (1978):

> "We note in passing that some of our opinions refer to the crime defined in G.S. 14-39A as 'aggravated kidnapping.' This is a misnomer. The proper term for the crime there defined is 'kidnapping.' Subsection (b) of the statute states the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear."

The construction of G.S. 14-39 advanced by defendant has never been adopted by this Court. We now reject it.

General Statute 14-39(a) defines kidnapping as (1) an unlawful, nonconsensual restraint, confinement or removal from one place to another (2) for the purpose of committing or facilitating the commission of certain specified acts. On its face, this is all the statute requires for a *conviction* of kidnapping.

General Statute 14-39(b) prescribes the punishment for one convicted of kidnapping: "Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life." The statute goes on, however, to set forth factors that will result in reduced punishment: "If the person kidnapped . . . was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court."

The existence of two different ranges of sentences under G.S. 14-39(b) should not be read as creating two separate offenses. General Statute 14-39(b) by its terms presupposes a conviction for kidnapping, the elements of which are set forth in G.S. 14-39(a). It does not purport to add or subtract elements of the offense. It speaks merely to matters which may be shown in mitigation of punishment. It does not therefore divide the crime of kidnapping into two separate offenses.

There is support elsewhere for interpreting a statute like G.S. 14-39 as creating a single offense of kidnapping. In *Smith v. United States*, 360 U.S. 1 (1959), the Supreme Court considered the then federal kidnapping statute, which read in relevant part as follows, *id.* at 7: " 'Whoever knowingly transports in interstate . . . commerce any person who has been unlawfully . . . kidnapped . . . shall be punished (1) by death *if the kidnapped person has not been liberated unharmed*, and if the verdict of the jury shall so recommend. . . .' " (Emphasis supplied.) At issue in *Smith* was whether defendant had to be prosecuted by an indictment. Defendant had pled guilty to kidnapping on the basis of an information that did not state whether the victim was released unharmed. The Federal Rules of Criminal Procedure required that: " 'An offense which *may* be punished by death *shall* be prosecuted by indictment.' " *Id.* at 6. The government argued that the kidnapping statute created two separate offenses, one capital and one non-capital, and that defendant was charged with the non-capital offense. The Court rejected that argument holding that the statute created a single offense which could be punished by death depending on the evidence presented at trial:

> "Under the statute, the offense is punishable by death if certain proof is introduced at trial. When an accused is charged, as here, with transporting a kidnapped victim across state lines, he is charged and will be tried for an offense which *may* be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which *may* be punished by death and thus must be prosecuted by indictment." *Id.* at 8. (Emphasis original.)

The West Virginia Supreme Court has reached the same result in construing a similar state kidnapping statute. *Pyles v. Boles*, 148 W. Va. 465, 135 S.E. 2d 692, *cert. denied*, 379 U.S. 864 (1964); *but see State v. Sewell*, 342 So. 2d 156 (La. 1977) (holding that a similar statute created separate offenses).

Our determination that G.S. 14-39 creates a single offense does not entirely resolve the double jeopardy questions raised by defendant. The statute sets forth factors whose presence or absence may result in a more or less severe sentence. If these are

aggravating or sentence-enhancing factors and if they are identical to some other offense for which defendant was punished, then he may still have received multiple punishments for the same offense.

The United States Supreme Court faced a similar problem recently in *Simpson v. United States*, --- U.S. ---, 55 L.Ed. 2d 70 (1978). Defendants in *Simpson* had been prosecuted for violations of two federal statutes—18 U.S.C. § 2113 and 18 U.S.C. § 924(c). 18 U.S.C. § 2113(a) defines bank robbery and imposes a punishment for its commission of a fine of not more than $5000 or imprisonment for not more than 20 years, or both. Under 18 U.S.C. § 2113(d), this punishment may be enhanced to a fine of not more than $10,000 or imprisonment for not more than twenty-five years, or both, if the perpetrator "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 924(c) imposes a punishment of not less than one nor more than ten years imprisonment on any person who "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States." Defendants were convicted of violating both 18 U.S.C. § 2113 and 18 U.S.C. § 924(c). They each received an enhanced sentence of 25 years imprisonment under Section 2113(d) and a consecutive 10-year sentence under Section 924(c). The only evidence to support both the enhanced sentence and the Section 924(c) conviction was the fact that handguns were used in the robbery. Defendants argued that the two charges should merge for purposes of sentencing. The Court conceded that cases in which it was possible "to prove violations of two separate criminal statutes with precisely the same factual showing . . . raise the prospect of double jeopardy. . . ." --- U.S. at ---, 55 L.Ed. 2d at 76. It avoided having to decide that question, however, by finding that Congress had not meant for cumulative sentences to be imposed under 18 U.S.C. §§ 2113(d) and 924(c) and remanding for resentencing on that ground.

It is not necessary to meet the similar double jeopardy argument here, either, but on a different ground. The provisions of 18 U.S.C. §§ 2113(d) and 924(c) are, as the Supreme Court noted, "addressed to the same concern and designed to combat the same problem: the use of dangerous weapons—most particularly firearms—to commit federal felonies." --- U.S. at ---, 55 L.Ed.

2d at 75. The remedy embodied in these provisions is to deter use of firearms in commission of felonies by imposing longer or additional prison sentences when firearms are used.

Different policy considerations are involved in G.S. 14-39. It follows the pattern of the kidnapping provision, § 212.1, of the Model Penal Code, which contains a qualifying provision providing for reduced punishment in kidnapping cases if the victim is "released alive in a safe place prior to trial." The drafters of the Model Penal Code stated that the purpose of this provision is to "maximize the kidnapper's incentive to return the victim alive." Model Penal Code, Tentative Draft No. 11, § 212.1, at 19 (1960). It is reasonable to assume that the General Assembly had a similar purpose in providing reduced punishment under G.S. 14-39(b) when the victim has been released in a safe place and has not been sexually assaulted or seriously injured. Unlike 18 U.S.C. §§ 2113(d) and 924(c), which seek to deter the introduction of a dangerous element in the commission of felonies, G.S. 14-39(b) seeks to reduce the possibility of harm to a victim who is in an already dangerous situation. In other words, it is intended to offer a kidnapper the inducement of a lesser sentence if he refrains from injuring or permitting injury to his victim.

This purpose points to the key distinction between G.S. 14-39(b) and a statute like 18 U.S.C. § 2113(d). Rather than being sentence-enhancing, the factors set forth in G.S. 14-39(b) are sentence-reducing in nature. In subsection (a) of the statute, the General Assembly defines the crime of kidnapping. In the first sentence of subsection (b), it provides the punishment for *this* crime as imprisonment for not less than 25 years nor more than life. It then lists various factors, the presence of which will result in a reduced sentence.

The General Assembly has determined that kidnapping is a serious crime and has set punishment at a term of imprisonment of not less than 25 years nor more than life.[10] Out of concern for the safety of kidnapping victims, however, the General Assembly has set forth certain factors that can result in mitigation of sentence. If a defendant can show that the victim of the crime was released in a safe place and was not sexually assaulted or

10. It is noteworthy that before the enactment of new G.S. 14-39 in 1975 life imprisonment had been the prescribed punishment for kidnapping in this state, at least since 1933. *See* G.S. 14-39, 1B General Statutes 360 (1969 Replacement).

seriously injured, then he cannot be imprisoned for more than 25 years. These factors are not elements of a crime; nor are they sentence-enhancing in nature. They can, if shown, result only in a lesser sentence for a defendant. They are in this respect like any other mitigating circumstance or true affirmative defenses, *see, e.g., Patterson v. New York*, 432 U.S. 197 (1977) ("extreme emotional disturbance"); *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, --- U.S. ---, 55 L.Ed. 2d 780 (1978) (insanity); *Rivera v. Delaware*, 351 A. 2d 561, *app. denied*, 429 U.S. 877 (1976) (insanity), that defendants may take advantage of to reduce or obviate their criminal liability. When the same or similar evidence tends both to show their absence and to prove the commission of some other crime, subjecting a defendant to punishment for the other crime while not reducing his punishment for kidnapping does not offend either the Double Jeopardy or the Law of the Land Clauses.

The General Assembly might have chosen a different statutory structure and a different result might have ensued. The effect of such a different statutory structure can be seen in *Presnell v. State*, 241 Ga. 49, 243 S.E. 2d 496 (1978), in which defendant was convicted at trial of both forcible rape and kidnapping with bodily injury. The Georgia Supreme Court reversed the conviction for rape on grounds of double jeopardy,[11] stating, *id.* at ---, 243 S.E. 2d at 501:

> "The only evidence of bodily injury to support the crime of kidnapping with bodily injury . . . is the bodily injury which resulted from the rape. . . . Thus, the convictions for both kidnapping with bodily injury and forcible rape cannot be upheld."

The Georgia court was construing the following statute:

> "A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have re-

11. It should be noted that the *Presnell* court's basis for finding a double jeopardy violation was a Georgia statute that bars multiple punishment if one crime is included in another as a matter of fact or of law. *See State v. Estevez*, 232 Ga. 316, 206 S.E. 2d 475 (1974). This standard is similar to the one set forth in *Brown v. Ohio*, 432 U.S. 161 (1977), but we do not decide whether it is the same.

ceived bodily injury, the person convicted shall be punished by life imprisonment or death." Ga. Code Ann. § 26-1311 (1978).

This statutory structure is exactly the reverse of North Carolina's. Instead of providing a more severe sentence for the crime of kidnapping and then specifying factors that would reduce this sentence, the Georgia legislature chose to fix a lower sentence for the crime and then to set out aggravating factors that result in increased punishment. Though an application of the Double Jeopardy Clause might be more likely under Georgia's statute than North Carolina's, either is a permissible legislative choice. As the United States Supreme Court has recognized:

> "[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments. . . ." *Brown v. Ohio, supra* n. 11, 432 U.S. 161, 165.

[3] Defendant's argument should therefore be rejected because first, G.S. 14-39 creates only a single offense of kidnapping, and second, the factors listed in subsection (b)—release in a safe place and absence of sexual assault or serious injury—are mitigating rather than aggravating and result in a lesser rather than more severe sentence.

II

[4] While not necessary to the decision in this case, we think it desirable to set forth for the guidance of bench and bar procedures which should be followed in applying our interpretation of the kidnapping statute. Normally a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in G.S. 14-39(a). The factors set forth in subsection (b) relate only to sentencing; therefore, their existence or non-existence should properly be determined by the trial judge.

[5-7] The judge may make such a determination from evidence adduced at the trial of the kidnapping case itself or at the sentencing hearing provided for in G.S. 15A-1334 following the trial, or at both proceedings. If at either or both proceedings evidence of the existence of the mitigating factors has been presented, the judge must consider this and all other evidence bearing on the

question. If the judge is satisfied by a preponderance of the evidence, the burden being upon the defendant to so satisfy him, that the kidnapping victim was released in a safe place and was neither sexually assaulted nor seriously injured, he shall so find and may not then impose a sentence on the kidnapping conviction of more than 25 years or a fine of up to $10,000, or both.[12] If the judge is not so satisfied, he must so state on the record in which case he may impose a sentence of not less than 25 years nor more than life imprisonment. If no evidence either at trial or at the sentencing hearing is adduced tending to show the existence of the mitigating factors then the judge, without making findings, may proceed to impose a sentence of not less than 25 years nor more than life imprisonment.

[8] In any case the state may stipulate to the presence of all the mitigating factors and thereby avoid determination of the question.

The procedure here outlined comports with both state and federal constitutional requirements. The procedures prescribed for the sentencing hearing in G.S. 15A-1334(b)[13] accord due process. That the judge rather than the jury makes the crucial factual determinations upon which the ultimate sentence is based does not contravene either state or federal constitutional guarantees of a jury trial in criminal cases. Neither is it violative of constitutional due process to place the burden of persuasion as to the existence of the mitigating factors on the defendant.

[9] Although G.S. 15A-1334(b) makes inapplicable "formal rules of evidence" at the sentencing hearing, the statute does require that defendant be given an opportunity to confront and cross-examine witnesses against him and to present witnesses and arguments in his own behalf. To this we have added the requirement, solely for purposes of implementing the sentencing provisions of the kidnapping statute, that the trial judge make

12. This procedure differs from the one set forth in *Smith v. United States, supra,* 360 U.S. 1, which called for the evidence to be presented at trial. This difference is justified by the different roles played by the jury in the sentencing process. Here, sentencing is entirely a matter for the judge. There, if the jury found that the victim had not been liberated unharmed, it could recommend the death penalty.

13. That statute reads: "(b) Proceeding at Hearing.—The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing."

findings. We recognize that findings are not ordinarily required to sustain the imposition of a criminal sentence. To require them in limited circumstances, however, is not new to our jurisprudence.[14] Findings may be required as a matter of due process where the sentence proceeding itself, for example, is a new proceeding apart from the trial of the specified crime which triggered it and where the sentence imposed as a result of the findings is greater than could be imposed upon conviction of the specified crime. In considering the requirements of due process under such a sentence-enhancing procedure[15] the United States Supreme Court in *Specht v. Patterson*, 386 U.S. 605, 610 (1967) said:

> "Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed."

The requirements of *Specht* are clearly met here. *See also* the plurality opinion by Mr. Justice Stevens in *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

The extent to which the rules of evidence may be relaxed within the dictates of due process need not now be definitively resolved. Such resolution is best accomplished case by case. In *Specht* the Supreme Court found the sentencing procedure violative of due process essentially because it afforded no hearing at all and because it provided for the use of "hearsay evidence to which the person involved is not allowed access." *Specht v. Patterson*, supra, 386 U.S. at 608. *Specht*, furthermore, distinguished *Williams v. New York*, 337 U.S. 241 (1949), in which no violation of due process was found when a trial judge's determination to impose the death sentence in the face of a jury's recommendation of life imprisonment was based in part upon information contained in a presentence investigation report. In *Williams* the trial judge could have sentenced the defendant to death in his un-

14. Our Court of Appeals has consistently held that before sentencing one otherwise entitled to be sentenced as a committed youthful offender under G.S. 148-49.4 under any other sentencing provision, the trial judge must first find that the defendant would derive no benefit from being sentenced as a youthful offender. *State v. Matre*, 32 N.C. App. 309, 231 S.E. 2d 688 (1977); *State v. Worthington*, 27 N.C. App. 167, 218 S.E. 2d 233 (1975). *See also* the statutory requirements for the imposition of the death penalty, G.S. 15A-2000.

15. The Colorado Sex Offenders Act under which a defendant convicted of a specified sex offense who was thereafter found by the trial judge to be, among other things, "an habitual offender and mentally ill," could be given a more severe sentence than that specified by the sex offense itself. 386 U.S. at 607.

bridled discretion without conducting a separate hearing or making findings whereas in *Specht* the statutory scheme required a separate proceeding and new findings of fact that were not ingredients of the offense charged. While the continued validity of *Williams* in death cases has been seriously questioned in the plurality opinion in *Gardner v. Florida, supra*, suffice it to say that under our kidnapping statute these kinds of evidentiary—due process questions are unlikely to arise. Whether the victim was released unharmed and in a safe place are facts which by their nature lend themselves to proof in open court by sworn testimony.[16] They are not the kind of "background information" normally found in presentence reports or psychiatric examinations.

Our discussion of the procedure to which a defendant is due at a sentencing hearing would be wanting if we did not recall the dictates of *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962), where, in a thoroughly researched and considered opinion on the subject, Justice Clifton Moore, writing for the Court, said, *id.* at 334, 126 S.E. 2d at 132-33:

> "Sentencing is not an exact science, but there are some well established principles which apply to sentencing procedure. The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation."

After approving the use by the sentencing judge of presentence investigation reports Justice Moore wrote, further, *id.* at 335, 126 S.E. 2d at 133:

> "Unsolicited whispered representations and rank hearsay are to be disregarded. It is better practice to *receive* all reports and representations from probation officers in open court. All information coming to the notice of the court which tends to defame and condemn the defendant and to aggravate punishment should be brought to his attention before sentencing,

16. In most cases this evidence will likely be adduced during the trial of the kidnapping charge itself.

and he should be given full opportunity to refute or explain it." (Emphasis original.)

[10] Since the factors to be found here relate solely to the severity of the sentence and not to any element of the offense itself, defendant is not entitled to a jury determination under either the federal or state constitution. In part, we base this conclusion on the fact that matters having to do with severity of sentence within the range authorized by statute for a given offense have been traditionally determined by judges. *See Williams v. New York, supra*; *State v. Pope, supra.* When, however, a statute, such as the kidnapping statute under consideration, establishes two ranges of sentences and makes their imposition dependent on the presence or absence of additional facts the question of defendant's entitlement to a jury determination of these facts is more difficult. Our conclusion that there is no such entitlement here is bolstered by the proposition that the factors are mitigating rather than enhancing. By statute in North Carolina factors which enhance the punishment are generally made elements of an offense and must be alleged and proved to a jury. General Statute 15A-928, for example, requires this procedure "[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter. . . ." The same requirements prevail under our Habitual Felon Act, G.S. 14-7.1, *et seq. State v. Allen*, 292 N.C. 431, 233 S.E. 2d 585 (1977).

Most courts have, however, sustained against constitutional attack statutory procedures for sentence enhancement even when the enhancing factors are determined by the judge sitting without a jury following conviction of the primary offense. For example, the Federal Dangerous Special Offender Act, 18 U.S.C. § 3575, provides for an increased sentence if a convicted felon is later found by the judge to be a dangerous special offender, the definitions of which are set out in the Act. This procedure has been upheld by a majority of federal circuit courts against the contention, among others, that defendant is entitled to a jury trial on the question whether he is a dangerous special offender. *United States v. Williamson*, 567 F. 2d 610 (4th Cir. 1977); *United States v. Bowdach*, 561 F. 2d 1160 (5th Cir. 1977); *United States v. Stewart*, 531 F. 2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976); *but cf. United States v. Neary*, 552 F. 2d 1184 (7th Cir.), *cert.*

denied, 434 U.S. 864 (1977) (raising but not resolving constitutional questions). A majority of state courts have, likewise, upheld similar recidivist type statutes under which the trial judge determines whether a convicted felon is indeed a recidivist for purposes of enhancing the penalty under these statutes. *See, e.g., Howard v. State*, 83 Nev. 53, 422 P. 2d 548 (1967); *State v. Hoffman*, 236 Or. 98, 385 P. 2d 741 (1963), and cases cited therein; *State v. Guidry*, 169 La. 215, 124 So. 832 (1929). *See also*, Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356 (1975); Note, Recidivist Procedures, 40 N.Y.U. L. Rev. 332 (1965). *A fortiori* factors which are mitigating in nature may constitutionally be determined by the sentencing judge.

Article I, § 24 of the North Carolina Constitution guarantees the right of a jury trial to criminal defendants.[17] This section has been interpreted to mean that a criminal defendant is "entitled as of right to a jury trial as to *every* essential element of the crime charged. . . ." *State v. Lewis*, 274 N.C. 438, 442, 164 S.E. 2d 177, 180 (1968). (Emphasis original.) Since we have concluded that the mitigating factors in question are not elements of any substantive criminal offense but bear solely on the question of punishment, having the judge determine these matters is not violative of Article I, § 24.

[11] Neither do we find any constitutional infirmity in placing the burden of persuasion as to the mitigating factors on the defendant. The controlling authorities are *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom, Hankerson v. North Carolina*, 432 U.S. 233 (1977). *Winship* held that the New York Family Court Act, which provided that determinations at juvenile hearings could be made on a preponderance of the evidence, was violative of constitutional due process saying, "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, supra*, 397 U.S. at 364. Relying on *Win-*

17. "Sec. 24. *Right of jury trial in criminal cases.* No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo."

ship the Supreme Court in *Mullaney* struck down Maine's common law of homicide as being violative of due process insofar as that law required a homicide defendant to prove by a preponderance of the evidence that he killed in the heat of passion on sudden provocation in order to reduce the homicide from murder to manslaughter. In *Patterson* a majority of the Court concluded there was no constitutional infirmity in New York's statutory law of homicide which permitted a defendant accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." New York Penal Law § 125.25 (1)(a) (McKinney 1975). Under New York law the defendant had the burden to prove this affirmative defense by a preponderance of the evidence to reduce murder to manslaughter. The *Patterson* majority distinguished *Mullaney* on the ground that Maine's homicide law made a killilng in the heat of passion on sudden provocation the antithesis of malice, an essential element of the crime of murder. Therefore Maine could not, consistent with due process, relieve the state of the burden of proving malice beyond a reasonable doubt by placing upon the defendant the burden of proving that he acted with heat of passion upon sudden provocation, *i.e.*, without malice. In New York, reasoned the *Patterson* majority, malice was not an element of murder. The New York Penal Law, § 125.25, provided:

> "A person is guilty of murder in the second degree when:
>
> "1. With intent to cause the death of another person, he causes the death of such person or of a third person. . . ."

Thus in New York murder in the second degree was defined by statute to be simply causing the death of another person with intent to cause that death. The affirmative defense of acting under the influence of extreme emotional disturbance was not the antithesis of any element of the crime. Proof of it did not negate any affirmative element of the crime upon which the state must bear the burden of persuasion. The defense was more in the nature of a plea, not in negation, but in avoidance. The majority in *Patterson* said on this point, 432 U.S. at 214 n. 15:

> "There is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to

require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system. . . . Carried to its logical extreme, such a reading of Mullaney might also, for example, discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony. See Senate bill S 1, 94th Cong, 1st Sess, 118 (1975). The Court did not intend Mullaney to have such far-reaching effect."

Although *Mullaney* itself was decided unanimously, Mr. Justice Powell, its author, dissented in *Patterson* and was joined by Mr. Justice Brennan and Mr. Justice Marshall. This dissent is also noteworthy for its construction of *Mullaney*. It makes clear that *Mullaney* did not purport to preclude shifting the burden of persuasion to a criminal defendant on all factors that mitigate punishment. Mr. Justice Powell wrote, 432 U.S. at 226-27:

"The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies a fortiori if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof.

. . . .

"Moreover, it is unlikely that more than a few factors—although important ones—for which a shift in the burden of persuasion seriously would be considered will come within the Mullaney holding. With some exceptions, then, the State has the authority 'to recognize a factor that mitigates

> the degree of criminality or punishment' without having 'to prove its nonexistence in each case in which the fact is put in issue.' . . . New ameliorative affirmative defenses, about which the Court expresses concern, generally remain undisturbed by the holdings in Winship and Mullaney—and need not be disturbed by a sound holding reversing Patterson's conviction." (Footnotes omitted.)

In *Hankerson* this Court concluded that our law of homicide was violative of the Due Process Clause as that clause was interpreted in *Mullaney* insofar as it utilized certain presumptions of malice and unlawfulness in homicide cases so as to shift the burden of persuasion with regard to the non-existence of these elements to the defendant. We concluded that a defendant may not be given the burden of persuading the jury that he killed in the heat of passion, *i.e.*, without malice, in order to mitigate his crime to manslaughter or that he killed in self-defense, *i.e.*, not unlawfully, in order to excuse it altogether. These conclusions were reached because under our law of homicide both malice and unlawfulness were affirmative elements of the crime of murder in the second degree. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Heat of passion on sudden provocation is the antithesis of malice. The two concepts are mutually exclusive. Likewise self-defense is the antithesis of unlawfulness and these two concepts are mutually exclusive. Since *Winship* and *Mullaney* made it clear that the state must bear the burden of proof as to every essential element beyond a reasonable doubt, we concluded in *Hankerson* that the state must continue to bear this burden throughout the trial on the elements of malice and unlawfulness. This meant that in cases where evidence was adduced that the defendant killed in heat of passion the state must bear the burden of persuading the jury that defendant did not in fact kill in the heat of passion but that he killed with malice. Likewise where evidence was adduced of self-defense the state must continue to bear the burden of persuading the jury that the defendant did not in fact kill in self-defense but that he killed unlawfully.

The mitigating factors in the kidnapping statute, however, are not the antithesis of any essential element of the crime of kidnapping. Proof of these factors does not negate any element of the crime of kidnapping which the state must prove. The mitigating factors are, in reality, pleas in avoidance or mitigation

of punishment and not pleas in negation. Neither are they the kind of factors making "a substantial difference in punishment and stigma" which have been historically present in the Anglo-American legal tradition. Consequently, placing the burden of persuasion on these factors on the defendant would satisfy even the dissenters in *Patterson*. Clearly this procedure is within the rationale of the *Patterson* majority opinion.

Even before *Patterson* was decided a New York trial court in *People v. Archie*, 380 N.Y.S. 2d 555, 85 Misc. 2d 243 (1976), and the United States District Court for the Southern District of New York in *Farrell v. Czarnetsky*, 417 F. Supp. 987 (1976), had upheld the armed robbery section of the New York Penal Law, § 160.15, against the contention that an affirmative defense portion of the statute violated the holding of *Mullaney*. The statute provided in part as follows:

> "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> * * * * * *
>
> 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged."

If defendant proved the affirmative defense the crime was reduced from first to second degree robbery. Both courts concluded that it was no violation of due process under *Mullaney* to give the defendant the burden of persuasion on the affirmative defense. The court in *Farrell* said, 417 F. Supp. at 988:

> "Section 160.15 requires that the prosecution prove beyond a reasonable doubt that the defendant forcibly took property by the display of what appears to be a firearm. The fact that the firearm is loaded is not an essential element of the crime of robbery and the prosecution is not relieved of any of its burden of proof.

"The affirmative defense is an ameliorative device which permits the defendant to show, after his guilt has been proved, that he was unable to complete the assault he threatened with the firearm. Due process is not offended by requiring the defendant to prove, after the prosecutor has first established the display of a firearm, that the firearm was not loaded. If he does not, the jury is entitled to presume what the criminal's victim presumes, that is, that the gun is loaded."

We think, as *Patterson* subsequently demonstrated, that both the result and the reasoning in *Farrell* were correct. The mitigating factors in our kidnapping statute are of the same nature as the ameliorative affirmative defense discussed in *Farrell.* Due process does not prohibit placing the burden of persuasion on these factors on the defendant.

[12] We note one exception to the procedures we have set out above, and it applies to this case. When, as here, the question of the existence of mitigating factors has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty, there is no need for the judge to make separate findings. The nonexistence of mitigating factors will already have been determined beyond a reasonable doubt. Since the jury made such a determination in this case, the life sentences imposed upon defendant's conviction of the kidnapping charges were proper.

III

Defendant next contends that the sentences imposed by the trial court constituted cruel and unusual punishment and denied him equal protection of the laws in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He argues that the trial judge "sentenced him to serve . . . 300 years" because five of the sentences run consecutively and each life sentence is considered to be 80 years. *See* G.S. 14-2 as amended by the 1977 Session Laws, chapter 711, section 15 (effective 1 July 1978); *compare* G.S. 15A-1351, -1354, -1355, -1371. Notwithstanding the magnitude of this punishment, we find no merit in defendant's contention.

[13, 14] A sentence within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v.*

Cradle, 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied*, 396 U.S. 1024 (1970). Where the objection was really to the imposition of consecutive sentences rather than to the length of any particular sentence, this Court has specifically approved consecutive sentences. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). Here each sentence received by defendant was statutorily authorized, and nothing appears to distinguish this case from *Mitchell* and others where consecutive sentences have been upheld. We conclude that the sentences imposed did not constitute cruel and unusual punishment.

The equal protection aspect of defendant's argument is rather difficult to sort out. In essence, defendant says that it is unconstitutional for him to have received a longer sentence than others have received for similar or more serious crimes. Defendant seems at one point to suggest that he received a longer sentence because he is black and his victims are white. Beyond this mere suggestion, however, he neither pursues this argument nor points to any evidence to support it. His primary argument is that it is violative of equal protection for him to have received a longer sentence than some murderers have in similar circumstances. The short answer to this argument is that in this case no credit except that required by statute is due defendant for the fact that a murder did not occur. He shot Harrison in the head fully intending to kill him and left him for dead. Harrison lived by God's grace, not defendant's. Defendant's plea for mercy because Harrison did not die falls on deaf ears here. Furthermore there is nothing in the record to support the premise that defendant received longer sentences than others similarly convicted. His brief refers us only to *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977), where two defendants were convicted of murder in the first degree, and to the "N.C. Reports." In *Madden* both defendants received the maximum sentence available, life imprisonment. Defendant's reference to the "N.C. Reports" is so vague and indefinite as to be unavailing on this aspect of his argument. *See also State v. Benton*, 276 N.C. 641, 660, 174 S.E. 2d 793, 805 (1970).

IV

[15] Defendant's final two assignments of error which merit discussion relate to remarks made by Mr. Walker, the privately

employed prosecutor. The first of these remarks occurred as Mr. Walker objected to a portion of the jury argument by defense counsel, Mr. Blackford:

> "MR. BLACKFORD: Consider everything. Where is the physical evidence? We know one other thing—that physical evidence was obtained from Mrs. Walters; that it was obtained at Presbyterian Hospital; that it was sent to the Crime Lab. That is what we know. We know that this man when he was first apprehended, blood samples was taken from him; a combing of the pubic area was taken from him, a hair sample. Where are they today? Now, the State is duty bound. It is their obligation, according to the laws of the State of North Carolina and the United States to prove this man's guilt beyond a reasonable doubt, by solid evidence.
>
> MR. WALKER: I OBJECT TO THIS ARGUMENT. Nothing was sent to Raleigh.
>
> MR. BLACKFORD: I didn't argue that.
>
> MR. WALKER: You told the jury something was sent there.
>
> MR. BLACKFORD: I didn't say anything about Raleigh.
>
> MR. WALKER: You just got through telling them that.
>
> COURT: The jury will take their own recollection."

Defendant contends that the private prosecutor, by stating, "Nothing was sent to Raleigh," suggested to the jury the existence of other incriminating evidence and thus precluded a fair trial. The record shows that some physical evidence had been sent to Raleigh. The results of tests on that evidence had been inconclusive; they neither pointed to defendant's guilt or his innocence. The prosecutor offered this material into evidence, apparently because he thought it was exculpatory and he thought it was his duty to do so. Defendant objected, apparently feeling that the material was not exculpatory. The trial court sustained his objection. Defendant's counsel therefore knew the answer to his question, "Where is the physical evidence?" It had been excluded because of his objection. The private prosecutor's objection to his argument was well founded. What was unfortunate was his additional inaccurate statement, "Nothing was sent to

Raleigh." What we must decide is whether this inaccurate statement, in the context of a proper objection, denied defendant a fair trial.

While a prosecuting attorney may not include in his argument facts not in evidence, arguments of counsel to the jury are largely in the control and discretion of the trial court. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Ordinarily the trial judge's exercise of discretion is not reviewed unless the impropriety of counsel's remarks is extreme and clearly calculated to prejudice the jury. *State v. Taylor, supra*; *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). Nevertheless, the trial court upon objection has a duty to censor remarks not warranted by the evidence, and even in the absence of objection it is proper to correct a gross impropriety *ex mero motu*. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Monk, supra*.

Here, though perhaps technically improper, the private prosecutor's remark plainly was not extreme, nor was it clearly calculated to prejudice the jury. *Compare State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Britt, supra*. Defendant did not object or request an instruction that the jury not consider it. We perceive no abuse of discretion in the failure of the trial judge to give a corrective instruction *ex mero motu*. Nor does it appear defendant was prejudiced; the jury could have inferred from the remark the non-existence of other evidence as easily as the existence of such evidence. This assignment of error is overruled.

[16] Defendant's next assignment of error relates to Mr. Walker's own closing argument for the state. The record discloses the following:

> "MR. WALKER: I want to say that the defense lawyer must have had some sessions with him, because he handled himself . . . .
>
> MR. BLACKFORD: OBJECT to that.
>
> MR. WALKER: Well, I hope he did. I hope he talked with his client. He'd be remiss if he hadn't. I never heard of a defense lawyer . . . .

COURT: No more of the comments. Just stick with the evidence.

MR. BLACKFORD: I'd like that stricken from the record, your Honor.

COURT: Members of the jury, do not consider the comments between counsel regarding what they may or may not have done in regard to their respective clients. Do not consider that in your deliberations in this case."

The trial court's instruction to the jury was clearly sufficient, under the rules already discussed, to remedy any impropriety in the remark by the private prosecutor. Accordingly, defendant's assignment of error is overruled.

We have examined defendant's other assignments of error and find that they do not merit discussion. In the trial and the sentences imposed there was

No error.

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

JACK ADAMS, CLAUDE BROWN, HENRY DAVIS, THURMAN AND RODA M. LAWRENCE AND CROW HILL PROPERTIES (A PARTNERSHIP) v. NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES AND NORTH CAROLINA COASTAL RESOURCES COMMISSION

AND

ALPHIOUS K. EVERETT, SR., RAY HARTSFIELD, JR., JULIUS B. PARKER AND LISTON YOPP v. NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES AND NORTH CAROLINA COASTAL RESOURCES COMMISSION

No. 28

(Filed 28 November 1978)

1. Statutes § 2.1— distinction between local and general act

A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class, while a

local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class.

2. **Statutes § 2.9; Waters and Watercourses § 7— Coastal Area Management Act—coastal counties—valid legislative class**

The coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone, since, according to the legislative findings of G.S. 113A-102, the coastal lands and waters are among the State's most valuable resources; the coastal area is among the most biologically productive regions of the State and the nation; coastal waters and marshlands provide almost 90% of the most productive sport fisheries on the east coast of the U. S.; the coastal area has a high recreational and esthetic value which should be preserved; and in recent years the coastal area has been subjected to increasing pressures resulting from the expansion of industrial development, population and recreational needs.

3. **Waters and Watercourses § 7— Coastal Area Management Act—boundary of coastal area—seawater encroachment criterion**

Plaintiffs' contention that the General Assembly did not properly define the inland limits of the coastal sounds in the Coastal Area Management Act of 1974 and hence unreasonably excluded from the coverage of the Act counties which were coastal in nature is without merit, since, in order to determine the inland limits of the coastal sounds and hence the western boundary of the coastal areas, the General Assembly had to decide where the salty, marshy, coastal sounds ended and the fresh water coastal rivers began; the criterion ultimately adopted by the General Assembly was "the limit of seawater encroachment" on a given coastal river under normal conditions; and the western boundary of the coastal zone as determined by use of the seawater encroachment criterion was reasonably related to the purpose of the Act.

4. **Administrative Law § 1— delegation of legislative authority—requirements**

The constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

5. **Administrative Law § 1; Waters and Watercourses § 7—Coastal Area Management Act—proper delegation of authority to Coastal Resources Commission—guidelines—procedural safeguards**

The Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and amend the State guidelines for the coastal area, since the Act provides that the State guidelines will be consistent with goals of the coastal area management system as set forth in G.S. 113A-102; the legislative findings in G.S. 113A-102(a) and the criterion for designating areas of environmental concern in G.S. 113A-113 provide further specific standards to aid the Coastal Resources Commission in the formulation of State guidelines; the goals, policies and criteria outlined in these statutes provide the Commission with an adequate notion of the legislative parameters within which they are to operate in the exercise of their

delegated powers; and the General Assembly has subjected the actions of the Commission to an extensive system of procedural safeguards.

6. **Declaratory Judgment Act § 3— Coastal Area Management Act—unconstitutional taking of land alleged—no justiciable controversy**

Plaintiffs' contention that the Coastal Area Management Act of 1974 effected an unconstitutional taking of their land was properly dismissed in a declaratory judgment action since, at the time the action was brought, plaintiffs had no occasion to seek development permits, variances or exemptions from coverage under the Act, and they could therefore only speculate as to the effect the Act would have on the usefulness and value of their specific plots of land; such speculation did not constitute a controversy justiciable under the Declaratory Judgment Act.

7. **Declaratory Judgment Act § 3— Coastal Area Management Act—improper warrantless search power alleged—no justiciable controversy**

In a declaratory judgment action where plaintiffs alleged that the Coastal Area Management Act of 1974 authorized warrantless searches violative of the Fourth Amendment, there was no justiciable controversy with respect to that issue and the trial court properly dismissed it since plaintiffs did not allege that they had been subjected to actual searches or that they had been fined pursuant to G.S. 113A-126(d)(1)c for refusing access to investigators.

Justice COPELAND dissenting.

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

APPEAL by plaintiffs in each case from judgment of *Walker, S.J.*, 30 November 1977, at a special sitting of CARTERET Superior Court.

Plaintiffs Jack Adams, et al., instituted their action on 5 November 1976. Plaintiffs Alphious K. Everett, Sr., et al., instituted their action on 24 March 1977. Upon joint motion of plaintiffs and defendants these actions were consolidated for trial on 29 August 1977.

In this consolidated action, brought under the Declaratory Judgment Act, plaintiffs attack the constitutionality of the Coastal Area Management Act of 1974, G.S. 113A-100, *et seq.*, hereinafter referred to as the Act. Plaintiffs allege in pertinent part:

1. That the Act is a prohibited local act under Article II, section 24 of the North Carolina Constitution.

2. That the Act delegates authority to the Coastal Resources Commission (hereinafter referred to as CRC) to develop and adopt

"State Guidelines" for the coastal area without providing adequate standards to govern the exercise of the power delegated in violation of Article I, section 6 and Article II, section 1 of the North Carolina Constitution.

3. That the provisions of the Act, and the State guidelines adopted by the CRC, deprive them of their property without due process of law in violation of the Fifth and Fourteenth Amendments and in violation of Article I, section 19 of the North Carolina Constitution.

4. That Section 113A-126 of the Act authorizes warrantless searches by the CRC which are repugnant to the Fourth Amendment of the United States Constitution and Article I, section 20 of the North Carolina Constitution.

5. That the guidelines for the coastal area promulgated by the CRC exceed the powers delegated by the Act and are impermissibly inconsistent with the goals of the Act as set forth in Section 113A-102.

The Coastal Area Management Act of 1974 is a "cooperative program of coastal area management between local and state governments." (G.S. 113A-101). Its basic objective is to "establish a comprehensive plan for the protection, preservation, orderly development and management of the coastal area of North Carolina." (G.S. 113A-102(a)).

Primary responsibility for implementing the Act is given to a fifteen-member citizen panel, the CRC, all but three of whom must have expertise in a specific phase of coastal activity such as commercial fishing, coastal engineering, coastal agriculture or coastal land development, or in local government in the twenty-county coastal area. Twelve of the fifteen are nominees of local government; all are appointed by the Governor. (G.S. 113A-104).

The CRC is assisted by the Coastal Resources Advisory Council (CRAC), composed of representatives appointed by each of the twenty coastal counties, plus four from coastal multi-county planning groups and eight from coastal towns and cities, as well as marine scientists and representatives of State agencies involved in coastal programs (G.S. 113A-105(b)).

The coastal area is generally defined as including all counties bordering the Atlantic Ocean or one of the coastal sounds. G.S. 113A-103(2).

A number of activities, including certain agricultural activities, are exempted from coverage of the Act by G.S. 113A-103(5)b.

Four basic mechanisms are utilized by the Act to accomplish its objectives:

I. STATE GUIDELINES FOR THE COASTAL AREA ARE TO BE PROMULGATED BY THE CRC. G.S. 113A-106 through 108.

The CRC is to develop State guidelines for the coastal area, specifying objectives, policies and standards to be followed in public and private use of land and water in the coastal area. These guidelines are to give particular attention to the nature of development which shall be appropriate within the various types of area of environmental concern designated by the CRC. (See Part III, infra.) G.S. 113A-107. The State guidelines have a threefold effect. All county land use plans (see Part II, infra) must be consistent with the guidelines. All development permits granted (see Part IV, infra) must be consistent with the guidelines. Finally, all land policies of the State relating to acquisition, use, disposition, and classification of coastal land shall be consistent with the guidelines. G.S. 113A-108.

II. LAND USE PLANS ARE TO BE ADOPTED BY EACH COUNTY WITHIN THE COASTAL AREA. G.S. 113A-109 through 112.

A land use plan is to "consist of statements of objectives, policies, and standards to be followed in public and private use of land within the county" which shall be supplemented by maps showing the appropriate location of particular types of land or water use in particular areas. The plan shall give special attention to the protection and appropriate development of areas of environmental concern designated by the CRC. G.S. 113A-110(a). If a coastal county fails to adopt a land use plan the CRC shall promptly prepare such a plan. G.S. 113A-109. The land use plans are to be consistent with the State guidelines promulgated by the CRC. G.S. 113A-110(a). No land use plan shall become effective until it is approved by the CRC. G.S. 113A-110(f). The county land use plans have a twofold effect. No development permit shall be

issued under Part IV (infra) which is inconsistent with the approved land use plan for the county in which the development is proposed. G.S. 113A-111. No local ordinance or regulation shall be adopted within an area of environmental concern (see Part III, infra) which is inconsistent with the land use plan of the county in which said ordinance or regulation is effected. *Id.*

III. DESIGNATION OF AREAS OF ENVIRONMENTAL CONCERN BY THE CRC THROUGH RULE MAKING. G.S. 113A-113 through 115.

"The [CRC] shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof. . . ." G.S. 113A-113(a). In specifying areas of environmental concern (AEC) the CRC is to consider the criteria listed in G.S. 113A-113(b). "Prior to adopting any rule permanently designating any [AEC] the Secretary and the [CRC] shall hold a public hearing in each county in which lands to be affected are located, at which public and private parties shall have the opportunity to present comment and views." G.S. 113A-115(a). The CRC shall review the designated AEC's at least biennially. New AEC's may be added and others deleted in accordance with the procedures outlined above.

IV. PERMITS MUST BE OBTAINED FOR DEVELOPMENT WITHIN AEC's. G.S. 113A-116 through 125.

Every person before undertaking any development in any AEC must obtain a permit. G.S. 113A-118(a). Permits for major developments are obtained from the CRC and permits for minor developments are obtained in the first instance from the county in which the development is to take place. Permits for major development are obtained through a formal, quasi-judicial proceeding. G.S. 113A-122. All permit applicants for major development are entitled to a hearing in which evidence is taken and the rules of procedure applicable to civil actions are followed insofar as practicable. A transcript of this hearing is forwarded to the CRC which renders a decision supported by findings of fact and conclusions of law. *Id.* Any person directly affected by any final decision or order of the CRC may appeal to the superior court for judicial review. G.S. 113A-123. Permits for minor development are procured from the designated local official pursuant to an expedited system of review. These expedited procedures are for-

mulated at the local level. G.S. 113A-121. Any person directly affected by a decision of the designated local official may request a hearing before the CRC. *Id.* The procedure followed at this hearing is identical to that followed at hearings for major development permits. G.S. 113A-122.

The trial court upheld in all respects the constitutionality of the Act and the State guidelines promulgated by the CRC. Plaintiffs appealed to the Court of Appeals, and we allowed motion to bypass that court to the end that initial appellate review be had in the Supreme Court.

Turner, Enochs, Foster & Burnley by C. Allen Foster, Wendell H. Ott and E. Thomas Watson, attorneys for plaintiffs appellant.

Rufus L. Edmisten, Attorney General; A. C. Dawson III, Assistant Attorney General; W. A. Raney, Jr., Special Deputy Attorney General, for defendants appellee.

John S. Curry, attorney for Amicus Curiae (Natural Resources Defense Council, Inc.; Sierra Club; Conservation Council of North Carolina; New Hope Chapter of the National Audubon Society in support of appellees.)

HUSKINS, Justice:

Plaintiffs challenge the constitutionality of the Act on two grounds: (1) The Act constitutes local legislation prohibited by Article II, section 24 of the North Carolina Constitution; and (2) The Act unconstitutionally delegates authority to the Coastal Resources Commission (CRC) to develop and adopt "State guidelines" for the coastal area.

The scope of review exercised by this Court when passing on the constitutionality of a legislative act is well stated in *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781 (1936):

> "It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people."

Accord, McIntyre v. Clarkson, 254 N.C. 510, 119 S.E. 2d 888 (1961). Implicit in this presumption of constitutionality accorded to legislative acts is the principle that this Court and the General Assembly "are coordinate branches of the state government. Neither is the superior of the other." *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969). In passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly. Rather, it is the Court's duty to determine whether the legislative act in question exceeds constitutional limitation or prohibition. "If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *Id.* Thus, this Court "will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition." *McIntyre v. Clarkson, supra.*

The first issue for consideration is whether the Act is a *local act* prohibited by Article II, section 24 of the Constitution or is a *general law* which the General Assembly has the power to enact.

In distinguishing between a general law and a local act it is important to note at the outset that Article XIV, section 3 of the Constitution expressly provides that: "General laws may be enacted for classes defined by population or other criteria." In *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697 (1965), we said: "For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute 'local' if the classification is reasonable and based on rational difference of situation and condition." Thus, the mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act.

[1] The above discussion indicates that the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. A general law defines a class which reasonably warrants

special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. In sum, the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories." Ferrell, "Local Legislation in the North Carolina General Assembly," 45 N.C.L. Rev. 340, 391 (1967). This rule of reasonable classification was formally announced in *McIntyre v. Clarkson, supra*, and reaffirmed in *Treasure City, Inc. v. Clark*, 261 N.C. 130, 134 S.E. 2d 97 (1964); *Surplus Co. v. Pleasants, Sheriff, supra; Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E. 2d 67 (1972).

Plaintiffs make a two-part argument in support of their position that the Act constitutes a prohibited local act. First they contend the General Assembly may not reasonably distinguish between the coast and the remainder of the State when enacting environmental legislation; and next, that even if the coast is sufficiently unique to justify separate environmental legislation, the twenty counties covered by the Act do not embrace the entire area necessary for the purposes of the legislation. We will address these arguments *seriatim*.

[2] In support of the first contention plaintiffs argue that the natural resources and environmental needs of the coastal counties are not sufficiently unique to warrant special legislative treatment in the form of "a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." G.S. 113A-102(a). We disagree. The legislative findings on their face highlight the importance of the unique and exceptionally fragile coastal ecosystem:

> "§ 113A-102. *Legislative findings and goals.*—(a) Findings.—It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable

resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina."

The following passages from 46 N.C.L. Rev. 779 and 49 N.C.L. Rev. 889-90 help to convey the exceptional qualities of the coastal zone which make it so important to this State and the nation:

"The vast estuarine areas of North Carolina—'those coastal complexes where fresh water from the land meets the salt water of the sea with a daily tidal flux'— are exceeded in total area only by those of Alaska and Louisiana. Estuarine areas include bays, sounds, harbors, lagoons, tidal or salt marshes, coasts, and inshore waters in which the salt waters of the ocean meet and are diluted by the fresh waters of the inland rivers. In North Carolina, this encompasses extensive coastal sounds, salt marshes, and broad river mouths exceeding 2,200,000 acres. These areas are one of North Carolina's most valuable resources.

* * * *

This vast array of land and water combines to provide one of the largest relatively unspoiled natural areas on the eastern coast of the United States. . . . This massive

ecosystem provides food, cover, nesting and spawning areas for countless finfish, shellfish, waterfowl, and fur and game animals."

The above cited legislative findings are confirmed by the trial record and indicate that the unique, fragile and irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment. We conclude that the coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone. *Accord, Toms River Affiliates v. Department of Environmental Protection,* 140 N.J. Super. 135, 355 A. 2d 679 (1976); *Meadowlands Regional Development Agency v. State,* 112 N.J. Super. 89, 270 A. 2d 418 (1970), *aff'd.* 63 N.J. 35, 304 A. 2d 545 (1973). *See generally, Turnpike Authority v. Pine Island,* 265 N.C. 109, 143 S.E. 2d 319 (1965).

Plaintiffs' contention that the environmental problems of the mountains and piedmont are equally deserving of legislative attention is not a valid constitutional objection to the Act in light of our finding that the coastal area is sufficiently unique to warrant special legislative attention. "[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. . . . It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs." *Silver v. Silver,* 280 U.S. 117, 74 L.Ed. 221, 50 S.Ct. 57 (1929). *See generally, Mobile Home Sales v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542 (1970).

[3] In the second part of their argument plaintiffs contend the General Assembly did not properly define the inland limits of the coastal sounds in G.S. 113A-103(3) and hence unreasonably excluded from the coverage of the Act counties which were coastal in nature. It should be noted that the inland limits of the coastal sounds in effect constitute the western boundaries of the coastal zone for purposes of the Act.

Plaintiffs' argument requires us to consider whether the General Assembly, in defining the inland limits of the coastal sound, drew boundary lines which were reasonably related to the

purposes of the Act. In determining this issue it is well to note that "[w]hile substantial distinctions . . . are essential in classification, the distinctions need not be scientific or exact. The Legislature has wide discretion in making classifications." *McIntyre v. Clarkson, supra.* Thus, in reviewing the General Assembly's definition of the inland limits of the coastal sounds this Court recognizes that the constitutional prohibition against local legislation does not require a perfect fit; rather, it requires only that the legislative definition be reasonably related to the purpose of the Act. The following passage from Justice Holmes explains the reason why the law-making body generally has broad discretion in making classifications and illuminates the nature of the task faced by the General Assembly in defining the inland limits of the coastal sounds:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or a point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say it is very wide of any reasonable mark. [Citation omitted.]" *Louisville Gas Co. v. Coleman,* 277 U.S. 32, 72 L.Ed. 770, 48 S.Ct. 423 (1928) (dissenting opinion).

To evaluate the legislative definition of the inland limits of the coastal sounds in its proper context, we must first examine the definition of coastal area in G.S. 113A-103(2). The coastal area is defined as those counties "that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean . . . or any coastal sound." This statutory definition of coastal area accurately reflects the unique geography of our coastal area. Some coastal counties are bounded by the Atlantic Ocean while others are bounded not by the ocean but by shallow, swampy, fertile coastal sounds which lie to the landward side of our extensive system of barrier islands known as the Outer

Banks. The coastal sounds, of course, are the heart of the coastal area. *See generally,* Note, 49 N.C.L. Rev. 888-92 (1971).

These saltwater coastal sounds are in turn fed by the fresh water coastal rivers. One of the unique features of the North Carolina coastal zone is that its salty coastal sounds are contiguous with the fresh water coastal rivers. In fact, the sounds represent the mouths of the coastal rivers. *See generally,* G.S. 113A-103(3) for the names of the coastal sounds and rivers. Thus, in order to determine the inland limits of the coastal sounds and hence the western boundary of the coastal areas the General Assembly had to decide where the salty, marshy, coastal sounds ended and the fresh water coastal rivers began.

It is evident from the record that the boundaries of the coastal area could not be formulated with mathematical exactness. Affected by a number of varying conditions, the reaches of saltwater intrusion and tidal influence vary markedly from time to time and are thus incapable of exact determination. The criterion ultimately chosen by the General Assembly to distinguish the salty coastal sounds from the fresh water coastal rivers which fed into the sounds was "the limit of seawater encroachment" on a given coastal river under normal conditions. G.S. 113A-103(3). In effect, the limits of the coastal sounds were defined as those points on the coastal rivers where the salt content of the water measured below a scientifically determined amount.

The General Assembly added two refinements to the seawater encroachment criterion. The limits of seawater encroachment were legislatively established as the confluence of a given coastal river with an easily identifiable tributary near to but not always at the points indicated as the farthest inland reach of seawater encroachment. G.S. 113A-103(3). Given the difficulty of determining the precise location of the inland extent of seawater encroachment, we think the points of confluence provided a convenient method of implementing the seawater encroachment criterion. The General Assembly also excluded from the coverage of the Act all counties which adjoined a point of confluence and lay entirely west of said point. *Id.* Two counties—Jones and Pitt—were excluded from the coverage of the Act as a result of this exemptive clause. The record shows that these coun-

ties were not coastal in nature and contained insignificant quantities of coastal wetlands. We agree with the conclusion of the trial court that the slight extent of seawater encroachment into these two counties was of no significance to an accurate and reasonable definition of the coastal area.

We conclude that the western boundary of the coastal zone as determined by use of the seawater encroachment criterion is reasonably related to the purpose of the Act. The record shows, and a look at any map of eastern North Carolina will confirm, that the twenty counties included within the purview of the Act under the statutory definition of coastal area are the counties which are substantially bounded by the large open bodies of water which may be logically, scientifically, or otherwise, considered to be coastal sounds. The coastal area as defined includes all those counties which intimately affect the quality of North Carolina's valuable estuarine waters. We thus hold that the Act is a general law which the General Assembly had power to enact.

Since we hold that the Act is a general law we need not determine whether it relates to or regulates one of the subjects as to which the Constitution prohibits local legislation. *See* N.C. Const., art. II, § 24.

The second issue for determination is whether the Act unconstitutionally delegates authority to the CRC to develop, adopt and amend "State guidelines" for the coastal area. *See* G.S. 113A-107.

[4] Article I, section 6 of the North Carolina Constitution provides that the legislative, executive and judicial branches of government "ought to be forever separate and distinct from each other." Legislative power is vested in the General Assembly by Article II, section 1 of the Constitution. From these constitutional provisions we glean the bedrock principle "that the legislature may not abdicate its power to make laws or delegate its *supreme* legislative power to any coordinate branch or to any agency which it may create." *Turnpike Authority v. Pine Island, supra.* It is obvious that if interpreted literally the Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine

would unduly hamper the General Assembly in the exercise of its constitutionally vested powers. *See, e.g., Turnpike Authority v. Pine Island, supra; Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310 (1953). A modern legislature must be able to delegate—in proper instances—"a *limited* portion of its legislative powers" to administrative bodies which are equipped to adapt legislation "to complex conditions involving numerous details with which the Legislature cannot deal directly." *Turnpike Authority v. Pine Island, supra,* 265 N.C. at 114; *Coastal Highway v. Turnpike Authority, supra,* 237 N.C. at 60. Thus, we have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. *See, e.g., Hospital v. Davis,* 292 N.C. 147, 232 S.E. 2d 698 (1977); *Guthrie v. Taylor,* 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied,* 406 U.S. 920 (1972), and cases cited therein.

The task of determining whether a particular delegation is accompanied by *adequate guiding standards* is not a simple one. The difficulties involved in making that determination were succinctly summarized by Justice Sharp, now Chief Justice, in *Jernigan v. State,* 279 N.C. 556, 184 S.E. 2d 259 (1971): "The inherent conflict between the need to place discretion in capable persons and the requirement that discretion be in some manner directed cannot be satisfactorily resolved." In her commentary the Chief Justice clearly perceives that the purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. *See generally, Guthrie v. Taylor, supra.* In applying this test we must recognize that if the General Assembly is to legislate effectively it must have the capacity in proper instances to delegate authority to administrative bodies. On the other hand, it is our duty to insure that all such delegations are indeed necessary and do not constitute a total abdication by the General Assembly. We concur in the observation that "[t]he key to an intelligent application of this [test] is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is

not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." Glenn, The Coastal Management Act in the Courts: A Preliminary Analysis, 53 N.C.L. Rev. 303, 315 (1974).

In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the circumstances permit." *Turnpike Authority v. Pine Island, supra. See also, Jernigan v. State, supra.* When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to "insure that the decision-making by the agency is not arbitrary and unreasoned." Glenn, *supra.* Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. *See* K. Davis, 1 Administrative Law Treaties, § 3.15 at p. 210 (2d ed. 1978).

[5] Applying these principles to the case *sub judice* we conclude that the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area.

The State guidelines are designed to facilitate state and local government compliance with the planning and permit-letting aspects of the Act. G.S. 113A-108. Land use plans adopted by the coastal counties must be consistent with the guidelines. *Id.* No permit for development within the AEC's shall be granted which

is inconsistent with the guidelines. *Id.* Finally, State land policies governing the acquisition, use, and disposition of land by State departments and agencies and any State land classification system must be consistent with the guidelines. *Id.*

The Act states that "State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area." G.S. 113A-107(a). The Act then provides: "Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102." *Id.* These legislative goals are spelled out as follows in subsection (b) of G.S. 113A-102:

> "(b) Goals.—The goals of the coastal area management system to be created pursuant to this Article are as follows:
>
> (1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;
>
> (2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;
>
> (3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;
>
> (4) To establish policies, guidelines and standards for:
>
> a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to

intensive use or development, as well as areas of significant natural value;

b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;

c. Recreation and tourist facilities and parklands;

d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;

f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;

g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article."

We also note that the legislative findings in G.S. 113A-102(a) and the criteria for designating AEC's in G.S. 113A-113 provide further specific standards to aid the CRC in the formulation of State guidelines.

In our view the declarations of legislative findings and goals, articulated in G.S. 113A-102 and the criteria for designating AEC's in G.S. 113A-113 are "as specific as the circumstances permit." *Turnpike Authority v. Pine Island, supra.* In reaching this conclusion we note that the process of developing and adopting detailed land use guidelines for the complex ecosystem of the coastal area is an undertaking that requires much expertise. Legislative recognition of this need is reflected in the composition of the CRC, which is to consist of fifteen members—twelve of whom are required to have expertise in different facets of coastal

problems. G.S. 113A-104. The goals, policies and criteria outlined in G.S. 113A-102 and G.S. 113A-113 provide the members of the CRC with an adequate notion of the legislative parameters within which they are to operate in the exercise of their delegated powers.

In addition to providing the CRC with a comprehensive set of legislative standards, the General Assembly has subjected the actions of the CRC to an extensive system of procedural safeguards. In effect, the General Assembly has furnished both the standards which are to guide the CRC in the exercise of its delegated powers and a procedural framework which insures that the CRC will perform its duties fairly and in a manner consistent with legislative intent.

There are four sources of procedural safeguards: (1) those provided by the Act, (2) those contained in the North Carolina Administrative Procedure Act (APA), (3) the Administrative Rules Review Committee created by G.S. 120-30.26 and (4) the "Sunset" legislation enacted by the 1977 General Assembly, G.S. 143-34.10, *et seq.*

Initially, section 113A-107 of the Act sets forth in detail the procedures to be followed by the CRC in the adoption and amendment of the State guidelines. These include submission of the proposed guidelines for review and comment to the public, to cities, counties, and lead regional organizations, to all State, private, federal, regional and local agencies which have special expertise with respect to environmental, social, economic, esthetic, cultural, or historical aspects of coastal development. Copies of the adopted guidelines must be filed with both Houses of the Legislature and the Attorney General. The CRC is also to mail copies of the adopted guidelines to all cities, counties, lead regional organizations, and to appropriate citizens and agencies. These broad provisions for input and review by groups representing all levels and types of agencies and interests provide a substantial curb against arbitrary and unreasoned action by the CRC. Additionally, the guidelines must be reviewed by the CRC every five years, although they may be reviewed from time to time as necessary. G.S. 113A-107(f). Any proposed amendments must follow these same procedures for public scrutiny before they can be adopted. Certified copies of any amendments must be filed with the Legislature.

Secondly, amendments to the State guidelines by the CRC are considered administrative rule-making under G.S. 150A-10 and thus subject to the comprehensive additional safeguards contained in the Administrative Procedure Act. G.S. 150A-1 *et seq.* The APA sets forth specific and mandatory guidelines for rule-making, including requirements for public hearings and publication of all agency rules. The mandatory provisions of the APA must now be read as complementing the procedural safeguards in the Act itself. *See* G.S. 150A-9 through 17.

Thirdly, pursuant to G.S. 120-30.24 *et seq.*, all rules adopted by the CRC are subject to review by a permanent committee of the Legislative Research Commission known as the Administrative Rules Committee. The purpose of this legislative scrutiny is to determine whether the agency whose rules are under review "acted within its statutory authority in promulgating the rule." G.S. 120-30.28(a). An elaborate review procedure is established whereby the Administrative Rules Committee and the Legislative Research Commission lodge objections to a particular rule with the appropriate agency. If the agency does not act upon the recommendations of the Commission, the Commission "may submit a report to the next regular session of the General Assembly recommending legislative action." G.S. 120-30.33.

Finally, under the "Sunset" legislation, entitled "Periodic Review of Certain State Agencies," G.S. 143-34.10 *et seq.*, the CRC is subjected to review by the Governmental Evaluations Commission, G.S. 143-34.16 and .17; to public hearings held by the Governmental Evaluations Commission, G.S. 143-34.18; and to hearings and recommendations of legislative committees. G.S. 143-34.19. The Act will stand repealed effective 1 July 1981 unless revived by legislative action. G.S. 143-34.12.

We conclude that the authority delegated to the CRC is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. We therefore hold that the General Assembly properly delegated to the CRC the authority to prepare and adopt State guidelines for the coastal area.

[6] At the trial of this case plaintiffs contended the Act effected an unconstitutional taking of their land and that the Act authorized warrantless searches violative of the Fourth Amendment. At

the close of plaintiffs' evidence, the trial judge ruled that no genuine and justiciable controversy existed as to these issues and granted defendants' motion to dismiss on these issues. Plaintiffs assign this ruling as error.

We have said many times that "an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949). *See generally, Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), and cases cited therein. An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations." *Lide v. Mears, supra.* As Justice Seawell stated in *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450 (1942): "The [Declaratory Judgment Act] does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." In sum, the sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions, is fully applicable to the Declaratory Judgment Act. *See generally,* K. Davis, Administrative Law Text, § 21.01 at p. 396 (3d ed. 1972).

We now proceed to determine whether plaintiffs allege an actual, genuine existing controversy with respect to the "taking" and "search" issues.

The gist of plaintiffs' contention on the taking issue is that designation of their land as an "interim" area of environmental concern by the CRC, G.S. 113A-114, and as a "conservation area" by the local land-use plans, in practical effect determines that their property will be formally designated eventually as an AEC under G.S. 113A-115 and that all applications for development permits will be denied on the ground that all development is inconsistent with the classification of their property as a conservation area. *See* G.S. 113A-120(a)(7).

We think it apparent that there has been no "taking" of plaintiffs' property which gives rise to a justiciable controversy at this time. Plaintiffs' assertion that their property has been "taken" by the Act rests on *speculative* assumptions concerning which a declaratory judgment will not be rendered. "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931).

A brief examination of relevant provisions of the Act demonstrates that plaintiffs' apprehension of diminished land values is premature and hence not justiciable.

At the outset we note that permits must be sought to develop land which falls within an AEC. G.S. 113A-118. It is further noted that the designation of land as an interim AEC under G.S. 113A-114 "does not subject development to a permit requirement; it merely requires the developer to give the state sixty days notice before undertaking the proposed activity." Schoenbaum, The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina, 53 N.C.L. Rev. 275, 290 (1974). Before an area can be designated as an AEC the CRC must engage in full-blown administrative rule-making with public participation and consideration of factors enumerated in G.S. 113A-113. Before a permit request can be granted or denied the CRC must hold a quasi-judicial hearing and make written findings of fact and conclusions of law. G.S. 113A-122. An applicant may appeal the decision of the CRC to the superior court and then to the Court of Appeals as a matter of right. G.S. 113A-123; G.S. 7A-27(b). Significantly, the Act also provides that in his appeal of a permit denial the applicant may also litigate the question whether denial of a permit constitutes a taking without just compensation. G.S. 113A-123(b). Moreover, the Act exempts certain activities from its coverage, G.S. 113A-103(5)b, and also permits landowners to request a variance from the CRC. G.S. 113A-120(c).

It is evident that plaintiffs are in no position at this point to obtain a declaratory judgment determining whether the provi-

sions of the Act have impermissibly impaired the usefulness and value of their land. At the time this case was tried few determinations which could lead to a genuine controversy over the taking of plaintiffs' land had been made. Although some land had been designated as an AEC, no development permits were required until 1 March 1978, the "permit changeover date" designated by the Secretary of the Department of Natural and Economic Resources pursuant to G.S. 113A-125. *See* G.S. 113A-118(a). The remainder of plaintiffs' land was designated as an "interim" AEC and was not subject to a permit requirement. Thus, at the time this case was tried plaintiffs had no occasion to seek development permits, variances, or exemptions from coverage. Hence, they could only speculate as to the effect the Act would have on the usefulness and value of their specific plots of land. A "suspicion" that all development permits within AEC's will be denied does not constitute a controversy within the meaning of our cases. *Tryon v. Power Co., supra.* Accordingly, we affirm the ruling of the trial judge that there is no justiciable controversy on the taking issue entitling plaintiffs to relief under the Declaratory Judgment Act.

[7] For similar reasons we conclude that plaintiffs do not allege an actual or presently existing controversy with respect to the "search" issue. G.S. 113A-126(d)(1)c permits the CRC to assess a civil penalty of not more than one thousand dollars against any person who refuses entry to premises—"not including any occupied dwelling house or curtilage"—to an official of the CRC who is conducting an investigation authorized by the Act. Plaintiffs contend this provision authorizes warrantless searches in violation of the Fourth Amendment. However, plaintiffs did not allege that they had been subjected to actual searches or that they had been fined for refusing access to investigators. Since plaintiffs failed to allege a controversy as to an actual search it follows that the trial court was without jurisdiction to pass upon the constitutionality of this provision.

Plaintiffs contend the State guidelines adopted by CRC dealing with land-use planning in the coastal area, 15 NCAC 7B, exceed the authority granted by the Act and therefore the guidelines so adopted are void. Plaintiff's argument on this issue, however, is couched in generalities which make it difficult for us to pinpoint where and in what manner the State guidelines adopted by CRC allegedly exceed the authority granted to it. *Cf.*

State v. Kirby, 276 N.C. 123, 171 S.E. 2d 416 (1970). Nonetheless, we have examined the guidelines in light of the arguments and find the arguments unpersuasive. Further discussion will serve no useful purpose. This assignment is overruled.

Plaintiffs contend the trial court erred in excluding plaintiffs' Exhibit No. 35. Plaintiffs argue that this exhibit was relevant to the determination of the local act issue. Conceding, without deciding, that the trial court erred in excluding plaintiffs' Exhibit No. 35, we are of the opinion that admission of this exhibit would not have changed the result on the local act issue and its exclusion, if error, was harmless error. *See State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); 1 Stansbury's North Carolina Evidence § 9 (Brandis Rev. 1973).

For the reasons stated the judgments appealed from are

Affirmed.

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

Justice COPELAND dissenting.

Article II, Section 24 of the North Carolina Constitution declares that "[t]he General Assembly shall not enact any local, private or special act or resolution" which falls within certain designated categories. Thus, there must be a two-prong analysis to determine whether a law is a prohibited local act or a valid general one.

First, the act in question must be local, which means,

> "primarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole state, . . . or [applies] to the property and persons of a limited portion of the state, . . . or is directed to a specific locality or spot, as distinguished from a law which operates generally throughout the state." *McIntyre v. Clarkson*, 254 N.C. 510, 518, 119 S.E. 2d 888, 893 (1961).

By necessity, however, this Court has recognized that not every valid law does by definition apply equally to all areas of the State.

"A law is general in the constitutional sense when it applies to and operates uniformly on all members of any class of persons, places or things *requiring* legislation peculiar to itself in matters covered by the law." *State v. Dixon*, 215 N.C. 161, 171, 1 S.E. 2d 521, 526 (1939) (Barnhill, J., concurring), quoted in *McIntyre v. Clarkson, supra* at 520, 119 S.E. 2d at 895. (Emphasis added.)

An examination of the Coastal Area Management Act (the Act) itself warrants the conclusion that this piece of legislation is nothing more than a device enabling the implementation of conservation and land-use management. G.S. 113A-102(b) sets forth the goals of the Act, which include insuring the development and preservation of the land, water and natural resources and setting guidelines for economic development, recreation facilities, historical and cultural enhancement and transportation in the coastal area. While these results are unquestionably desirable, no one would seriously contest that they can and should apply to all of North Carolina.

It is important to note that the Act merely lays out these broad policies and sets up the system by which the goals are to be reached, specifically through a Coastal Resources Commission and a Coastal Resources Advisory Council working with local governments. I do not doubt that economic, conservation and environmental problems differ significantly among various areas throughout the State. However, these problems are specifically dealt with outside the Act by the bodies set up for that purpose.

The trial court overlooked this fact when it found that "[a] comprehensive management plan of the type envisioned by the CAMA would be beneficial in dealing with problems in other regions of North Carolina, however, the uniqueness of the problems in the coastal area provided a rational basis for inclusion of the counties covered by the Act." In fact, the legislation in question does not even attempt to deal with these "unique" problems. Furthermore, a comprehensive statewide land-use management act is possible, viable and reasonable. *See, e.g.*, Land Policy Act of 1974, N.C.G.S. §§ 113A-150 *et seq.*

The majority of this Court cites the legislative findings and goals in G.S. 113A-102 as signifying the importance and uniqueness of our coastal area, such that it can be singled out for this special treatment. The Mountain Area Management Act, Senate Bill 973, 1973 Session, which was introduced the same time as the

Coastal Area Management Act but was not enacted, states its legislative goals in proposed § 113A-137.

> "It is hereby determined and declared as a matter of legislative finding that the mountain area including its land and water resources is one of the most valuable areas of North Carolina. The forest and mineral resources of the region are of major importance to the economy of the State and nation. The clear and unpolluted streams, the vast forests, and the scenic vistas of the mountain region make it one of the most esthetically pleasing regions of the State and nation. Because of these features the mountain area of North Carolina has an extremely high recreational and esthetic value which should be preserved and enhanced.
>
> The mountain area in recent years has been subjected to increasing pressures which are the result of the often conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the mountain area which make it economically, esthetically and ecologically rich will be destroyed. The General Assembly, therefore, finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the mountain area of North Carolina.

This language is virtually identical in all possible respects to G.S. 113A-102, quoted above in the majority opinion.

The second question which must be answered to determine if a law is a prohibited local act is whether it falls within one of the subject matters listed in N.C. Const. art. 2, § 24. The trial court found that the Act "relates to health, sanitation and the abatement of nuisances and to non-navigable streams and CAMA regulates labor, trade, mining and manufacturing." It thus determine that the Act comes within three of the categories listed in our Constitution.

Although defendants except to this finding, I feel that their argument is without merit. For instance, G.S. 113A-102 dictates that guidelines must be set as to "economic development of the

coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments." Clearly these relate to the regulation of trade. Moreover, the same section of the Act states that "water resources shall be managed in order to preserve and enhance water quality." Again, I do not see how water pollution does not relate to "health, sanitation, and the abatement of nuisances." *See also* Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. Rev. 303, 306-07 (1974).

In summary, the North Carolina Constitution forbids the Legislature to enact local laws that deal with certain topics. It was determined that concern over these subject matters embrace the entire State. The Coastal Area Management Act is such a prohibited local law; therefore, it is unconstitutional.

For the foregoing reason, I respectfully dissent.

STATE OF NORTH CAROLINA v. PAUL AUSTIN HAYWOOD, JOHN WILLIAM BROWN, JAMES LEWIS WATKINS, AND RONALD EUGENE COVINGTON

No. 83

(Filed 28 November 1978)

1. Assault § 14.2; Robbery § 4.3— assault with deadly weapon—robbery with firearm—sufficiency of evidence

In a prosecution against four defendants for assault with a deadly weapon and robbery with firearms, the following evidence was sufficient to support a finding by the jury that the four defendants were friends acting in concert, that each was aiding and abetting the others in the robbery, and that all were principals in the crimes charged: defendant Brown was identified by the victim as the person who beat him in the face with a "long type weapon" and defendant Watkins as the man wearing a "yellow tank top" whom a witness saw a few minutes later walking away from the victim as he lay in the door of the store crying for help; defendant Watkins owned the automobile which several witnesses saw at the grocery store before and after the victim was shot; at least three and perhaps four of the defendants went into the grocery store; when the getaway car would not crank after defendants left the store, Watkins remained to start the car while the others fled behind the store where Watkins picked them up; when a patrolman spotted the getaway car, all

defendants except the driver were crouched down in the car; and when all defendants had been removed from the car, a hoe handle and three guns, including the one used in the assault, were found in plain view on the floorboard.

2. **Criminal Law § 35— declaration against penal interest—no right of codefendants to have statement admitted**

In a prosecution of four defendants for assault with a deadly weapon and robbery with firearms, the trial court did not err in excluding an alleged declaration against penal interest made by one defendant on the ground that he was not warned of his constitutional right to remain silent, and the other defendants were not entitled to have the statement admitted to exonerate them, since the statement in fact only implicated the defendant who made it and did not exonerate the other defendants, and the court's ruling in excluding the statement was in accord with Supreme Court decisions holding that the defendant in a criminal case may not introduce in evidence a third person's extrajudicial confession that he committed the crime for which the defendant is being tried.

3. **Criminal Law § 35— declarations against penal interest—conditions for admission**

It is in the best interests of the administration of justice that declarations against penal interest be admitted under the following conditions: (1) The declarant must be dead; beyond the jurisdiction of the court and the reach of its process; suffering from infirmities of body or mind which preclude his appearance as a witness either by personal presence or by deposition; or exempt by ruling of the court from testifying on the ground of self-incrimination, and the party offering the declaration must show that he has made a good-faith effort to secure the attendance of the declarant; (2) The declaration must be an admission that the declarant committed the crime for which defendant is on trial, and the admission must be inconsistent with the guilt of the defendant; (3) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and he must have understood the damaging potential of his statement; (4) The declarant must have been in a position to have committed the crime to which he purportedly confessed; (5) The declaration must have been voluntary; (6) There must have been no probable motive for the declarant to falsify at the time he made the incriminating statement; and (7) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness. The admissibility of a declaration against penal interest will be determined by the trial judge upon a voir dire out of the presence of the jury.

4. **Criminal Law § 113.6; Robbery § 5.4— four defendants—determination of guilt individually—lesser offenses—jury instructions proper**

Defendants' contentions that the trial judge pushed the jury to a verdict against all four defendants, never gave the jury an opportunity to convict less than all the defendants and erred in failing to submit lesser included offenses of common law robbery and accessory after the fact to the robbery and assault are without merit, since there was no intimation by the judge that the jury

should find any or all of the defendants guilty; the judge gave separate mandates relating to each charge and each defendant individually so that the jury could not have understood that, if they found one defendant guilty, they would have to find all four guilty; and all the evidence tended to show that the robbery with which defendants were charged was a robbery with firearms, and the uncontradicted evidence of the State tended to show that all of the defendants conspired to rob the store and those who did not enter were outside ready to assist those who did.

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

APPEAL by defendants under G.S. 7A-27 from *Martin (Perry), J.*, 13 December 1976 Session of the Superior Court of SAMPSON, docketed and argued as Case No. 25 at the Fall Term 1977.

Upon indictments, proper in form, each of the four defendants was prosecuted for the crimes of assault with a deadly weapon with intent to kill and inflicting serious injury (G.S. 14-32(a) (1969)) and for robbery with firearms (G.S. 14-87, Cumm. Supp. 1975). Upon the State's motion, and with defendants' consent, the four cases were consolidated for trial pursuant to G.S. 15A-926(b)(2) (1975). Linda Evette Watkins, the wife of defendant Watkins, was a fifth defendant. She entered a plea of guilty of common-law robbery and was, therefore, not a codefendant in this case.

Defendants offered no evidence. The State's evidence tended to show:

On 7 September 1976 Aaron Jackson, the operator of Jackson's Red & White Grocery on College Street in Clinton, opened his store sometime between 7:30 and 8:00 a.m. Shortly thereafter a man grabbed him from behind and hollered, "Get the money; get the money!" When his assailant threw him to the floor Jackson's .38 caliber pistol (serial number 75J816, State's Exhibit 1-a) fell from his rear pocket, and a second man picked it up. The two men then started beating on Jackson and seriously injured him. He was stomped and shot through the left arm and finger, and finally he was shot in the back with his own pistol when he ran to the door. Prior to the robbery Jackson, 56 years old, had been in perfect health. The shooting left him paralyzed from the waist down. Jackson's pistol, the only item taken from the store, was valued at $115.00.

Jackson identified defendant Brown as the man who was beating him in the face with a hoe handle, which he described as "a long type weapon." However, he could neither identify the man who grabbed him from behind nor say how many persons were in his store at the time of the robbery. Jackson testified that while the two men were assaulting him "there was one that was running down the aisle, that [he] didn't see . . . it sounded like he was running toward the back of the store."

Several witnesses testified that on the morning of 7 September 1976 they saw a green automobile occupied by five black persons in the parking lot at the Red & White Grocery. Gretha Jackson passed within one foot of this car as she went in and out of the store before going to her work across the street. The right front door of the car was open, and she saw a man under the wheel, a woman beside him. She also observed three men in the back seat. Miss Jackson, who later identified this woman as Linda Evette Watkins, heard sounds "like firecrackers" as she crossed the street after leaving the store, but she did not look back.

James Johnson, the driver of a city garbage truck, also saw an automobile, which he described as a green and black 1970 Monaco, parked beside "the Red & White." He observed three black males sitting in the back seat, a black male in the driver's seat, and a black female sitting beside him. "The car had D.C. License tags." After Johnson had driven around the block and passed back by the Red & White he parked farther down on College Street near its intersection with Highway 701. While there the car he had seen parked at the Red & White passed him and turned north on Highway 701 at the stop light. At that time he saw only one person in the car.

On the morning of 7 September 1976 Mrs. Faye Gaddy and her young son were at the Red & White waiting for Mr. Jackson to open the store. At that time she noticed a green Dodge Monaco with an out-of-state license in the parking lot. Outside the store, she saw a black man wearing "a yellow tank top." After taking her son to school, she drove back by the Red & White and, as she did so, "she heard someone hollering, 'Help me, help me.' " She slowed down and observed Mr. Jackson lying in the door and "this same black male was walking away from him." This man got

into the car and then "picked up three more [black people] around behind the store."

That night, from a group of photographs, Mrs. Gaddy picked out defendant Watkins as the man she had seen at Jackson's Store that morning. In the photograph he was not wearing the yellow tank shirt he had worn that morning. In court she testified that "[s]he is as positive as she can be that James Watkins is the black man she saw at the Red & White and there is only a very slim chance of a mistake."

Another witness, Bernice Gautier, who owns a body shop about 250 feet from Jackson's Red & White, "heard a shooting over at Jackson's and heard Mr. Jackson begging for help." He observed Jackson lying about halfway out of his door and then saw two or three people "come out this side of the grocery," run to a dark green Dodge, and then jump out of the car because it would not crank. However, one man stayed in the car and got it started. He then drove around to the back of the store, got the others, and pulled out of the driveway headed toward Highway 701. All the people Gautier saw were black and the car had "out-of-state license tags."

Captain Leo Benson and Lieutenant Goodwin of the Clinton Police arrived at the Red & White soon after 8:00 a.m., before Mr. Jackson was taken to the hospital. Near the door, on the floor between aisles 3 and 4, Lieutenant Goodwin found a .32 caliber bullet (Exhibit 5-b). Frances Warrick, an employee of Mr. Jackson's, found a .38 bullet (Exhibit 5-a) on a shelf of a gondola in the store and gave it to Lieutenant Goodwin. After talking with Mrs. Gaddy, Gautier, and Johnson, who gave him information substantially in accord with their testimony as set out above, Benson radioed the police dispatcher "to put it on the pen system" that the green Dodge, which had been seen at the grocery at the time Jackson was shot, was traveling north on Highway 701 toward Newton Grove, I-95, and Smithfield.

About 8:50 a.m. Highway Patrolman Mason was instructed to look for a two-toned green Dodge with D.C. license plates and occupied by five black persons. He encountered a two-toned green Dodge with D.C. license plates on Highway 701, five or six miles north of Newton Grove. When Mason came upon the car it was being followed by a Newton Grove Police car, the driver of which

"pointed toward the car." At that time, however, the only visible occupants of the Dodge were a man and woman in the front seat. The vehicle stopped upon Mason's signal and the driver, defendant Watkins, got out of the car. He was wearing a gold or yellow tank or tee shirt and Bermuda shorts. When Mason, who was armed with a pump shotgun, saw a knee or leg move in the back seat he backed up and ordered Watkins to lay down on the ground. Two other patrolmen soon arrived and Watkins was handcuffed. Then, using the public address system the patrolmen ordered the other occupants of the car to come out one at a time with their hands up.

After all defendants were handcuffed Mason went to the car they had just vacated. Its motor was still running and three pistols were visible on the floorboard in the rear. A .32 caliber Harrington-Richardson pistol (Exhibit 2-a) was to the left of the hump; a longer gun, a .22 caliber Harrington-Richardson (Exhibit 3-a) was on the hump, about halfway under the seat; the .38 caliber pistol (Exhibit 1-a) was to the right of the hump.

Without touching anything in the car, Mason cut off the motor, locked the car and summoned a wrecker. In accordance with Mason's instructions, the operator, Cecil Fields, deposited the locked car at Hall's Garage. He then delivered the keys to Lieutenant Goodwin, who had been assigned to investigate the robbery and shooting at Jackson's Red & White.

Sometime after 9:00 a.m. on 7 September 1976 Captain Benson saw defendant Watkins "at the Magistrate's Office." He was wearing a yellow-gold tank shirt and Bermuda shorts. That afternoon at the police department Benson photographed all the defendants. At their request he went to Hall's Garage, removed their clothes from the trunk of the Dodge, and took them to defendants at the jail. There each man identified his own clothing and Watkins got his wife's clothes.

While at Hall's Garage, Goodwin examined the pistols in the back seat of the car. The .32 caliber pistol (Exhibit 2-a) contained six bullets, two fired and four unfired. The .38 pistol (Exhibit 1-a) was loaded with five shots, two fired and three unfired. The serial number of this pistol identified it as belonging to Mr. Jackson. The .22 caliber gun (Exhibit 3-a) held nine rounds but contained only six, none of which were fired. Goodwin also found in the back

seat on the left side a part of a hoe handle (Exhibit 19). In the glove compartment of the Dodge, he found the title to the automobile which showed it to be registered in the names of James Lewis Watkins and Catherine Watkins, 2716 Second Street, S.E., Washington, D.C. Also in the glove compartment was a citation issued on 7 September 1976 by a Virginia State Patrolman directing defendant Watkins to appear in the General District Court of Manassas, Virginia on 4 October 1976 to answer the charge of speeding 72 MPH in a 55 MPH zone, "clocked by radar."

Sometime during the morning of September 7th, Dr. Cooper Howard operated on Mr. Jackson to repair internal organs which had been penetrated by a .38 caliber bullet. He removed a bullet (State's Exhibit 4-b) from the left side of Jackson's body just below the rib cage and delivered it to Lieutenant Goodwin. A ballistic expert's examination of this bullet showed it to have been fired from Mr. Jackson's .38 caliber pistol, which was one of the three pistols found on the back floorboard of defendant Watkins' car.

The expert also found that the bullet (Exhibit 5-a), which Frances Warrick had discovered on the gondola shelf in the grocery, was fired from Mr. Jackson's .38 pistol. He further determined that the bullet, Exhibit 5-b, which Lieutenant Goodwin had picked up between aisles 3 and 4 in the store, had been fired from Exhibit 2-a, the .32 pistol which was on the left side of the back floorboard of defendant Watkins' automobile when Patrolman Mason stopped it.

On the morning of 7 September 1976 defendants were taken before a magistrate and advised of the charges against them. Thereafter Lieutenant Goodwin advised them of their constitutional rights by reading them from a "Rights Form" which purported to state the Miranda warnings. Goodwin testified he had received "some written statements" from defendants, but the State did not offer them in evidence.

However, on cross-examination, in response to questions from Mr. Thompson, the attorney for defendants Brown and Covington, Lieutenant Goodwin testified that he had these written statements in his briefcase; that he had obtained a signed waiver of rights and statement from only defendant Haywood. The

others "would not and did not sign the waiver." When Mr. Thompson asked Lieutenant Goodwin to relate the statement which Haywood made to him, Mr. Lanier, counsel for defendants Haywood and Watkins, objected on behalf of defendant Haywood only. He specifically stated that defendant Watkins had no objection to the statement.

After examining the "Rights Form" from which Goodwin had read "their rights" to Haywood and the other defendants, Judge Martin sustained defendant Haywood's objection because the form did not contain the warning that any statement a defendant made to the officers could be used against him in court.

At Mr. Thompson's request, out of the hearing of the jury, Lieutenant Goodwin was permitted to read into the record the following statement, which he testified that Haywood had made to him:

"I came to Clinton from D.C. with James and Linda Watkins, John Brown and Ronald Covington. We stopped at Jackson's Red & White in Clinton. I went in to rob the store but Mr. Jackson put up such a fight that I shot him and ran out of the store. Paul Haywood, 5936 East Capitol Street, Northeast, Washington, D.C. Witness, Lieutenant J. H. Goodwin."

Defendants offered no evidence.

The jury found each defendant guilty of the crimes of robbery with a firearm and assault with a deadly weapon inflicting serious injury. On the robbery charge each defendant was sentenced to life imprisonment; on the assault charge each received a sentence of 10 years imprisonment to begin at the expiration of the sentence imposed for robbery with a firearm. Each defendant appealed.

Rufus L. Edmisten, Attorney General, and George J. Oliver, Assistant Attorney General, for the State.

E. C. Thompson III, Attorney for John William Brown and Ronald Eugene Covington defendant-appellants.

Russell J. Lanier, Jr., for Paul Austin Haywood and James Lewis Watkins, defendant-appellants.

SHARP, Chief Justice.

[1] We examine first defendants' assignment of error No. 14, that the trial court erred in denying their respective motions for judgments as of nonsuit, made at the close of all the evidence. G.S. 15-173 (1975). We consider this assignment under the established rule that upon a motion to nonsuit the trial court must view 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 from it. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

It is immediately apparent from an examination of the facts that the court properly overruled the motion as to defendants Watkins and Brown. Defendant Brown was the man whom Jackson identified in court as the one beating him in the face with the "long type weapon." Defendant Watkins was the man wearing the "yellow tank top," whom Mrs. Gaddy saw outside Jackson's grocery when she went there before taking her son to school. After delivering him she drove back by the store where she again saw Watkins as he walked away from Jackson lying in the door crying for help. Furthermore, Watkins owned the green and black 1970 Dodge Monaco with the D.C. license which several witnesses saw at the grocery before and after Jackson was shot. It was in this car that the four defendants were traveling when they were arrested less than an hour after the robbery and shooting, and in which Jackson's .38 pistol was found.

Defendants Haywood and Covington, however, contend that the evidence admitted at the trial fails to place either of them in the store or to show that they were acting in concert with Brown and Watkins. Haywood correctly asserts that his alleged confession to Lieutenant Goodwin, having been ruled incompetent ("because the constable blundered") "in no way incriminates him" legally. Haywood and Covington rely upon *State v. Aycoth and Shadrick*, 272 N.C. 48, 157 S.E. 2d 655 (1967). As to them, they maintain that case is indistinguishable from this one. They argue, therefore, that their presence with Brown and Watkins immediately before and after the assault and robbery is insufficient to establish their complicity in these crimes.

The principle for which *Aycoth* is so often cited is firmly established law: "Mere presence at the scene of a crime does not

make one guilty as a principal or as an aider and abettor or as an accessory before the fact. *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655." *State v. Eakins*, 292 N.C. 445, 450, 233 S.E. 2d 387, 390 (1977). In *Aycoth*, the two defendants were jointly indicted and convicted for the armed robbery of Mrs. Keith Stevenson, who was in charge of Outen's Grocery. The State's evidence tended to show: The defendant Shadrick was a passenger in the defendant Aycoth's car when he stopped at Outen's and went into the store, leaving Shadrick in the car. The robbery occurred inside the store, where Aycoth remained no more than two or three minutes. There was no evidence that Shadrick ever moved from where he was sitting on the right side of the front seat of the car. Mrs. Stevenson testified she could see Shadrick, and he could have seen her through the plate glass window, but he never did look around. There was no evidence that Shadrick did observe what was taking place inside the store or that he had a weapon of any kind. After robbing Mrs. Stevenson, Aycoth concealed his pistol before he left the store and returned to the car. When the defendants were arrested several hours later there was no evidence that Shadrick shared in the hundred dollars which Aycoth took from Mrs. Stevenson beyond the fact that he had fifteen dollars and some change on him. Weapons were found under the seat of Aycoth's car, but there was no evidence that Shadrick knew they were there.

In reversing Shadrick's conviction this Court said: "Although there are circumstances which point the finger of suspicion towards Shadrick, we are constrained to hold that the evidence is insufficient to warrant a verdict that he is guilty of the alleged armed robbery as an aider and abettor of Aycoth." 272 N.C. at 51, 157 S.E. 2d at 657-8. *See also State v. Swaney*, 277 N.C. 602, 612-13, 178 S.E. 2d 399, 405-6 (1970), *appeal dismissed*, 402 U.S. 1006 (1971).

In the instant case, however, the evidence is not as sparse as it was in *Aycoth*; it does more than point the finger of suspicion toward Haywood and Covington. Competent evidence sustains findings (1) that these two defendants were present, either in or sufficiently close to Jackson's grocery, to aid the perpetrators in the commission of the robbery should their assistance become necessary and (2) that their intent to do so was communicated to the actual perpetrators. "The communication or intent to aid, if

needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 291, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091 (1976). "[W]hen the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this is aiding and abetting." *State v. Holland*, 234 N.C. 354, 358, 67 S.E. 2d 272, 275 (1951). *See State v. Rankin*, 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973) and cases cited therein.

It is a fair inference from the State's evidence that the four men and one woman who occupied the green Dodge on 7 September 1976 were "friends" who had left Washington, D.C. together on a joint venture to the south. Washington was the residence of Watkins, the owner of the car, and his wife, Linda. All occupants had clothes in the trunk of the car, and they arrived together at the Red & White before Jackson opened the store.

According to all the testimony at least three of the defendants—perhaps four—went into the store. Jackson testified that while two were beating on him he heard a third person running down the aisle. Mr. Gautier, who heard the shooting and Mr. Jackson's cries for help, testified that he saw two or three people come out of the store and run to the Dodge. "When it would not crank," they jumped out and ran back around the building. The driver, however, stayed with the car, got it started, drove around the back and got the others. He then drove toward Highway 701. Mrs. Gaddy also saw Watkins drive around behind the store and pick up "three more." As the car stopped for the light at Highway 701, James Johnson could see only the driver. The other four occupants were obviously all crouched in the seat or floorboard.

When Patrolman Mason spotted a two-toned Dodge with a D.C. license on Highway 701 he could see only a man and a woman in the front seat. After he had stopped the car and had seen a knee move in the back, he discovered Haywood, Brown, and Covington lying down in the seat—an unusual posture of choice for innocent persons unaware of any reason why officers of the law would be interested in them. When the occupants of the

back seat had been removed, Mason observed in plain view on the floorboard four deadly weapons: a hoe handle, two Harrington-Richardson pistols (Exhibit 2-a, of .32 caliber; Exhibit 2-b, of .22 caliber), and a .38 caliber pistol, later identified as the pistol which had been taken from Mr. Jackson. The .32 caliber pistol had been used in the robbery, for a bullet fired from it was found in the aisle. Indubitably, all the occupants of the Watkins vehicle knew of the presence of the two Harrington-Richardson pistols and the hoe handle and that they were to be used in the robbery of the Red & White grocery.

We conclude that this evidence is sufficient to support a finding that the four defendants were "friends" acting in concert, that each was aiding and abetting the others in the robbery, and that all were principals in the crimes charged. We hold, therefore, that the motion for nonsuit was properly overruled.

[2] We next consider assignment of error No. 5 in which defendants Watkins, Brown and Covington challenge the trial judge's ruling excluding an alleged declaration against penal interest made by their codefendant Haywood.

On cross-examination defendants Watkins, Brown, and Covington sought to elicit from Lieutenant Goodwin the oral statements, and the contents of a written statement, which defendant Haywood had given the police with reference to his involvement in the robbery and shooting of Jackson. The trial judge sustained defendant Haywood's objection to this evidence, and that ruling is the basis of assignment of error No. 5.

Haywood's statement was that he had traveled from Washington, D.C. to Clinton with the other defendants; that, after arriving there, they stopped at Jackson's Red & White and he went in to rob the store; that Jackson put up such a fight he shot him and ran out.

The district attorney, conscious of the fact that the officers had obtained Haywood's confession without having warned him of his constitutional right to remain silent, did not offer his incriminating statement in evidence. The State thus avoided a confrontation with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and the cases having been consolidated, perhaps a confrontation with *Bruton v. United States*, 391 U.S.

123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). *See* G.S. 15A-927(c)(1) (1973); *State v. Heard and Jones*, 285 N.C. 167, 203 S.E. 2d 826 (1974); *State v. Fox*, 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1948). Here we note that when the district attorney moved to consolidate the cases for trial each defendant announced that he had no objection to the consolidation. The judge allowed the motion and thereafter no one moved for a severance at any time during the trial. G.S. 15A-927(c)(2)b.

Defendants Watkins, Brown, and Covington concede that Haywood's confession was inadmissible against him because he had not received the full *Miranda* warning. They assert, however, that Haywood's statement was "made voluntarily"; that "there [is] nothing to indicate his statement was not true"; that it tended to exonerate them; and that, even though its admission would have incriminated Haywood, fair play required the judge to allow the jury to hear it. Thus, they contend that they are entitled to a new trial because the statement was excluded. For the reasons hereafter stated these contentions cannot be sustained.

It is true that Haywood's sparse statement does not specifically implicate any other defendant in the armed robbery and shooting, but neither does it purport to exonerate them from complicity in those crimes. The statement does not negate the State's evidence tending to show that at the time of the robbery all the defendants were engaged in a joint enterprise, aiding and abetting each other. On the contrary, Haywood's statement is entirely consistent with the State's theory of the prosecution. Indeed, when it is considered in conjunction with the evidence relating to the weapons found in Watkins' car, the eyewitness testimony that Watkins and Brown were in the store at the time of the robbery, and the circumstances attendant upon the defendants' arrest, it appears that the likely impact of Haywood's statements, had they been admitted, would have been to bolster the State's case against all the defendants. Its exclusion, therefore, was not prejudicial. Furthermore, the trial court's ruling was clearly in accord with the decisions of this Court holding inadmissible declarations against penal interest.

For more than a century this Court, presumably fearful that a different rule would open "a door to a flood of perjured witnesses falsely testifying to confessions that were never

made",[1] has adhered to the rule that the defendant in a criminal case may not introduce in evidence a third person's extrajudicial confession that he committed the crime for which the defendant is being tried.[2] Notwithstanding, we deem it appropriate to reevaluate these decisions in the light of developing trends in the law.

The first discussion of this rule appears in our reports in *State v. May*, 15 N.C. 328 (1833). In *May*, the defendant, Daniel May, was indicted for the larceny of a slave named Harry, whom he had allegedly sold in South Carolina. At his trial the defendant attempted to prove (1) that warrants had also been issued against William May and Hardy May for the theft of the slave; (2) that when the warrants were issued William May immediately fled the State and had not returned; and (3) that William had confessed he alone had stolen the slave. The trial court excluded the proffered evidence and the defendant was convicted. Upon appeal the Supreme Court affirmed the conviction, each of its three members voting to affirm and expressing his concurring views in a separate opinion.

The consensus was that the whole of the excluded evidence was inadmissible. Chief Justice Ruffin rejected the confession as "mere hearsay . . . the words of a stranger to the parties, and not spoken on oath . . . too uncertain, and too easily fabricated falsely for the purpose of deceiving, to be relied on or acted on in a Court." *Id.* at 332-33. Justice Daniel opined that the "hearsay declarations of William May that he committed the crime were not on oath, nor was there any opportunity of a cross-examination. The evidence, therefore, according to the plainest principles of law, was properly rejected." *Id.* at 334. Justice Gaston wrote: "The criminal act imputed to the prisoner might as readily be committed by many as by one. The question of William May's guilt or innocence was not necessarily connected with that of the guilt or innocence of Daniel. Both might be guilty, or both might be innocent, and a common guilty or a common innocence was as presumable as the guilt of one only. . . . The thing to be proved must not only be relevant, but the testimony offered must be such as the law sanctions. The issuing of a State's warrant

1. C. McCormick, Evidence § 255, 549-50 (1954).

2. 1 Stansbury, N.C. Evidence § 247 at 495 and cases cited in n. 57 (Brandis rev. 1973). *See* Annot., 35 A.L.R. 441 (1925); Annot., 48 A.L.R. 348 (1927).

against William and the prisoner, in which William is first named, of *itself* is no evidence, and, unless necessary to explain or contradict something properly in evidence, ought not to have been received. . . . I am of the opinion the whole of the testimony offered in order to show the taking by William was illegal." *Id.* at 339.

In *State v. English*, 201 N.C. 295, 159 S.E. 318 (1931), Justice Brogden, speaking for the Court, stated the determinative question to be, "Is the voluntary confession of a third party, made to officer of the law, that he killed the deceased, detailing the circumstances, competent evidence in behalf of the defendant charged with the murder?" Justice Brogden noting that the "numerical weight of authority excludes such testimony"[3] and that "the *May* case [supra] is the original patriarch of an increasing line of legal descendants in this State," answered the question No for the Court. However, in doing so, he said: "The writer of this opinion strings along with the minority, but it was the duty of the trial judge to apply the law as written, and the exceptions of the defendant are not sustained." *Id.* at 299, 300.

The last in the "line of the legal descendants" of *the May case* is *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). In that case a third party, while in the State's prison, confessed that he had committed the crimes for which the two defendants were charged. A week later he gave the police a second statement which contradicted his first statement and implicated two other men. Further investigation revealed that neither of the confessions could be supported by known facts. The facts in *Madden* demonstrate the reasonableness of the courts' fear that the unrestricted admission of such confessions as a declaration against interest would open a spillway to a flood of perjured testimony.

When a defendant seeks to introduce a third person's extrajudicial confession as substantive evidence that he and not the defendant committed the crime, it is offered as a declaration against interest. The rules governing the admission of declarations against interest in this State are succinctly stated in 1 Stans-

3. *See* Annot, Admissibility, as against interest, of declarations of commission of criminal act, 162 ALR 446 (1946). *See also* Annot, Extrajudicial declaration of commission of criminal act as admissible in evidence where declarant is a witness or available to testify, 167 ALR 394 (1947); 29 Am. Jur. 2d Evidence § 620 (1967); 39 Fordham L. Rev. 136, 138 (1970); 56 Boston U.L. Rev. 148, 151 (1977); 22A C.J.S. *Criminal Law* § 749 (1961).

bury's N.C. Evidence § 147 (Brandis rev. 1973) as follows: "(1) The declarant must be dead or, for some other reason, unavailable as a witness. (2) The fact stated must have been against the declarant's interest when made, and he must have been conscious that it was so. (3) The declarant must have had competent knowledge of the fact declared. (4) There must have been no probable motive for the declarant to falsify. (5) The interest must be a pecuniary or proprietary (as distinguished from a penal one), and it is on this ground that the defendant in a criminal case is not permitted to show the confession of another person."

The "orthodox rule" restricting the admissibility of declaration against interest to declarations against pecuniary or proprietary interest has been much criticized.[4] The arguments in favor of admitting declarations against penal interest are (1) that a person's desire to avoid criminal liability is as strong as his desire to protect his economic interests and his declarations against penal interest are as trustworthy as those concerning his pocketbook, for "no other statement is so much against interest as a confession of murder"; (2) that since a conviction of crime ordinarily results in an economic loss, the traditional concept of a pecuniary interest could logically include one's penal interest; and (3) that it is a "barbarous doctrine" which would permit manifest injustice by not allowing an innocent accused to vindicate himself by introducing evidence of a third person's confession that he was the true culprit.[5]

The United States Supreme Court addressed the admissibility of declarations against penal interest in *Chambers v. Mississippi*, 410 U.S. 284, 300, 35 L.Ed. 2d 297, 311, 93 S.Ct. 1038, 1047 (1973). Mr. Justice Powell, writing the majority opinion, described

4. *See* Holmes, J., dissenting in *Donnelly v. United States*, 228 U.S. 243, 277-78, 33 S.Ct. 449, 461, 57 L.Ed. 820, 834 (1913); *People v. Spriggs*, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 389 P. 2d 377 (1964); *People v. Edwards*, 396 Mich. 551, 242 N.W. 2d 739 (1976); *People v. Brown*, 26 N.Y. 2d 88, 308 N.Y.S. 2d 825, 257 N.E. 2d 16, 43 A.L.R. 3d 1407 (1970); *Howard v. Jessup*, 519 P. 2d 913 (Okla. 1973); *Hines v. Commonwealth of Virginia*, 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923); 1 Stansbury, N.C. Evidence, § 147 at 495; C. McCormick, Evidence § 255 (1954); 5 Wigmore on Evidence § 1477, p. 360 (Chadbourn rev. 1940); L. Powers, The North Carolina Hearsay Rule and the Uniform Rules of Evidence, 34 N.C.L. Rev. 171, 197-198 (1956).

5. In *People v. Lettrich*, 413 Ill. 172, 108 N.E. 2d 488 (1952), the defendant's conviction was based solely upon his repudiated confession, which did not conform in material respects to the known facts. After noting the danger of perjury inherent in out-of-court confessions, the Supreme Court awarded a new trial because, *inter alia*, the trial judge had excluded a third person's declaration that he had committed the crime. The Court said, "The rule is sound and should not be departed from except in cases where it is obvious that justice demands a departure. But it would be absurd, and shocking to all sense of justice, to indiscriminately apply such a rule to prevent one accused of a crime from showing that another person was the real culprit merely because that other person was deceased, insane or outside the jurisdiction of the court." *Id.* at 178, 108 N.E. 2d at 492.

the exclusion of the declaration against penal interest while admitting declarations against pecuniary interests, as a "materialistic limitation."

In *Chambers*, the defendant was tried for the murder of a policeman who had been shot with a .22 caliber pistol. The State's evidence excluded the theory that more than one person participated in the shooting of the officer. At the trial "Chambers called one McDonald as a witness, laid a predicate for the introduction of his sworn out-of-court confession [which McDonald had given Chambers' attorney], had it admitted into evidence and read it to the jury." Upon cross-examination the State elicited from McDonald the fact that he had repudiated his confession. McDonald further testified, as he had done at his preliminary hearing, that he did not shoot the officer and that he had confessed only because an acquaintance, "Reverend Stokes," had promised him he would not go to jail and would share in the proceeds of a lawsuit which Chambers would bring against the town. McDonald denied the shooting and asserted that he was not at the scene but in a cafe down the street when the officer was shot.

Thereafter the trial judge (1) denied Chambers' motion that he be allowed to cross-examine McDonald as a hostile witness and (2) sustained the State's objection when Chambers attempted to introduce the declarations McDonald had made to three of his friends that he was the man who had shot the policeman. On appeal the Supreme Court held that Chambers had been denied due process by the trial judge's refusal (1) to permit him to cross-examine McDonald in order to test his recollection, to probe into the details of his alibi, or to "sift" his conscience so that the jury might decide for itself whether McDonald's testimony was worthy of belief; and (2) to allow in evidence the extrajudicial declarations which McDonald had made to three of his close friends that he was the man who had shot the officer.

Justice Powell emphasized the fact that the rejected hearsay statements bore persuasive assurances of trustworthiness and thus were well within the basic rationale of the exception for declarations against interest: "First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn

confession, the testimony of an eyewitness to the shooting, and proof of his prior ownership of a .22 caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal interest rationale, each confession is in a very real sense self-incriminatory and unquestionably against interest."

The Supreme Court concluded that the result of the trial judge's exclusion of McDonald's declarations against his interest ("critical evidence"), coupled with his refusal to permit Chambers to cross-examine McDonald, was a denial of due process which entitled Chambers to a trial *de novo*. However, the Supreme Court carefully hedged the impact of its decision by the following statement: "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedures.[6] Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id.* at 303, 35 L.Ed. 2d 313, 93 S.Ct. 1049.

Obviously the factual situation in *Chambers v. Mississippi* is not comparable to that of the instant case, in which no constitutional issues are raised. However, any reconsideration of the admissibility of declarations against penal interest must take *Chambers v. Mississippi* into account. As limited by the facts, a number of courts have accepted "the *Chambers* rule" into their evidentiary common law.[7]

Chambers aside, the recent trend among the states has clearly been to admit declarations against penal interest although there is a lack of uniformity with reference to the conditions

6. For comments on this statement see *Pitts v. State*, 307 So. 2d 473 (Fla. App. 1975); *Commonwealth v. Nash*, 457 Pa. 296, 324 A. 2d 344 (1974).

7. In *State v. Gardner*, 13 Wash. App. 194, 198-199, 534 P. 2d 140, 142 (1975), the "*Chambers* Rule" is stated as follows:

"The minimal evidentiary criteria which must be met before any declaration can be considered as rising to constitutional stature are these: (1) the declarant's testimony is otherwise unavailable; (2) the declaration is an admission of an unlawful act; (3) the declaration is inherently inconsistent with the guilt of the accused; and (4) there are such corroborating facts and circumstances surrounding the making of the declaration as to clearly indicate that it has a high probability of trustworthiness."

under which such declarations are admitted.[8] As stated in a thoroughgoing note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 Boston U.L. Rev. 148 (1976), "[t]he rule excluding declarations against penal interest has gradually eroded, and the number of states holding such declarations admissible has increased dramatically in recent years." *Id.* at 149. "The legislatures of seven states have adopted rules of evidence that permit the introduction into evidence of declarations against penal interest.[9] . . . The courts of 14 states have held declarations against penal interest admissible without legislative authorization.[10] . . . In addition the courts of [two states] have indicated a willingness to adopt the rule if presented with an appropriate case."[11]

Furthermore Section 804(b)(3) of the Federal Rules of Evidence (28 U.S.C.A. Appendix, Rules of Evidence, effective 1 July 1975) provides that if the declarant is unavailable as a witness "[a] statement [is admissible] which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." If the declarant "is exempt by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement," Rule 804(a)(1) declares him unavailable as a witness.

In the explanatory comment on Rule 804(b)(3) in S. Saltzburg and K. Redden, Federal Rules of Evidence Manual (2d ed. 1977), the editors emphasize the rule's requirement that if the criminal defendant offers evidence of a declaration against interest to ex-

8. Note, 39 Fordham L. Rev. 136, 139 (1970). *See State v. Larsen*, 91 Idaho 42, 47, 415 P. 2d 685, 691-692 (1966), for a succinct discussion of the trial and informative array of the cases.

9. 56 Boston L. Rev. 148, 149, n. 5 (1976) (California, Kansas, Nevada, New Mexico, Wisconsin, New Jersey, Utah).

10. *Id.*, Arizona, Hawaii, Idaho, Illinois, Maryland, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia.

11. *Id.*, Maine and Washington.

culpate himself, corroborating circumstances must clearly indicate the trustworthiness of the statements. This requirement, they say, "is apparently an attempt to respond to the problem of one criminal with very little to lose trying to exculpate another," and they note that the cases interpreting this rule indicate "more than minimal corroboration is required." *Id.* at 602-603. *See United States v. Bagley*, 537 F. 2d 162, 34 A.L.R. Fed. 403 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); Annot., 34 A.L.R. Fed. 412 (1976).

Most courts, in admitting declarations against penal interest, have recognized that their unrestricted admission "would be an open invitation to perjury of a kind that would be most difficult to ascertain.[12] Thus, with few exceptions,[13] they have circumscribed the admission of such declarations with specific safeguards calculated to protect the interest of the State while affording the defendant "essential justice and common fairness." In general, more proof is required than the mere fact that another person has confessed to the same crime for which the defendant stands charged, and—as with other exceptions to the hearsay exclusionary rule—"the trial judge [on voir dire] must apply a threshold test" to determine "in his sound discretion" whether the declaration "bears the indicia of trustworthiness."[14]

Courts have selected various evidentiary criteria for determining the trustworthiness of an unavailable declarant's statement against penal interest. (*See* Note, 56 Boston L. Rev., supra at 158-180, where the cases are collected and analyzed.) There is general agreement, however, that to be competent evidence the declaration must be an admission of an unlawful act which is inherently inconsistent with the guilt of the accused. It must have had the potential of *actually* jeopardizing the personal liberty of the declarant at the time it was made, and the declarant must have understood the damaging potential of his statement. The

12. *See e.g., State v. Gervais*, 317 A. 2d 796 (Me. 1974); *People v. Lettrich*, 413 Ill. 172, 108 N.E. 2d 488 (1952); *State v. Larsen*, 91 Idaho 42, 415 P. 2d 685 (1966).

13. *People v. Spriggs*, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 389 P. 2d 377 (1964); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E. 2d 318 (1950); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W. 2d 284 (1945) (civil case); *People v. Edwards*, 396 Mich. 551, 242 N.W. 2d 739 (1976).

14. *State v. Higginbotham*, 298 Minn. 2, 4-5, 212 N.W. 2d 881, 883 (1973); *Brady v. State*, 226 Md. 422, 174 A. 2d 167 (1961), *affirmed*, 373 U.S. 83 (1963); *See State v. Gervais*, 317 A. 2d 796, 803 (Me. 1974); *See also Pitts v. State*, 307 So. 2d 473 (Fla. App.), *cert. dismissed*, 423 U.S. 918 (1975).

statement must have been voluntary and there must have been no probable motive for the declarant to falsify. Further, it must be shown that the declarant was in a position to have committed the crime to which he purportedly confessed.[15]

In addition to the foregoing requirements a significant number of courts impose a corroboration requirement as a prerequisite to admissibility.[16] For example, the Minnesota Supreme Court said in *State v. Higginbotham* that declarations against penal interest must be "proved trustworthy by independent corroborating evidence that bespeaks reliability." In *State v. Gardner* the requirement was "corroborating facts and circumstances surrounding the making of the declaration [which] clearly indicate that it has a high probability of trustworthiness." The rule in Idaho, as stated in *State v. Larsen*, is that an extrajudicial confession of a third party is admissible "only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial."

In every case the precise application of the standards of reliability must be left to the discretion of the trial judge who, on voir dire, will weigh all the evidence and thereafter admit the declaration only if he determines there is a reasonable possibility that the declarant did indeed commit the crime. It was pointed out in *Pitts v. State*, 307 So. 2d 473 (Fla. App.), *cert. dismissed*, 423 U.S. 918 (1975), that "it would be imperative that broad discretion be afforded the trial judge in determining the reliability of the declaration and the declarant by consideration of such factors as spontaneity, relationship between the accused and the declarant, existence of corroborative evidence, whether or not the declaration had been subsequently repudiated and whether or not the declaration was in fact against the *penal interests* of the declarant. As an example, an 'admission' by one who had already admitted or been convicted of other similar crimes could hardly be said to be against his *penal* interests." *Id.* 484-485. (Nor would a declarant's out-of-court confession be against penal interest if he had been either convicted or acquitted of the crime.)

15. *See, e.g., Cameron v. State*, 153 Tex. Crim. 29, 31, 217 S.W. 2d 23, 24 (1949); *State v. Gardner*, 13 Wash. App. 194, 198-199, 534 P. 2d 140, 142 (1975); *Mason v. United States*, 257 F. 2d 359 (10th Cir. 1958); *Breeden v. Independent Fire Ins. Co.*, 530 S.W. 2d 769 (Tenn. 1975).

16. *See* 56 Boston L. Rev. at 172-177.

[3] As earlier noted, this Court has not heretofore considered the admissibility of declarations against penal interest in light of the modern trend and the respectable arguments for their admission under appropriate safeguards. Having done so, we now conclude that it is in the best interests of the administration of justice that declarations against penal interest be admitted under the following conditions:[17]

(1) The declarant must be dead; beyond the jurisdiction of the court and the reach of its process; suffering from infirmities of body or mind which preclude his appearance as a witness either by personal presence or by deposition; or exempt by ruling of the court from testifying on the ground of self-incrimination. As a further condition of admissibility, in an appropriate case, the party offering the declaration must show that he has made a good-faith effort to secure the attendance of the declarant.

(2) The declaration must be an admission that the declarant committed the crime for which defendant is on trial, and the admission must be inconsistent with the guilt of the defendant.

(3) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and he must have understood the damaging potential of his statement.

(4) The declarant must have been in a position to have committed the crime to which he purportedly confessed.

(5) The declaration must have been voluntary.

(6) There must have been no probable motive for the declarant to falsify at the time he made the incriminating statement.

(7) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness.

The admissibility of a declaration against penal interest will be determined by the trial judge upon a voir dire out of the presence of the jury.

17. For a similar review and action *see Breeden v. Independent Fire Ins. Co.*, 530 S.W. 2d 769 (Tenn. 1975).

[4] Assignments of error numbered 7 through 14 relate to the charge. Defendants contend, inter alia, that the trial judge, by "innuendo and language pushed the jury to a verdict against all four defendants"; that "the Court never realistically gave the jury the opportunity to convict less than all of the defendants and acquit one or more of the defendants"; and that he erred in failing to submit to the jury the issues of defendants' guilt of the lesser included offenses of common-law robbery and accessory after the fact to the robbery and assault. We find no merit in these contentions and no prejudicial error in the charge.

First, there is no suggestion in the charge that the judge intimated to the jury that it should find any or all of the defendants guilty. On the contrary, in a separate mandate relating to each charge and each defendant individually the judge "declared and explained the law arising on the evidence" as required by G.S. 1-180 (1966). The jury were instructed that the State must prove beyond a reasonable doubt the guilt of the named defendant or acquit "that defendant." The jury could not have understood from the court's charge that if they found one defendant guilty they would have to find all four guilty. *See State v. Tommlin*, 276 N.C. 273, 171 S.E. 2d 901 (1970).

As to the charge of common-law robbery and accessory after the fact, the rule is that the necessity for instructing the jury as to an included crime of lesser degree than that charged arises *only* when there is evidence from which the jury could find that the included crime of lesser degree had been committed. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). That rule is applicable to this case, the record in which contains no evidence of common-law robbery. All the evidence tends to show that the robbery at Jackson's Red & White Grocery was a robbery with firearms. Likewise the uncontradicted evidence of the State (which is all the evidence) tends to show that the defendants, four of the five occupants of the Watkins automobile who had traveled together during the preceding night from Washington, D.C., to Clinton, had conspired to rob the grocery and that those who did not go into the store were outside, standing by to assist those who had entered. (The defendants' brief tells us that the female occupant, Mrs. Watkins, removed herself from this case by a plea of common-law robbery.)

Defendants' remaining assignments of error, Nos. 1, 2, 3, 4, and 6, relate to the trial judge's rulings upon objections to evidence which was either competent or so inconsequential that any discussion would be good-for-nothing. These assignments are overruled.

In the trial we find

No error.

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

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

AUSTIN v. ROYALL

No. 87 PC.

Case below: 38 N.C. App. 118.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 November 1978.

BARBOUR v. LITTLE

No. 58 PC.

Case below: 37 N.C. App. 686.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1978.

CONSTRUCTION CO. v. MANAGEMENT CO.

No. 53 PC.

Case below: 37 N.C. App. 549.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

DIXON v. RIVERS

No. 92 PC.

No. 7 (Spring Term)

Case below: 37 N.C. App. 168.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals allowed 3 November 1978.

HEWETT v. HEWETT

No. 88 PC.

Case below: 38 N.C. App. 37.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 November 1978.

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

HUGHEY v. CLONINGER

No. 18 PC.

No. 4 (Spring Term)

Case below: 37 N.C. App. 107.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 November 1978.

IN RE BROWN

No. 35 PC.

Case below: 37 N.C. App. 457.

Petition by respondent for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

IN RE KOWALZEK

No. 48 PC.

Case below: 37 N.C. App. 364.

Petition by Kowalzek for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of respondents to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

MANUFACTURING CO. v. MANUFACTURING CO.

No. 62 PC.

Case below: 37 N.C. App. 726.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

PRICE v. PATTERSON

No. 80 PC.

Case below: 37 N.C. App. 742.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 November 1978.

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

SHELLHORN v. BRAD RAGAN, INC.

No. 113 PC.

Case below: 38 N.C. App. 310.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 November 1978.

SIBBETT v. LIVESTOCK, INC.

No. 79 PC.

Case below: 37 N.C. App. 704.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978.

STATE v. BATES

No. 66 PC.

Case below: 37 N.C. App. 276.

Application by defendant for further review denied 3 November 1978.

STATE v. BROOKS

No. 63 PC.

Case below: 38 N.C. App. 48.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

STATE v. CUMMINGS

No. 61 PC.

Case below: 37 N.C. App. 742.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978.

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

STATE v. DUNN

No. 55 PC.

Case below: 37 N.C. App. 742.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978.

STATE v. HUNT

No. 47 PC.

Case below: 37 N.C. App. 315.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

STATE v. KEARNEY

No. 67 PC.

Case below: 37 N.C. App. 616.

Application by defendant for further review denied 3 November 1978.

STATE v. LONG

No. 82 PC.

Case below: 37 N.C. App. 662.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1978.

STATE v. MOORE

No. 91 PC.

Case below: 38 N.C. App. 239.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 November 1978.

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

STATE v. OXNER

No. 52 PC.

No. 5 (Spring Term)

Case below: 37 N.C. App. 600.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 November 1978.

STATE v. STALLINGS

No. 81 PC.

Case below: 37 N.C. App. 742.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978.

STATE v. STEPTOE

No. 121.

No. 8 (Spring Term)

Case below: 38 N.C. App. 243.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 3 November 1978.

STATE v. TAYLOR

No. 85 PC.

Case below: 37 N.C. App. 709.

Application by defendant for further review denied 3 November 1978.

STATE v. TWIDDY

No. 77 PC.

Case below: 36 N.C. App. 155.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 November 1978.

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

STOCK YARDS v. WILLIAMS

No. 59 PC.

Case below: 37 N.C. App. 698.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 November 1978.

WILLOW MOUNTAIN CORP. v. PARKER

No. 54 PC.

Case below: 37 N.C. App. 718.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1978.

APPENDIXES

AMENDMENTS TO RULES
OF APPELLATE PROCEDURE

INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

AMENDMENT TO RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO RULES GOVERNING
ADMISSION TO THE PRACTICE OF LAW

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

1. Rule 7, entitled *Security For Costs on Appeal in Criminal Actions*, is repealed in its entirety.

2. Rule 17, entitled *Appeal Bond in Appeals Under G.S. Sections* 7A-30, 7A-31, is amended by:

(a) inserting the words "in civil cases" after the word "Court" in line 2 of subsection (a);

(b) inserting the word "civil" before the word "case" in line 2 of subsection (b);

(c) inserting the word "civil" before the word "case" in line 2 of subsection (c).

These amendments to the Rules of Appellate Procedure were adopted by the Supreme Court in Conference on 19 June 1978 to become effective on 1 July 1978. The amendments shall be promulgated by publication in the next succeeding Advance Sheets of the Supreme Court and the Court of Appeals.*

Exum, J.
For the Court

*Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use.

Rule 4(a)(2) is amended by striking "after the last day of the session at which rendered" and inserting in lieu thereof: "after entry of the judgment or order or within ten days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order."

The last paragraph of Rule 27(c) is amended by changing the period after the word "state" to a semicolon and adding immediately thereafter the following: "provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard."

The foregoing amendments were approved by the Court in conference on 4 October 1978 to be promulgated in the next succeeding Advance Sheets of the Court of Appeals and the Supreme Court. The amendments shall become effective on 1 January 1979.

Done by the Court in conference this the 4th day of October, 1978.

EXUM, J.
For the Court

INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

The following rules are hereby adopted to govern the internal operation of the Supreme Court Mimeographing Department:

Pursuant to G.S. 7A-11 and the North Carolina Rules of Appellate Procedure, the Clerk of the Supreme Court is authorized and directed to administer the Mimeographing Department as follows:

1. Receipts by the Mimeographing Department shall be deposited daily or as often as practicable in a checking account entitled "Supreme Court of North Carolina Mimeographing Department," which shall be maintained in the First Citizens Bank and Trust Company, Raleigh, North Carolina. A savings account shall be maintained in the State Employees Credit Union under the same title, to which the Clerk shall transfer excess funds when, in his discretion, such transfer is practicable.

2. The Clerk shall employ the necessary personnel to operate the Mimeographing Department. These persons may be employed on a full or part-time basis, in the discretion of the Clerk, and shall be paid every two weeks out of the Mimeographing Department receipts, at the following rates:

a. For cutting stencils ..... 83¢ per page
b. For proofreading ..... 17¢ per page
c. For mimeographing ..... 15¢ per page
d. For dividing, assembling, collating, and stapling ..... 13¢ per page

3. The Clerk shall make the necessary withholding deductions from compensation paid to Mimeographing Department personnel and shall remit the same monthly to the appropriate agencies.

4. The Clerk shall purchase the necessary supplies and materials for the operation of the Mimeographing Department. He shall also purchase and maintain the necessary equipment and shall make any other expenditures reasonably necessary for the operation of the department.

5. Excess funds accumulated by the Mimeographing Department shall be held in the savings account named above, subject to the order of this Court.

6. The Clerk shall make an annual financial report on the operation of the Mimeographing Department to the Chief Justice and Associate Justices of the Supreme Court.

7. All books and records of the Mimeographing Department shall be open for inspection and audit by the State Auditor.

8. Until such time as this Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be mimeographed, shall be printed at a per page cost of $2.00, effective 1 November 1978.

So ordered this 12 day of September, 1978.

EXUM, J.
For the Court

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

AMENDMENT TO RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendment to the Rules and Regulations and 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 October 19, 1978.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article IX, Section 29 as appears in 205 NC 865 and as amended in 253 NC 820 and 288 NC 743 at 771 be and the same is hereby amended by rewriting said section as follows:

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of The North Carolina State Bar as a result of the Grievance Committee of The North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon a conviction of the accused attorney of a crime. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a hearing committee of the Disciplinary Hearing Commission enters an Order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

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 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 30th day of October, 1978.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of November, 1978.

SUSIE SHARP
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 3rd day of November, 1978.

BRITT, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The amendments below to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by deleting the figure $130.00 in the second and fourth lines of Rule .0404 and substituting in lieu thereof the figure $150.00; and deleting the figure $400.00 in the first line of Rule .0502(2) and substituting $500.00 in lieu thereof, as appear in 289 NC 735 at 742 & 743 and 293 NC 761 to read as follows:

.0404 FEES

Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of $150.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $150.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident. All said fees shall be payable to the board.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(2) Pay to the board with each written application a fee of $500.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, no part of which may be refunded to the applicant whose application is denied;

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 17th day of July, 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, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 29 day of August, 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 29 day of August, 1978.

EXUM, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ARREST AND BAIL

§ 3.1. Probable Cause for Warrantless Arrest

Trial court properly determined that, notwithstanding the officer's declaration to the contrary, defendant's initial detention was in fact an arrest and that it was unlawful. *S. v. Sanders*, 361.

§ 3.6. Legality of Warrantless Arrest for Robbery

An officer's warrantless arrest of defendant was legal where the officer had probable cause to believe that the felony of robbery had been committed. *S. v. Mathis*, 623.

§ 6. Resisting Arrest

Defendant's contention that his motion for nonsuit should have been granted in a first degree murder case because the evidence conclusively demonstrated that his actions were fully justified as a valid attempt to escape from an unlawful arrest and that he was privileged to use deadly force because he was confronted with attackers of superior size and number and thus had a reasonable fear of death or serious bodily harm is without merit. *S. v. Sanders*, 361.

In a first degree murder case where defendant claimed that he had a privilege to resist the efforts of military policemen to continue his unlawful confinement, trial court erred in instructing on provisions of the U.S. Army Regulations and the Uniform Code of Military Justice. *Ibid.*

§ 9. Right to Bail

Defendants' contention that the trial court erred in denying their motion for reduction of bail was without merit. *S. v. Jones*, 345.

ASSAULT AND BATTERY

§ 14.2. Nonsuit in Assault with Firearm Case

Evidence was sufficient to support a finding that four defendants acted in concert in assaulting and robbing a grocery store owner. *S. v. Haywood*, 709.

§ 14.3. Nonsuit in Assault with Other Deadly Weapon Case

The jury could properly find that defendant was guilty of assault with a deadly weapon inflicting serious bodily injury by thrusting a drink bottle into the rectum of the victim. *S. v. Joyner*, 55.

AUTOMOBILES

§ 46. Opinion Testimony as to Speed

Trial court erred in excluding a witness's opinion as to the speed of defendant's truck immediately prior to the collision. *Cockrell v. Transport Co.*, 444.

§ 76.1. Contributory Negligence in Following Too Closely

Where plaintiff's agent drove a tractor-trailer into a ditch to avoid hitting a pickup truck he was following, plaintiff's evidence did not show his agent was contributorily negligent as a matter of law in failing to keep a proper lookout or in following too closely. *Daughtry v. Turnage*, 543.

AUTOMOBILES — Continued

§ 89.1. Sufficient Evidence of Last Clear Chance

Trial court erred in denying plaintiff's request for an instruction on the doctrine of last clear chance in a wrongful death action where deceased's automobile was struck by a truck driven by the individual defendant when deceased's car was stalled just over the center line in defendant's lane of travel. *Cockrell v. Transport Co.*, 444.

§ 127.1. Sufficient Evidence of Driving Under the Influence

In a prosecution for driving under the influence, circumstantial evidence was sufficient to permit a reasonable inference that defendant was intoxicated at the time of an accident. *S. v. Snead*, 615.

§ 129. Instructions in Driving Under Influence Cases

Trial court in a prosecution for driving under the influence did not err in failing to instruct with respect to reckless driving. *S. v. Snead*, 615.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Trial court in a homicide case did not err in permitting the State to present on rebuttal defendant's oral statements to officers which were inconsistent with his trial testimony but which had not been disclosed by the district attorney to defense counsel. *S. v. Stevens*, 21.

Defendants were not entitled by statute or common law to pre-trial discovery of statements made by a State's witness to an SBI agent or to a list of names and addresses of the State's witnesses. *S. v. Abernathy*, 147.

CONSPIRACY

§ 6. Sufficiency of Evidence of Criminal Conspiracy

Circumstantial evidence was sufficient for the jury to find that defendant conspired to commit an armed robbery. *S. v. Abernathy*, 147.

CONSTITUTIONAL LAW

§ 28. Due Process in Criminal Case

Trial court did not err in denial of defendant's motion to dismiss the charges against him because of alleged violations of his constitutional rights in obtaining a confession. *S. v. Joyner*, 55.

Defendant was not denied due process because of hostile sentiment against him by the courtroom audience where the trial judge on three occasions admonished those present in the courtroom to be quiet. *S. v. Berry*, 534.

It is not violative of due process to place the burden of persuasion as to the existence of mitigating factors in a kidnapping case on defendant. *S. v. Williams*, 655.

§ 29. Fairness of Pretrial Identification Procedures

Though a showup in a first degree murder case was inherently suggestive, such confrontation nevertheless did not render inadmissible the witnesses' in-court identifications of defendants. *S. v. Matthews*, 265.

So long as circumstances were not unnecessarily suggestive, police officers were free to arrange a confrontation between defendants, whether they were under arrest or not, and three witnesses to the alleged crimes. *Ibid.*

CONSTITUTIONAL LAW — Continued

§ 30. Discovery; Access to Evidence

Trial court in a homicide case did not err in permitting the State to present on rebuttal defendant's oral statements to officers which were inconsistent with his trial testimony but which had not been disclosed by the district attorney to defense counsel. *S. v. Stevens*, 21.

Defendants were not entitled by statute or common law to pre-trial discovery of statements made by a State's witness to an SBI agent or to a list of names and addresses of the State's witnesses. *S. v. Abernathy*, 147.

Defendants' contention that the trial court erred in failing to allow their motion for discovery is without merit since defendants abandoned their motion. *S. v. Jones*, 345.

Defendant failed to show that his right to interview prospective witnesses had been obstructed by the prosecution. *S. v. Mason*, 584.

§ 31. Affording Accused the Basic Essentials for Defense

Trial court did not err in refusing defendants' motions for a transcript of the testimony at their first trial since defendants had available to them the court reporter at the first trial. *S. v. Matthews*, 265.

§ 43. What Is Critical Stage of Proceedings

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. *S. v. Cobb*, 1.

Defendants who were not formally charged with a crime but who accompanied officers to a police station for the purpose of participating in a showup were not entitled to counsel at the showup. *S. v. Matthews*, 265.

§ 44. Time to Prepare Defense

Trial court did not err in failing to appoint counsel for defendant until the day of his preliminary hearing and in denying defense counsel's motion for a continuance. *S. v. Cobb*, 1.

§ 45. Right to Appear Pro Se

Trial court did not err in permitting defendant to represent himself in his murder trial without executing a written waiver of his right to counsel. *S. v. House*, 189.

Trial court did not err in denying defendant's request that he be permitted to question witnesses at the trial in addition to questions propounded by his counsel. *Ibid.*

Trial court did not err in denying defendants' pro se motions to dismiss their court-appointed attorneys. *S. v. Jones*, 345.

§ 48. Effective Assistance of Counsel

Trial court did not err in failing to appoint defendant's court-appointed trial counsel to represent him on appeal where defendant had moved that another attorney be appointed for the appeal. *S. v. House*, 189.

§ 49. Waiver of Counsel

Trial court erred in concluding that defendant waived his right to counsel. *S. v. Connley*, 327.

CONSTITUTIONAL LAW — Continued

§ 51. Speedy Trial; Delay Between Arrest and Trial

Defendant was not prejudiced by a five month delay between his arrest and trial. *S. v. Hudson*, 427.

§ 53. Speedy Trial; Delay Caused by Defendant

Defendant was not denied his right to a speedy trial by a delay of more than five years between two murders and defendant's trial on those charges where defendant was serving a life sentence in Missouri during most of that time. *S. v. McQueen*, 96.

§ 57. When Jury Trial Not Required

A defendant in a kidnapping case is not entitled to a jury trial on the question of mitigating factors. *S. v. Williams*, 655.

§ 68. Right to Call Witnesses; Continuances

Defendant was not denied his constitutional right to confrontation by the court's refusal to allow his motion, made when his case was called for trial, for a continuance to obtain an expert witness to testify regarding fingerprint evidence. *S. v. Abernathy*, 147.

Trial court did not err in refusing to direct the issuance of subpoenas for persons whom defendant, who had waived his right to counsel, said he wished to call as witnesses where the court determined that the testimony of such proposed witnesses would be immaterial; however, the court erred in refusing to permit defendant to put subpoenaed witnesses on the stand after the court determined, in the absence of the jury, that the testimony would be detrimental to defendant. *S. v. House*, 189.

§ 80. Death and Life Imprisonment Sentences

Sentences of life imprisonment are substituted for the death penalty imposed upon defendants upon their conviction for first degree murder. *S. v. Matthews*, 265.

§ 81. Consecutive Sentences; Cruel and Unusual Punishment

The imposition on defendant of three consecutive life sentences and consecutive sentences of 40 years and 20 years did not constitute cruel and unusual punishment. *S. v. Williams*, 655.

CORPORATIONS

§ 4.1. Authority and Duties of Stockholders

In an action by minority stockholders to specifically enforce an alleged stockholders' agreement, the term "shareholders' agreement" refers to an arrangement whereby all the shareholders in a close corporation, the stock of which is not traded in markets maintained by securities dealers or brokers, seek to conduct their business as if they were partners operating under a partnership agreement. *Blount v. Taft*, 472.

§ 4.2. Meetings and Voting Rights of Stockholders

The entire bylaws, all of which were unanimously adopted as a whole by a close corporation, constituted an agreement among the shareholders of the corporation, and one section of those bylaws authorized the repeal of the bylaws by a majority vote of the directors. *Blount v. Taft*, 472.

CRIME AGAINST NATURE

§ 1. Elements

Crime against nature is not limited to penetration by the male sexual organ and includes cunnilingus. *S. v. Joyner*, 55.

CRIMINAL LAW

§ 5. Mental Capacity

The M'Naghten Rule remains the test of criminal responsibility in this State. *S. v. Connley*, 327.

§ 6. Mental Capacity as Affected by Intoxicants

Evidence was insufficient to require an instruction by the trial court on the law of intoxication as a defense to homicide. *S. v. Medley*, 75.

§ 7.1. Entrapment

Trial court properly refused to charge on entrapment in a prosecution for possession and sale of heroin where defendant contended that he sold drugs to an SBI agent because he understood that prior drug charges against him would be dropped if he would deal with people in the drug trade and supply information to the N. C. Attorney General and to the SBI. *S. v. Walker*, 510.

§ 15.1. Change of Venue Because of Pretrial Publicity

Trial court in a first degree murder case properly denied defendants' motions for a change of venue where defendants were not prejudiced by newspaper articles about their first trial. *S. v. Matthews*, 265.

§ 21. Preliminary Proceedings; Right to Communicate with Friends

Defendant's contention that his case should have been dismissed because his arresting officers allegedly failed to inform him of his right to communicate with friends pursuant to G.S. 15A-501(5) is without merit. *S. v. Curmon*, 453.

§ 21.1. Preliminary Hearing

Trial judge correctly denied defendant's motion to dismiss made on the ground that he was denied a preliminary hearing. *S. v. Hudson*, 427.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Although the State and trial judge treated "serious injury" arising out of the felonious assault of one victim and the "sexual assault" arising out of the rape of the second victim as elements, respectively, of kidnappings of the two victims, the punishment of defendant for the kidnappings and also for the felonious assault and rape did not offend the Double Jeopardy or Law of the Land Clauses. *S. v. Williams*, 655.

§ 34.7. Evidence of Other Offenses to Show Intent

Statements by defendant during a robbery and murder that he was an escapee from a life sentence and that he had killed several people were competent to show that defendant took articles from the victims by putting them in fear of their lives and to establish defendant's intent to kill. *S. v. McQueen*, 96.

§ 35. Evidence Offense Was Committed by Another

Conditions for admission of declarations against penal interest. *S. v. Haywood*, 709.

Defendants were not entitled to have alleged declarations against penal interest made by their codefendant admitted in evidence. *Ibid.*

CRIMINAL LAW — Continued

§ 50.2. Opinion of Nonexpert

A police officer and an accomplice to a rape were properly permitted to identify stains on the back seat of defendant's car as bloodstains. *S. v. Mason*, 584.

§ 53. Medical Expert Testimony in General

In determining whether expert medical opinion is to be admitted, the inquiry should not be whether it invades the province of the jury but whether the opinion expressed is really one based on the special expertise of the expert. *S. v. Wilkerson*, 559.

§ 53.1. Medical Testimony as to Cause of Death

Trial court properly allowed expert medical witnesses to testify that a child suffered from the "battered child syndrome." *S. v. Wilkerson*, 559.

§ 60. Fingerprint Evidence

The State made a sufficient showing of the chain of custody of batteries found in a flashlight at the crime scene to permit a fingerprint expert to testify as to the comparison of a fingerprint found on one of the batteries. *S. v. Abernathy*, 147.

Prior to giving his opinion a fingerprint expert is not required to explain the method of testing used and the specific manner in which he identified the prints in question. *Ibid.*

Trial court did not err in allowing a fingerprint expert to testify that a palmprint found at the scene of the assault was defendant's. *S. v. Banks*, 399.

§ 66. Evidence of Identity by Sight

Trial court did not err in admitting the in-court identification of defendant by the prosecuting witness. *S. v. Banks*, 399.

Where the trial court conducted a voir dire hearing and excluded in-court identification testimony offered through a particular witness, it was not error for the court subsequently to permit the witness to testify as to the color of the skin of the man the witness saw fleeing from the crime scene. *S. v. Hudson*, 427.

§ 66.9. Suggestiveness of Photographic Identification Procedure

The fact that photographs of the two defendants were newer than other photographs shown to a rape victim in a pretrial photographic identification procedure did not suggest that defendants were involved in the crime or that the witness should select their photographs, and such distinction was not impermissibly suggestive. *S. v. Cobb*, 1.

§ 66.12. Other Pretrial Confrontations

There was no evidence to suggest that the confrontation between defendants and the prosecuting witness at a preliminary hearing in any way affected her in-court identification testimony. *S. v. Cobb*, 1.

§ 66.17. Independent Origin of In-Court Identification

Though a showup in a first degree murder case was inherently suggestive, such confrontation nevertheless did not render inadmissible the witnesses' in-court identifications of defendants. *S. v. Matthews*, 265.

A pretrial identification of defendant by a deputy sheriff at the courthouse when both were there on unrelated business was impermissibly and unnecessarily suggestive, and the deputy's in-court identification of defendant was not of independent origin. *S. v. Headen*, 437.

CRIMINAL LAW — Continued

§ 69. Telephone Conversations; Radio Communications

Radio communications are governed by the rules of evidence regulating the admission of oral statements made during a face-to-face transaction once the identity of the speakers is ascertained. *S. v. Connley*, 327.

§ 72. Evidence as to Age

Witnesses' opinion testimony of defendants' ages was admissible in a prosecution for rape. *S. v. Cobb*, 1.

A public record of birth which was authenticated by the Register of Deeds who was the official custodian thereof was admissible in evidence and was competent to show the date of defendant's birth. *S. v. Joyner*, 55.

§ 73.1. Hearsay Statement as Prejudicial or Harmless Error

Trial court erred in admitting hearsay testimony which formed the basis for the court's finding that defendant's confession was voluntary. *S. v. Connley*, 327.

§ 73.4. Res Gestae

Radio transmissions by an abducted State trooper, though hearsay, were properly admitted into evidence since they were part of the res gestae and since they were made in the regular course of business and in the midst of the transaction the trooper was reporting. *S. v. Connley*, 327.

§ 74. Confessions; Manner of Introduction into Evidence

Even if defendant's pretrial statement was admitted in improper form, defendant was not prejudiced thereby. *S. v. Potter*, 126.

§ 75.1. Effect of Arrest or Delay in Arraignment on Confession

A four and one half hour delay in bringing defendant before a judicial official did not require exclusion of his confession. *S. v. Richardson*, 309.

Defendant's contention that his inculpatory statement was the fruit of his original unlawful arrest on a city street and therefore should have been suppressed is without merit. *S. v. Sanders*, 361.

§ 75.7. What Constitutes Custodial Interrogation

An officer's question as to "what happened" when he saw defendant in a hospital emergency room constituted a general on-the-scene question not requiring the Miranda warnings. *S. v. Alston*, 629.

§ 75.9. Volunteered Statements

Trial court properly allowed into evidence defendant's incriminating statements which were volunteered to an officer at the crime scene. *S. v. Freeman*, 210.

§ 75.11. Sufficiency of Waiver of Constitutional Rights

Trial court erred in admitting defendant's confession where the evidence on voir dire failed to show that defendant specifically made a waiver of counsel after the Miranda warnings had been given him. *S. v. Butler*, 250.

Defendant did not make an effective waiver of his rights to remain silent and have an attorney present during in-custody questioning where defendant answered negatively when he was asked whether he wanted "any individual or person present." *S. v. Silhan*, 636.

Trial court erred in concluding that defendant waived his right to counsel. *S. v. Connley*, 327.

CRIMINAL LAW — Continued

§ 75.13. Confessions to Persons Not Police Officers

A conversation between defendant and his uncles at the sheriff's office which resulted in defendant's assistance in finding the murder weapon did not constitute a "custodial interrogation" so as to require the Miranda warnings, and the weapon and evidence of its location were properly admitted in defendant's murder trial. *S. v. Holcomb*, 608.

Defendant's statement to a hospital worker that "a man that would do something like that deserved killing" was properly admitted in evidence. *S. v. Alston*, 629.

§ 76.2. Necessity for Voir Dire Hearing

When a confession is used on rebuttal for impeachment purposes and defendant challenges the admissibility of the confession on the ground it was coerced or induced by improper means, a voir dire hearing must be held. *S. v. Richardson*, 309.

§ 76.5. Necessity for Findings of Fact after Voir Dire Hearing

Where all the evidence on voir dire to determine the admissibility of defendant's pretrial statements tended to show the appropriate waivers and that defendant was sober, such findings were not required. *S. v. Potter*, 126.

Defendant was not prejudiced where the trial court did not make findings of fact and conclusions of law with respect to the admissibility of defendant's statements at the time they were offered into evidence. *S. v. Richardson*, 309.

An immaterial conflict in the voir dire evidence did not require the court to make findings of fact before admitting defendant's statement to a police officer. *S. v. Alston*, 629.

§ 80. Records and Other Writings

A public record of birth which was authenticated by the Register of Deeds who was the official custodian thereof was admissible in evidence and was competent to show the date of defendant's birth. *S. v. Joyner*, 55.

§ 84. Evidence Obtained by Unlawful Means

Defendant's contention that his cross-examination concerning various illegal drugs found in his home in a prior unrelated search was improper because the search leading to the discovery of those drugs was subsequently declared unlawful in district court is without merit since defendant failed to show the evidence seized was excluded on constitutional grounds. *S. v. Ross*, 488.

§ 85.2. State's Character Evidence Relating to Defendant

In a first degree murder case where defendant stabbed his victim to death, trial court erred in allowing the State, during presentation of its case in chief, to offer evidence of defendant's gang membership in another city and his stabbing of another gang member. *S. v. Sanders*, 361.

Trial court erred in permitting the cross-examination of defendant's character witness as to specific acts of misconduct by defendant. *S. v. Wilkerson*, 559.

Trial court properly permitted a deputy sheriff and an SBI agent to testify as to defendant's bad character. *S. v. Abernathy*, 147.

§ 86.5. Impeachment; Questions as to Specific Acts

The district attorney was properly permitted to ask defendant on cross-examination whether he remembered shooting a named girl in the head in Arkansas. *S. v. McQueen*, 96.

CRIMINAL LAW — Continued

§ 86.6. Impeachment of Defendant; Prior Statements

Where defendant's pretrial statement was offered in rebuttal for the purpose of impeaching defendant, it was not incumbent upon the State to demonstrate that the requirements of Miranda were met. *S. v. Potter*, 126.

§ 87. Direct Examination of Witnesses

A witness's testimony as to her present recollection of events which she saw and heard at the time of two murders was not rendered incompetent by the fact that her memory had been refreshed by hypnosis. *S. v. McQueen*, 96.

Trial court did not err in denying defendant's request that he be permitted to question witnesses at the trial in addition to questions propounded by his counsel. *S. v. House*, 189.

§ 87.1. Leading Questions

Trial court did not abuse its discretion in allowing the district attorney to ask leading questions of an 11 year old rape victim. *S. v. Cobb*, 1.

§ 88.4. Cross-Examination of Defendant

Cross-examination for impeachment purposes of a defendant as to his prior unrelated convictions and acts of misconduct does not place an unreasonable burden on defendant's right to testify. *S. v. Ross*, 488.

§ 89.3. Corroboration; Prior Statements

Prior written statements of two witnesses in a homicide prosecution were properly admitted for corroborative purposes. *S. v. Medley*, 75.

§ 89.8. Impeachment of Witnesses; Promise of Leniency

Trial court did not err in allowing one defendant who withdrew his not guilty plea during trial and entered a plea of guilty to a lesser offense to testify concerning his plea bargain arrangement. *S. v. Potter*, 126.

The trial court properly sustained the State's objections to defendants' improper questions to an accomplice concerning whether the accomplice had entered a guilty plea in another county and got off light and whether he knew that a deal could be worked out when one is charged with a crime. *S. v. Abernathy*, 147.

Trial court properly limited cross-examination of defendant's accomplice with respect to his expected punishment. *S. v. Mason*, 584.

§ 89.10. Impeachment of Witnesses, Prior Criminal Conduct

Trial court properly sustained the State's objection to a question asked for impeachment purposes as to whether the witness had been involved in street gang operations in New York. *S. v. Mason*, 584.

§ 90. Rule that Party May Not Discredit Own Witness

The State did not impeach its own witness when an 11 year old witness first testified that he did not see defendant on the day in question and did not know him and, after conferring with the district attorney in private, the witness testified as to his observations of defendant's actions on the day in question. *S. v. Berry*, 534.

§ 91. Time of Trial

Trial court properly denied defendant's motion to dismiss murder indictments on the ground the State failed to comply with the Interstate Agreement on Detainers Act where defendant merely wrote a letter to the clerk of superior court requesting disposition of the murder charges. *S. v. McQueen*, 96.

CRIMINAL LAW — Continued

§ 91.6. Continuance to Obtain Additional Evidence

Trial court did not err in denying defendant's motion for continuance made that he might have time to investigate certain materials submitted by the State pursuant to his motion for discovery. *S. v. Mason*, 584.

§ 91.7. Continuance on Ground of Absence of Witness

Defendant was not denied his constitutional right to confrontation by the court's refusal to allow his motion, made when his case was called for trial, for a continuance to obtain an expert witness to testify regarding fingerprint evidence. *S. v. Abernathy*, 147.

§ 92. Consolidation of Charges

Defendant's contention that joinder of his trial with that of his codefendant and subsequent rulings limiting cross-examination of State's witnesses concerning statements by his codefendant deprived him of his constitutional right of cross-examination and confrontation was without merit. *S. v. Cobb*, 1.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by a witness's objectionable testimony where defendant objected and moved to strike and the judge instructed the jury not to consider the testimony. *S. v. Curmon*, 453.

Defendant was not prejudiced by the trial court's error in allowing into evidence defendant's statement without a prior showing that he waived his right to counsel since the evidence was promptly withdrawn from the jury's consideration. *S. v. Snead*, 615.

§ 97.2. Refusal to Permit Additional Evidence

Trial court in a murder case did not abuse its discretion in denying defendant's motion to recall the jury and reopen the case to permit defendant to introduce letters written by a State's witness to defendant. *S. v. McQueen*, 96.

§ 98.2. Sequestration of Witnesses

Though the trial court's basis for denying defendant's motion to sequester witnesses was improper, defendant was not prejudiced by the denial of his motion. *S. v. Mason*, 584.

§ 99.5. Expression of Opinion in Admonition of Counsel

The trial judge did not express an opinion when he instructed defense counsel to let a witness finish his answer. *S. v. Berry*, 534.

§ 99.6. Expression of Opinion by Examination of Witnesses

Trial court did not express an opinion in violation of G.S. 1-180 by asking a State's witness a number of questions. *S. v. Hudson*, 427.

§ 101.4. Misconduct Affecting Jury

Defendant is entitled to a new trial where the bailiff told the jury after it had received the case that "he was proud or glad that the district attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County." *S. v. Johnson*, 227.

§ 102. Argument of Counsel

A defendant represented by counsel was not entitled to make an opening statement to the jury in propria persona. *S. v. House*, 189.

CRIMINAL LAW — Continued

§ 102.9. Prosecutor's Comment on Defendant's Character or Credibility

Any impropriety in the private prosecutor's remark during jury argument indicating that defense counsel may have coached defendant was cured when the court instructed the jury to disregard such remark. *S. v. Williams*, 655.

§ 106.4. Nonsuit; Confession of Defendant

Evidence concerning the unreliability of defendant's confessions merely tended to cast some doubt upon the credibility of his confessions and did not show that they were without probative value. *S. v. Green*, 244.

§ 112.4. Charge on Circumstantial Evidence

Trial court's instruction on circumstantial evidence was sufficient without containing a statement that such evidence "must point unerringly to defendant's guilt and exclude every other reasonable hypothesis." *S. v. Alston*, 629.

§ 113.6. Charge Where There Are Several Defendants

Trial court's instruction was not susceptible to the construction that if the jury found one defendant guilty of first degree burglary it would then convict both defendants. *S. v. Abernathy*, 147.

In a prosecution against four defendants, trial court properly instructed the jury that they must determine guilt of each defendant individually. *S. v. Haywood*, 709.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court's instruction that the State contended that defendant was guilty of murder and armed robbery even though he did not enter the home in question did not constitute an expression of opinion that defendant was present at the scene in an automobile. *S. v. Abernathy*, 147.

§ 115. Instructions on Lesser Degrees of the Crime

The trial judge's ambiguous statement as to what offenses he would charge on, followed by his failure to instruct on lesser offenses of the crime charged, was not prejudicial to defendant. *S. v. Mason*, 584.

§ 117.4. Charge on Credibility of State's Witness

Trial court's charge on accomplice testimony was not insufficient in failing to include defendant's requested instruction that "an accomplice may be motivated to falsify his testimony in whole or in part because of his own self-interest in obtaining leniency in his own prosecution." *S. v. Abernathy*, 147.

§ 118.1. Disparity in Stress Given to Contentions

Prejudicial error is committed when the trial judge gives the contentions of the State but fails to give any contentions of the defendant. *S. v. Hewett*, 640.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

The trial judge did not improperly coerce a verdict when he told the jury he would like to have the jury reach a verdict before the evening was over if at all possible. *S. v. Holcomb*, 608.

The trial judge did not coerce a verdict by his instruction, "If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed." *Ibid.*

CRIMINAL LAW — Continued

§ 130. New Trial for Misconduct of Jury

Trial judge did not err in failing to declare a mistrial when the jury opened the jury room door and requested that it be allowed to review a certain exhibit, and the bailiff reported this to the trial judge and the judge then properly instructed the jury on the point. *S. v. Berry*, 534.

§ 138.9. Credit for Time Served

Where defendant was given three consecutive sentences upon conviction of three different crimes, it made no difference to which one of the consecutive sentences credit for pre-conviction incarceration was applied. *S. v. Richardson*, 309.

Defendant was entitled to credit for pretrial time spent in custody. *S. v. Mason*, 584.

§ 146. Appellate Jurisdiction in Criminal Case

The State's appeal from an order granting a motion to suppress is properly made to the Supreme Court where the punishment for the crime charged is either death or life imprisonment. *S. v. Silhan*, 636.

§ 157.1. Matters Not Necessary Parts of Record

Trial court did not err in refusing to permit defendant to put into the record the responses which a witness would have given had he been permitted to testify. *S. v. Mason*, 584.

§ 163.2. Assignment of Error to Charge

When an appellant excepts to the inadequacy of the court's instruction on a particular point, appellant must set out the substance of the inadequacy. *S. v. Freeman*, 210.

DECLARATORY JUDGMENT ACT

§ 3. Justiciable Controversy

Plaintiffs' contention that the Coastal Area Management Act of 1974 effected an unconstitutional taking of their land did not constitute a controversy justiciable under the Declaratory Judgment Act. *Adams v. Dept. of N.E.R.*, 683.

FIXTURES

§ 1. Generally

An agreement between the owner of gasoline dispensing equipment and the owner of realty upon which the equipment was affixed that the equipment should remain the personal property of the original owner was not required to be in writing and was binding on the subsequent purchaser of the realty who took with notice of the agreement. *Oil Co. v. Cleary*, 417.

GARNISHMENT

§ 1. Property Subject to Garnishment

Payments a retired military officer received from the U.S. on account of disability were not subject to garnishment. *Elmwood v. Elmwood*, 168.

Defendant's military retirement pay was not subject to garnishment for alimony since the pay was necessary for the use of a family supported by his labor,

but up to 20% of defendant's retirement pay from and after the period beginning 60 days prior to service of garnishment order was subject to garnishment for child support. *Ibid.*

HOMICIDE

§ 5. Second Degree Murder

Statements in prior cases that "an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree" and that "second-degree murder imports a specific intent to do an unlawful act" are not universally applicable. *S. v. Wilkerson*, 559.

§ 15.4. Opinion Evidence

In a prosecution for first degree murder of a military policeman while defendant was in a holding cell, trial court properly refused to permit witnesses to testify concerning the intent of military policemen when they entered the holding cell. *S. v. Sanders*, 361.

§ 16. Dying Declarations; Apprehension of Death

The requirements of G.S. 8-51.1 for the admission of a dying declaration do not change our case-law requirement that the declaration must have been "in present anticipation of death." *S. v. Stevens*, 21.

Evidence supported the court's finding that decedent was conscious of approaching death and believed there was no hope of recovery when he made declarations to an officer. *Ibid.*

Dying declarations are not inadmissible because they are made in response to an officer's leading questions or because decedent survived one week longer than his physician told him he might live. *Ibid.*

Admission of dying declarations did not deny defendant his constitutional right of confrontation. *Ibid.*

§ 16.2. Credibility of Dying Declarations

A dying declaration was not subject to impeachment by evidence of decedent's criminal record or his record as a patient at a treatment center for alcoholics. *S. v. Stevens*, 21.

§ 17. Evidence of Intent

In a prosecution for murder committed during the perpetration of a robbery, trial court erred in refusing to permit defendant to testify that he had no intention of robbing or harming deceased when he went to the scene of the crime but such error was not prejudicial. *S. v. Wooten*, 378.

§ 17.2. Evidence of Threats

Evidence of threats was not inadmissible in a first degree murder case on the ground that the threats were too remote. *S. v. Potter*, 126.

Evidence of defendant's threat to kill deceased was properly admitted in a first degree murder case. *S. v. Sanders*, 361.

§ 18.1. Evidence of Premeditation and Deliberation

Evidence that defendant shot deceased in the back after he had been felled by prior shots was competent to show premeditation and deliberation even though such shot was not the fatal one. *S. v. Barbour*, 66.

HOMICIDE — Continued

§ 19.1. Self-Defense; Evidence of Character or Reputation

In a homicide case in which defendant presented evidence that deceased was the first aggressor, trial court erred in refusing to permit defendant to testify that he once saw deceased run from a night spot and hit a passerby with a pair of brass knuckles. *S. v. Barbour*, 66.

Trial court properly struck testimony by deceased's wife that she knew deceased's character to be dangerous and violent when it was disclosed on cross-examination that she was speaking from personal experience, but the court erred in refusing to allow deceased's wife to relate on redirect examination deceased's reputation in the community. *Ibid.*

§ 21.5. Sufficiency of Evidence of First Degree Murder

State's evidence was sufficient to support a finding that defendant shot deceased with premeditation and deliberation. *S. v. Barbour*, 66.

Evidence of defendant's threats against deceased, statements made after the killing, and the manner of the killing were sufficient for the jury in a first degree murder case. *S. v. Potter*, 126.

Defendant's contention that his motion for nonsuit should have been granted in a first degree murder case because the evidence conclusively demonstrated that his actions were fully justified as a valid attempt to escape from an unlawful arrest and that he was privileged to use deadly force because he was confronted with attackers of superior size and number and thus had a reasonable fear of death or serious bodily harm is without merit. *S. v. Sanders*, 361.

§ 21.6. Sufficiency of Evidence of Murder in Perpetration of Felony

Evidence that defendant killed deceased while attempting to commit a robbery was sufficient to be submitted to the jury. *S. v. Wooten*, 378.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

Evidence was sufficient for the jury in a second degree murder case where it tended to show defendant burned her victim. *S. v. Freeman*, 210.

Evidence that the victim of an attack was found near defendant's place of employment and evidence that defendant confessed to the murder was sufficient for the jury in a homicide case. *S. v. Green*, 244.

An act that indicates a total disregard for human life is sufficient to supply the malice necessary for second degree murder. *S. v. Wilkerson*, 559.

State's evidence was sufficient for the jury in a prosecution for second degree murder of a man who had cut defendant's wife. *S. v. Alston*, 629.

§ 23. Instructions in General

In a first degree murder case where defendant claimed that he had a privilege to resist the efforts of military policemen to continue his unlawful confinement, trial court erred in instructing on provisions of the U.S. Army Regulations and the Uniform Code of Military Justice. *S. v. Sanders*, 361.

§ 23.2. Instructions on Proximate Cause

Trial court's instruction with respect to proximate cause was proper where the court defined it as "a real cause, a cause without which [deceased's] death would not have resulted." *S. v. Freeman*, 210.

HOMICIDE — Continued

§ 31.1. Punishment for First Degree Murder

Sentences of life imprisonment are substituted for the death penalty imposed upon defendants upon their conviction for first degree murder. *S. v. Matthews*, 265.

§ 32.1. Error Cured by Verdict

Defendant was not prejudiced by the trial court's instruction erroneously defining involuntary manslaughter as the "intentional" killing of a human being by an unlawful act not amounting to a felony where defendant was convicted of first degree murder. *S. v. Berry*, 534.

Defendant was not prejudiced by the erroneous submission of manslaughter where he was convicted of second degree murder. *S. v. Wilkerson*, 559.

HUSBAND AND WIFE

§ 12. Rescission of Separation Agreement by Resumption of Marital Relationship

Any sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract. *Murphy v. Murphy*, 290.

INDICTMENT AND WARRANT

§ 5. Irregularities in Endorsement and Return of Indictment

An indictment was not invalid because it contained no attestation by the foreman of the grand jury that twelve or more grand jurors concurred in the finding of a true bill. *S. v. House*, 189.

Defendant's motion to dismiss the bill of indictment on the ground that it failed to state the number of qualified jurors who concurred in the finding of the bill was properly denied. *S. v. Richardson*, 309.

INFANTS

§ 18. Sufficiency of Evidence in Juvenile Proceeding

In a proceeding to have respondent declared a juvenile delinquent, the trial court erred in denying respondent's motion to dismiss where there was no competent evidence before the court to show that respondent was one of the perpetrators of the alleged crimes. *In re Byers*, 256.

INSURANCE

§ 68.8. Automobile Policies Covering More than One Vehicle

Where a family automobile policy covering three automobiles provided medical payments coverage for nonrelatives for bodily injury "caused by accident while occupying the owned automobile," a nonrelative who was injured while driving an "owned automobile" was not entitled to recover the $1000 medical payments limit for each automobile for which separate premiums had been paid but could recover only up to the $1000 limit for the automobile she occupied at the time of the collision. *Woods v. Insurance Co.*, 500.

Where a family automobile policy covering two automobiles provided medical payments coverage to insured and his relatives for bodily injury "caused by accident while occupying or being struck by an automobile," an insured who paid medical bills for a family member injured in an automobile accident in excess of the $500 coverage provided for each insured automobile was entitled to stack or aggregate the medical payments coverage up to the $500 limit for each car on which he paid a premium. *Ibid.*

INSURANCE — Continued

§ 72. Vehicles Covered by Collision Policy

Plaintiff's complaint was sufficient to show that a leased International tractor was a "replacement vehicle" within the purview of a collision insurance policy covering a Ford tractor owned by plaintiff and newly acquired vehicles replacing the covered vehicle. *Grant v. Insurance Co.*, 39.

JUDGES

§ 7. Misconduct in Office

Art. IV, § 17(2) of the N. C. Constitution by implication gives the Legislature authority to confer upon the Supreme Court original jurisdiction to censure or remove judges and justices. *In re Martin*, 291.

A district court judge's arbitrary dismissal of a criminal case, after the district attorney had refused to take a nol pros and without permitting the State to offer its evidence, constituted willful misconduct in office. *Ibid.*

The conduct of a district court judge in holding hearings and signing orders without proper notice to the opposing party or his counsel constituted willful misconduct in office. *Ibid.*

A finding that a district court judge had committed the felony of suborning perjury was not supported by clear and convincing evidence and would not support removal of the judge from office. *Ibid.*

JURY

§ 5.2. Discrimination in Jury Selection

Black defendants are not entitled to a new trial because all the jurors impaneled to try their case were white. *S. v. Matthews*, 265.

§ 6. Voir Dire Procedure

Trial court did not err in denying defendant's request that he be permitted to question prospective jurors on voir dire in addition to questions propounded by his counsel. *S. v. House*, 189.

Defendant was not prejudiced by the trial court's ruling which permitted the prosecutor to consult with a psychologist during the voir dire examination of the jury. *S. v. Banks*, 399.

§ 7.6. Time of Challenges for Cause

Trial court did not err in allowing the district attorney to reexamine and then excuse a venireman after indicating that she was satisfactory to the State. *S. v. Matthews*, 265.

§ 7.12. Scruples Against Capital Punishment

Trial court did not err in allowing the district attorney to challenge for cause 14 jurors, each of whom indicated he was so opposed to capital punishment that regardless of the evidence he would not return a verdict requiring the death sentence. *S. v. Matthews*, 265.

§ 7.13. Peremptory Challenges

Defendant on trial for first degree murder was properly limited to six peremptory challenges rather than the fourteen challenges allowed in capital cases where the death penalty was inapplicable at the time of defendant's crime. *S. v. Barbour*, 66.

KIDNAPPING

§ 1. Definitions; Elements of Offense

The crimes of crime against nature, assault with intent to commit rape, and robbery with a dangerous weapon, though the purposes for which defendant confined and restrained the victim, were not elements of the offense of kidnapping but were separate and distinct offenses and were punishable as such. *S. v. Banks*, 399.

Although the State and trial judge treated "serious injury" arising out of the felonious assault of one victim and the "sexual assault" arising out of the rape of the second victim as elements, respectively, of kidnappings of the two victims, the punishment of defendant for the kidnappings and also for the felonious assault and rape did not offend the Double Jeopardy or Law of the Land Clauses. *S. v. Williams*, 655.

§ 1.2. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for abduction of an 11 year old for the purpose of facilitating the crime of rape. *S. v. Cobb*, 1.

§ 2. Punishment

G.S. 14-39 creates only a single offense of kidnapping; therefore, the jury need only determine whether defendant was guilty of kidnapping as defined by G.S. 14-39(a), and the trial judge must determine the existence or nonexistence of the mitigating factors set forth in G.S. 14-39(b). *S. v. Williams*, 655.

In imposing a sentence in a kidnapping case the trial judge must make findings of fact as to the existence or nonexistence of the statutory mitigating factors. *Ibid.*

When the question of the existence of mitigating factors in a kidnapping case has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty of the separate charges, there is no need for the judge to make separate findings. *Ibid.*

A defendant in a kidnapping case is not entitled to a jury trial on the question of mitigating factors, and it is not violative of due process to place the burden of persuasion as to the existence of mitigating factors upon the defendant. *Ibid.*

MASTER AND SERVANT

§ 67.1. Workmen's Compensation, Other Injuries or Disabilities

Where the uncontradicted evidence tended to show that plaintiff suffered an injury to her spinal cord which resulted in weakness in all of her extremities and numbness and loss of sensation throughout her body, the Industrial Commission erred in limiting plaintiff to an award for partial loss of use of her back. *Little v. Food Service*, 527.

§ 67.3. Pre-Existing Condition

If pre-existing conditions such as age, education and work experience are such that an injury causes a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers. *Little v. Food Service*, 527.

§ 69. Amount of Workmen's Compensation

Since the criterion for compensation in workmen's compensation cases is the extent of the claimant's incapacity for work, physicians' estimates of plaintiff's disability which referred only to the degree of loss of use of her nervous system and to the impairment of her ability to carry out "total life functions" were insufficient to support the Commission's finding that plaintiff was entitled to compensa-

tion only for permanent partial disability or loss of use of her back. *Little v. Food Service*, 527.

§ 93.2. Proceedings Before Industrial Commission; Right to Present Evidence

When a claimant refrains from presenting evidence in reliance on an inaccurate statement by a deputy commissioner of the Industrial Commission that a certain matter is uncontested, the right to testify and present evidence guaranteed by G.S. 97-84 has been abridged. *Little v. Food Service*, 527.

§ 94. Findings by Industrial Commission; Effect of Stipulation

A stipulation between the parties in a workmen's compensation case as to plaintiff's average weekly wage was approved by the Industrial Commission and was binding. *Little v. Food Service*, 527.

NEGLIGENCE

§ 6.1. Application of Res Ipsa Loquitur

Res ipsa loquitur was applicable in an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's restaurant. *Husketh v. Convenient Systems*, 459.

§ 56. Competency of Evidence in Actions by Invitees

In an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's restaurant, evidence of post rem statements by the store manager were improperly excluded. *Husketh v. Convenient Systems*, 459.

§ 57.2. Fall of Invitee from Chair

Res ipsa loquitur was applicable in an action to recover for personal injuries allegedly sustained by plaintiff when she fell from a barstool in defendant's restaurant. *Husketh v. Convenient Systems*, 459.

OBSCENITY

§ 4. Peeping Into a Room Occupied by a Woman

The statute making it a crime to "peep secretly into any room occupied by a female person" prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectancy of privacy and is constitutional. *In re Banks*, 236.

PROCESS

§ 12. Service on Domestic Corporations

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation rather than the officer or agent receiving service is the entity being sued, the summons, when properly served upon an officer, director or agent specified in G.S. 1A-1, Rule 4, is adequate to bring the corporate defendant within the trial court's jurisdiction. *Wiles v. Construction Co.*, 81.

PROPERTY

RAPE

ROBBERY

§ 4.3. Sufficient Evidence in Armed Robbery Case

State's evidence was sufficient to show that a ring was taken from the victim by the threatened use of a firearm where the victim had earlier been placed under a continuing threat with a firearm. *S. v. Joyner*, 55.

Evidence was sufficient to support a finding that four defendants acted in concert in assaulting and robbing a grocery store owner. *S. v. Haywood*, 709.

RULES OF CIVIL PROCEDURE

§ 4. Process

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation rather than the officer or agent receiving service is the entity being sued, the summons, when properly served upon an officer, director or agent specified in G.S. 1A-1, Rule 4, is adequate to bring the corporate defendant within the trial court's jurisdiction. *Wiles v. Construction Co.*, 81.

SEARCHES AND SEIZURES

§ 7. Search Incident to Arrest

In a prosecution for kidnapping and rape, trial court did not err in allowing into evidence bloodstained underwear, pubic hair samples and a long blond hair taken from defendant after a search of his person on the night he was arrested. *S. v. Cobb*, 1.

§ 11. Search of Vehicle on Probable Cause

Trial court properly allowed into evidence items seized during a warrantless search of defendant's car at police headquarters the day after he had been taken into custody. *S. v. Cobb*, 1.

Probable cause existed to search defendant's automobile at the police station where it had been taken following defendant's arrest. *S. v. Jones*, 345.

§ 13. Search by Consent

Evidence seized during a consent search of defendant's premises was admissible even though officers failed to give defendant a receipt for the seized items. *S. v. Richardson*, 309.

§ 14. Voluntariness of Consent

The fact that defendant was under arrest at the time he consented to a search of his apartment was insufficient, standing alone, to overcome an otherwise apparently voluntary consent. *S. v. Cobb*, 1.

§ 34. Plain View Rule in Search of Vehicle

A shotgun in plain view in defendant's automobile was properly seized by an officer. *S. v. Jones*, 345.

A sawed-off rifle in plain view seized from the automobile in which defendant had been riding during a high speed chase by police officers was properly admitted in a prosecution for armed robbery. *S. v. Mathis*, 623.

§ 37. Search of Vehicle Incident to Arrest

A shotgun seized from defendant's car was seized pursuant to a lawful arrest. *S. v. Jones*, 345.

STATUTES

§ 2.9. Prohibition Against Certain Local Acts

The Coastal Area Management Act does not constitute local legislation prohibited by the N. C. Constitution. *Adams v. Dept. of N.E.R.*, 683.

UTILITIES COMMISSION

§ 20. Regulation of Two-Way Radio Service

A medical doctor who provides two-way radio service for ten doctors in his county medical society for compensation is operating a "public" utility and is subject to regulation by the Utilities Commission. *Utilities Comm. v. Simpson*, 519.

WATERS AND WATERCOURSES

§ 7. Marsh and Tidelands

The Coastal Area Management Act of 1974 does not constitute local legislation prohibited by the N. C. Constitution and does not unconstitutionally delegate authority to the Coastal Resources Commission to develop and adopt "State Guidelines" for the coastal area. *Adams v. Dept. of N.E.R.*, 683.

WITNESSES

§ 7. Refreshing Memory

A witness's testimony as to her present recollection of events which she saw and heard at the time of two murders was not rendered incompetent by the fact that her memory had been refreshed by hypnosis. *S. v. McQueen*, 96.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina