NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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297 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

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JOSEPH BRANCH[1]

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J. WILLIAM COPELAND
JAMES G. EXUM, JR.
DAVID M. BRITT
WALTER E. BROCK
J. PHIL CARLTON[2]

Retired Chief Justices

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SUSIE SHARP[3]

Retired Justices

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CARLISLE W. HIGGINS
I. BEVERLY LAKE
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ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

1. Appointed Chief Justice by Gov. James B. Hunt, Jr., and took office 1 August 1979.
2. Appointed Associate Justice by Gov. James B. Hunt, Jr., and took office 2 August 1979.
3. Retired as Chief Justice 31 July 1979.

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	N. B. BAREFOOT	Wilmington
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7	GEORGE M. FOUNTAIN	Tarboro
	FRANKLIN R. BROWN	Tarboro
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN[1]	Kinston

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	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
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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
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	EDWARD K. WASHINGTON	Greensboro
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	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
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	F. FETZER MILLS	Wadesboro
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	HARVEY A. LUPTON	Winston-Salem

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	PETER W. HAIRSTON	Advance
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	CLIFTON E. JOHNSON	Charlotte
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	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

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SAMUEL E. BRITT[2]	Lumberton
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JOHN R. JOLLY, JR.[4]	Rocky Mount
ARTHUR L. LANE[5]	Fayetteville
CHARLES C. LAMM, JR.[6]	Boone

EMERGENCY JUDGE

ALBERT W. COWPER	Wilson

1. Appointed 1 June 1979 to succeed Albert W. Cowper who retired 1 March 1979 and was constituted Emergency Judge on that date.
2. Appointed 3 August 1979 to succeed Robert R. Browning whose term expired 2 August 1979.
3. Appointed 3 August 1979 to succeed William Thomas Graham whose term expired 2 August 1979.
4. Appointed 3 August 1979 to succeed David I. Smith whose term expired 2 August 1979.
5. Appointed 3 August 1979 to succeed Ronald Barbee whose term expired 2 August 1979.
6. Appointed 20 August 1979 to succeed Ralph A. Walker whose term expired 19 August 1979.

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	JOHN J. SNOW, JR.	Murphy

1. Appointed 31 August 1979.
2. Appointed 30 August 1979.
3. Appointed 29 August 1979.
4. Retired 31 July 1979.
5. Appointed Chief Judge 1 August 1979.
6. Appointed 15 August 1979.
7. Deceased 19 September 1979.
8. Appointed 26 September 1979.
9. Appointed Special Judge Superior Court 3 August 1979.
10. Appointed Chief Judge 3 August 1979.
11. Appointed 17 August 1979.
12. Appointed 5 October 1979.
13. Appointed 26 October 1979.

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CASES REPORTED

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. Joyner, 349
1A-1	See Rules of Civil Procedure infra
14-2	State v. Sparks, 314
14-39	State v. Silhan, 660
14-39(a)	State v. Silhan, 660
14-54(a)	State v. Boone, 652
14-71	State v. Haywood, 686
15A-501(2)	State v. Jolly, 121
15A-533(b)	State v. Sparks, 314
15A-536	State v. Sparks, 314
15A-903	State v. Sledge, 227
15A-904	State v. Silhan, 660
15A-910	State v. Milano, 485
15A-943	State v. Hunt, 131
15A-952	State v. Haywood, 686
15A-952(c)	State v. Phillips, 600
15A-1232	State v. Joyner, 349
15A-1447(e)	State v. Boone, 652
20-138	In re Greene, 305
20-139(a)	In re Greene, 305
20-139(b)	In re Greene, 305
20-179	In re Greene, 305
25-9-502	Bank v. Burnette, 524
25-9-601	Bank v. Burnette, 524
25-9-603	Bank v. Burnette, 524
25-9-603(2)	Bank v. Burnette, 524
29-19	Mitchell v. Freuler, 206
36A-48	Kania v. Chatham, 290
58-176	Collins v. Insurance Co., 680
97-2(6)	Booker v. Medical Center, 458
97-38	Booker v. Medical Center, 458

G.S.	
97-53(13)	Booker v. Medical Center, 458
	Wood v. Stevens & Co., 636
105-164.4(1)	Equipment Co. v. Coble, Sec. of Revenue, 19
105-164.13(16)	Equipment Co. v. Coble, Sec. of Revenue, 19
105-375(i)	Henderson County v. Osteen, 113
105-392(c)	Henderson County v. Osteen, 113
105-467	Equipment Co. v. Coble, Sec. of Revenue, 19
Ch. 108	Hughey v. Cloninger, 86
Ch. 111	Hughey v. Cloninger, 86
Ch. 115	Hughey v. Cloninger, 86
115-166	State v. Vietto, 8
115-315.7	Hughey v. Cloninger, 86
115-377	Hughey v. Cloninger, 86
115-384	Hughey v. Cloninger, 86
136-112	Board of Transportation v. Jones, 436
153A-149(c)(30)	Hughey v. Cloninger, 86
153A-248(a)(2)	Hughey v. Cloninger, 86
153A-255	Hughey v. Cloninger, 86
160A-36(d)	Conover v. Newton, 506
160A-37(e)	Conover v. Newton, 506

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA 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 were duly admitted to the practice of law in the State of North Carolina on the dates indicated:

On May 18, 1979, the following individuals were admitted by comity:

DOUGLAS CANNON ..... Raleigh, applying from Ohio
DAVID MICHAEL CARTER ..... Asheville, applying from Indiana
WILLIAM PAUL CONSTANTINI ..... Raleigh, applying from New York
WILLIAM G. DOSSE ..... Greensboro, applying from Illinois
ROBERT HARDY FALK ..... Asheville, applying from Texas
JOHN F. GOEMAAT ..... Greensboro, applying from the District of Columbia
RICHARD M. KLEIN ..... Raleigh, applying from Wisconsin
RALPH BINFORD LAKE ..... Greensboro, applying from Ohio
ROE D. MCBURNETT, JR. ..... Greensboro, applying from New York
ARTHUR S. ROSEN ..... Greensboro, applying from New York

On May 31, 1979, the following individual was admitted by comity:

STEVEN R. EDELSTEIN ..... Raleigh, applying from Vermont

On June 8, 1979, the following individual was licensed:

DAVID HENRY ROGERS

On June 13, 1979, the following individual was admitted by comity:

GUY M. BLYNN ..... Winston-Salem, applying from New York

Given under my hand and seal, this the 3rd day of August, 1979.

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 August 6, 1979, the following individuals were admitted:

RAYMOND FRANCIS BROWN ..... Concord, applied from New York
CHARLES W. MATTHEWS, JR. ..... Charlotte, applied from Texas
CORNELIUS ARTHUR MANLY, JR. ..... Valdese, applied from Ohio

On August 13, 1979, the following individual was admitted:

GARY A. ROBINSON ..... Pinehurst, applied from Pennsylvania

Given under my hand and the Seal of the Board of Law Examiners, this the 30th day of August, 1979.

FRED P. PARKER III

Executive Secretary

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, 1979, and said persons have been issued certificates of this Board:

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H. HEATH ALEXANDER ..... Charlotte
WILLIAM STEVEN ALLEN ..... Greensboro
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TEMPE YARBOROUGH CARLTON ..... Winston-Salem
RICHARD HENRY CARLTON ..... Salisbury
EUGENE ALAN CARMICHAEL ..... Fayetteville
PROSSER DEVANE CARNEGIE ..... Davidson
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WALTER BRADSHER CATES ..... Hurdle Mills
ROBERT BRUCE CAUTHEN, JR. ..... Raleigh
KENNETH DWIGHT CHAMBLEE ..... Durham
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JAMES D. CLARK ..... Chapel Hill
MARTHA HOLTON CLARK ..... Fayetteville
ROBERT W. CLARK ..... St. Petersburg, Fla.
JAMES HARRY CLARKE ..... Hendersonville
KEITH ASHFORD CLINARD ..... High Point
JEFFREY LOYD CLINE ..... Morganton
WAYNE ODELL CLONTZ ..... Glen Alpine
ROBERT EUGENE CLUTE, JR. ..... Athens, Ga.
JOHN A. COCKLEREECE, JR. ..... Greensboro
MICHAEL ALLAN COLLIFLOWER ..... Bath, N. Y.
MICHAEL ALLEN COLOMBO ..... Greenville
ROGER RAY COMPTON ..... Fayetteville
LORYNN ADDERHOLDT CONE ..... Durham
DAVID THOMAS CONLEY ..... Statesville
JULIUS HARSHAW CORPENING II ..... Winston-Salem
WILLIAM J. COTTER ..... Durham
MARGARET CROSBY COURTRIGHT ..... Kernersville
ORVILLE DILLARD COWARD, JR. ..... Sylva
RICHARD THOMAS CRAVEN ..... Fayetteville
LAURA ELLEN CRUMPLER ..... Clinton
KAREN MELINDA CRUTCHFIELD ..... Winston-Salem
MARGARET PERSON CURRIN ..... Oxford
ROBERT ARTHUR D'ANGIO, JR. ..... Lake Worth, Fla.
RICHARD SAMUEL DANIELS ..... Brevard
WALTER ETHERIDGE DANIELS ..... Manteo

LAWRENCE TALTON DARK III ..... Siler City
JANICE WATSON DAVIDSON ..... High Point
ANN HINES DAVIS ..... Waynesville
BARBARA ANN DAVIS ..... Banner Elk
DANNY EDWARD DAVIS ..... Waynesville
GEORGE THOMAS DAVIS, JR. ..... Swan Quarter
GWYNETH B. DAVIS ..... Greensboro
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ROBERT A. DONAT ..... Livonia, Michigan
DAVID RAY DORTON ..... Huntersville
MARION KENNETH DOSS ..... Eden
EVELYN FRANCYNE DOVE ..... Kinston
DALLAS FRANKLIN DRAKE ..... Jamestown
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LUTHER H. DUDLEY II ..... Alexandria, Va.
WILLIAM ARCHIE DUDLEY ..... LaGrange
ALAN WILLIAM DUNCAN ..... Shrewsbury, Mass.
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WAYNE BUCHANAN EADS ..... Chapel Hill
WILLIAM ALBERT EAGLES ..... Crisp
WILBERT WELLONS EDGERTON, JR. ..... Fayetteville
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ROGER LEE EDWARDS ..... Sparta
RICHARD DAVID ENDERBY ..... Buffalo, N. Y.
JODIE ENGLISH ..... Sherrill, N. Y.
SUSAN M. ERDA ..... New York, N. Y.
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DALBY CHANDLER ETHERIDGE ..... Greenville, S. C.
GUY BENJAMIN EUBANKS ..... Morehead City
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EDWARD JOHN FALCONE ..... Durham
GAIL POOLE FANNON ..... Sparta
HARRY CRAIG FARVER ..... Bishopville, S. C.
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ALICE SKRANZ FLORIDA ..... Charlotte
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LEO A. FOX ..... Boca Raton, Fla.
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SUZANNE KUCZKO FULTON ..... Asheville
MARY GALLAGHER ..... Winston-Salem

MARY CAROLINE GAMBLE ..... Lincolnton
MAX ALTON GARNER ..... Biscoe
JOHNNY SHERWOOD GASKINS ..... Frisco
JOSEPH JOHN GATTO ..... Elizabeth, N. J.
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MICHAEL G. GIBSON ..... Raleigh
DEBORAH MARKLAND GLASS ..... Winston-Salem
RICHARD J. GODLEWSKI ..... Pfafftown
CHRISTOPHER BOLTON GODWIN ..... Fayetteville
WILLIAM CLEMENTS GOFORTH ..... New London
MEG DEBORAH GOLDSTEIN ..... Charlotte
REX GORE ..... Nakina
GARY ARNOLD GRADY ..... Elizabethtown
STEVEN ANDERSON GRAHAM ..... Enfield
JANE POWELL GRAY ..... Williamsburg, Va.
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L. WAYNE GREENBERG ..... Durham
ROBERT JOSEPH GREENE, JR. ..... Salt Lake City, Utah
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GREGORY THOMAS GRIFFIN ..... Clinton
MICHAEL H. GRIFFIN ..... Shelby
DORIAN H. GUNTER ..... Charlotte
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RICHARD BYRON HAGER ..... Sanford
JOHN WILEY HALSTEAD, JR. ..... South Mills
STEPHEN PAUL HALSTEAD ..... Greensboro
JOHN CHARLES HAM ..... Winston-Salem
BILLY CURTIS HAMLET ..... Pittsboro
FRANKLIN S. HANCOCK ..... Charlotte
ANN ELIZABETH HANKS ..... Burlington
THOMAS N. HANNAH ..... Newton
JOEL CLINE HARBINSON ..... Taylorsville
AVERILL CURRIE HARKEY ..... Charlotte
MILTON G. HARRIS ..... Williamston
JAMES WADE HARRISON ..... Asheville
MARTHA VAUGHAN HAWKINS ..... Warrenton
WILSON HAYMAN ..... Chapel Hill
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THOMAS PATRICK HELLER ..... Severn
ROBERT EZEKIEL HENDERSON ..... Charlotte
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VICTORIA MARY HERMAN ..... Greensboro
EVELYN WERTH HILL ..... Raleigh
STEVEN L. HOARD ..... Tarboro
GRACE ELIZABETH T. HODGES ..... Sanford
THOMAS EDWARD HODGES ..... Dunn
CHRIS GARETH HOKE ..... Durham
PATRICIA LEE HOLLAND ..... Raleigh
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RICHARD DEAN HOVIS ..... High Point
JEFFREY C. HOWARD ..... Matthews
RANDELL HUGHES ..... Tarboro
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NANCY HUTT ..... Durham
HANAN MAYER ISAACS ..... Chapel Hill
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MICHAEL O. JOHNSON ..... Clinton, S. C.
ROBERT KEITH JOHNSON ..... Vale
SARAH MORRIS JOHNSON ..... Winston-Salem
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PAUL MARTIN KADE ..... Queens Village, N. Y.
MICHAEL KEITH KAPP ..... Rural Hall
STEPHEN DENNIS KAYLOR ..... Valdese
JOYCE ANN KELLER ..... Decatur, Ga.
THOMAS EDWARD KELLEY ..... Cary
TIMOTHY S. KINCAID ..... Newton
JODEE SPARKMAN KING ..... New Brunswick, N. J.
THOMAS MICHAEL KING ..... Advance
THOMAS WESLEY KING ..... Roanoke Rapids
DAVID NEIL KIRKMAN ..... Chapel Hill
MARILYN PORTER KOCH ..... Concord
DIANE APPLETON KREKORIAN ..... Fayetteville
WILLIAM JOSEPH KUBIDA ..... Winston-Salem
JAN WISE LAMM ..... Boone
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KAREN ELIZABETH LONG ..... Chapel Hill
LEON ARTHUR LUCAS ..... Kenly
MARIA MCAFEE LYNCH ..... Raleigh
THOMAS KINKAID MCCLELLAN ..... Winston-Salem
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JOHN VICTOR MCINTOSH ..... Asheville
BRENDA SUE MCLAIN ..... Thomasville
ERNEST COBB MCLEAN III ..... Greensboro
MITCHELL SUTTON MCLEAN ..... Kinston
REBECCA J. MCLEAR ..... Chapel Hill
MARTHA LYNN MCMURRAY ..... Morganton
BARRY STEVEN MCNEILL ..... Chapel Hill
JOSEPH FRANCIS MCNULTY, JR. ..... Greensboro
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JOHN FOSTER MADDREY ..... Arlington, Va.
ROGER MANUS ..... Freeport, Ill.
SIDNEY THOMAS MARABLE ..... Henderson
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CATHY LOU MARTIN ..... Charlotte
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JOHN ALFRED MAUNEY ..... Durham
DEBORAH ARLENE MAYO ..... Hillsborough
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DAN L. MERRELL ..... Aydlett
STEVEN HAMILTON MESSICK ..... Burlington
LESLIE HUNTER MILLER ..... Charlotte
RALPH BRADLEY MILLER ..... Fayetteville
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WILLIAM S. MILLS ..... Plymouth
BEVERLY R. MITCHELL ..... Winston-Salem
BRUCE D. MITCHELL ..... Winston-Salem
CHARLES GEOFFREY MITCHELL ..... Greenville
VICTOR CARTON MITCHENER ..... Morganton
CHARLES LUTHER MOORE ..... Greensboro
ELIZABETH LORRAINE MOORE ..... Greenville
LARRY I. MOORE III ..... Houston, Texas
WILLIAM K. MOORE ..... Frankfort, Ky.
RICKEY L. MOOREFIELD ..... Snow Camp
JAMES REID MORGAN ..... Marshville
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RAY DONAVON MUNFORD, JR. ..... Raleigh
EUGENE WILSON MUSE ..... Winston-Salem
THOMAS PALMER NASH IV ..... Elizabeth City
LINDA HARVEY NELSEN ..... Raleigh
JOHN VASILIOS NICOPOULOS ..... Shelby

LARRY ELLIS NORMAN ..... Henderson
LILLIAN IRENE B. O'BRIANT ..... Asheboro
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ELIZABETH LILLIAN M. O'NEAL ..... Walnut Cove
RICHARD E. PANOSH ..... Kewaunee, Wisc.
DAVID PAYNE PARKER ..... Raleigh
EMILY DALE PARKER ..... Eden
FRANCIS MARION PARKER, JR. ..... Asheville
JASON RAY PARKER ..... Taylorsville
FRANK ROLAND PARRISH ..... Wilson
JAMES WAYLON PARTIN ..... Elkin
WANDA LOUISE PATE ..... Laurinburg
RALPH A. PEEPLES ..... Charleston, S. C.
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VANCE MELTON PERRY ..... Spindale
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DURWOOD ROYCE POWELL ..... Wake Forest
WILLIAM ARRINGTON PULLY ..... Rocky Mount
KENNETH DAVID QUAT ..... Westport, Conn.
GARY WAYNE RAGLAND ..... Alexandria, Va.
KELLY G. RAGSDALE ..... Kenbridge, Va.
CABELL JONES REGAN ..... St. Pauls
CRAIG ANDERSON REUTLINGER ..... Charlotte
CHARLES PREYER ROBERTS III ..... Shelby
MARGARET EUGENIA ROGERS ..... Roxboro
MARY WARD ROOT ..... Winston-Salem
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JOHN BRUCE ROSS, JR. ..... Winston-Salem
JEROME SAMUEL ROTHENBERG ..... Durham
CHARLES STANLEY ROUNTREE III ..... Greenville
JOHN FRED RUDISILL ..... Charlotte
MARC SAMUEL RUDOW ..... Asheville
MARGARET DUBÉ RUNDELL ..... Chapel Hill
HAROLD EUGENE RUSS II ..... Wilmington
ROBERT SANTEN RYAN ..... Ada, Ohio
STANLEY M. SAMS ..... Asheville
ROBERT SAMUEL SARASON ..... Syracuse, N. Y.
LYNNE G. SCHIFTAN ..... Kinston
KATHERINE M. SCHWARTZ ..... Wilson
DOUGLAS SCOTT ..... Coronado, Calif.
ISABEL RESTON SCOTT ..... Wilmington
BRENT WESLEY SHENK ..... Raleigh

WILLIAM RADCLIFFE SHENTON ..... Chapel Hill
ROBERT HUGH SHEPPARD ..... San Antonio, Texas
HAZEL L. SHERRILL ..... Statesville
DAVID P. SHOUVLIN ..... Springfield, Ohio
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KAREN ANN SINDELAR ..... Chapel Hill
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ANGELA G. SKELTON ..... Garner
MACEO KENNEDY SLOAN ..... Durham
JOHN HERBERT SMALL ..... Elizabeth City
PATRICK UNDERWOOD SMATHERS ..... Canton
ROGER THEODORE SMITH ..... Asheville
THOMAS G. SMITH ..... Drexel
WILLIAM BENJAMIN SMITH ..... Rocky Mount
DAVID GRAY SNEEDEN ..... Wilmington
THEODORE JOHN SOLOMON II ..... Rock Hill, S. C.
HAROLD CRAIG SPEARS ..... Ironton, Ohio
W. MARK SPENCE ..... Elizabeth City
WILLIAM MICHAEL SPIVEY ..... Rich Square
DENA FAYE SQUIRES ..... Fayetteville
THOMAS PATY STAMPS ..... Westport, Conn.
E. RAY STANFORD ..... Winston-Salem
DAVEY L. STANLEY ..... Shallotte
SCOTT MACGREAGOR STEVENSON ..... Charlotte
NED ALLEN STILES ..... Durham
ANN HAPPEL STURGIS ..... Palmyra, Mo.
ROBERT TOWNSEND SUMNER ..... Gastonia
WARREN LEE TADLOCK ..... Winston-Salem
HUGH CLIFTON TALTON, JR. ..... Smithfield
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RALPH FREDERICK TELLEFSEN III ..... Elmhurst, Ill.
WILLIAM JOHN THOMAS II ..... Durham
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THOMAS DRAYTON THOMPSON ..... Hendersonville
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MARY JANE S. TRIMBLE ..... Jacksonville, Fla.
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DAVID SANDERS TUTTLE ..... Raleigh
RANDALL ARNOLD UNDERWOOD ..... Charlottesville, Va.
WILLIAM ALFRED VAN STORY IV ..... Fayetteville
WALTER WAYNE VATCHER ..... Jacksonville
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LOUIS ERNEST VINAY, JR. ..... Valdese
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ROBIN KENTON VINSON ..... Goldsboro
EDWIN CHRISCO WALKER ..... Kernersville
JAMES FLYNN WALKER ..... Burlington
MONA LISA LANE WALLACE ..... Salisbury
GEORGE STEWART WARREN ..... Clinton
JAMES A. WARREN, JR. ..... Charlotte

JOHN HAMILTON WATTERS ..... Raleigh
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JOE LOUIS WEBSTER ..... Madison
GRACE ELIZABETH WEIN ..... Chicago, Ill.
BARBARA BRANDON WEYHER ..... New York, N. Y.
VIRGINIA GRAVES WEISZ ..... Chapel Hill
PAMELA ELAINE WHITAKER ..... Climax
HUGH GLENN WHITE III ..... Raleigh
JOHNNIE ALONZA WHITLEY ..... Smithfield
A. GRANT WHITNEY, JR. ..... Charlotte
JAMES DANIEL WILLIAMS, JR. ..... Washington, D. C.
JAMES E. WILLIAMS, JR. ..... Plymouth
PHILIP EDWARD WILLIAMS ..... Clinton
REYNAULD MERRIMON WILLIAMS ..... Lillington
ROBERT HARRISON WILLIAMS ..... High Point
OWEN HENRY WILLIS, JR. ..... Dunn
CLARENCE COLON WILLOUGHBY, JR. ..... Tabor City
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MARK TRENT WILSON ..... Mocksville
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CLAUDIA ANNETTE WITHERS ..... Charlotte
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JAMES MATTHEW YATES, JR. ..... Dunn
MICHAEL MACKAGER YORK ..... High Point
JOHN BUNDY YORKE ..... Rock Hill, S. C.
GARY FRANCIS YOUNG ..... Bloomfield, N. J.
KAREN MAE ZAMAN ..... Raleigh
EDWARD V. ZOTIAN ..... Winston-Salem
THOMAS DAVID ZWEIGART ..... Raleigh

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1979

REBECCA GOODMAN WOOD v. VERNON L. WOOD

No. 93

(Filed 16 March 1979)

1. Rules of Civil Procedure § 7— *oral motion*—same session as case is calendared

An oral motion made in a case during the session of court at which the case was calendared is permitted by G.S. 1A-1, Rule 7.

2. Rules of Civil Procedure §§ 7, 60.1— oral motion at session case is calendared —constructive notice

Where an oral motion is appropriately made under G.S. 1A-1, Rule 7, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during which the cause is regularly calendared is preserved in G.S. 1A-1, Rules 6 and 7, and actual notice of the motion is not required to be given to the opposing party. Therefore, defendant was charged with constructive notice of plaintiff's oral motion under G.S. 1A-1, Rule 60(b) for relief from a divorce judgment entered at the same session of court.

3. Rules of Civil Procedure § 7— failure to state rule number in motion

A motion was not fatally defective because it failed to state the rule number under which the movant was proceeding as required by Rule 6 of the Rules of Practice for Superior and District Courts, since the purpose of the rule is to ensure that the court and parties are aware of the grounds upon which the movant is relying, and the court's order indicates that the court was fully aware of the basis for the motion.

4. Judgments § 25.3— relief from judgment—negligence of attorney

A party may be relieved from a judgment rendered against him as a result of the negligence of his attorney if the litigant himself was not at fault.

5. **Rules of Civil Procedure § 60— relief from judgment to successful plaintiff**

Relief from a judgment may be granted under G.S. 1A-1, Rule 60(b) to a successful plaintiff when adequate reason is shown.

6. **Judgments § 25.3; Rules of Civil Procedure § 60.2— relief from divorce judgment—excusable neglect—negligence of attorney**

The trial court properly allowed plaintiff's motion to set aside a divorce judgment entered in her favor because of "excusable neglect" where plaintiff told her attorney that she wanted a divorce because her husband had committed adultery and left her; she explained to her attorney that she and defendant husband had already consented to a judgment for alimony in a prior action; the attorney negligently filed a complaint for divorce based on one year's separation; and the divorce judgment based on such complaint would have deprived plaintiff of the benefit of her alimony decree, since the negligence of counsel on these facts cannot be attributed to plaintiff even though she verified the complaint which was filed.

ON plaintiff's petition pursuant to G.S. 7A-31 for review of the decision of the Court of Appeals, 37 N.C. App. 570, 246 S.E. 2d 549, reversing order of *Alexander (Abner), J.*, entered 20 May 1977 in FORSYTH District Court. Docketed and argued as case No. 118 at Fall Term 1978.

Plaintiff instituted this action on 17 March 1977 by filing a complaint asking for absolute divorce based on one year's separation. She also asked that the court incorporate into any decree for divorce a 4 December 1975 consent judgment between her and defendant settling their differences with regard to child custody, child support and alimony. The complaint was verified by plaintiff and signed by her attorney, Harold R. Wilson.

On 17 March 1977 Harold R. Wilson and John F. Morrow were partners, but Morrow had previously notified Wilson that he was withdrawing from the partnership on the last day of the month.

On 15 April 1977 defendant went to Morrow at his new office and asked him to attempt to obtain a reduction in the alimony and support payments which he was making. He exhibited to Morrow the divorce complaint which had been served on him. Morrow advised him not to answer the complaint and informed him that after the divorce was granted he could file a motion to terminate the alimony award. Defendant did not answer the complaint.

The case was calendared for trial at the 16 May 1977 Session of the Court and on Monday, 16 May 1977, a judgment granting

plaintiff an absolute divorce was entered. Morrow notified defendant that the divorce had been granted and that he could then file his motion seeking termination of alimony. Said motion was filed on Thursday, 20 May 1977, at 10:43 a.m.

The evidence in the record tends to show, however, that earlier that same morning plaintiff through counsel had moved that the court vacate the divorce judgment. The record does not reveal the authority upon which plaintiff based her motion. Plaintiff's motion was granted during the same session the divorce judgment was entered and the court's order vacating the divorce judgment was filed Thursday, 20 May 1977, at 11:19 a.m. No actual notice of plaintiff's motion or of the court's order was given to defendant. Later the same day defendant moved that the court's order vacating the divorce be stricken. The court ordered that a hearing on this motion be held and plaintiff was notified of the hearing.

On 23 May 1977 plaintiff filed a notice of voluntary dismissal pursuant to Rule 41 of the Rules of Civil Procedure; the notice was served on defendant's counsel. On 26 May 1977 Morrow withdrew from the case due to a possible conflict of interest and Fred G. Crumpler was substituted as defendant's counsel. On 31 May 1977 plaintiff moved that the court strike all pleadings in the case filed by Morrow. Following these procedural steps the court, at a date which cannot be ascertained from the record, held a hearing on the various motions in the case. Testimony was offered and arguments were made by both parties to the action.

On 6 June 1977 the court entered an order denying defendant's motion to set aside the order striking the divorce judgment. The court also denied defendant's motion to terminate alimony and plaintiff's motion to strike the pleadings filed by John F. Morrow.

The Court of Appeals (Morris, J., with Hedrick and Webb, JJ., concurring) reversed the trial court's order vacating the divorce decree and remanded the case for a hearing on plaintiff's motion after proper notice to defendant. Plaintiff's motion for discretionary review was granted by this court.

Wilson and Redden, by Harold R. Wilson, for plaintiff-appellant.

White and Crumpler, by Fred G. Crumpler, G. Edgar Parker, V. Edward Jennings, Jr., and David R. Tanis, for defendant-appellee.

BRITT, Justice.

Did the trial court err in entering its order vacating the divorce judgment entered at the same session of the court without actual notice to defendant and without a hearing? We hold that it did not.

In its opinion the Court of Appeals declined to consider the question posed in the light of Rule 60 of the Rules of Civil Procedure but quoted extensively from *Hagins v. Redevelopment Commission*, 275 N.C. 90, 165 S.E. 2d 490 (1969). Inasmuch as the Rules of Civil Procedure were not in effect at the time *Hagins* was decided, we prefer to review the case at hand in the light of these rules.

G.S. 1A-1, Rule 60, is entitled "Relief from Judgment or Order". Rule 60(b) provides as follows:

> "(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. *The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.* (Emphasis ours.)

[1] Rule 60(b) makes no express provisions for the manner in which a motion thereunder must be served. Furthermore, it does not provide that notice be given to any party. Rather, it compels the parties to look to the other provisions of "these rules" to determine the requisites of a proper motion. G.S. 1A-1, Rule 7, governs the form of motions under the North Carolina Rules of Civil Procedure. In pertinent part, it requires that "[a]n application to the court for an order shall be by motion which, *unless made during a hearing or trial or at a session at which a cause is on the calendar for that session,* shall be made in writing, shall state the grounds therefor, and shall set forth the relief or order sought. . . ." (Emphasis added.) Plaintiff's motion in this case was made orally during the session of court at which the case was calendared. This form of motion is clearly permitted by Rule 7.

An oral motion such as the one made by plaintiff is not subject to the actual notice requirement of Rule 6(d) which requires that *written* motions be served at least five days prior to the date set for the hearing on the motion. *Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726, 731, 198 S.E. 2d 73, *cert. denied*, 283 N.C. 754, 198 S.E. 2d 723 (1973). This conclusion is made even clearer by comparing North Carolina's Rule 7 with the similar federal provision. The North Carolina rule excepts "from the requirement that they be in writing motions made 'at a session at which a

cause is on the calendar for that session,' whereas the Federal Rule contains no such language. . . ." Shuford, *North Carolina Civil Practice and Procedure* § 7.1 at 56 (1975).

This change in the wording of Rule 7 clearly allows the continuation of the pre-rules practice under which oral motions to which no actual notice provision applied were allowed in an action during the session of court at which it was regularly calendared. This conclusion is bolstered by the editorial comment appended to Rule 7(b)(1). It states that this portion of the rule is intended to make "explicit as a matter of literal statement the motion practice actually followed" prior to the adoption of the rules.

[2] We therefore hold that where an oral motion is appropriately made under Rule 7, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during the session of court at which the cause is regularly calendared is preserved in Rules 6 and 7 of the North Carolina Rules of Civil Procedure. Thus, in the case at bar defendant was charged with constructive notice of plaintiff's motion for relief from the judgment entered in the action. Actual notice to defendant was not required.

[3] Defendant argues one other contention with regard to the procedure by which plaintiff's motion was made. He contends that her motion did not comply with Rule 6 of the Rules of Practice for Superior and District Courts adopted by this Court pursuant to G.S. 7A-34 and promulgated in 276 N.C. 735 (1970). This rule provides, among other things, that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding".

The record does not contain plaintiff's motion and it is difficult to ascertain whether the grounds for the motion were adequately stated. Nevertheless, we do not think this defect fatal. *See*: *Lehrer v. Edgecombe Manufacturing Co.*, 13 N.C. App. 412, 185 S.E. 2d 727 (1972); *Long v. Coble*, 11 N.C. App. 624, 182 S.E. 2d 234, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 246 (1971); *contra*, *Sherman v. Myers*, 29 N.C. App. 29, 222 S.E. 2d 749 (1976). The directive of this rule of practice has the salutory purpose of ensuring that the court and the parties are aware of the grounds upon which the movant is relying. The court's order in this case indicates that the judge was fully aware of the basis for plaintiff's

motion. It states that "upon motion of counsel for the plaintiff showing that errors have been committed in the complaint filed in this action in behalf of the plaintiff, and the Court, in its discretion, finds that the judgment heretofore entered in this action should be stricken." Because this awareness of the grounds upon which plaintiff's motion was made has been shown, we conclude that the motion was adequately stated.

Finally, we conclude that the trial court properly exercised its discretion in relieving plaintiff from the judgment. Rule 60(b)(1) allows the court to grant a party relief on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." Excusable neglect is present in this case.

[4] It has long been the rule in this state that a party may be relieved from a judgment rendered against him as a result of the negligence of his attorney if the litigant himself is not at fault. *Moore v. WOOW, Inc.*, 250 N.C. 695, 110 S.E. 2d 311 (1959); *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507 (1954); *Stallings v. Spruill*, 176 N.C. 121, 96 S.E. 890 (1918); *Seawell v. Lumber Co.*, 172 N.C. 320, 90 S.E. 241 (1916); *Schiele v. Insurance Co.*, 171 N.C. 426, 88 S.E. 764 (1916); *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976); *Kirby v. Asheville Contracting Co., Inc.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). These cases are readily distinguished from those where relief on the basis of excusable neglect has been denied when the party has himself been inattentive to his action. *See, e.g., Johnson v. Sidbury*, 225 N.C. 208, 34 S.E. 2d 67 (1945).

[5] The rule which we have cited has been employed most often to relieve a defendant with a meritorious defense from a default judgment. However, Rule 60(b) provides that relief may be granted to "any party" and raises no bar to granting relief to a successful plaintiff when adequate reason is shown. Shuford, *supra* § 60-4 at 507; Moore, *supra* ¶ 60.01 at 4009.

[6] In the case *sub judice* the record indicates that plaintiff did everything she reasonably could do to bring her case before the court. She employed a reputable local attorney who was licensed to practice in this state. She told him that she wanted a divorce because her husband had committed adultery and had left her.

Further, she explained to her attorney that she and the defendant had already consented to a judgment for alimony in a prior action.

The attorney negligently filed a complaint for divorce based on one year's separation. Had the judgment based on this complaint not been vacated, plaintiff would have been deprived of the benefit of her alimony decree. The negligence of counsel on these facts cannot be attributed to plaintiff even though she verified the complaint which was filed. The facts stated therein were, insofar as she knew, true and sufficient to bring her action. A nonlawyer cannot be held to know what allegations must be pled in a complaint in order to prove at trial those facts which have been communicated to an attorney.

For the reasons stated, the decision of the Court of Appeals is reversed. Consequently, the trial court's order vacating the divorce judgment is in full force and effect and plaintiff's voluntary dismissal terminates the action.

Reversed.

STATE OF NORTH CAROLINA v. JOYCE BARNHILL VIETTO

No. 18

(Filed 16 March 1979)

Schools § 14— compulsory school attendance law—failure to show private school not "approved"

Defendant's motion for directed verdict should have been allowed in this prosecution for violating the N.C. compulsory school attendance law, G.S. 115-166, where the evidence showed that defendant removed her twelve-year-old child from the public schools and enrolled her in Learning Foundations of Wilmington, and the only evidence that Learning Foundations was not a nonpublic school approved by the State Board of Education was inherently speculative.

Justice HUSKINS concurring.

ON petition for discretionary review of the decision of the Court of Appeals, 38 N.C. App. 99, 247 S.E. 2d 298 (1978) (*Erwin, J.*, concurred in by *Parker* and *Clark, JJ.*), which found no error

in defendant's trial in the 14 November 1977 Criminal Session of NEW HANOVER County Superior Court, *Webb, J.* presiding.

The defendant was charged, in an indictment proper in form, with violating G.S. 115-166,[1] North Carolina's compulsory school attendance law.

At trial the evidence for the State tended to show the following:

During the 1976-77 school year, defendant's daughter, Jayne Vietto, was twelve years old and was in the sixth grade at Tileston School in Wilmington, North Carolina. She attended school regularly until 19 April 1977. On that date defendant called Mr. George Tally, the principal of Tileston School, and complained about her daughter's teacher who had been frequently absent from school throughout the year and who had told some parents of Jayne's classmates not to allow their children to associate with her daughter. The defendant appeared very upset.

On 21 April 1977 the defendant went to Tileston School and told Mr. Tally she was removing Jayne from that institution. Mr. Tally offered to transfer Jayne to another sixth grade classroom, but the defendant refused on the ground that "she felt that the teachers would not be fair to her child because the teachers sort of stuck together." On 27 May 1977 Mr. Tally wrote defendant a letter informing her of the compulsory school attendance law. The letter also stated that the attendance counselor would be contacted unless the law was complied with immediately.

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1. G.S. 115-166. Parent or guardian required to keep child in school; exceptions.—Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. No person shall encourage, entice or counsel any such child to be unlawfully absent from school.

The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

Mr. Tally testified that after 19 April 1977 Jayne Vietto did not attend another public school or private school approved by the State Board of Education. He based this conclusion only on the fact that "[n]o other school, public or private, contacted me at any time after April 19, 1977 and before June 9, 1977, requesting the transcript of records of Jayne Vietto's grades." The witness then went on to explain, however, that the transfer procedure normally is implemented by the child's parent or guardian and not by the new school.

Mrs. Hilda Worth, the attendance counselor for New Hanover County Schools, testified that she visited the defendant at her home on 28 April 1977 to try and "work out the problem." The defendant informed Mrs. Worth that she had enrolled Jayne in Learning Foundations and "would not consider changing that." The defendant refused to talk with Dr. Bellamy, the Superintendent of New Hanover County Schools.

On 29 April 1977, after talking with Dr. Bellamy, Mrs. Worth wrote defendant a letter informing her she was violating the compulsory school attendance law because "Dr. Bellamy stated that Learning Foundations, Inc., is not accredited by the State Board of Education." Another offer was made to place Jayne in a different classroom or a different school; however, the defendant refused.

Dr. Bellamy testified for the State. His testimony was mainly concerned with whether or not Learning Foundations of Wilmington was an approved nonpublic school within the meaning of G.S. 115-166. On direct examination, over defendant's objection, he stated that Learning Foundations was not a public or an accredited private school "as I interpret North Carolina law."

The evidence for the defendant tended to show the following:

The defendant testified that on 11 October 1976 she had called Mr. Tally, her daughter's principal, because her daughter Jayne was upset over her regular teacher's absence from school. At this time defendant asked Mr. Tally to transfer her daughter to another sixth grade classroom. On 19 April 1977 defendant's daughter was upset and crying after she got home from school. She had had fifteen different substitute teachers so far during that school year. The defendant testified that her daughter "not

only was not learning and covering the material but was not competent in what she was covering."

Defendant again called Mr. Tally, and she told him that she felt compelled to remove Jayne from Tileston School "to insure that my daughter was in a learning situation and that her emotional state improved." The defendant refused to have her daughter transferred to another sixth grade classroom because "I [the defendant] determined that it would not be in my child's best interest." The defendant made arrangements with the Learning Foundations to privately tutor her daughter in all her school subjects using the same books Jayne had been using in public school. Jayne attended Learning Foundations Monday through Friday for four hours a day until 8 June 1977.

Ms. Georgia Spiliotis, the director of Learning Foundations, testified that Jayne Vietto was individually tutored at that institution beginning in April of 1977. The girl was taught art, language, science, math and social studies, the same subjects that were taught in the sixth grade in public schools. Ms. Sue Collins, Jayne's tutor at Learning Foundations, testified that the girl "seemed much happier later on once she was working with me and this happiness was much greater than when she had first come in."

The jury found the defendant guilty of violating G.S. 115-166, the compulsory school attendance law. The judge sentenced the defendant to imprisonment in the county jail for thirty days. The sentence was suspended for one year on the condition that defendant pay court costs and a fine of fifty dollars. The defendant appealed. The Court of Appeals found no error in defendant's trial, and this Court granted her petition for discretionary review.

Prickett & Scott by Carlton S. Prickett, Jr., and James K. Larrick for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Patricia B. Hodulik for the State.

COPELAND, Justice.

The defendant contends the trial court erred in denying her motion for a directed verdict of not guilty at the close of all of the

evidence. We agree; therefore, the decision of the Court of Appeals must be reversed.

The trial judge correctly charged the jury that to convict the defendant of violating G.S. 115-166, the State must prove beyond a reasonable doubt that for the time period specified in the indictment, the defendant caused her child not to attend a public school *or a nonpublic one that had been approved by the State Board of Education.*[2] The State's proof that Learning Foundations was not an approved school within the meaning of G.S. 115-166 was insufficient to take this case to the jury.

The only evidence with any probative force relating to Learning Foundations' status came from State's witness Dr. Heyward Bellamy, Superintendent of New Hanover County Schools. He attempted to show that Learning Foundations had not been approved by the State Board of Education; however, he obviously had no real basis for his testimony. The witness took no part in the approval of nonpublic schools; under G.S. 115-166, the State Board of Education has the sole authority to do this. He stated that he had never checked to see if Learning Foundations was on the official list of approved schools, and he had not talked with anyone at that institution about its status. Although Dr. Bellamy recited certain requirements that must be met before a school is approved, he could not know whether Learning Foundations complied with these standards at the time in question because he had not visited that institution for ten or twelve years. In essence, the witness' whole testimony was based on the fact that "*[s]o far as I know* they [Learning Foundations] don't claim to be a school and have not filed the request with the State [Board of Education]." (Emphasis added.)

"When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is *substantial evidence* of every essential element of the offense." *State v. Davis*, 246 N.C. 73, 76, 97 S.E. 2d 444, 446

2. Apparently the State did not rely on G.S. 115-170 which states in pertinent part:

"The reports of unlawful absence required to be made by teachers and principals to the attendance counselor shall, in his hands, in case of any prosecution, constitute prima facie evidence of the violation of this Article and the burden of proof shall be upon the defendant to show the lawful attendance of the child or children upon an authorized school."

Although neither party to this lawsuit raised an issue concerning this provision, we note that it appears to violate the mandates laid down by the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

(1957) (Emphasis added.) *See also State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977). When ruling on such a motion, the judge must consider both competent and incompetent evidence that has been admitted at trial. *See, e.g., State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). However, even when we consider all the evidence at this defendant's trial in the light most favorable to the State, *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971), we cannot find that the inherently speculative testimony of Dr. Bellamy constituted substantial evidence that Learning Foundations was not a nonpublic school approved by the State Board of Education. Consequently, defendant's motion for a directed verdict of not guilty should have been granted.

For the foregoing reason, we reverse the decision of the Court of Appeals and remand the case to that court with instructions to further remand it to the Superior Court of New Hanover County for entry of judgment dismissing the charge as of nonsuit.

Reversed and remanded.

Justice HUSKINS concurring.

If, as the evidence tends to show, defendant's child had had fifteen different substitute teachers during the school year, defendant was justifiably concerned that her daughter's progress in school was minimal at best. That defendant acted in good faith is shown by the fact that she "felt compelled to remove the child from public school to insure that the child was in a learning situation and that her emotional state improved," and then paid $90.00 per week for tutors to instruct her daughter in all her school subjects, using the same books that had been used in public school. All these facts indicate that defendant did not *wilfully* violate the general compulsory school attendance law. It is my view that there must be a wilful violation of the compulsory attendance law before a parent or guardian may be convicted under G.S. 115-166.

I fully concur in the decision dismissing this indictment.

ROSANNA CRUMP MOORE v. ALTON MONROE MOORE

No. 20

(Filed 16 March 1979)

1. **Divorce and Alimony § 21; Husband and Wife § 13— separation agreement—enforcement by specific performance**

Plaintiff was entitled to specific performance of a separation agreement not incorporated into the parties' divorce decree, since the available remedy at law—to wait until payments became due and defendant failed to comply, then file suit for the amount of the accrued arrearage, reduce the claim to judgment, and, if defendant failed to satisfy it, secure satisfaction by execution, and perhaps go through this process repeatedly if defendant continued his failure to comply—was inadequate.

2. **Divorce and Alimony § 21.3; Husband and Wife § 13— separation agreement—specific performance to enforce—evidence improperly excluded**

In an action for specific performance of alimony provisions of a separation agreement which was not made a part of the parties' divorce decree, the trial court erred in excluding evidence tendered by plaintiff of defendant's income, assets and liabilities since that evidence showed a deliberate pattern of conduct by defendant to defeat plaintiff's rights under their separation agreement.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 38 N.C. App. 700, 248 S.E. 2d 761 (1978). The question we are called upon to decide is whether an action for specific performance will lie to enforce the alimony provisions of a separation agreement, which has not been made part of a divorce decree.

The parties were separated on 24 April 1972, at which time they executed a separation agreement with defendant obligating himself to pay to the plaintiff $250.00 per month as alimony until plaintiff reaches age 65 or remarries. If plaintiff reaches the age of 65 and remains unmarried, defendant is to continue making monthly support payments in a reduced amount until her death. The parties subsequently divorced, but the separation agreement was apparently not made a part of the divorce decree. Defendant complied with the alimony provisions of the separation agreement until 15 July 1975; he has made no payments since. On 27 January 1976 plaintiff obtained a judgment against defendant for accrued arrearages. Execution issued on this judgment was returned, marked "unsatisfied." On 26 August 1976 defendant appeared

at a supplemental proceeding and testified concerning his property and earnings. The judgment remains unsatisfied. Plaintiff then tried unsuccessfully to garnish defendant's earnings.

On 19 January 1977 plaintiff brought this action for further accrued arrearages and seeking a decree of specific performance ordering defendant to perform his support obligations required by the separation agreement. The parties stipulated that the agreement had been breached and that the arrearages totaled $4,875.00 at the time. Counsel for defendant objected at trial to all questions regarding defendant's income, assets, and liabilities. The court sustained those objections on grounds of irrelevancy but allowed plaintiff's counsel to elicit answers for the record. Defendant's testimony established: That he has remarried; that his annual gross income is approximately $20,000.00; that upon receiving his bimonthly paycheck, he immediately endorses it over to his present wife who deposits it in her checking account; that his present wife owns and operates a beauty parlor, the purchase of which was partially financed by defendant's earnings; that the house in which defendant and his present wife live is owned jointly by defendant and his present wife; that other property, such as cars and a boat trailer, is titled in his present wife's name; that defendant provides no support to his natural children; that his present wife receives $75.00 per month in support payments from her former husband for her child who lives with her and defendant; and that household expenses and a variety of loan payments on property held jointly by defendant and his present wife or solely by his present wife are financed from his present wife's checking account in which defendant's paycheck is regularly deposited.

The trial court on 20 October 1977 entered judgment in plaintiff's favor for the stipulated amount but denied plaintiff's request for a decree of specific performance. The Court of Appeals affirmed the trial court's disposition of the case in an opinion by Vaughn, Judge, with Morris, Judge (now Chief Judge), concurring, and Webb, Judge, dissenting.

Smith, Anderson, Blount & Mitchell, by J. G. Billings and Nigle B. Barrow, Jr., for plaintiff.

Soles & Phipps, by R. C. Soles, Jr., for defendant.

BROCK, Justice.

This case raises again the troublesome issue of enforcement of a marital separation agreement that has not been incorporated into a judgment, which would thereby subject the parties to the contempt power of the court. *See Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946); *Brown v. Brown*, 224 N.C. 556, 31 S.E. 2d 529 (1944). *Stanley* and *Brown* involved attempts to invoke the contempt power of the court to enforce a separation agreement not made a part of a divorce judgment. The instant case differs from them in that the plaintiff seeks a decree of specific performance ordering defendant to comply with the support provisions of the separation agreement.

A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract. *Stanley v. Stanley, supra;* 2 Lee, *N.C. Family Law*, § 201, p. 423 (3d ed. 1963). The equitable remedy of specific enforcement of a contract is available only when the plaintiff can establish that an adequate remedy at law does not exist. *Bell v. Smith Concrete Products, Inc.*, 263 N.C. 389, 139 S.E. 2d 629 (1965). Therefore, we must consider plaintiff's contention that her remedy at law is inadequate.

Equity "seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do." *Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E. 2d 535, 537 (1939). In *Sumner v. Staton*, 151 N.C. 198, 201, 65 S.E. 902, 904 (1909), Justice Brown discussed the nature of a court's inquiry into the adequacy of a plaintiff's remedy at law thusly:

> "An adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. *It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.*" (Emphasis added.)

Thus in *McClintock on Equity*, § 46, p. 110 (2d ed. 1948) it is observed that "[t]he fact that the remedy which the courts of law

would ultimately give if the plaintiff were successful would be an adequate one does not prevent the intervention of equity if the procedures which must be followed at law would make the remedy less efficient and practical to meet the plaintiff's needs." A common instance of this basis of equity jurisdiction is found in the continuing trespass situation. The plaintiff, who is suffering a continuing trespass to his property or interference with a legal right, could bring numerous actions at law serially to recover damages. That remedy, although it will ultimately compensate the plaintiff, is deemed to be inadequate because of the nature of the wrong and the impracticality and inefficiency of the remedy. *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (1905); *Cobb v. Atlantic Coast Line RR*, 172 N.C. 58, 89 S.E. 807 (1916); Dobbs, *Trespass to Land in North Carolina*, 47 N.C.L. Rev. 334, 352 n. 94 (1969).

[1] What remedy at law is available to the plaintiff who seeks to compel compliance with a provision for periodic alimony payments in a separation agreement that has not been made part of a divorce judgment? The facts of this case are illustrative of the answer to that question. The plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident. The nature of the contract, *i.e.*, providing for the plaintiff's basic subsistence, is such that the remedy available at law involves unusual and extreme hardship.

The adequacy of the remedy at law must be evaluated in a relative sense, treating the contract in a particular case "as one of a class, and the inquiry is whether, in agreements generally of that kind, the terms or relations of the parties are such that the legal remedy of damages is adequate or inadequate." *Pomeroy's Specific Performance of Contracts*, § 27, pp. 89-90 (3d ed. 1926). The *Restatement of the Law of Contracts*, § 361, p. 646 sets forth the factors involved in the determination of the adequacy of remedies at law when specific performance of a contract is

sought. Subsections (c) and (e) are pertinent to our consideration. Subsection (c) focuses on "the difficulty, inconvenience, or impossibility of obtaining a duplicate or substantial equivalent of the promised performance by means of money awarded as damages." Plaintiff here contracted for payment of support at regular stated intervals until her remarriage or death. Requiring her to bring successive lawsuits to recover in a piecemeal fashion the sums due can hardly be viewed as a duplicate or substantial equivalent of the promised performance. Subsection (e) focuses on "the probability that full compensation cannot be had without multiple litigation." This factor goes to the heart of the inadequacy of plaintiff's remedy at law as discussed *supra* and, in an appropriate situation, is a sound basis for the granting of equitable relief. *See Sanford v. Boston Edison Co.*, 316 Mass. 631, 56 N.E. 2d 1 (1944).

[2] The trial judge erred in excluding the evidence tendered by plaintiff of defendant's income, assets, and liabilities. The excluded evidence has been summarized in the statement of facts and will not be repeated here. That evidence shows a deliberate pattern of conduct by defendant to defeat plaintiff's rights under their separation agreement. Execution upon plaintiff's judgments for arrearages cannot be enforced upon the property of defendant's second wife. Defendant deliberately, each payday, places his income out of reach of plaintiff's remedies at law.

[1] Because we consider the available remedy at law for the enforcement of a separation agreement not incorporated into a judicial decree to be inadequate, we hold that plaintiff is entitled to a decree of specific performance ordering defendant to comply with the agreement. The defendant has made no payments since 15 July 1975. There is nothing in the record which would indicate that he intends to make payments due in the future.

1 *Pomeroy's Equity Jurisprudence*, § 252, p. 500 (5th ed. 1941) considers the general rule that equitable relief will be granted when the plaintiff is suffering a continuing trespass to his property or interference with a legal right. It is also observed:

> "[t]here are some other special instances in which a court of equity has interfered and determined the entire controversy by one decree, in order to prevent a multiplicity of suits where otherwise the plaintiff would be compelled to bring

several actions at law against the same adversary and with respect to the same subject matter."

Cited in support of this statment is *Fleming v. Peterson*, 167 Ill. 465, 47 N.E. 755 (1897), in which the Illinois Supreme Court held that alimony provisions of a separation agreement are enforceable by a decree for specific performance because plaintiff's remedy—bringing multiple actions at law—was inadequate. Courts in a number of other jurisdictions have also held that alimony and support provisions of a separation agreement are enforceable by a decree ordering specific performance. *Strasner v. Strasner*, 232 Ark. 478, 338 S.W. 2d 679 (1960); *Burke v. Burke*, 32 Del. Ch. 320, 86 A. 2d 51 (1952); *Doerfler v. Doerfler*, D.C. App., 196 A. 2d 90 (1963); *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936); *Lorant v. Lorant*, 366 Mass. 380, 318 N.E. 2d 830 (1974); *Zouck v. Zouck*, 204 Md. 285, 104 A. 2d 573 (1954); *Schlemm v. Schlemm*, 31 N.J. 557, 158 A. 2d 508 (1960); *Annot.* 154 A.L.R. 323; 81 C.J.S., Specific Performance, § 99, pp. 932-33. The rationale underlying these decisions is sound and reinforces our conclusion that plaintiff's remedy at law is inadequate.

The decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for further remand to Superior Court, Wake County, for entry of a decree ordering defendant to specifically perform his support obligations under the separation agreement, both as to the arrearages and future payments.

Reversed and remanded with instructions.

GREGORY POOLE EQUIPMENT CO., INC. v. J. HOWARD COBLE, SECRETARY OF REVENUE STATE OF NORTH CAROLINA

No. 16

(Filed 16 March 1979)

Taxation § 31.1— sale of used equipment accepted as trade-in—local 1% sales tax

A retailer doing business in a county which imposes the 1% local government sales tax is required by G.S. 105-467 to collect that tax when it sells and delivers within that county used tangible personal property previously accepted in trade as part payment on the sales price of new property that was

delivered outside the county, since (1) this is the kind of transaction to which the State sales tax would apply, G.S. 105-164.4(1), and (2) the exemption of G.S. 105-164.13(16) does not apply because no local sales tax was paid on the sales price of the new articles delivered outside the county.

APPEAL pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, reported at 38 N.C. App. 483, 248 S.E. 2d 378, opinion by *Judge Hedrick* with Judge, now *Chief Judge, Morris* concurring and *Judge Webb* dissenting, affirming a judgment in favor of defendant entered by *Judge Godwin* at the 26 September 1977 Civil Session of WAKE Superior Court.

Poyner, Geraghty, Hartsfield & Townsend, by Thomas L. Norris, Jr. and Curtis A. Twiddy, Attorneys for plaintiff appellant.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, and Marilyn R. Rich, Associate Attorney, for defendant appellee.

EXUM, Justice.

The single question presented by this appeal is whether a retailer doing business in a county that imposes the 1% local government sales tax must collect that tax when it sells and delivers within that county used tangible personal property previously accepted in trade as part payment on the sales price of new property that was delivered outside the county. We hold that the transaction is subject to the tax and the retailer must collect it.

Plaintiff Gregory Poole Equipment Co., Inc., maintains places of business in Wake, New Hanover and Beaufort Counties where it sells new and used industrial equipment and machinery. Between 1 June 1971 and 31 May 1974 plaintiff sold certain pieces of new equipment and delivered them to counties other than those where it maintains a place of business. Plaintiff gave a credit on the sales price of this new equipment in return for trade-ins of used equipment.

Plaintiff collected the 3% state retail sales tax imposed by G.S. 105-164.4 on the gross sales price of each of these pieces of

new equipment.[1] Plaintiff did not, however, collect the 1% local government sales tax imposed by G.S. 105-467 because these transactions were exempt from that tax.[2] The local tax, if any, which could have been collected on these transactions was the 1% use tax imposed by G.S. 105-468 on items or articles of tangible personal property "not sold but used, consumed or stored for use or consumption" in the taxing county. The use tax would have applied only if the county where the equipment was delivered had chosen to impose the 1% local sales and use tax. Responsibility for payment of this tax would have been on the purchasers of the equipment.

The sales that gave rise to the dispute here were of the used equipment taken in trade in the above described transactions. Plaintiff did not collect the 3% state tax on these sales relying on G.S. 105-164.13(16), which states:

> "The sale at retail . . . of the following tangible personal property is specifically exempted from the tax imposed by this Article:
>
> (16) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article."

It is conceded that plaintiff acted properly in not collecting this tax.

Plaintiff also, however, did not collect the 1% local sales tax (which was in force in each of the counties where it did business) on any of these transactions. Defendant in an audit of plaintiff took the position that plaintiff was liable for the 1% tax on the sales of the used equipment. Plaintiff paid the assessment and

1. G.S. 105-164.4 reads in relevant part:

> "There is hereby levied and imposed . . . a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail . . . the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:
>
> (1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State . . . ."

2. This exemption is set out in the last sentence of G.S. 105-467, which reads:

> "However no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent or by a common carrier."

filed suit seeking a refund of what it paid, $10,859.24 plus interest.

The case was heard on stipulated facts and the trial court granted judgment for defendant. The Court of Appeals affirmed, one judge dissenting.

The controlling statute on the issue presented here is G.S. 105-467, which reads in relevant part:

> "The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:
>
> (1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1).
>
> . . . .
>
> The exemptions and exclusions contained in G.S. 105-164.13 . . . shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article."

Plaintiff seizes on the language of subsection (1) and argues that since a state sales tax cannot be collected on the sales of used equipment then neither can a local tax. This is not the proper approach to the statute. What it requires is a two-part inquiry. The first question is whether this is the kind of transaction to which the state sales tax would apply. The answer to this question is unequivocally "Yes." G.S. 105-164.4(1) clearly imposes a tax on retail sales of articles of tangible personal property.

The second question is whether any of the exemptions and exclusions of G.S. 105-164.13 apply. The only exemption that even arguably applies is G.S. 105-164.13(16), which exempts from the state sales tax proceeds of sales of used articles taken in trade as a credit on the sales price of a new article *provided the sales tax was paid on the gross sales price of the new article.* Since no local sales tax was paid on the sales price of the new articles in question here, this exemption does not apply.

The operation of the exemption is illustrated by Sales Tax Ruling 191.[3] That ruling dealt with the problem of sales and deliveries of new tangible personal property by a North Carolina vendor to a point outside the state with used property taken in trade.[4] It was held that retail sales of the used tangible personal property in this state were subject to tax. The rationale underlying Sales Tax Ruling 191 was that the original sale of the new equipment was not subject to the state sales tax. Thus the exemption of G.S. 105-164.13(16) did not apply. This in turn points to the policy behind G.S. 105-164.13(16), which is to prevent the same tax from being imposed twice on what are essentially the proceeds of one sale.

Applying this reasoning to the facts here, it is clear that these sales of used equipment are not exempt from taxation. The counties of this state are discrete taxing authorities for purposes of the local government sales and use tax. *See* G.S. 105-464. None of the counties where plaintiff does business collected a local sales tax on the sales of new equipment through which these used items were obtained. To allow them to collect that tax on these transactions will not result in a double imposition of the same tax by the same taxing authority.

In summary, these were sales of tangible personal property and thus the kind of transactions to which the local sales tax applies. There are no applicable exemptions from taxation. Plaintiff was correctly assessed the tax it paid and is not entitled to a refund.

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

Affirmed.

3. In giving weight to this ruling by the Secretary of Revenue, we are mindful of G.S. 105-474, which states with respect to the local government sales and use tax:

> "The administrative interpretations made by the Secretary of Revenue with respect to the North Carolina Sales and Use Tax Act, to the extent not inconsistent with the provisions of this Article, *may be uniformly applied in the construction and interpretation* of this Article. It is the intention of this Article that the provisions of this Article and the provisions of the North Carolina Sales and Use Tax Act, insofar as practicable, shall be harmonized."

4. Sales of tangible personal property delivered outside the state and not to be returned to the state for use or consumption are not subject to the state sales tax under State Sales and Use Tax Regulation 23. *See also, Excel, Inc. v. Clayton*, 269 N.C. 127, 152 S.E. 2d 171 (1967).

STATE OF NORTH CAROLINA v. TENNYSON ALEXANDER HARRIS

No. 88

(Filed 16 March 1979)

Homicide § 24.1— instructions—presumption arising from use of deadly weapon

Though the trial court's instruction on second degree murder would have been more articulate had it been joined with the ensuing instructions on burden of proof by words to the effect that inferences raised by proof of the intentional use of a deadly weapon might be considered along with the other facts and circumstances in determining whether the killing was unlawful or whether it was done with malice, nevertheless, when the trial judge *seriatim* correctly charged on the possible verdicts of second degree murder, voluntary manslaughter, and not guilty, explained self-defense, and in each case placed the burden of proof squarely on the State, it must have been clear to the jury that these were circumstances to be considered with the raised inferences in determining whether the killing in this case was unlawful and whether it was done with malice.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

ON discretionary review of the decision of the Court of Appeals, 36 N.C. App. 652 (1978), finding no error in the trial before *Kirby, J.*, at the 18 July 1977 Session of MECKLENBURG Superior Court. This case was docketed and argued as No. 113 at the Fall Term 1978.

Defendant was charged in a bill of indictment, proper in form, with the second degree murder of Samuel Lee Jackson. He entered a plea of not guilty.

The State's evidence tended to show that on the night of 4 November 1976, defendant and Jackson were at Big Brother's Lounge in Charlotte. The men spoke for a few moments, and defendant pushed Jackson. Jackson then pushed defendant, whereupon defendant drew a pistol from his coat pocket and shot Jackson. No weapon was seen in Jackson's hand or found on or near him following the shooting.

Defendant and other witnesses testified that Jackson previously had threatened defendant and had "come looking for him" with a gun. There was also testimony that Jackson was reaching for a gun, which was protruding from his pocket, when defendant shot him.

The trial court instructed the jury that it could return a verdict of guilty of second degree murder, guilty of voluntary manslaughter, or not guilty. The jury returned a verdict of second degree murder.

Rufus L. Edmisten, Attorney General, by R. W. Newsom III, and John C. Daniel, Jr., Assistant Attorneys General, for the State.

Fritz Y. Mercer, Jr., Public Defender, by Grant Smithson, Assistant Public Defender, for defendant appellant.

BRANCH, Justice.

The single question presented by this appeal is whether the trial judge committed prejudicial error in charging the jury as follows:

> If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Sammie Jackson with a deadly weapon or intentionally inflicted a wound upon Sammie Jackson with a deadly weapon that proximately caused his death, you may, but you need not infer; first, that the killing was unlawful; and second, that it was done with malice and if nothing else appears, the defendant would be guilty of Second Degree Murder.

Prior to the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), it was well settled in this jurisdiction that when the State proved or it was admitted that a defendant intentionally inflicted a wound upon a person with a deadly weapon which proximately caused his death, the law raised presumptions (1) that the killing was unlawful and (2) that it was done with malice. Then, nothing else appearing, defendant would be guilty of murder in the second degree. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968); *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955). When the presumptions from the intentional use of a deadly weapon arose, the burden was on the defendant to show to the satisfaction of the jury the legal provocation that would negate malice, thus reducing the offense to manslaughter or that would excuse it altogether upon the ground of self-defense. *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Gordon, supra.*

In *Mullaney v. Wilbur, supra*, the United States Supreme Court held that a Maine statute which required a defendant to prove by a preponderance of evidence that he acted in the heat of passion on sudden provocation violated the defendant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution since the burden was on the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. *In Re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). In *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), we interpreted *Mullaney* to prohibit the use of our rule which placed on a defendant the burden of proving to the satisfaction of the jury that he killed in the heat of passion on sudden provocation in order to rebut the presumption of malice. We further interpreted *Mullaney* to mean that the burden to prove self-defense in order to overcome the presumption of unlawfulness could no longer be placed upon a defendant.

In *Hankerson*, Justice Exum, speaking for the Court, stated:

> . . . the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. . . . If, after the mandatory presumptions [of malice and unlawfulness] are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. . . . If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

Defendant argues that the charge in the case *sub judice* is deficient because it fails to advise the jury that the inferences arising from the facts were not, standing alone, sufficient to support a verdict of guilty. We do not agree.

Immediately after giving the above-quoted and challenged instruction on second degree murder, the trial judge proceeded to define and explain voluntary manslaughter and in so doing he, in part, stated:

> . . . *The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation but rather that he acted with malice.* If the State fails to meet this burden, then the defendant can be guilty of no more than Voluntary Manslaughter. [Emphasis added.]

The court then fully explained the findings that the jury must make in order to entirely excuse defendant on the ground of self-defense. In respect to the burden of proof on this complete defense, the court instructed, "You must remember, members of the jury, that the burden is on the state to prove beyond a reasonable doubt that defendant did not act in self-defense."

Admittedly, the challenged instruction on second degree murder would have been more articulate had it been joined with the ensuing instructions by words to the effect that inferences thus raised might be considered along with the other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. Nevertheless, when the trial judge *seriatim* correctly charged on the possible verdicts of second degree murder, voluntary manslaughter, and not guilty, explained self-defense, and in each instance placed the burden of proof squarely on the State, it must have been clear to the jury that these were circumstances to be considered with the raised inferences in determining whether the killing in this case was unlawful and whether it was done with malice.

We, therefore, hold that the charge was adequate and met the constitutional requirements of due process. *See, State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

Although we find this charge to be adequate and within the requirements of *Mullaney* and *Hankerson*, we strongly recommend that in similar cases trial judges include in their charge the following language:

If the State proves beyond a reasonable doubt, or it is admitted, that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first, that the killing was unlawful, and second that it was done with malice, but you are not compelled to do so. You may consider the inferences along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

The decision of the Court of Appeals is

Affirmed.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GAINES LEE FORD

No. 13

(Filed 16 March 1979)

1. **Criminal Law § 122.1 — jury request for review of evidence**

The decision whether to grant or refuse the jury's request for a restatement of the evidence lies within the discretion of the trial court.

2. **Criminal Law § 175 — refusal to act on discretionary matter — appellate review**

When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable.

3. **Criminal Law § 122.1 — denial of jury request to review evidence — misapprehension of law — absence of prejudice**

While the trial judge's ruling that he was not permitted to review the evidence after the jury had begun its deliberations was based on a misapprehension of the law, defendant was not prejudiced by the judge's denial of the jury's request to review evidence as to the dates and times when defendant and an accomplice were picked up and signed rights forms where the requested evidence was, for the most part, conflicting, inconclusive or not in the record, and any attempt to review such evidence would likely have raised more questions than it would have answered.

State v. Ford

APPEAL by defendant from *Battle, J.*, 22 May 1978 Criminal Session, CUMBERLAND Superior Court.

Defendant was charged in a bill of indictment, proper in form, with burglary in the first degree and robbery with firearms.

The witness Jimmie D. Beck in summary testified that on 30 December 1977, he had obtained a room at Horne's Motor Lodge in Fayetteville, North Carolina. He was in his room at about 10:15 p.m., and when he cracked the door in response to a knock, the door was kicked open, and three black males, one armed with a shotgun, entered the room. By the threatened use of a shotgun, they proceeded to rob him of a CB radio, two rings, a wristwatch, cash, and other personal property. He was tied up, and the three men fled. Beck managed to free himself and call the desk clerk. Police were on the scene in about five minutes and were furnished with a description of the men.

The victim was unable to identify defendant at trial.

On the morning of 6 January 1978, both defendant and State's witness Michael Eugene Barbee were arrested. At about 11:20 a.m. on that day, defendant made a statement to the officers to the effect that he had received a CB radio from Barbee and thereafter sold it to a Mr. Grover Lee. On the same day, Barbee stated to the officers that he, defendant and Larry Felder committed the robbery at Horne's Motor Lodge on 30 December 1977. The record does not disclose the time at which Barbee made his statement.

At trial, Barbee testified to facts which were consistent with the statement made to the police. The State also offered the testimony of police officers which tended to corroborate the testimony of the witnesses Barbee and Beck.

Defendant testified that he was at the home of his sister Patricia Ann Ford on the night of 30 December 1977 where they were illegally selling intoxicants. He did not see Barbee or Felder on that night, and he did not commit the crime of burglary or robbery with firearms on 30 December 1977. He testified that he did see Barbee on the morning of 31 December 1977, at which time Barbee asked him to sell the CB radio for him. Pursuant to this request, he sold the radio to a Mr. Grover Lee. The testimony of

defendant's sister tended to corroborate defendant's testimony as to his whereabouts on the night of 30 December 1977.

The jury returned verdicts of guilty as to each charge, and defendant appealed from judgment imposing a sentence of life imprisonment for first degree burglary and a concurrent sentence of twenty-five years for robbery with firearms.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery III, Assistant Attorney General, for the State.

Fred J. Williams, Assistant Public Defender, for defendant appellant.

BRANCH, Justice.

By his first assignment of error, defendant contends that the trial judge erred in refusing to review certain evidence at the jury's request after it had begun its deliberation. It appears from the record that after deliberating for several hours, the jury returned to the courtroom whereupon the following exchange took place:

> COURT: All right, ladies and gentlemen, I understand you have a question.
>
> FOREMAN: Your Honor, we would like answered—we can't remember which time did each man, Barbee and Ford, sign his rights and on what date was this, and what time did the detectives go out and pick up each man?
>
> COURT: Members of the jury, I'm sorry but we're not allowed to go back in and review the evidence once the case is completed. It is your duty, of course, as best you can to recall all of the evidence that was presented, and I'm sorry, but we really can't help you with that particular matter.
>
> FOREMAN: Thank you, your Honor.

[1, 2] It is well settled in this jurisdiction that the decision whether to grant or refuse the jury's request for a restatement of the evidence lies within the discretion of the trial court. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977), *cert. denied*, 434 U.S. 924; *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). When the exer-

cise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable. *See, Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972); *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

[3] In instant case, it appears that the trial judge erroneously believed that he was not permitted to review the evidence after the jury had begun its deliberation. We must, therefore, determine whether defendant has been prejudiced by the trial court's ruling which was apparently based on a misapprehension of law.

The jury wanted to know the date and time when Barbee and defendant signed the rights forms and the time the detectives picked up each man. It appears from the record that on 6 January 1978 between 8:30 and 9:00 a.m., two detectives went to Barbee's residence and left "some papers" for Barbee, who was not present. Later that day, Barbee turned himself in at the Law Enforcement Center, signed a rights form and gave a written statement. The record does not indicate, however, the time of these occurrences.

Defendant testified that he was arrested at his house at 8:30 a.m. on 6 January 1978. One of the detectives testified, however, that it was around 10:00 a.m. when the detectives went to defendant's house. Testimony of defendant and a policeman shows that defendant signed a rights form between 11:00 a.m. and noon.

The judge misstated the law when he told the jury that "we're not allowed to go back in and review the evidence once the case is completed . . . ." However, we are of the opinion that the erroneous statement of his reason for refusing to review the evidence was not prejudicial. The requested evidence was, for the most part, conflicting, inconclusive, or not in the record. We note that the trial judge correctly instructed the jury that it was their duty "as best you can to recall all of the evidence that was presented . . . ." It would have been difficult, if not impossible, for the trial judge to review this evidence in a comprehensible manner. Here, any attempt to review such evidence would likely have raised more questions than it would have answered. Thus, defendant has failed to show prejudice resulting from the trial judge's ruling.

The only other assignment of error which defendant brings forward and argues in his brief is that the trial judge violated the eighth amendment to the United States Constitution, which prohibits cruel and unusual punishment, by imposing a life sentence upon the jury verdict finding defendant guilty of first degree burglary. We do not agree. This Court has consistently held that when punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in the constitutional sense. *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied*, 418 U.S. 905. Moreover, we expressly held in *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976), that the mandatory life sentence for first degree burglary does not constitute cruel and unusual punishment.

We have read and carefully considered the forceful and scholarly arguments advanced by defense counsel. However, we choose to adhere to our holdings that, in the constitutional sense, punishment will not be classified as cruel and unusual when it is within statutory limits. Whether the trial judge should be given latitude in imposing punishment for first degree burglary is a matter for the Legislature.

Our examination of this entire record discloses no error which warrants disturbing the verdict or judgment.

No error.

P. H. CRAIG v. JONAS KESSING AND WIFE, ALICE KESSING, AND GORDON BLACKWELL AND JACK CARLISLE

No. 86

(Filed 16 March 1979)

1. Evidence § 32.1 — written agreement — parol evidence of terms inadmissible

In an action for specific performance of an option agreement to convey interests in real estate, the admission of parol testimony concerning purchase price and expiration date was not permissible under the partial integration rule, since those terms were included in the parties' written agreement.

2. Evidence § 32.3— written agreement complete at time of signing—parol evidence inadmissible

In an action for specific performance of an option agreement to convey interests in real estate, the exception to the parol evidence rule made in the case of subsequently altered instruments was inapplicable where defendants failed to present testimony with any probative value that would show that the document containing the parties' written agreement was not completely filled out when defendant signed it.

Justice BROCK did not participate in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals reported in 36 N.C. App. 389, 244 S.E. 2d 721 (1978), reversing judgment entered by *Walker (Ralph A.), J.*, 1 April 1977 in ORANGE Superior Court. Docketed and argued as case No. 109 at Fall Term 1978.

Plaintiff instituted this action seeking specific performance of an option agreement to convey interests in real estate. Following a nonjury trial, the trial court found facts, made conclusions of law and adjudged that plaintiff was not entitled to relief.

Plaintiff appealed to the Court of Appeals. That court, in an opinion by Arnold, J., concurred in by Morris and Martin (Robert), JJ., reversed the judgment appealed from and remanded the cause to superior court with instructions that an order be entered granting plaintiff specific performance. An adequate summary of the pleadings, evidence and judgment is set forth in the Court of Appeals opinion and no useful purpose would be served by another summarization here.

Defendant Carlisle filed notice of appeal to this court and also petitioned for discretionary review. We allowed plaintiff's motion to dismiss the notice of appeal. We allowed the petition for discretionary review but only for the limited purpose of "determining whether the Court of Appeals erred in deciding that parol evidence was inadmissible to show that the instrument in question had been altered or added to after its execution".

Powe, Porter, Alphin & Whichard, by Charles R. Holton, for plaintiff-appellee.

Hatch, Little, Bunn, Jones, Few & Berry, by David H. Permar, for defendant-appellant.

BRITT, Justice.

We conclude that the decision rendered by the Court of Appeals is correct and we affirm the decision. However, there is one principle of law alluded to in the Court of Appeals opinion that we think should be clarified.

In part III of its opinion the Court of Appeals held that the conclusions of law made by the trial court were not supported by sufficient findings of fact or by the evidence contained in the record. Conclusion (a) states that "(t)he instrument was not completed at the time of execution by Jonas Kessing". In commenting on this conclusion the Court of Appeals said:

> Conclusion (a), presumably, was prompted by the testimony of defendant Kessing that he was "sure that parts of this document were not filled in at the time I signed it. I can't be too specific except for recalling, the first thing is the 31 July, 1968. This sticks in my craw. That's a month after I had to have the money." However, a review of the written contract indicates that it represents at least a partial integration of the agreement. "(I)t is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953). *See also* 2 Stansbury Sec. 253 (Brandis Rev. 1973). Parol evidence, therefore, was incompetent and will not support the trial court's conclusion that the instrument was not completed when executed.

We think the last sentence quoted above needs clarification as it leaves the impression that even when a document is not complete at the time of signing, and other provisions are added, parol evidence with respect to the additions is not admissible. Furthermore, it does not adequately explain why evidence of the particular terms in question is inadmissible under the partial integration theory.

It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. 2

Stansbury's N.C. Evidence § 253 (Brandis Rev. 1973). This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol. *Id.*, § 252.

[1] Assuming *arguendo* that the writing which evidenced the agreement of the parties in this case was only a partial integration of their contract, it would be proper for defendant to prove by parol those terms of the agreement not incorporated in the writing. However, the two terms about which Kessing sought to testify, the purchase price and the expiration date, were terms on the written instrument. Thus, the admission of parol testimony concerning these terms is not permissible under the partial integration rule and is incompetent to support the trial court's conclusion (a).

Parol evidence is also generally admissible to show that a written document has been altered subsequent to its execution. 32A C.J.S., Evidence § 933 (1964). Terms added to a written contract after its execution without the assent of all the parties do not become a part of the contract. *See Johnson v. Orrell*, 231 N.C. 197, 56 S.E. 2d 414 (1949).

[2] Had defendants presented evidence tending to show that the option agreement in question was not completely filled out at the time Jonas Kessing signed it, oral testimony would have been competent to prove the provisions added. But, defendants failed to present testimony with any probative value that would show that the document was not completely filled out when Kessing signed it. Thus the exception to the parol evidence rule made in the case of subsequently altered instruments is inapplicable, and testimony as to terms different from those on the writing is incompetent.

The only evidence even intimating that the instrument was not completed at the time of signing was the testimony of Jonas Kessing. While he stated that all of the terms of the agreement were not set out in the document at the time he signed it, he stated in almost the same breath that he did not "specifically remember what terms were not on there". He intimated that the expiration date set forth in the document, 31 July 1968, was not

correct; yet, when pressed, he stated that he had no recollection "one way or the other" as to whether the date was on the document when he signed it and that he "would be an idiot to sign it with that date on there". He further intimated that the agreed purchase price was $15,000 rather than $14,000 as set forth in the document; immediately thereafter he stated "and I would think that I would scream if it had not been ($15,000), but I can't recall one way or the other".

The burden of proving that the instrument was not completed at the time Jonas Kessing signed it and that it was completed differently from the terms agreed upon was on defendants. *Bowden v. Bowden*, 264 N.C. 296, 141 S.E. 2d 621, 30 A.L.R. 3d 561 (1965). Kessing's testimony was insufficient to meet this burden of proof. Plaintiff testified unequivocally that the document was the same at the time Kessing signed it as it was when introduced at trial. Therefore, we agree with the Court of Appeals that the trial court's finding of fact and conclusion of law that the document in question was not completed at the time it was signed by Kessing are not supported by the evidence.

The decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

MOBIL OIL CORPORATION v. R. E. WOLFE, CAROLYN G. WOLFE AND C. E. CROWELL

No. 98

(Filed 16 March 1979)

Seals § 1 — intent to adopt seal — unambiguous instrument — parol evidence not allowed

A signatory to an instrument may not introduce parol testimony that he did not intend to adopt a seal printed on the instrument as his own where there is no ambiguity on the face of the instrument as to the adoption of the seal.

Oil Corp. v. Wolfe

ON petition for discretionary review pursuant to G.S. 7A-31 prior to a determination by the Court of Appeals of a judgment in favor of plaintiff entered by *Judge Battle* at the 17 April 1978 Civil Session of CUMBERLAND Superior Court. The case was consolidated for argument on motion of the plaintiff with No. 89. Docketed and argued as No. 133 at the Fall Term 1978.

Nance, Collier, Singleton, Kirkman & Herndon, by David A. Harlow, Attorneys for plaintiff appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by E. R. Zumwalt III and Richard M. Wiggins, Attorneys for defendant appellants.

EXUM, Justice.

This case presents the question whether a signatory to an instrument may introduce parol testimony that he did not intend to adopt a seal printed on the instrument as his own. We hold that where, as here, there is no ambiguity on the face of the instrument as to the adoption of the seal, such testimony is barred by the parol evidence rule.

This is an action by plaintiff Mobil Oil Corporation, filed 13 February 1978, on two guaranty agreements, each for $10,000. These agreements guaranteed the obligations of Dominion Oil Co., Inc., of Fayetteville. One was signed by defendant C. E. Crowell and dated 6 December 1971. The other was signed by defendants R. E. Wolfe and Carolyn G. Wolfe and dated 14 December 1971. Above their signatures were the words, "signed, sealed and delivered." Beside each signature was the symbol "(L.S.)."[1]

On 27 October 1977 plaintiff obtained a judgment against Dominion for $31,007.52 plus interest. It attempted but was unable to obtain satisfaction of the judgment from Dominion. It next demanded payment from defendants under their guaranties, and defendants refused to pay. Plaintiff then brought this action.

Defendants admit the execution of the guaranty contracts but contend they did not adopt the seals printed on the instruments as their own. They thus contend that the 10-year stat-

1. "L.S." is an abbreviation for *"Locus sigilli,"* which means "the place of the seal." Black's Law Dictionary, p. 1014 (Rev. 4th ed. 1968). The symbol is well understood in law and commerce to be a seal. *See Pitts v. Pitchford*, 201 So. 2d 563 (Fla. Dist. Ct. App. 1967). Defendants make no contention that the use of this symbol creates an ambiguity on the face of the instrument as to its adoption as a seal.

ute of limitations prescribed by G.S. 1-47(2) does not apply and that this action is barred by the 3-year statute of limitations in G.S. 1-52. Defendants also plead lack of consideration for their contracts of guaranty.

Summary judgment was granted against defendants on 21 April 1978. Defendants Crowell and R. E. Wolfe appealed. Plaintiff moved to bypass the Court of Appeals and consolidate this case for argument with No. 89. Because of identity of issues in the two cases we allowed its motion.

Defendants concede there is no genuine issue of material fact in this case and that summary judgment for plaintiff was proper if they cannot introduce parol testimony that they did not intend to adopt the seals on the instruments. The decisive issue in the case is therefore whether they can introduce such testimony.

The question is controlled by *Bell v. Chadwick*, 226 N.C. 598, 39 S.E. 2d 743 (1946). *Bell* was a suit on six promissory notes. Defendant in *Bell* had signed each of the notes and beside his signature on each was printed the word "(Seal)." Defendant sought to introduce testimony that he did not intend to adopt the printed word "Seal" as his own seal. He further stated that the term "Seal" did not imply any special meaning to him, that the plaintiffs did not call it to his attention, and that he "didn't know what it meant at all." The trial court excluded all this testimony. This Court held that exclusion proper, stating, *id.* at 600, 39 S.E. 2d at 744:

> "[T]he proffered testimony of the defendant Chadwick that he did not adopt, or intend to adopt, as his seal, the word 'Seal' appearing in brackets at the end of the line opposite his signature, was properly excluded under the rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument."

This statement of the law is correct and the facts of the case from which it came are indistinguishable from those now under consideration.

Defendants contend that *Bell v. Chadwick* is an aberration and that the law, correctly stated, is, "Whether the defendant adopted the seal is a question for the jury." *Bank v. Insurance Co.*, 265 N.C. 86, 96, 143 S.E. 2d 270, 277 (1965); *accord, Pickens v.*

Rymer, 90 N.C. 282 (1884); *Yarborough v. Monday*, 14 N.C. 420 (1832). We agree with this statement in regard to the special circumstances of the cases in which it was made. Such special circumstances are not, however, present here.

In *Bank v. Insurance Co., supra*, there were three signatures on the instrument but only one printed term "(SEAL)" opposite only one of the signatures. There was thus an ambiguity on the face of the document as to whether all of the signers intended to adopt the seal as their own. Likewise, in both *Pickens v. Rymer, supra*, and *Yarborough v. Monday, supra*, there were two signers of the instruments but only one seal. In each of these cases the instruments themselves were ambiguous as to whether all signers intended to adopt the single seal as their own. Here there is no such ambiguity. Above the signatures on each document were the words "signed, sealed and delivered." Beside each signature was the symbol "(L.S.)." These terms are too clear to leave any question for the jury.

Defendants argue vigorously that they should be allowed to testify that they did not intend to adopt the printed seals because (1) they did not understand their legal significance, and (2) plaintiff did not disclose to them what the terms meant. Defendant in *Bell v. Chadwick, supra*, 226 N.C. 598, 39 S.E. 2d 743, advanced essentially the same points. This Court did not give them controlling weight there, and we decline to do so here. This was a commercial transaction. Defendants have made no claim of misrepresentation, overreaching or undue influence. Thus even if they did not understand all the terms in the instrument, they are bound by those which are unambiguous. *See Casualty Co. v. Teer Co.*, 250 N.C. 547, 109 S.E. 2d 171 (1959); *Howland v. Stitzer*, 240 N.C. 689, 84 S.E. 2d 167 (1954) (holding that unambiguous terms of a contract are controlling regardless of what either party thought them to mean).

Defendants also raise the defense of lack of consideration. We have held that these instruments were signed under seal. "A contract executed under seal imports consideration." *Honey Properties, Inc. v. Gastonia*, 252 N.C. 567, 571, 114 S.E. 2d 344, 347

(1960). The application of this principle here is not affected by G.S. 25-2-203.[2] This defense is without merit.

For the reasons stated, the judgment of the trial court is

Affirmed.

STATE OF NORTH CAROLINA v. BORIS RAY DANCY

No. 97

(Filed 16 March 1979)

1. **Criminal Law § 31 — information about moon — no judicial notice of source offered**

The trial court did not err in failing to take judicial notice of the contents of the LADIES BIRTHDAY ALMANAC, BLACK DRAUGHT FOR ALL THE FAMILY, CARDUI FOR WOMEN, 1978, since that publication was not a document of such indisputable accuracy as justified judicial reliance.

2. **Criminal Law § 31 — information about moon — judicial notice taken by court on appeal**

In a prosecution for first degree burglary where the State relied upon eye witness identification of defendant by bright moonlight, the court on appeal takes judicial notice of the phase of the moon and the time of rising of the moon from the records of the U.S. Naval Observatory and awards defendant a new trial.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 18 May 1978 in Superior Court, NASH County. Argued as No. 124 at the Fall Term 1978.

Defendant was charged in a bill of indictment, proper in form, with the felony of burglary in the first degree. The jury returned a verdict of guilty of burglary in the first degree, and defendant was sentenced to imprisonment for life.

Attorney General Rufus L. Edmisten by Assistant Attorney General Leigh Emerson Koman for the State.

Michael J. Anderson for defendant-appellant.

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2. This section makes seals inoperative as to contracts or offers relating to the buying and selling of goods. It provides:

"The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer."

BROCK, Justice.

Joseph Wilkinson (Wilkinson) and Major G. Thompson (Thompson) (age approximately 90 years) lived in adjoining duplex apartments in Rocky Mount, N. C. At about 9:45 p.m. on 30 January 1978, Thompson was lying in his bed in the middle room of his apartment. Thompson awakened and saw a boy in his apartment. The boy went to the front door, then turned and ran to the back door. Wilkinson, in his apartment next door, heard the disturbance in Thompson's apartment. Wilkinson ran to Thompson's back door and grabbed the boy as he emerged from Thompson's apartment. Wilkinson was unable to hold the boy but recognized him as the defendant by the light of the moon. Defendant was age sixteen at the time of the trial.

Wilkinson testified, *inter alia*: "I got a good look at Ray. The light was shining and the moon was shining bright that night. At that time it was wintertime and the tree in the backyard didn't have any leaves, and the light could shine right through." Then on cross-examination Wilkinson testified, *inter alia*: "The moon was shining that night. . . . It happened at 9:45. That's when I caught Ray. I couldn't hold him because I was barefooted. When he came out of that kitchen door he was facing me. The moon was shining bright."

One of the investigating officers testified that he arrived at Major Thompson's apartment at approximately 10:30 p.m. He further testified: "The weather was fair and clear and the moon was shining."

Thus it appears that the State's evidence of identification hinged largely upon the bright light of the moon at 9:45 p.m. on 30 January 1978.

Upon the opening of defendant's evidence the following transpired:

> "MR. ANDERSON [counsel for defendant]: I would like to have the court take judicial notice of page 6 of the LADIES BIRTHDAY ALMANAC, BLACK DRAUGHT FOR ALL THE FAMILY, CARDUI FOR WOMEN, 1978. The relevance of this is that it shows that the moon on 30th of January, 1978, was not full, as testified, but in the last quarter, and that it did not in fact rise until 11:48 at night.

COURT: Does the State have any comment one way or the other?

MR. BONEY [district attorney]: The State will resist and object to that.

COURT: I am going to deny the motion to take judicial notice of that page of the almanac, in my discretion."

[1] We cannot say that the trial judge erred or abused his discretion in refusing to take judicial notice of the contents of the publication tendered. The LADIES BIRTHDAY ALMANAC, BLACK DRAUGHT FOR ALL THE FAMILY, CARDUI FOR WOMEN, 1978, is not a document of such indisputable accuracy as justified judicial reliance. The trial judge is not required to make an independent search for data of which he may take judicial notice; counsel should supply him with appropriate data. 1 Stansbury's North Carolina Evidence, § 11, p. 24 (Brandis Rev.). It is desirable and certainly contemplated by G.S. 1A-1, Rule 16(6), that counsel bring to the court's attention, in pre-trial conference, those matters of which it will be asked to take judicial notice. In the present case, it may well be, if defendant had advised the judge and the district attorney in pre-trial or other conference of what he would ask the court to take judicial notice, a more recognized and judicially reliable source could have been utilized.

[2] Nevertheless, in view of the reliance of the State upon eye witness identification of the defendant by bright moonlight at 9:45 p.m. on 30 January 1978, this court takes judicial notice of the phase of the moon and the time of rising of the moon from the records of the U.S. Naval Observatory as follows:

"At Rocky Mount, North Carolina, on 30 January 1978, moonset occurred at 10:40 a.m. Eastern Standard Time. Moonrise occurred at midnight, Eastern Standard Time, dividing 30 January and 31 January 1978. The Moon reached last quarter phase at 6:51 p.m. Eastern Standard Time on 31 January 1978."

Because of the reliance by the State upon identification by moonlight at 9:45 p.m., and because of the seriousness of the of-

fense charged and the penalty therefor, in our view the ends of justice require a new trial.

New trial.

BANK OF NORTH CAROLINA, N.A. v. DAVID W. CRANFILL AND WIFE, MARY A. CRANFILL

No. 89

(Filed 16 March 1979)

Seals § 1— intent to adopt seal—unambiguous instrument—parol evidence not allowed

A signatory to an instrument may not introduce parol testimony that he did not intend to adopt a seal printed on the instrument as his own where there is no ambiguity on the face of the instrument as to the adoption of the seal.

ON petition for discretionary review of a decision of the Court of Appeals, reported at 37 N.C. App. 182, 245 S.E. 2d 538, reversing summary judgment in favor of plaintiff entered by *Judge Albright* at the 9 May 1977 Session of FORSYTH Superior Court. This case was consolidated for argument with No. 98. Docketed and argued as No. 114 at the Fall Term 1978.

House and Blanco, P.A., by Reginald F. Combs and Robert Tally, Attorneys for plaintiff appellant.

Morrow, Fraser and Reavis, by John F. Morrow and N. Lawrence Hudspeth III, Attorneys for defendant appellees.

EXUM, Justice.

The case presents the same question as *Oil Corporation v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979), decided this day, and we reach the same result.

On 11 August 1976 plaintiff here brought suit against defendants on a promissory note executed by them and dated 4 February 1972. Defendants admitted signing the note. Immediately above the signature blanks on the note were the words "witness my/our hand(s) and seal(s)." Beside each signature was the printed term "(SEAL)."

Defendants contend that they did not intend to adopt the printed seals as their own. It follows, according to their argument, that the instruments were not under seal; that the 10-year statute of limitations of G.S. 1-47(2) is not applicable; and that the 3-year statute of limitations of G.S. 1-52 had run.

The trial court entered summary judgment in favor of plaintiff. The Court of Appeals reversed, finding that there was a genuine issue of material fact as to whether defendants adopted the printed seal. In so doing, it relied primarily on *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965). For the reasons stated in *Oil Corporation v. Wolfe, supra*, this reliance was misplaced. The ruling of the trial court was correct under *Bell v. Chadwick*, 226 N.C. 598, 39 S.E. 2d 743 (1946), and it should have been affirmed.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. JOHNNY MACK OXNER

No. 5

(Filed 16 March 1979)

Criminal Law § 177— equally divided Court—judgment affirmed—no precedent

Where one member of the Supreme Court did not participate in the decision or consideration of this case and the remaining six justices are equally divided, the opinion of the Court of Appeals is affirmed without precedential value.

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

ON petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 600, 246 S.E. 2d 546 (1978) (*Erwin, J.*, concurred in by *Britt* and *Clark, JJ.*), which affirmed the judgment of *Bailey, J.* entered in the 5 August 1977 Criminal Session of DURHAM County Superior Court. This case was docketed and argued during Fall Term 1978 as No. 127.

The defendant was charged, in an indictment proper in form, with armed robbery.

At trial the evidence for the State tended to show the following:

On 15 April 1977 the defendant approached Louis Keith outside a poolroom and stated to him, "you have got my money." Keith testified that Iris Harris, defendant's girlfriend, had previously given him some marijuana and the defendant felt that Keith owed him the money for it. Keith first testified that he thought the marijuana was given to him as a present; he then claimed that he tried but could not sell the marijuana and "that is why I [Keith] didn't owe Oxner any money."

Later that afternoon the defendant returned to the poolroom with his friend, Connie Hickson, and both men had guns. Several times the defendant asked Keith "did I [Keith] have his money and I said no." Keith claimed the two men pointed the guns at him. One of them held a gun on Keith while the other searched him. A fight ensued, Keith was struck and the defendant and Hickson got into a red Pinto and drove away. Although it does not appear in the testimony set forth in the record, apparently Keith stated that after this encounter, he was missing a fifty dollar bill. This fact was included in the judge's summary of the evidence to the jury and was not objected to by the defendant.

Keith immediately flagged down a police car that was driving by and told the officers that the men in the red Pinto had sawed-off shotguns. The policemen pursued the car which stopped at a residence hall of Durham College. The two men fled, carrying some objects. They were apprehended, and two loaded sawed-off shotguns were later found in the vicinity.

The evidence for the defendant tended to show the following:

Iris Harris testified that she had given Louis Keith some marijuana to sell and had promised the proceeds to the defendant. Keith had known of that promise and had told the defendant that he would pay him.

On 15 April 1977 Larry Baines and Iris Harris were present when the confrontation between the defendant, Hickson and Keith took place. The defendant got out of his car with a gun, but Hickson did not have a gun at that time. As Keith started toward his car, Hickson raced him to it and took a gun from Keith's car.

The defendant told Keith that the only thing he wanted was the money Keith had gotten from the marijuana sale. Larry Baines testified that Keith had previously stated he had sold the marijuana for approximately one hundred dollars. Iris Harris testified that the defendant never pointed the gun at Keith and that neither the defendant nor Hickson searched Keith's pockets.

The defendant took the stand on his own behalf. He said he had spoken to Keith several times before 15 April 1977 about the money in question. Keith had indicated to him that Ms. Harris told Keith defendant was to get the proceeds from the sale.

The defendant testified that he took the gun with him on 15 April because he knew Keith had a gun; he "did not intend to take the money from him with the gun." Neither he nor Hickson pointed a gun at Keith or took any property from him; however, the defendant struck Keith with the back of his gun.

The trial judge refused to use several instructions tendered by the defendant. He then submitted the crimes of armed robbery, attempted armed robbery, common law robbery and attempted common law robbery to the jury. The jury found the defendant guilty of attempted armed robbery, and the defendant was sentenced to imprisonment for a term of not less than eight years nor more than ten years. The defendant appealed. The Court of Appeals found no error in defendant's trial, and this Court granted defendant's petition for discretionary review.

Richard N. Weintraub for the defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch for the State.

PER CURIAM.

Justice David M. Britt, being a member of the panel of the Court of Appeals which decided the case, did not sit in the appeal to this Court. The remaining six justices are equally divided as to whether, upon the facts in this case, the trial court should have instructed the jury that "[a] person is not guilty of robbery with force if he takes property from the actual possession of another under bona fide claim of right or title to the property" and should have charged the jury on the offense of assault with a deadly

weapon. Thus, the opinion of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation. *See, e.g., State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974) and cases cited therein.

Affirmed.

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

In re Rogers

IN THE MATTER OF: DAVID HENRY ROGERS, APPLICANT TO THE 1975 BAR EXAMINATION

No. 78

(Filed 20 April 1979)

1. **Attorneys at Law § 2— applicant for admission to Bar—good moral character—necessity for findings of fact**

In cases in which all the essential facts either appear on the face of the application for admission to the Bar or are otherwise indisputably established, the Board of Law Examiners need only weigh the evidence and determine whether the applicant has shown his good moral character. However, when a decision of the Board of Law Examiners rests on a specific fact or facts the existence of which is contested, the Board must resolve the factual dispute by specific findings of fact, and a mere recitation of the testimony heard by the Board will not suffice.

2. **Attorneys at Law § 2— applicant for admission to Bar—good moral character—burden of proof—quantum of proof**

An applicant for admission to the Bar has the burden of showing his good moral character and, at the outset, must come forward with sufficient evidence to make out a prima facie case. However, when an applicant does make a prima facie showing of his good moral character and, to rebut the showing, the Board of Law Examiners relies on specific acts of misconduct the commission of which is denied by the applicant, the Board has the burden of proving the specific acts by the greater weight of the evidence.

3. **Attorneys at Law § 2— character defined**

Character encompasses both a person's past behavior and the opinion of members of his community arising from it.

4. **Attorneys at Law § 2— review of findings of Board of Law Examiners—"whole record" test**

The "whole record" test is the proper scope of judicial review of findings of the Board of Law Examiners.

5. **Attorneys at Law § 2— denial of permission to take Bar Examination—moral character—insufficient evidence**

The Board of Law Examiners erred in denying an applicant permission to stand for the N. C. Bar Examination on the ground that the applicant had failed to demonstrate his good moral character where the Board attempted to rebut the applicant's prima facie showing of good moral character by showing that he had acted wrongfully in (1) altering an order form so as to have a clock radio shipped to him but billed to another and (2) posing as another person in an effort to cash a check drawn to the other person, but the record as a whole did not contain substantial evidence to support findings, had they been made, that the applicant committed either or both of these acts.

Chief Justice SHARP and Justices BRITT and BROCK did not participate in the consideration or decision of this case.

In re Rogers

ON appeal pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law (hereinafter Rules) from a judgment entered by *Judge Giles Clark* on 26 April 1977 in WAKE Superior Court, affirming an order of the North Carolina Board of Law Examiners denying appellant permission to stand for the 1975 Bar Examination. Docketed and argued as No. 109 at the Fall Term 1977.

Blanchard, Tucker, Twiggs & Denson, by Howard F. Twiggs and R. Paxton Badham, Jr., Attorneys for Appellant.

Fred P. Parker III, Attorney for the North Carolina Board of Law Examiners.

EXUM, Justice.

Appellant David Henry Rogers is an applicant for admission to the North Carolina Bar. He was denied permission to stand for the 1975 Bar Examination by the Board of Law Examiners because of its decision that he had failed to demonstrate his good moral character. Upon consideration of the evidence as a whole, we conclude that it is insufficient to support the Board's determination. We therefore reverse the judgment of the superior court which affirmed the order.

Rogers filed application for admission to the Bar on 8 January 1975. His application was complete, including four "Certificates of Moral Character" signed by persons acquainted with him. Applicant appeared before the Bar Candidate Committee for the Tenth Judicial District which recommended that the Board find him to be of good moral character.

Rogers was subsequently twice summoned to appear before the Board for inquiry into his moral character. The first hearing was held on 12 June 1975. Five days later, the Board notified Rogers that he would be permitted to take the 1975 Bar Examination but that the results would be withheld pending further investigation. He took the examination. A second hearing was held on 5 February 1976. On 15 May 1976 the Board issued an order which in effect denied Rogers permission to be admitted to the bar because he failed to satisfy the Board "that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public." On appeal to Wake Superior Court this order was affirmed.

Rogers' application showed that he was born in 1935 and was an honor graduate of the United States Military Academy in 1959. While he served as an officer in the United States Army from 1959 to 1968, he received numerous security clearances for access to the highest levels of classified information and was never denied any such clearance for which he applied. From 1968 to 1973 he worked as an insurance agent and commodity futures broker. He was licensed as an insurance agent and real estate broker by the State of North Carolina, as a mutual funds salesman by the National Association of Securities Dealers, and as a commodity futures broker by the Chicago Board of Trade. He entered the University of North Carolina School of Law in 1973 and graduated in just over two years while working part-time. He had no criminal record except for minor traffic violations. No fact listed in his application was controverted.

Although some other matters were mentioned at the hearing, it is apparent that the Board's concern about Rogers' moral character was based on two incidents:

On 13 May 1974 an individual identifying himself as Nick DeMai opened a checking account at the Ridgewood office of First Citizens Bank & Trust Company in Raleigh by making a deposit of $50.00. Later that day the individual attempted to cash a check drawn to Nick DeMai in the amount of $234.14 at First Citizens' *Cameron Village* and *Westside* offices. The individual had no identification, and both offices refused to cash the check. Bank officials became suspicious and called Mr. DeMai, who stated that he had not opened an account with the bank. Later that day, an individual identifying himself as DeMai attempted to withdraw $50.00 from the bank's *downtown* office. While there, he was photographed by the bank's cameras. A postal inspector testified that DeMai rented Raleigh Post Office Box 18625 and Rogers, 18605 and that the two were next to each other. He also said he had investigated a lost check in the amount of $233.14 dated 10 May 1974 payable to Nick DeMai and supposedly mailed to DeMai at Post Office Box 18625 in Raleigh. The only witness who identified Rogers as the individual claiming to be DeMai was Mrs. Schoffner, manager of the Ridgewood office where the account had been opened. Mrs. Schoffner saw the individual for 15 to 20 minutes on 13 May 1974. She stated that she had not seen him again until the date of the hearing, 12 June 1975. When asked

how positive she was of her identification, she said she felt "pretty sure." In response to questions by Rogers, who was not then represented by counsel, she admitted she could be mistaken and that it could have been someone who looked like Rogers. She further stated she could not say that Rogers' voice was the same as the voice of the individual describing himself as DeMai, later clarifying this by saying she didn't recall if they were the same. She also identified several photographs as looking like the man who had posed as DeMai, but commented that "the hairline looked like the man that I remembered but the photograph looked younger than what I remember Mr. DeMai being."

The second incident involved a possible fraud in the use of a mail order form. Mr. John M. Roman, a postal inspector, testified that he had received a complaint from a Mr. Robert T. Bostrom that Bostrom's name had been forged on a mail order form. The order form was for a digital clock radio from the Union 76 Oil Company. On it Mr. Bostrom's post office box number, 19023, had been stricken through and been replaced with the number 1821; the zip code had been altered from 27609 to 27601; and Bostrom's signature was written at the bottom. Roman further stated that the radio was sent to Post Office Box 1821 in Raleigh in June, 1973, and that Rogers rented that box from 23 September 1968 to 30 June 1973. With regard to his investigation of this matter, Roman testified that he had gone to Rogers' house several times without finding him and had telephoned him and spoke to him once. He had made no other efforts to contact Rogers, had never seen him personally, had never shown him his identification as a postal inspector and had never asked him personally for information.

Rogers denied any involvement in either the DeMai or the Bostrom incidents.

He gave samples of his handwritten signature to the Board, but so far as the record reveals the Board made no comparison of them with the allegedly forged signatures. Rogers testified that he had handled money in a number of positions he had held and there had never been any complaint about his conduct. He further stated that he had no sudden need for money in May, 1974. He had an income at that time of about $650.00 per month from veteran benefits and part-time jobs. He had a credit rating which

made it possible for him to borrow money and had always been able to call on his father for financial assistance. He also testified and produced evidence that at the time of the hearing he was still a customer in good standing of both Union 76 and First Citizens Bank and had credit cards from both.

Fourteen witnesses, nine in person and five by affidavits, testified on Rogers' behalf and attested to his good character.

Colonel James F. Berry, a retired officer of the United States Air Force, testified that he had served as State Treasurer for Common Cause in North Carolina since 1972. During that time he had come to know Rogers, who then worked part-time as office manager of Common Cause. He stated that Common Cause kept about $300.00 on hand at all times and that Rogers handled this account as well as the account for fund raising. With regard to Rogers' character and honesty, he said, "He is of the finest character of anyone. . . . He is honest in every way. He has a fierce honesty, I think."

Mr. James P. Weaver testified that he was an automobile dealer and developer in the Raleigh area and had first met Rogers in 1959 when he sold him a car. He had also had contact with Rogers through prayer breakfasts which both attended. He stated that Rogers' character and reputation were excellent. In his experience, Rogers had been a good customer who paid his bills. He was also very impressed with the depth of Rogers' Christian faith.

Mr. William W. Coppedge testified that he was a licensed attorney serving as Deputy Secretary of State of North Carolina in charge of securities. Mr. Coppedge knew Rogers and had sought to have him employed with his department. He stated that Rogers was a very exceptional man in regard to honesty: "I think he is so honest that sometimes he may appear to be a little blunt to people." He recommended Rogers as a person fully qualified to practice law in North Carolina "without the slightest reservation."

Mr. Richard C. Titus, a Raleigh attorney, stated that he had known Rogers for several months, having met him at a businessmen's prayer group. He had come to know Rogers further by virtue of their common membership in the Church of the Good

Shepherd. Mr. Titus stated that Rogers' general character and reputation were excellent as was his reputation for telling the truth and being honest. He recommended Rogers as a person fit and qualified to practice law "without question."

State Senator John W. Winters stated that he thought very highly of Rogers in regard to his general character and reputation. He added in respect to Rogers' honesty and reputation for telling the truth, "I would put my life on the line along with him."

Mr. Joseph J. Kalo, Mr. Arnold H. Loewy and Mr. Walker J. Blakey, all professors of law at the University of North Carolina, stated that they knew Rogers as a student. Each expressed a high opinion of Rogers' character and reputation. All three recommended his admission to the bar.

Mr. Robert W. Newsome III and Mr. Al Carlton stated that they had known Rogers as law school classmates. Both had a high opinion of Rogers in regard to his character and reputation. According to Mr. Newsome, Rogers' reputation was one of complete "frankness and honesty." He added that he would rate Rogers' reputation for honesty and telling the truth "at 100%." In his words, "He is the most honest and open individual I have ever met." Mr. Carlton's evaluation was similar. In his experience, he had never found Rogers to make a statement to him that was false. Both Mr. Newsome and Mr. Carlton recommended Rogers as a person fully qualified to practice law in North Carolina.

The Honorable Samuel P. Winborne, then a District Court Judge in the Tenth District, testified that he had come to know Rogers as a litigant in his court in a domestic case. He stated that in his opinion Rogers' general character and reputation were very good and that he "was very favorably impressed with him." Judge Winborne added that Rogers' regard for truth and honesty was "very high" and that it appeared to him that Rogers possessed the good moral character necessary for admission to the bar.

Mr. Jack P. Gulley, a Raleigh attorney, stated that he had represented Rogers' wife in an action against Rogers for child support. He said that in the negotiations he had found Rogers to be of high integrity and upstanding character.

Mr. Jacob W. Todd, a Raleigh attorney, stated by letter that Rogers had paid in full a $2,000.00 judgment against him by First and Merchants National Bank of Virginia. Mr. Todd added that he appreciated Rogers' attitude in the matter since he had made it known to Rogers that the Bank was willing to accept a sum substantially less than payment in full.

The Honorable Burley B. Mitchell, Jr., now a Judge of the North Carolina Court of Appeals, then District Attorney of the Tenth Prosecutorial District, stated by affidavit that he had offered Rogers a position as an Assistant District Attorney contingent upon his admission to the bar.

I

The Board of Law Examiners was created for the purpose of "examining applicants and providing rules and regulations for admission to the Bar." G.S. 84-24; *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771, *appeal dismissed* 423 U.S. 976 (1975); *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954). The Board is authorized by G.S. 84-24 "to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law." In connection with its investigations the Board may require applicants to appear before it to answer inquiries concerning their eligibility for admission to the bar. Rule .1201.[1]

The Board required Rogers to appear before it twice. The purpose of the hearings was to determine whether Rogers had met the requirements of Rule .0601:

> "Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public."

Had nothing else been shown Rogers' past record and the testimony of his character witnesses would have carried this burden overwhelmingly. The only evidence before the Board to the contrary was that concerning his possible involvement in the DeMai and Bostrom incidents.

1. The Rules Governing Admission to the Practice of Law have been promulgated by the Board and approved by this Court pursuant to G.S. 84-21. They have undergone some revision during the pendency of this action, but no provision bearing on the outcome here has been materially altered. All citations are to the rules as published by the Board on 23 August 1977.

The Board made no finding of fact that Rogers was involved in either incident. Indeed it made no findings of fact at all. It merely recited some of the evidence presented and stated its conclusion that Rogers had not satisfied the Board of his good moral character. For example, Mrs. Schoffner was the key witness whose testimony might have shown that Rogers was the person posing as DeMai. At one point she said Rogers was the impostor; later, however, she admitted that she might have been mistaken. The Board did not pass on the credibility of her testimony. It merely noted that she "identified David Henry Rogers as the individual who appeared before her on May 13, 1974 representing himself as Nick DeMai." It made no finding based on her or anyone else's testimony that Rogers was indeed the person who posed as Nick DeMai.

The Board argues that it is not required to make findings of fact but need only make the ultimate determination whether an applicant has carried his burden of showing good moral character. The procedure suggested by the Board may be acceptable in cases in which there is no dispute as to the underlying facts. This seems to have been the posture of all previous cases cited by the parties.

Applicant in *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924), was accused by protestants of obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion and other conduct involving moral turpitude. Applicant made no substantial denial of the charges but attempted to show that there was an excuse for his prior conduct and that at the time of his application he was a person of good character. There was thus before the Court only the question whether applicant had shown his good moral character; none of the facts underlying this determination were in dispute. In *In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926), there were some factual disputes, but the principal questions before the Court were whether the acts complained of were evidence of bad moral character and, if so, whether the applicants had shown sufficient improvement in their character. And in *In re Willis, supra*, 288 N.C. 1, 215 S.E. 2d 771, the question was whether the conclusion that the applicant had not shown his good moral character was supported by the undisputed facts before the Board.

[1] In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the Board need only weigh the evidence and determine whether the applicant has shown his good moral character. In the words of Mr. Justice Frankfurther, concurring in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 248 (1957), *quoted in In re Willis, supra*, 288 N.C. at 19, 215 S.E. 2d at 782:

> "[S]atisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said . . . that it expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.' "

Even in such cases, while it might be permissible for the Board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review as it did in *In re Willis, supra.*

This case is different from those just discussed in that the only facts which could support a conclusion that Rogers did not show good moral character are in sharp dispute. The Board had before it accusations which Rogers totally and unequivocally denied and which had never before been tested by any other tribunal. In such a case the Board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the Board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952); *see also Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 388-91, 239 S.E. 2d 48, 63-64 (1977); *Taylor v. Dickson*, 251 N.C. 304, 111 S.E. 2d 181 (1959). Cases from other jurisdictions supporting these propositions include *American Transport Co. v. Public Service Commission*, 239 Ind. 453, 154 N.E. 2d 512 (1958); *Weston v. New Jersey State Board of Optometrists*, 32 N.J. Super. 502, 108 A. 2d 632 (1954); *Valley and Siletz R.R. Co. v. Flagg*, 195 Or. 683, 247 P. 2d 639 (1952). When a

decision of the Board of Law Examiners rests on a specific fact or facts the existence of which is contested, the Board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies.

Indeed the rules under which the Board operates clearly contemplate that it make findings of fact when necessary. Rule .1404 speaks of the manner in which "findings of fact by the Board" shall be reviewed by the Superior Court. The exercise of the Board's fact-finding function is illustrated in *Baker v. Varser, supra*, 240 N.C. 260, 82 S.E. 2d 90, a dispute over whether an applicant had established his residency, in which the Board made extensive findings. Furthermore, under G.S. 84-24 the Board is the primary investigatory and fact-finding agency in the bar admissions process. When factual disputes are fairly brought before it, it must resolve them. No other agency exists to make such resolutions.

[2] Moreover, when an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the Board relies on specific acts of misconduct the commission of which is denied by the applicant, the Board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the Board from having to prove such specific acts of misconduct. To place the burden on the applicant to disprove such acts would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the Board's burden of proving particular instances of misconduct. A general procedure is suggested by the United States Supreme Court in *Konigsberg v. State Bar of California*, 366 U.S. 36, 41 (1961):

> "[A]n applicant must initially furnish enough evidence of good character to make a prima facie case. The examining Committee then has the opportunity to rebut that showing with evidence of bad character."

Accord Martin-Trigona v. Underwood, 529 F. 2d 33 (7th Cir. 1975); *State v. Poyntz*, 152 Or. 592, 52 P. 2d 1141 (1935).

[3] Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In the words of Chief Justice Stacy in *In re Applicants for License, supra*, 191 N.C. at 238, 131 S.E. at 663:

> "[Good moral character] is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong."

Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it. Were it not for the requirement that each applicant marshal evidence of his own good moral character, an insurmountable investigatory burden would be placed on the Board. Nor in most cases is it a particular hardship for the applicant to have to bear this burden. "Facts relevant to the proof of [an applicant's] good moral character are largely within the knowledge of the applicant and are more accessible to him than to an investigative board. Accordingly, the burden of proving his good moral character traditionally has been placed upon the applicant in this State and in other jurisdictions." *In re Willis, supra*, 288 N.C. at 15, 215 S.E. 2d at 780.

This rationale does not apply, however, when an investigation is narrowed to one or two incidents of alleged misconduct of the applicant. Here, for example, Rogers stands accused of two acts of fraudulent conduct. His access to information concerning these transactions is not superior to that of the Board. Indeed, taking into account the superior investigatory resources of the Board, it is reasonable to assume the contrary. An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. *Coleman v. Watts*, 81 So. 2d 650 (Fla. 1955); *In re Crum*, 103 Or. 296, 204 P. 948 (1922). Yet if there is not some reallocation of the burden of proof in these circumstances precisely this may happen. An applicant may be able to meet a charge of wrongdoing only with his denial. If the Board is not required to

prove that which applicant denies the result might be that the application is refused on the basis of a mere accusation.

It could be argued that such an extreme situation might be avoided by simply requiring the Board to come forward with some substantial evidence to support its charges. We think such an approach should be rejected for two reasons. First, it is not in accord with sound administrative procedure to allow something to be found as a fact when it is not supported at least by the greater weight of the evidence:

> "It is a commonplace that in a given case the evidence may support a finding either way. . . . The factfinder must make a choice based on his own appreciation of the greater probability . . . the factfinder should believe that the fact is 'true,' rather than merely make an objective judgment of its probability." Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914, 915 (1966).

Second, such a procedure would be in conflict with our usual civil practice on assignment of burden of proof. As a general rule in this jurisdiction, the party who substantively asserts the affirmative of an issue bears the burden of proof on it. *King v. Bass*, 273 N.C. 353, 160 S.E. 2d 97 (1968); 2 Stansbury's North Carolina Evidence § 208 (Brandis rev. 1973) (hereinafter Stansbury). The rationale for this rule lies in the inherent difficulty of proving the negative of any proposition. It is reflected in the Rules under which the Board operates. The applicant for admission to the bar asserts his good moral character. The burden is on him to prove it. When the Board attempts to rebut his proof by showing some particular adverse fact, it should bear the burden of proving that fact. The normal burden of proof in civil cases is by the preponderance, or greater weight, of the evidence. *Speas v. Bank*, 188 N.C. 524, 125 S.E. 398 (1924). It should suffice for the Board to make its findings on that basis.

In summary, an applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The Board, or any other person wishing to contest an application, may then offer rebuttal evidence. If there are material factual disputes, the Board must resolve them by making findings of fact. If the disputes arise out of charges initially made

before the Board, the Board must determine whether the charges have been proved by a preponderance of the evidence before it can rely on them in concluding that an applicant has not shown his good moral character.

Here Rogers made out a prima facie case. The Board offered evidence tending to show that he had committed two wrongful acts. Rogers denied committing the acts. The Board could have found that Rogers had not shown his good moral character only if it believed he had done these acts. There was thus a genuine dispute as to the crucial facts. It was error for the Board, as a prerequisite to denying Rogers' application, to fail to find by the greater weight of the evidence, the burden of proof being upon the Board, that Rogers did commit either or both of these acts.

II

Normally, remand is the proper course when an administrative body has failed to make necessary findings of fact. *Commissioner of Insurance v. Automobile Rate Office, supra,* 293 N.C. 365, 239 S.E. 2d 48. It is also clearly established, however, that when an agency does make findings of fact an order based on them may be reversed by a reviewing court when they are not supported by the evidence. *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 181 S.E. 2d 1 (1971). Appellant Rogers urges us to consider at this juncture whether had the Board made the required findings here, such findings would have been supported by the evidence. He argues that the evidence in the record is insufficient to support any finding on which a conclusion that he had not shown his good moral character could be based, and he asks us to order him admitted to the bar if he made a passing score on the 1975 examination.

We note that courts elsewhere, even after determining that an error justifying remand had occurred, have proceeded to examine the record to see if there would have been sufficient evidence to support necessary findings if they had been properly made. *See, e.g., Gardner v. Smith,* 368 F. 2d 77 (5th Cir. 1966). The hearing and appeals processes here have been lengthy. The matter in question touches on appellant's right to earn his livelihood by practicing his chosen profession. Considering the circumstances of the case and the merits of appellant's argument, we think it appropriate for us to undertake the review he suggests.

As already noted the Board could have properly concluded that Rogers had *not* shown his good moral character only if it had found that Rogers acted wrongfully either in (1) altering an order form so as to have a clock radio shipped to him but billed to Robert Bostrom or (2) posing as Nick DeMai in an attempt to cash a check drawn to DeMai. The question before us, then, is whether there was sufficient evidence in the record to have supported either or both of these findings had they been made.

[4] To answer this we need first decide the appropriate scope of judicial review of a finding of the Board of Law Examiners. Appellant urges us to adopt the "whole record" test for this purpose. The Board argues instead that its findings must be upheld if supported by "any competent evidence."

Judicial review of the sufficiency of evidence supporting administrative decisions has generally been under one of three standards in North Carolina: de novo review; a "substantial evidence on the whole record" test; or an "any competent evidence" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); Hanft, Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina, 49 N.C. L. Rev. 635, 666-74 (1971). De novo review is seldom applied in the absence of an express statutory provision. *E.g., In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). It is clearly neither contemplated nor warranted here.

We are thus left with a choice between the two tests urged by the parties. The language of Rule .1404 is not determinative:

> "The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court."

The emphatic word "any" does not modify "competent evidence." *Compare* G.S. 96-4(m) (findings by the Employment Security Commission conclusive on questions of fact when "supported by *any* competent evidence"). It is true that the word "evidence," when its meaning is not otherwise clarified, has been read as "substantial evidence." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 146-47 (1937). There is, however, no reference to evidence "on the whole record" or "on the entire record as submitted." We

must therefore go beyond the language of the Rule to resolve the question presented.

In our two previous cases from the Board of Law Examiners, *In re Willis, supra*, 288 N.C. 1, 215 S.E. 2d 771, and *Baker v. Varser, supra*, 240 N.C. 260, 82 S.E. 2d 90, the question of the proper scope of judicial review was not presented. *Baker v. Varser* merely restated the formulation of the Rules. In *In re Willis*, however, the following statements appear:

> "As long as there is evidence in the record which *rationally justifies* a finding that the applicant has failed to establish his moral fitness to practice law, this Court cannot substitute its judgment for that of the Board of Law Examiners."

and

> "When the Board's findings of fact and conclusions of law are viewed *in the context of the entire record as submitted*, we conclude that they are rationally justified by the evidence." 288 N.C. at 16, 19, 215 S.E. 2d at 780, 782. (Emphasis supplied.)

When read together, these two statements strongly support adoption of the "whole record" standard. The second statement clearly indicates that the Court applied the "whole record" test in making its decision. Nor is the first statement inconsistent with such an application, for as one of the leading commentators on judicial review has explained:

> "Judicial review is designed . . . to provide minimum assurance that there is record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence. This must mean evidence in the case and in the context of the case. To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. A conclusion based on such abstracted evidence may be 'rational,' *but it is not a rational decision of the case which was tried.*" Jaffe, Judicial Control of Administrative Action 601 (1965).

Thus to the extent our decisions have spoken on the issue of judicial review of findings by the Board, they have favored the "whole record" test.

In addition to the language from *In re Willis*, we find strong support for the "whole record" test in the public policy of the state as expressed in its General Statutes.[2]

Chapter 150 of the General Statutes, effective at the time this proceeding began, was captioned "Uniform Revocation of Licenses." It dealt with various licensing boards and set out procedures for granting and revoking licenses. It covered, for example, boards having to do with barbers, chiropractors, contractors, engineers and land surveyors, nurses, opticians, optometrists, vetenarians, dentists, psychologists and landscape architects.[3] G.S. 150-27 provided for the scope of judicial review of actions by these boards and provided that an agency decision could be reversed or modified by the courts if, among other grounds, it were "unsupported by competent, material and substantial evidence *in view of the entire record as submitted.*" (Emphasis supplied.)

Likewise at the time this proceeding began, Article 33 of Chapter 143 of the General Statutes controlled judicial review of administrative agencies in general. G.S. 143-306 defined "administrative agency" to mean "any State officer, committee, authority, board, bureau, commission, or department authorized by law to make administrative decisions, except those agencies in the legislative or judicial branches of government, and except those whose procedures are governed by Chapter 150 of the General Statutes, or whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor." Under G.S. 143-315(5) a decision of an administrative agency could be reversed or modified by a reviewing court if "unsupported by competent, material and substantial evidence *in view of the entire record as submitted.*" (Emphasis supplied.)

2. For a compelling argument urging the use of statutory policies in decisional law, see Traynor, Statutes Revolving in Common Law Orbits, 17 Cath. U.L. Rev. 401 (1968).

3. Among the few notable exceptions from the coverage of this Chapter were the Board of Law Examiners and the Board of Medical Examiners. Procedures before the Board of Medical Examiners are separately set out in Chapter 90 of the General Statutes. G.S. 90-14.1 makes clear that decisions of the Board of Medical Examiners are to be upheld unless "not supported by any evidence admissible under this Article [Article I of Chapter 90]."

Both Chapter 150 and Article 33 of Chapter 143 were repealed effective 1 February 1976 and replaced by Chapter 150A, the new Administrative Procedure Act. *See* Session Laws 1973, Ch. 1331, as amended by Session Laws 1975, Ch. 69. While the new Act introduced many new features in administrative procedure in North Carolina, *see generally*, Daye, North Carolina's New Administrative Procedure Act: An Interpretive Analysis, 53 N.C. L. Rev. 833 (1975), it left the scope of judicial review unchanged. G.S. 150A-51 reads, in pertinent part:

> "The court . . . may reverse or modify the [agency] decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> . . . .
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 *in view of the entire record as submitted* . . . ." (Emphasis supplied.)

It is thus clear that with few exceptions judicial review of administrative decisions in North Carolina is under the "whole record" test.[4]

While neither Chapter 150,[5] Article 33 of Chapter 143, nor the Administrative Procedure Act[6] apply generally to this proceeding, the policy which all these statutes reflect favoring the "whole record" test for judicial review of administrative proceedings helps persuade us to apply that test here in the absence of a clear statement to the contrary in the Board's rules.

[4] The rules of the Board express no real preference for one type of judicial review of findings as against another. *In re Willis*, *supra*, 288 N.C. 1, 215 S.E. 2d 771, gave implicit approval to the "whole record" test. That test has been endorsed by the General

4. Among the exceptions are the Employment Security Commission and the Board of Medical Examiners, for which the "any competent evidence" test is provided, and the Industrial Commission, for which the standard of review is not set out in the statute. *See* G.S. 150A-1, G.S. §§ 96-4(m), 90-14.1 and 97-86. *But see* G.S. 62-94(b)(5) ("whole record" test applies to review of decisions of Utilities Commission).

5. See note 3, *supra*.

6. The act provides that it "shall not affect any pending administrative hearings." 1973 Session Laws, Ch. 1331, § 4. This hearing was pending on the Act's effective date of 1 February 1976. Whether the act will in the future apply to proceedings of the Board is a question we do not now address.

Assembly as the principal method of judicial review of administrative findings in this state. The "whole record" test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. *See* Jaffe, Judicial Control of Administrative Action, *supra*, at 601; Daye, *supra*, at 920-921. We therefore adopt the "whole record" test as the proper scope of judicial review of findings of the Board of Law Examiners.

Application of the "whole record" test is illustrated in *Thompson v. Board of Education*, *supra*, 292 N.C. 406, 233 S.E. 2d 538. Plaintiff in *Thompson*, a teacher in Wake County, was dismissed from his position on grounds of immorality, insubordination, neglect of duty and mental incapacity. The dismissal was reversed by the superior court because of insufficient evidence to support the Board of Education's findings. The Court of Appeals reversed and reinstated the order of dismissal, finding, however, that the evidence supported at most the charge of neglect of duty. We in turn reversed the Court of Appeals, holding "the evidence that Mr. Thompson neglected his duty to maintain order and discipline [to be] insubstantial in view of the entire record." *Id.* at 415, 233 S.E. 2d at 544. Justice Copeland, writing for the Court, explained the application of the "whole record" test, *id.* at 410, 233 S.E. 2d at 541:

> "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under [this] rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." (Citations omitted.)

[5] Upon reviewing the entire record here with these considerations in mind, we conclude there is not substantial evidence to

support a finding that Rogers acted wrongfully in either (1) altering an order form so as to have a clock radio shipped to him but billed to Robert Bostrom or (2) posing as Nick DeMai in an effort to cash a check drawn to DeMai.

On the first point, the testimony was that the post office box number and the zip code on a Union 76 order form had been altered so that a clock radio would be sent to a box rented by Rogers. Mr. Robert T. Bostrom's signature was written in on the bottom of the form. The radio was sent out sometime in June, 1973. Rogers discontinued renting the box in question on 30 June 1973. There was no evidence he received the radio at that box. Mr. Roman, who investigated the matter, spoke to Rogers once. He never asked Rogers for information about the incident. He had apparently simply dropped the matter after their one conversation. No charges were ever brought against Rogers and he remained at the time of the hearing a credit card customer in good standing of Union 76. Giving due weight to all these circumstances, we cannot say that there is substantial evidence that Rogers acted wrongfully in this matter.

With regard to the second point, it is clear that someone posed as Nick DeMai in an attempt to cash a check on 13 May 1974. The question we must answer is whether there is substantial evidence that that person was Rogers.

The only testimony that could supply a positive answer to this question was given by Mrs. Schoffner. She saw the individual for 15 to 20 minutes on 13 May 1974. Her first reaction at the hearing on 12 June 1975, over a year later, was that Rogers was the individual. Shortly thereafter, she admitted she could have been mistaken and that it may have only been someone who looked like Rogers. She could not recall if Rogers' voice was similar to the voice of the person identifying himself as DeMai. And in identifying photographs as looking like the man who had posed as DeMai, she commented that "the hairline looked like the man that I remembered but the photograph looked younger than what I remember Mr. DeMai being."

Mrs. Schoffner's opportunity to observe the person posing as DeMai took place before she had any suspicions about his conduct. Nothing in the record indicates she paid any special attention to the person while he was in her presence. Over a year passed

before the hearing at which she was asked to identify this person. Even under the circumstances of the hearing, to which she had been summoned to identify a specific person and at which only Rogers was present to be identified, she admitted considerable uncertainty.[7] We cannot say that by itself Mrs. Schoffner's testimony was substantial evidence that Rogers was the person who posed as DeMai.

There are in the record photographs which might have bolstered Mrs. Schoffner's testimony. Because of the way they were used, however, we cannot give any weight to them. There was testimony that these photographs were taken when "DeMai" attempted to withdraw $50.00 at the bank's *downtown* office. Mrs. Schoffner was at the *Ridgewood* office. No witness testified that these photographs accurately depicted the person posing as DeMai as he stood at the bank counter; nor were the photographs otherwise authenticated. Authentication is, of course, a prerequisite for the admission of photographs into evidence. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); 1 Stansbury, *supra*, § 34.. Moreover, even with proper authentication, photographs may only be used for illustrative purposes. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *see* 1 Stansbury, *supra*, § 34. These photographs were not used to illustrate anyone's testimony.

Neither so far as the record reveals did the Board determine that these photographs depicted Rogers. Instead nine witnesses were asked whether they thought the photographs depicted Rogers.[8] The Board thus asked for clearly incompetent opinion testimony since the witnesses were in no better position than the Board to say who was represented in the photographs. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). For the reasons stated, no weight can be given the photographs in determining whether Rogers was the person posing as DeMai. Since we have already stated that Mrs. Schoffner's testimony alone will not suffice, we hold that there is not substantial evidence in the record as a whole to support such a finding.

7. Although some of the qualifications Mrs. Schoffner placed on her testimony were in response to questions by Rogers, we think it appropriate to note that she was not subjected to cross-examination by counsel. Rogers had waived counsel at the beginning of the hearing before he was fully informed of the nature of the charges against him.

8. Of the nine, only one thought the photographs depicted Rogers. Three thought the photographs did not depict Rogers. Five were unable to give an opinion.

While the matters presented before the Board aroused suspicions that perhaps Rogers had been engaged in wrongdoing, we have, in the end, nothing more than that. Arrayed against these suspicions is Rogers' impressive record. He served with distinction in the United States Army, rising to the rank of major and receiving the Bronze Star and the Air Medal. He had been given numerous high level security clearances. After leaving the army, he worked for five years in jobs in which he handled large sums of money. He graduaged high in his law school class while working part-time and completed the normal three-year curriculum in two years. In all his prior dealings, no question of his honesty had ever been raised. Fourteen character witnesses appeared on his behalf. Those who knew him best seemed especially impressed by his honesty and integrity.

In these circumstances, we are reminded of the words of Mr. Justice Black in *Konigsberg v. State Bar of California*, 353 U.S. 252, 273-74 (1957): "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action." So it is here.

The judgment of the superior court affirming the order of the Board of Law Examiners is reversed and the case remanded to the superior court with instructions that it be further remanded to the Board of Law Examiners. If Rogers made a passing grade on the 1975 Bar Examinations, the Board of Law Examiners is directed to issue him a license to practice law in this state.

Reversed and remanded.

Chief Justice SHARP and Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. FOREST DENZIL McGUIRE, ALTON WAYNE RUFF, AND RONALD HAL WELLMAN

No. 57

(Filed 20 April 1979)

1. **Criminal Law § 92.5— outbursts by one defendant—severance properly denied**

The trial court did not err in denying the motion for severance made by two defendants on the ground that outbursts by a third defendant deprived them of a fair and impartial trial, since the trial judge, when possible, immediately removed the jury from the courtroom when an outburst occurred and admonished the jury not to deliberate on the incident; when it became apparent that defendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom; at that time the court told the jury to disregard the whole matter, and they unanimously indicated that they could do so; and in his final charge to the jury the judge instructed them not to allow defendant's behavior to influence their decision in any way.

2. **Criminal Law § 92.5— reference to unrelated crime by defendant—severance properly denied**

Contention by one defendant that his motion to sever should have been allowed because evidence of an unrelated crime committed by him was brought out was without merit, since the evidence in question was one brief reference to defendant's arrest for an undisclosed crime, and the trial court sustained defendant's objection, struck the evidence, and immediately instructed the jury to disregard it; furthermore, the jury could well have assumed that the arrest referred to was for the crime for which defendant was being tried.

3. **Criminal Law § 101— defendant's statement in jury's hearing—individual polling not required**

Where one defendant stated to another defendant, "Pete, I believe we have got it won" as court was opening one morning, the trial court did all that was required by asking the jury if anyone had heard a statement made by defendant that morning; after three jurors stated that they had, the court told them all to disregard totally any remark in their consideration of the case; all the jurors then affirmatively indicated by raising their hands that they could follow the court's instructions; and the court correctly refrained from having defendant's statement repeated in front of the whole jury, the majority of whom did not hear it, asking each juror individually what he heard, and polling the jurors separately as to any prejudicial effect the statement may have had.

4. **Constitutional Law § 52— five years between offenses and trial—no prejudice shown—no denial of speedy trial**

Defendant was not denied his right to a speedy trial by the more than five year delay between the commission of the crimes charged and the date the indictments were returned, since defendant failed to show any actual prejudice resulting from the delay.

5. Constitutional Law § 45— right to appear pro se—right not asserted unequivocally

Where the indigent defendant who had counsel appointed for him repeatedly stated that he wanted different counsel, on one occasion stated that he wanted to represent himself, later apparently acquiesced in appointed counsel, and subsequently behaved at trial in a manner which would have required termination of his self-representation, defendant did not clearly and unequivocally assert his desire to conduct a *pro se* defense, and the court therefore did not err in denying his request to represent himself at trial without questioning defendant at the time he made his vague request.

6. Criminal Law § 29— mental capacity questioned during trial—no right to psychiatric examination

The trial court did not err in failing to have defendant examined by a psychiatrist when his capacity to proceed was raised by him at trial since examination by a medical expert is a discretionary matter, and the court did not abuse its discretion in this case.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

APPEAL by defendants from the judgment of *Ferrell, J.* entered in the 14 December 1977 Session of CATAWBA County Superior Court. This case was argued as Number 17 at the Fall Term 1978.

Defendant McGuire and defendant Ruff were each charged, in indictments proper in form, with armed robbery, first degree burglary and conspiracy to commit armed robbery. Defendant Wellman was charged, in indictments proper in form, with conspiracy to commit armed robbery and conspiracy to commit first degree burglary. The cases were all consolidated for trial.

At trial the evidence for the State tended to show the following:

On the night of 1 October 1971 Mr. Clifford (Dock) Hefner, his wife and his son were in their home in Hickory, North Carolina watching television. About 10:15 p.m. a window in the room was suddenly broken, and a masked man was standing outside pointing a shotgun at Mr. Hefner. Other masked men with guns and a knife then burst into the house. Mrs. Hefner stated she thought there were three men in all, but she could not be sure because "they kept coming and going." Ricky Hefner, the son, testified that "[he] saw three men but at the time it sounded like [he] could hear more talking in the other rooms."

The men proceeded to tie the Hefners' feet and hands together behind their backs with wire. They kicked and beat Mr. Hefner and burned him on his rectum and on the bottom of his feet with candles. All Mr. Hefner's teeth were knocked out, and he had a fractured skull. The men kept asking him for his money; Mr. Hefner had $1,200 or $1,300 taken from his wallet that night.

One of the intruders burned Mrs. Hefner on her breasts and pulled her pants down and held a candle to her vagina. They kept smothering her with a pillow and asking her for money. She showed the men where she had previously hidden $180.00, which they took. The men also took three watches and two diamond rings from Mrs. Hefner. At one point she showed the men where she thought her husband had hidden some money in the back-yard.

The men took $50.00 from Ricky Hefner. They burned the eleven-year old boy on his toes and asked him where his father "had the money hid."

Suzanne Hefner, who was Mr. and Mrs. Hefner's seventeen-year old daughter at the time, came home from a date at approximately 12:15 a.m. When she entered the house, a man grabbed her, threw her onto a garbage can in the kitchen and kicked her in the head. After tying her hands and feet with wire, they jerked her pants down and burned her "on my [Suzanne Hefner's] private parts between my legs with a candle." One of them rammed his fingers into her vagina, and they told Ms. Hefner they were going to rape her. The men took money from her wallet and continuously asked her "where the money was."

The men stayed at the Hefner house several hours. None of the Hefners could identify the intruders, however, because they had on masks and raincoats.

Mr. Hefner testified that he used to play poker regularly. On one occasion, while playing with some people he did not know, he had $300 or $400 with him that had gotten wet and had become moldy. One of the men asked him how the money had gotten in that condition, and Mr. Hefner had replied that "it was some that I had hid." Mr. Hefner testified that he in fact did have some money hidden in the yard.

Arthur Edward Williamson, Jr. testified for the State. He stated that in September of 1971 he, the three defendants, Lane McGraw and Hoyt Powell met at defendant Wellman's trailer in Spartanburg, South Carolina. Defendant Wellman told the others about a man named Dock in Hickory, North Carolina who had buried approximately $250,000 in a baby casket in his backyard. Defendant Wellman had stated that someone "very close to him" had given him this information, and that he himself had been at a poker game with Dock who had a money belt that smelled very moldy.

The men then discussed the proposed robbery. The others told defendant Wellman that after it was completed, he would get an equal share of the proceeds. It was never intended that defendant Wellman actively participate in the robbery because "he didn't do that."

A few days before the robbery, defendant McGuire, defendant Ruff, Hoyt Powell and Williamson went to Hickory to look over the Hefner residence. They decided where they would park the cars. They made masks out of pant legs, and they bought raincoats and gloves. The men got a roll of wire that was cut into strips three feet long to be used for tying the Hefners' hands and feet. Each man had a pistol, and the group also obtained a sawed-off shotgun and a .30 caliber rifle.

Late in the afternoon of 1 October 1971 defendant McGuire, defendant Ruff, Hoyt Powell and Williamson left defendant Wellman's trailer in Spartanburg and drove to the Hefner residence in Hickory. Williamson's story as to what happened there was basically the same as the testimony of the Hefner family.

After leaving the Hefner home, the four men returned to defendant Wellman's trailer; however, defendant Wellman was not there. They then divided the $1,500 and the jewelry four ways among themselves. Defendant Wellman was not given a share because "[defendant Wellman] told us that there was Two Hundred Fifty Thousand Dollars and he understood if the money wasn't there he wasn't to get anything and there wasn't enough there to split up with [him]."

Defendant McGuire and defendant Ruff presented no evidence.

Apparently defendant Wellman took the stand on his own behalf; however, that testimony is not in the record before this Court.

The jury found defendant McGuire and defendant Ruff guilty of armed robbery, first degree burglary and conspiracy to commit armed robbery. Each defendant received two life sentences on the substantive charges and ten years imprisonment on the conspiracy charge, all of which were to run concurrently. The jury found defendant Wellman guilty of conspiracy to commit first degree burglary and conspiracy to commit armed robbery; he received ten years imprisonment on each charge, to run consecutively. He was permitted to post $100,000 cash bond on appeal. Defendant McGuire and defendant Ruff appealed by right to this Court on their armed robbery and first degree burglary convictions. We allowed the three defendants' motions to bypass the Court of Appeals on all the remaining convictions.

Additional facts relevant to the decision will be included in the opinion below.

Lloyd M. Sigman and Devere C. Lentz, Jr. for defendant McGuire.

Corne and Pitts, P.A. by Stanley J. Corne for defendant Ruff.

Lefler, Gordon & Waddell by Lewis E. Waddell, Jr. for defendant Wellman.

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

COPELAND, Justice.

For the reasons stated below, we find the defendants had a trial free from error.

This appeal concerns three defendants who submitted separate briefs to this Court. We will deal first with those assignments of error brought forth by both defendant McGuire and defendant Wellman. A contention made by defendant Wellman alone will then be discussed. Last we will examine those questions presented by defendant Ruff alone.

[1] In their first assignment of error, defendant McGuire and defendant Wellman argue the trial court erred in denying their motions for severance and for a mistrial. The defendants contend they did not receive a fair and impartial trial due to the in-court outbursts of defendant Ruff.

Defendant Ruff made numerous outbursts during defendants' joint trial, many of which occurred while the jury was out of the courtroom. He did, however, disrupt the trial several times in the presence of the jury. He called the witness Williamson a liar three times. As the jury was retiring from the courtroom, defendant Ruff said "Good-bye girl!" on one occasion and "Keep cool. Peace!" another time. After the trial judge sustained one of his objections to a question asked by the State, the defendant made the comment, "Lay in there" to his attorney. As court was opening one morning, defendant Ruff stated to defendant Wellman that "Pete, I believe we have got it won;" however, neither the judge nor a majority of the jury heard this remark. Near the end of the trial, defendant Ruff broke into a tirade of obscenities and blasphemies. At that point, he was removed from the courtroom with his consent.

Several times during the trial defendant McGuire and defendant Wellman moved for a mistrial or for separate trials. The trial court denied these motions, finding that defendant Ruff's outbursts did not prejudice the other defendants and that the jury could disregard them.

It is undisputed that the initial joinder of these three defendants was proper under G.S. 15A-926(b)(2)(b)(1) because all charges against them stemmed from a common scheme or plan. However, G.S. 15A-927(c)(2)(b) states that a severance must be granted "[i]f during trial, . . . it is found necessary to achieve a fair determination of the guilt or innocence of that defendant [making the motion]." We have held that the question whether to order separate trials is within the trial court's discretion, and its decision will not be disturbed on appeal unless it is shown that the movant did not receive a fair trial. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Similarly, under G.S. 15A-1061, a mistrial must be declared "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." This Court has stated that the resolution of

this issue also is within the trial court's discretion. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976).

There is good reason for appellate courts to defer to the trial judge's determination of these matters. As Judge Parker aptly stated:

> "When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. 'Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial,' and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal." *State v. Sorrells*, 33 N.C. App. 374, 376-77, 235 S.E. 2d 70, 72 (1977), *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977). (Citations omitted.) *See also State v. Nowell*, 156 N.C. 648, 72 S.E. 590 (1911).

It appears that this Court has not had occasion to consider the precise situation present in this case, to-wit: disruptions at a joint trial by one defendant that are alleged to have prejudiced the other defendants. We note, however, that several federal courts have decided cases in which this problem has arisen.

In *United States v. Bamberger*, 456 F. 2d 1119 (3d Cir. 1972), *cert. denied sub nom Crapps v. United States*, 406 U.S. 969, 32 L.Ed. 2d 668, 92 S.Ct. 2424 (1972), four defendants had been jointly tried for and convicted of bank robbery. Two of the defendants disrupted the trial. One of them called two State's witnesses liars,

and he made derogatory remarks to and about the trial judge. Another defendant continually interrupted the testimony of an F.B.I. agent and finally swallowed one of the government's exhibits, a piece of paper. The trial judge instructed the jury to consider the evidence against each defendant separately. In upholding the trial court's denial of motions to sever and for a mistrial made by one of the passive defendants, the court said:

> "This issue presents a delicate balancing of the right of a passive co-defendant to have his cause determined in an atmosphere free of inflammatory speech and gesture, society's interest in speedy trials for those accused of crime, the realities of sound judicial administration, and a consideration of convenience to witnesses. The accommodation of these countervailing considerations is entrusted to the trial judge. So long as he accords the necessary protection to the passive defendant within the parameters of sound judicial discretion we should not disturb his decision. We find no abuse of discretion here." *Id.* at 1128.

In *United States v. Marshall*, 458 F. 2d 446 (2d Cir. 1972), there was a joint trial concerning three defendants charged with bank robbery. One defendant, Guglielmo, directed accusations and obscenities toward the witnesses, the trial judge and the prosecution throughout the trial. At one point he threw a water pitcher at the prosecutor and hurled a chair toward the jury box. During the summation of a codefendant's attorney, Guglielmo cut his wrists with a razor blade, cut his tongue and then apparently attempted to swallow the blade. The two passive defendants moved to sever and moved for a mistrial based on this behavior, but the trial court denied their motions. Finding no abuse of discretion below, the court of appeals noted that "[t]he trial court took great pains to repeatedly and carefully instruct the jury to disregard Guglielmo's trial conduct in determining the guilt of each of the appellants . . . as well as that of Guglielmo himself. There is no reason to assume that the court's instructions were not efficacious." *Id.* at 462. *See also United States v. Smith*, 578 F. 2d 1227 (8th Cir. 1978); *United States v. Bentvena*, 319 F. 2d 916 (2d Cir. 1963), *cert. denied*, 375 U.S. 940, 11 L.Ed. 2d 271, 84 S.Ct. 345 (1963).

Defendant Ruff's conduct in this case is mild when compared to that recited above. When possible, the able trial judge immedi-

ately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it. When it became apparent that defendant Ruff would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom. At this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so. In his final charge to the jury, Judge Ferrell again isntructed the jury not to allow defendant Ruff's behavior to "influence your decision in any way when you come to weigh the evidence or determine the issues of guilt either as to defendant Ruff or as to the defendant Wellman or McGuire." Under these circumstances, we cannot say the trial court abused its discretion in denying defendant McGuire's and defendant Wellman's motions for severance or for a mistrial.

[2] Defendant McGuire also asserts that his motion to sever should have been allowed because evidence of an unrelated crime committed by him was brought out at trial during the cross-examination of Williamson by defendant Ruff's attorney. We do not agree.

At one point, defendant Ruff used a prior statement of Williamson to cross-examine that witness. The following exchange took place:

> "Q. Now to read the rest of that part of your statement, did you read this in your statement, 'Williamson advised that the .30 caliber automatic rifle and the .45 caliber pistol that was taken in the robbery of Dock in Hickory were seized by the F.B.I. when Forest McGuire was arrested.'
>
> OBJECTION.
>
> SUSTAINED.
>
> MOVE TO STRIKE IT.
>
> COURT: Members of the jury, be advised to disregard that portion as to McGuire. Let me see it, sir. Do not consider statement of counsel, members of the jury, or deliberate upon it at any time."

In this instance, the trial court sustained defendant McGuire's objection, struck the evidence and immediately instructed the jury to disregard it. "[W]hen all evidence of a partic-

ular character is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured unless the evidence stricken was so highly prejudicial that its effect cannot be erased from the minds of the jurors." *State v. Barrow*, 276 N.C. 381, 388, 172 S.E. 2d 512, 516 (1970). (Citations omitted.) This one brief reference to defendant McGuire's arrest for an undisclosed crime does not fall within that category. Furthermore, the jury could well have assumed that the arrest referred to was for the crime for which defendant McGuire was being tried. This assignment of error is overruled.

Defendant McGuire and defendant Wellman also argue the trial court erred in allowing the State to ask Williamson certain questions on redirect examination of that witness.

The district attorney asked Williamson, "[D]id you commit any bank robbery or any other type robbery prior to the summer of 1971 whenever you first met these defendants, and I mean Alton Wayne Ruff and Forest Danzil McGuire?" Over defendants' objections, the witness replied that he had not committed any robberies before 1971.

Williamson had been subjected to vigorous cross-examination by defendants during which he admitted committing many crimes, including thirteen bank robberies and six armed robberies. This Court has said:

> "After a litigant brings out on cross examination specific acts of an adverse witness for the purpose of impeachment, the party by whom the witness is called may sustain the character of the witness by eliciting from him evidence explaining those acts, or mitigating their effect. This is true even though evidence otherwise inadmissible is thereby introduced." *State v. Minton*, 234 N.C. 716, 724, 68 S.E. 2d 844, 849-50 (1952). (Citations omitted.)

During cross-examination, Williamson testified that "I [Williamson] told him [defendant McGuire] that I read a letter from Foster Sellers to Billy Dawson stating that Wayne Ruff and Foster Sellers and all were mad at Mr. McGuire." On redirect examination the State asked Williamson who is Foster Sellers, and he replied that "he is a bank robber." The defendants complain that the trial court should have excluded this evidence when they

objected to it. It is proper, however, to elicit testimony on redirect examination to explain matters brought out on cross-examination. *State v. Minton, supra.* This argument is without merit.

[3] It was brought to the court's attention by Mr. Allen Bailey, one of defendant Wellman's trial attorneys, that defendant Ruff had stated to defendant Wellman, "Pete, I believe we have got it won" as court was opening one morning. The trial judge stated that he did not hear any such comment; however, he heard testimony outside the presence of the jury regarding the alleged statement. Both defendant Wellman's trial attorneys stated they had heard the remark, but Deputy Dellinger, who sat next to the jury box, testified that he did not hear it.

On motions by defendant McGuire and defendant Wellman, the trial judge then questioned the jury as to whether or not they overheard "any statement at the very beginning of the session this morning from any defendant made at that time." Two regular jurors and one alternate juror indicated they had heard "some statement by one defendant." The judge admonished the jury to "not deliberate upon any statement which you may have heard. Do not communicate among yourselves about it. Do not form or express an opinion about it. Cast aside from your mind with regard to your deliberation of this matter in this trial any such statement you may have heard. Do not deliberate upon it in any way, members of the jury." The jury then unanimously indicated that they could follow the court's instructions on this matter by raising their hands.

Although it is somewhat unclear, apparently defendant McGuire and defendant Wellman contend the trial court should have asked each juror individually exactly what he or she heard and should have polled the jurors separately as to any prejudicial effect the statement may have had. We do not agree.

In *State v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670 (1954), a woman entered the courtroom when the judge was absent and, in the presence of the jury, said to the defense counsel, "I told [the prosecutor] I don't know anything about this case. If you put me on the stand, you will be sorry." This incident was brought to the court's attention the next morning. The court made inquiry of the jury, and two jurors indicated they had heard the remark. On ap-

peal, the defendant contended that the other jurors were not given a chance to say whether they had heard the comment or whether they were influenced by it. In overruling this objection, we noted that "[t]he judge asked the jury twice, if any of them had heard the words of Annie Lee Hodges. Only two said they had. The other ten could have spoken up in response to the two questions, if they had heard her remarks." *Id.* at 610, 80 S.E. 2d at 674.

In this case the trial court did all that was required of it. It asked the jury if anyone had heard a statement made by a defendant that morning. After three jurors represented that they had, it told them all to totally disregard any remark in their consideration of the case. All the jurors then affirmatively indicated by raising their hands that they could follow the court's instructions. Furthermore, we think the trial court correctly refrained from having defendant Ruff's statement repeated in front of the whole jury, the majority of whom did not hear it. That action would have served merely to unnecessarily emphasize the remark. This assignment of error is overruled.

[4] Defendant Wellman claims his pretrial motion to dismiss the charges against him should have been granted because he was denied his right to a speedy trial. The basis for his argument is the more than five-year delay between when the crimes in question were committed and when the indictments against him were returned.

In *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752, 97 S.Ct. 2044 (1977), the United States Supreme Court considered "the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution." *Id.* at 784, 52 L.Ed. 2d at 755, 97 S.Ct. at 2046. The Court reaffirmed its holding in *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971), that it is only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provisions of the Sixth Amendment." *Id.* at 320, 30 L.Ed. 2d at 479, 92 S.Ct. at 463.

In *Lovasco* the Court went on to determine the applicability of the Due Process Clause to a defendant's charge of unnecessary

preindictment delay. Without setting forth a precise test to be used in every instance, the Supreme Court laid down at least one principle which applies to this case and which defeats defendant Wellman's claim. It was made clear that *actual* prejudice must be shown before the dismissal of charges is necessary. *See also State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976).

The only *potential* prejudice defendant Wellman could point out at the pretrial hearing on his motion was "the insurmountable burden of going back." Although he originally had argued that certain witnesses necessary for his defense could not be located, the trial court issued material witness orders pursuant to G.S. 15A-803 for him. Defendant Wellman's only argument to this Court as to the prejudicial effect of the preindictment delay is that "Defendant was harmed by virtue of the fact that he lost evidence and witnesses." There is nothing in the record to support this general allegation; therefore, defendant Wellman's argument must fail. The trial court correctly denied his motion to dismiss the charges against him.

[5] In his first assignment of error, defendant Ruff claims the trial court erred in denying his request to represent himself at trial. We do not agree.

In *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), the United States Supreme Court made it clear that a defendant in a state court has the constitutional right to conduct his own defense without the assistance of counsel. On that subject this Court has stated that "a defendant, so charged with a criminal offense, has the right, if he so elects, to conduct his own defense without counsel. The services of counsel unsatisfactory to him may not be forced upon him." *State v. Robinson*, 290 N.C. 56, 64-65, 224 S.E. 2d 174, 179 (1976).

In *Faretta*, however, the accused immediately asserted his desire to conduct his own defense, and he never wavered from that position. The Supreme Court noted that "weeks before trial, Faretta *clearly and unequivocally* declared to the trial judge that he wanted to represent himself and did not want counsel." *Faretta v. California*, *supra* at 835, 45 L.Ed. 2d at 582, 95 S.Ct. at 2541. (Emphasis added.) In this case, defendant Ruff never "clearly and unequivocally" asserted his desire to proceed to trial without his appointed attorney.

On 4 October 1977 defendant Ruff first appeared before the court for his arraignment. At that time the court informed him that "if you do not want a lawyer, you are not required to take one, however in the event that you elect not to take a lawyer, the court would likely appoint a lawyer to assist in the trial of these cases." Defendant Ruff then stated that he wanted the court to appoint him an attorney, and he filled out an indigent form. Mr. Stanley Corne was appointed as his lawyer.

Defendant Ruff's arraignment was continued on 11 October 1977. He pleaded not guilty and at that time asked the court to appoint him a different lawyer because "I [defendant Ruff] cannot reach any agreement with [Mr. Corne]." The defendant added that "I am asking the court to let me defend myself in these cases." The court refused, indicating that Mr. Corne had already been appointed to represent the defendant and that it would not change that decision. Defendant Ruff then repeated that "I am asking for another attorney."

Thereafter, on 24 October 1977, defendant Ruff sent Mr. Corne a letter stating that the two of them had gotten off to a bad start, that the defendant would like to talk with the attorney again and that "after today you can run the show." On 5 December 1977, the day of trial, the court asked defendant Ruff directly if he were "ready to proceed to trial with counsel Stanley Corne." The defendant replied, "Yes, sir."

On 11 October 1977 defendant Ruff twice asked the court to appoint a new attorney to represent him. A defendant's rights do not extend this far.

> "The constitutional right of an indigent defendant in a criminal action to have the effective assistance of competent counsel, appointed by the court to represent him, does not include the right to insist that competent counsel, so assigned and so assisting him, be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services." *State v. Robinson, supra* at 65-66, 224 S.E. 2d at 179. *See also United States v. Young*, 482 F. 2d 993 (5th Cir. 1973).

At the same time defendant Ruff was asking to have new counsel appointed for him, he made one statement to the effect

that he wanted to represent himself. When all the defendant's statements and actions are considered together, it is apparent that he never "clearly and unequivocally" asserted his desire to conduct a *pro se* defense.

Furthermore, the trial court's blanket denial of these ambiguous requests probably meant that it was going to have Mr. Corne at trial, regardless of defendant Ruff's objections, to stand by in case he was asked for or needed. This interpretation is bolstered by the court's original statement to defendant Ruff at the 4 October 1977 arraignment proceeding that even if the defendant did not want counsel, the court would still appoint one to assist him at trial.

> "Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta v. California*, *supra* at 835 n. 46, 45 L.Ed. 2d at 581 n. 46, 95 S.Ct. at 2541 n. 46.

Defendant Ruff's disruptive conduct at trial brings up another facet of this problem. Although these outbursts had not actually occurred at the time of the arraignment, it is in the record by defendant Ruff's attorney that "everybody thought [the proceeding] was going to be . . . an unruly situation." In *Faretta*, the Supreme Court stated that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom," and "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* The trial court had not only the right, but the duty to consider this possibility, especially since there were two other defendants being tried with defendant Ruff.

> "This actual disruption of the proceedings demonstrated what would have happened during trial if defendant had been permitted to represent himself. . . . His trial would have been a farce. Granting defendant's motion to represent himself would have subverted the orderly administration of justice and jeopardized a fair trial of the issues." *People v. Brown*, 124 Cal. Rptr. 130, 138 (Cal. App. 1975).

Defendant Ruff voiced his desire to proceed without counsel as to part of his defense in the middle of trial. The court denied his request after questioning the defendant thoroughly and after making extensive findings of fact and conclusions of law. The defendant does not contest this ruling and, in fact, he argues that "to have gone part of the way with an attorney and then suddenly be without counsel before the jury would have been highly prejudicial to him."

The better practice in this case would have been for the court to have questioned defendant Ruff at the time he made the vague statement concerning his desire to defend himself. However, in light of all the circumstances of this case—defendant Ruff's conflicting requests, his apparent acquiescence in appointed counsel, his antics at trial which would have required termination of the defendant's self-representation, the *voir dire* conducted by the court later during trial on this same issue and the overwhelming evidence of defendant's guilt—we cannot say the court's failure to question the defendant earlier warrants the grant of a new trial. If it were error, it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). This assignment of error is overruled.

[6] Defendant Ruff next claims the trial court erred in not having him examined by a psychiatrist when his capacity to proceed was raised by him at trial. This argument is without merit.

During the course of trial, defendant Ruff's counsel indicated to the court that he had some question as to the defendant's capacity to proceed with trial. The attorney asked one of the county doctors, Dr. John Sinnett, to come to court, observe defendant Ruff during trial and talk with him during recess and after court. The trial judge stated that he would be "delighted" for the doctor to examine the defendant.

The next day, out of the presence of the jury, the court conducted a hearing on defendant Ruff's capacity to proceed. Dr. Sinnett, a general practitioner, was called to testify. He had treated patients with nervous and mental disorders, and he had committed several patients to mental hospitals in the past. The doctor stated that in his opinion defendant Ruff knew right from wrong, understood the nature of the proceedings against him and his own situation in reference to the proceedings and could assist his at-

torney in his defense "if he desired to." Defendant Ruff's brother was also called to testify. He stated that he felt there had been "a definite change in [the defendant's] mental processes." After the hearing, the trial court made findings of fact and concluded that the defendant was competent to stand trial.

Defendant Ruff claims the trial court was required to order him examined by a psychiatrist in light of Dr. Sinnett's statement that "the ideal situation [would be] to have a psychiatrist's evaluation done." However, G.S. 15A-1002(b) dictates that when a defendant's capacity to proceed has been questioned, the trial court "[*m*]*ay* appoint one or more impartial medical experts to examine the defendant," "[*m*]*ay* commit the defendant to a State mental health facility for observation and treatment," and "[*m*]*ust* hold a hearing to determine the defendant's capacity to proceed." (Emphasis added.)

Thus, although a defendant has the right to a hearing on his capacity to proceed when that question is properly raised, whether to have a defendant examined by a medical expert is within the trial court's discretion. *See State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied*, 414 U.S. 1132, 38 L.Ed. 2d 757, 94 S.Ct. 873 (1974). There has been no showing the trial court abused its discretion in this case; therefore, this assignment of error is overruled.

We commend Judge Ferrell for the patience he exhibited under very trying circumstances.

For the foregoing reasons, we find defendants had a trial free from error.

No error.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

JAMES F. HUGHEY v. POLIE Q. CLONINGER, GEORGE A. JENKINS, BUD BLACK, GENE CARSON, HARLEY B. GASTON, JR., ROBERT A. HEAVNER, AND CHARLES A. RHYNE, COUNTY COMMISSIONERS OF GASTON COUNTY; AND GASTON COUNTY

No. 4

(Filed 20 April 1979)

1. **Counties § 6.2; Schools § 1— school for dyslexic children—appropriation by county commissioners—absence of statutory authority**

An appropriation by a board of county commissioners to a school for dyslexic children was not authorized by G.S. 153A-248(a)(2), the statute authorizing appropriations to sheltered workshops and like institutions which provide work or training for the physically and mentally handicapped, since (1) the school for dyslexic children is not like a sheltered workshop because the sheltered workshop seeks to *rehabilitate* patients who are mentally and physically deficient through work and vocational training and the school for dyslexic children seeks to *treat* the linguistic difficulties of children of average and above average intelligence in an academic setting; (2) the General Assembly intended to attack the problem of children with learning disabilities exclusively through programs administered by the State Board of Education and the local boards of education, to wit, education expense grants to "exceptional children" under G.S. 115-315.7 and special education subsidies to private schools under G.S. 115-384 and G.S. 115-377; and (3) the General Assembly has consistently delegated broad policy-making and budgetary authority in the field of special education to the State and local boards of education.

2. **Counties § 6.2; Schools § 1— school for dyslexic children—appropriation by county commissioners—absence of statutory authority**

An appropriation by a board of county commissioners to a school for dyslexic children was not authorized by G.S. 153A-149(c)(30) or G.S. 153A-255, statutes authorizing appropriations respectively for "public assistance programs" or "social service programs" of the type created by Chapters 108 and 111 of the General Statutes, since such programs are addressed exclusively to the problems of poverty, whereas a school for dyslexic children is addressed exclusively to the treatment of a learning disability without regard to the financial status of those afflicted.

3. **Counties § 6.2; Schools § 1— school for dyslexic children—appropriation by county commissioners—absence of statutory authority**

An appropriation by a board of county commissioners to a school for dyslexic children was not authorized under the scheme for public education adopted by the General Assembly pursuant to its constitutional duty to "provide . . . for a general and uniform system of free public schools," Art. IX, § 2(1) of the N.C. Constitution, since the county commissioners have been given the power to fund only those school-related programs proposed by the board of education. G.S. Ch. 115.

4. Taxation § 7— means of accomplishing public purpose—disbursement of funds to private entity

Under Art. V, § 2(7) of the N.C. Constitution, the direct disbursement of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation.

Justice EXUM dissenting.

ON petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 107, 245 S.E. 2d 543 (1978), reversing judgment of *Ervin, J.*, entered 14 July 1977 in GASTON Superior Court. This case was docketed and argued as No. 126 at the Fall Term 1978.

On 15 January 1977 the Gaston County Commissioners appropriated the sum of $47,068.00 to be disbursed directly to the Dyslexia School of North Carolina, Inc.

This is an action by James F. Hughey, a citizen and taxpayer of Gaston County, seeking to permanently enjoin Gaston County and its Board of Commissioners from appropriating or disbursing funds to the Dyslexia School of North Carolina. Plaintiff alleges this appropriation (1) was not authorized by statute and (2) violated the Constitution of North Carolina.

As of the filing of plaintiff's complaint on 18 April 1977 Gaston County had disbursed directly to the school approximately $22,068 of the $47,068 appropriated. The parties agreed that no funds had been disbursed since 18 April 1977 and that no funds would be disbursed in the future until the legality of the appropriation had been resolved.

The Dyslexia School of North Carolina, Inc., is a nonprofit corporation organized under Chapter 55A of the General Statutes of North Carolina. The purpose of the school is "to operate exclusively for educational purposes and to furnish programs of instruction for children with dyslexia." The school is an approved non-public school certified by the North Carolina State Department of Public Instruction as a special school. This approval allows school-aged children to attend the school in lieu of the public schools without violation of compulsory school attendance requirements.

The trial court sustained the legality of the appropriation, concluding, in pertinent part, that the funds appropriated by Gaston County were for a public purpose in the constitutional sense and that the appropriation was made to provide for educational needs not adequately provided in the public schools of Gaston County.

On plaintiff's appeal the Court of Appeals held that the funds appropriated by Gaston County were not for a public purpose in the constitutional sense. Defendants' petition for discretionary review of that decision was allowed by this Court.

Roberts and Planer, P.A., by Joseph B. Roberts III, for plaintiff appellee.

Hollowell, Stott and Hollowell by Grady B. Stott; Whitesides and Robinson, by Henry M. Whitesides, for defendant appellants.

Charles Ronald Aycock and Durward Franklin Gunnells, for amicus curiae, North Carolina Association of County Commissioners.

Tharrington, Smith & Hargrove, by George T. Register, Jr., for amicus curiae, North Carolina School Boards Association.

Chambers, Stein, Ferguson & Becton, P.A., by James C. Fuller, Jr., for amicus curiae, North Carolina Association of Educators.

HUSKINS, Justice.

This appeal challenges the legality of an appropriation made by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina, Inc.

It is axiomatic that a county has no power to appropriate funds unless authorized to do so by the General Assembly. The General Assembly determines the purposes for which a county may appropriate funds, which funds shall be utilized, and the manner in which appropriations are to be made. As Justice Bobbitt, later Chief Justice, states in *Harris v. Board of Commissioners*, 274 N.C. 343, 163 S.E. 2d 387 (1968):

> "Counties are creatures of the General Assembly and constituent parts of the State government. They possess only

such powers and delegated authority as the General Assembly may deem fit to confer upon them." (Citations omitted.)

Thus, the initial and dispositive question in this appeal is whether there was sufficient *statutory* authority for the appropriation made by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina, Inc.

[1] The Board of Commissioners contends its appropriation is authorized by G.S. 153A-248(a)(2) which provides:

"(a) A county may appropriate revenues not otherwise limited as to use by law:

* * * *

(2) To a sheltered workshop or other private, non-profit, charitable organization offering work or training activities to the physically or mentally handicapped, and may otherwise assist such an organization."

Does an appropriation to a school for dyslexic children come within the ambit of a statute authorizing appropriations to sheltered workshops and like institutions which provide work or training for the physically and mentally handicapped? We think not. Our studies, summarized below, have led us to conclude that the sheltered workshop is designed to deal with health problems fundamentally different from those presented by dyslexic children. As a consequence the objectives, organizational structure, and therapeutic philosophy of a sheltered workshop are markedly different from those of a school for dyslexic children.

The objective of a sheltered workshop is to help people handicapped by mental illness or physical disability to "achieve the maximum functioning of which they are capable." I. Zwerling, *Aftercare Systems*, in 5 American Handbook of Psychiatry 729 (D. Freedman, J. Dyrud eds. 1975). To accomplish this objective the sheltered workshop provides a working environment similar to that in the real world in which the patient works at a job and receives training in vocational and social skills. The therapeutic philosophy of a sheltered workshop is to *rehabilitate* the handicapped patients rather than to *treat* the underlying causes of their physical or mental disability. Treatment "represents a

direct attack on the disabilities of the patient, while [rehabilitation] represents an effort to identify and exploit the patient's assets to the end of providing the best possible community role." *Id.* Ultimately, it is hoped the rehabilitative program provided by the sheltered workshop will help make "the transition to autonomous community life easier for the patient." F. Braceland, *Rehabilitation*, in 5 American Handbook of Psychiatry 695. One of the best known sheltered workshop programs is operated by Goodwill Industries. In 1969 Goodwill Industries "estimated its workshops were servicing about 24,000 people per day and restoring 7000 of them to the labor market." *Id.*

"The label 'dyslexia' has been overused in recent years. There is, however, a measure of agreement that the term implies the inability to cope with written and printed language in children who have average or better intellectual endowment and whose reading, writing, and spelling performance is considerably below their achievement in non-language-related subjects." K. de Hirsch, *Language Disabilities*, in 2 Comprehensive Textbook of Psychiatry—II 2112-2116 (A. Freedman, H. Kaplan, B. Sadock eds. 1975). The objective of a school for dyslexic children is to help such children, who are of normal and above average intelligence, overcome the linguistic difficulties which hamper their academic progress in the fields of reading and writing. To accomplish this objective schools for dyslexic children provide their pupils with special remedial education designed to help them overcome their severe difficulties with language in an academic setting otherwise comparable to regular schools. Ultimately it is hoped the pupils can overcome their reading and writing difficulties to the point where they can return to regular schools. The therapeutic philosophy of these schools is treatment-oriented. Their goal is to turn hopelessly confused pupils into adequate readers and writers by directly attacking the perceptual difficulties which afflict them.

From this discussion it should be apparent that the sheltered workshop and the school for dyslexic children are fundamentally different institutions. The former seeks to *rehabilitate* patients who are mentally and physically deficient through work and vocational training, while the latter seeks to *treat* the linguistic difficulties of children of average and above average intelligence in an academic setting. Our studies have convinced us that G.S.

153A-248(a)(2) cannot be reasonably interpreted to encompass schools for dyslexic children.

Defendants argue that G.S. 153A-248(a)(2) should be liberally construed so as to enable boards of county commissioners to supplement the budgets of private special education facilities when it appears that the public school system cannot adequately provide for the special needs of all its learning disabled children. According to defendants the undisputed and urgent needs of learning disabled children who are not receiving adequate educational opportunities in the public school system amply justify a broad construction of G.S. 153A-248(a)(2).

We recognize that valid and urgent problems are presented in those instances where the public school system cannot adequately provide educational opportunities for all of its learning disabled children. However, since the General Assembly has specifically addressed this problem in other legislation, we find it unnecessary to adopt the broad construction requested by defendant. It is well established that where there are two statutes, one dealing specifically with the matter in issue and the other being in general terms which could conceivably address the matter in question, the specific statute controls. *See Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). G.S. 115-315.7, *et seq.*, in effect at the time the instant appropriation was made, deals specifically with the problems the Gaston County Board of Commissioners sought to remedy through its appropriation to the Dyslexia School of North Carolina.

Following is the statement of legislative policy and purpose declared in G.S. 115-315.7:

> "The General Assembly of North Carolina recognizes that in unusual circumstances the public schools of this State cannot provide the necessary training for all of its exceptional children. It is further recognized that, in order for the exceptional child to obtain a proper education, it may become necessary for the child to attend a private or out-of-state institution. So that all of our young children may be trained to be useful citizens, and to provide our children with this opportunity where it may not exist in the public schools, it shall be the policy of this State to make an educational expense grant available to each eligible child as provided under

this Article, for the private or out-of-state education of such child."

The term "exceptional children" encompasses "severely learning disabled" children who suffer from dyslexia. G.S. 115-315.8(1). The tuition grants authorized by G.S. 115-315.7 are to be administered by the State Board of Education in cooperation with local boards of education. G.S. 15-315.11 and G.S. 15-315.12. Moreover, as part of comprehensive new legislation in the field of special education, effective 1 July 1977, the General Assembly specifically authorizes direct subsidies by State and local boards of education to private schools devoted to special education and to regular private schools so as to enable them to provide special education and related services. *See* G.S. 115-384; G.S. 115-377. Thus while the general terms of G.S. 153A-248(a)(2) could conceivably be construed to address the problem of inadequate educational opportunities for learning disabled children in the school system, it is evident that the specific remedies prescribed in G.S. 115-315.7, *et seq.*, G.S. 115-384, and G.S. 115-377 are controlling.

Finally, we note the General Assembly has consistently delegated specific responsibility for the special education of learning disabled children to the State and local boards of education. *See* G.S. 115-315.16, *et seq.* (superseded by G.S. 115-363, *et seq.*); G.S. 115-315.7, *et seq.*; G.S. 115-315.23, *et seq.* Given this pattern of specific and comprehensive legislation in that field it is highly unlikely the General Assembly intended, by enacting G.S. 153A-248(a)(2), to authorize county boards of commissioners to appropriate funds directly to schools for dyslexic children. Such a result would be inconsistent with the broad policy-making and budgetary authority granted the State and local boards of education in the field of special education.

We therefore hold that the appropriation by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina is not authorized by G.S. 153A-248(a)(2).

[2] The Board of Commissioners next contends its appropriation is authorized by both G.S. 153A-149(c)(30) and G.S. 153A-255. In pertinent part, these statutes authorize appropriations respectively for "public assistance programs" or "social service programs" of the type created in Chapters 108 and 111 of the General

Statutes. We have analyzed these statutes and reached the conclusion that neither statute, when fairly construed and applied to the facts here, authorizes the appropriation under challenge. A review of the various aid programs established by Chapters 108 and 111 of the General Statutes indicates that the education of dyslexic children is not the type of "social service program" or "public assistance program" contemplated by these chapters. The programs in Chapters 108 and 111 are responsive to the needs of impoverished citizens who are unable to provide for the basic necessities of life. The programs authorized in these chapters provide financial aid to those citizens who are aged and disabled and lack sufficient resources "to provide a reasonable subsistence," G.S. 108-25(2); to dependent children who have "no adequate means of support," G.S. 108-38(a)(3); to citizens who cannot afford adequate health care, *see* G.S. 108-59 through 61.4; to "needy children who are placed in foster homes," G.S. 108-66; to the needy blind, *see* G.S. 111-13 *et seq.* In sum, the programs in Chapters 108 and 111 are addressed exclusively to the problems of poverty; whereas a school for dyslexic children is addressed exclusively to the treatment of a learning disability without regard to the financial status of those afflicted. We therefore hold that the challenged appropriation is not authorized by either G.S. 153A-149(c)(30) or G.S. 153A-255.

[3] Since dyslexia constitutes a learning disability which is remedied through special education, the challenged appropriation might be justified as an exercise of the constitutional duty to "provide . . . for a general and uniform system of free public schools." N.C. Const., Art. IX, § 2(1). Such duty is constitutionally vested in the General Assembly. As Justice Barnhill, later Chief Justice, explains in *Coggins v. Board of Education*, 223 N.C. 763, 28 S.E. 2d 527 (1944):

> "The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity."

In its discretion the General Assembly may delegate to local administrative units the general supervision and control of schools within their boundaries. *See Coggins v. Board of Education*, supra. Thus, the validity of this appropriation under the duty to

provide "free public schools" depends on whether the General Assembly has delegated to boards of county commissioners the power to initiate and fund their own programs for the public schools. *See generally, Harris v. Board of Commissioners, supra.*

Pursuant to its duty to establish a general and uniform system of free public education, the General Assembly in Chapter 115 of the General Statutes has delineated the purpose and structure of public education in North Carolina. A review of this legislation leads us to conclude that the General Assembly has not delegated to boards of county commissioners the power to initiate and fund their own programs for the public schools; rather, county commissioners are delegated the power to fund only those school-related programs proposed by the board of education.

In the scheme of public education adopted by the General Assembly, the "general control and supervision of all matters pertaining to the public schools in their respective administrative units" is delegated to the county and city boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency. G.S. 115-27. The board of education determines in the first instance the needs of its school system and proposes a budget to the board of county commissioners. The role of the county commissioners is to study the request for funds and provide by taxation such funds, and only such funds, as may be needed for economical administration of the schools. *See* G.S. 115-100.5 through 100.14; *Administrative Unit v. Commissioners of Columbus*, 251 N.C. 826, 112 S.E. 2d 539 (1960). It is well established that the role of the board of county commissioners in the funding of the school budget is not to interfere with the general control of the schools vested in the board of education. *See Dilday v. Board of Education*, 267 N.C. 438, 148 S.E. 2d 513 (1966), and cases cited therein. Thus, under the scheme for public education devised by the General Assembly, the board of commissioners is empowered to appropriate funds only for items that are included by the board of education in its annual school budget. The board of county commissioners, absent statutory authority, cannot on its own initiative devise and fund programs for the school system. The program of aid for the Dyslexia School of North Carolina was devised and funded by the Gaston County Board of Commissioners on its own initiative. It follows, therefore, that the appropriation made directly to the

school by that board was not authorized under the statutory scheme for public education adopted by the General Assembly.

[4] In conclusion, we note the Court of Appeals reached the right result but for the wrong reason. It held that the challenged appropriation was prohibited by Article V, section 2(1) of the North Carolina Constitution which requires that all government expenditures be for a public purpose. *See generally, Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968). The court reasoned that *direct disbursement* of public funds to private entities, such as this school, "could not be the *means* used to effect a public purpose." 37 N.C. App. at 112.

The constitutional problem under the public purpose doctrine perceived by the Court of Appeals is no longer present in view of the addition, effective 1 July 1973, of subsection (7) to Article V, section 2 of the North Carolina Constitution. Subsection (7) provides that the General Assembly may enact laws which permit the State, county, city or town, or any other public corporation to "contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." Thus, under subsection (7) *direct disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation. Had there been such statutory authority in this case the direct appropriation of funds by Gaston County to the Dyslexia School of North Carolina would have presented no "public purpose" difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E. 2d 551 (1970). We note that cases from this Court cited by the Court of Appeals in support of its reasoning were decided on facts arising prior to the effective date of subsection (7).

Since this case is decided on statutory grounds, further discussion of the constitutional questions raised by this appeal is unnecessary. *See State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957), and cases collected in 1 N.C. Index 3d, Appeal and Error § 3, n. 31.

The sum appropriated by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina totaled

$47,068.00. As of the filing of plaintiff's complaint, Gaston County had disbursed to the school approximately $22,068.00 of the sum appropriated. The parties agreed no funds would be disbursed in the future until the legality of the appropriation had been resolved. Thus, there now remains the matter of appropriate relief in regard to the $47,068.00 appropriation. With respect to this question we note the disbursement made prior to the commencement of this action was in good faith, for a commendable public purpose, and that Gaston County received the benefit of such expenditure. Therefore, relief in this case should be confined to restraining any further direct appropriations and disbursements by defendants to the Dyslexia School of North Carolina. *See Comrs. of Brunswick v. Inman*, 203 N.C. 542, 166 S.E. 519 (1932). *See also, Improvement Co. v. Greensboro*, 247 N.C. 549, 101 S.E. 2d 336 (1958); *Manufacturing Co. v. Charlotte*, 242 N.C. 189, 87 S.E. 2d 204 (1955); *Hawkins v. Dallas*, 229 N.C. 561, 50 S.E. 2d 561 (1948); *Realty Co. v. Charlotte*, 198 N.C. 564, 152 S.E. 686 (1930); *McPhail v. Commissioners*, 119 N.C. 330, 25 S.E. 958 (1896). It is so ordered.

For the reasons stated in this opinion the result reached by the Court of Appeals is

Affirmed.

Justice EXUM dissenting.

As the majority notes at the outset, there are two issues in this case: (1) whether the appropriation of funds by the Gaston County Commissioners to the Dyslexia School of North Carolina is in violation of the North Carolina Constitution, and (2) whether it is authorized by statute. The majority correctly concludes that this appropriation is consistent with Article V(2)(7) of the North Carolina Constitution. The problem, then, is whether there is statutory authorization for it.

On this point, I disagree with the majority. G.S. 153A-248(a)(2) does provide authority for this appropriation. That statute reads:

> "(a) A county may appropriate revenues not otherwise limited as to use by law:
>
> * * * *

(2) To a sheltered workshop *or other private, nonprofit, charitable organization offering work or training activities to the physically or mentally handicapped,* and may otherwise assist such an organization." (Emphasis supplied.)

The majority has essentially held that the Dyslexia School cannot fall within this statute because it is not *like* a sheltered workshop. In so doing it has unduly narrowed the scope of this provision. It has read its definition of "sheltered workshop" into the remaining language of the statute. Such a restrictive meaning should not be given wording which on its face is quite broad— "other private, nonprofit, charitable organization offering work or training activities to the physically or mentally handicapped."

The Dyslexia School is a nonprofit organization. The children it serves suffer from a handicap that makes it difficult for them to cope in society. The handicap is either physical or mental or both. The school offers them training and instruction with the goal of enabling them to receive an adequate education. The school and its activities, therefore, fit precisely within the provisions of G.S. 153A-248(a)(2).

The majority makes much of a supposed difference between "rehabilitation" and "treatment." This difference is one created largely by the highly selective definitions of these terms in the majority opinion. Even if it does exist, it is important only when the statutory provisions are given the narrow construction the majority attaches to them. The goals of a sheltered workshop and the Dyslexia School are essentially the same. Both work with persons with handicaps, seeking to help them cope in society despite their handicaps. Even if their methods differ, the statutory language is broad enough to encompass both.

Next the majority argues that because there are other statutes which address the problem of children with learning disabilities, the General Assembly did not intend for G.S. 153A-248(a)(2) to deal with it. The majority says that the legislature intended to attack this problem exclusively through programs administered by those agencies which administer the public schools, to wit, education expense grants to "exceptional children," G.S. 115-315.7, *et seq.*, and special education services for "children with special needs," G.S. 115-363, *et seq.*, particularly G.S. 115-366, 115-367, 115-377, 115-384.

The majority recognizes that serious, urgent needs arise "where the public school system cannot adequately provide educational opportunities for all of its learning disabled children." This, precisely, is the problem which, the record shows, has arisen with dyslexic children in Gaston County. In addition to efforts of the public school administrators, the elected representatives of the people of that county desire to support what, the record reveals, is an effective attack on the problem of dyslexia.

The majority does not tell us why the General Assembly might not have intended to attack this problem both through programs under the auspices of the public school administrators and through boards of county commissioners via such provisions as G.S. 153A-248(a)(2). It relies on a maxim of statutory construction that where one statute deals specifically with a matter in issue and another only in general terms the specific statute controls and cites *Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977). The maxim relied on simply has no application here. Indeed, as it applies this maxim the majority reaches an incredibly strange result.

The fallacy of the majority's argument, that because the General Assembly has authorized public school administrators to deal with learning disabilities it could not have meant for county commissioners also to do so, becomes apparent when the definitions of "exceptional children" entitled to education expense grants and "children with special needs" entitled to special education services are considered. An "exceptional child" is defined by G.S. 115-315.8 as:

> "[T]he seriously emotionally disturbed, the severely learning disabled, the *visually and/or hearing handicapped or impaired, the multiple handicapped, the mentally retarded, the crippled or other health-impaired child.*" (Emphasis supplied.)

"Children with special needs" are defined by G.S. 115-366 as including:

> "[A]ll children between the ages of five and 18 who because of permanent or temporary mental physical or emotional handicaps need special education, are unable to have all their needs met in a regular class without special education or related services, or are unable to be adequately educated in

> the public schools. It includes those who are *mentally retarded*, epileptic, learning disabled, cerebral palsied, seriously emotionally disturbed, *orthopedically impaired*, autistic, *multiply handicapped*, pregnant, *hearing-impaired, speech-impaired, blind or visually-impaired*, genetically impaired, and gifted and talented." (Emphasis supplied.)

Many "exceptional children" and "children with special needs" who are physically or mentally handicapped, mentally retarded, or orthopedically impaired, are eligible for help both at "sheltered workshops" and "other private, nonprofit, charitable organization[s]" as those terms are used in G.S. 153A-248(a)(2) *and defined by the majority.* Such children are "rehabilitated" by these institutions *even within the majority's definition of this term.* Such children could thus receive assistance under both G.S. 153A-248 *and* the statutes providing for "exceptional children" and "children with special needs." According to the logic of the majority's argument, however, county commissioners should not be able to appropriate money under G.S. 153A-248 to private organizations which serve these children because the General Assembly has provided for other means of helping them through "education expense grants" and "special education services" under auspices of public school administrators.

Obviously the General Assembly never intended such a result. It did not, in other words, intend to make the programs administered by public school administrators the exclusive tools by which this state can deal with the problem of its children who are physically or mentally handicapped, mentally retarded, or orthopedically impaired. The legislature intended, I am convinced, to authorize not only public school administrators but also county commissioners to help these children, the latter by direct appropriation to such organizations as sheltered workshops and "other private, nonprofit, charitable organization[s]," such as the Dyslexia School here, which help children who are disabled in all the various ways set out in all these statutes.

This is why the majority has applied the wrong maxim of statutory construction to this case. The proper maxim to be applied is that remedial statutes are to be liberally, not stintingly, construed. *Puckett v. Sellars*, 235 N.C. 264, 69 S.E. 2d 497 (1952);

State v. Lovelace, 228 N.C. 186, 45 S.E. 2d 48 (1947). So construed G.S. 153A-248(a)(2) clearly authorizes the challenged appropriation.

Moreover, the majority has relied on an incomplete statement of the maxim it chooses to apply. The maxim, completely stated, is that a statute dealing specifically and in detail with a subject controls as against a more general statute dealing with the same subject *only when* the two statutes are necessarily inconsistent and both cannot be given effect. In *Utilities Comm. v. Edmisten, Attorney General, supra*, 291 N.C. 451, 232 S.E. 2d 184, relied on by the majority, the general statute, as interpreted by the Commission, and the specific statute, as ultimately interpreted by this Court, were necessarily inconsistent, and both could not be given effect. We held that under these circumstances, and assuming the Commission's interpretation to be correct, the specific statute should nevertheless control. For this complete rendering of the maxim see N.C. Digest, Statutes, § 223.4 and cases therein annotated. Clearly G.S. 153A-248(a)(2) and those provisions of Chapter 115 relied on by the majority are not necessarily inconsistent. Both can, and should be, given effect.

For these reasons, I respectfully dissent and vote to reverse the Court of Appeals and affirm the trial court.

STATE OF NORTH CAROLINA v. MACKIE WAYNE FAIRCLOTH

No. 1

(Filed 20 April 1979)

1. **Criminal Law § 15.1— pretrial publicity—change of venue properly denied**

The trial court did not err in denying defendant's motion for change of venue made on the ground that prejudicial publicity prevented his getting a fair trial, since minor bits of information contained in issues of the newspaper appearing over a period of four months that did not properly get to the jury as evidence at trial were not sufficiently prejudicial to entitle defendant to removal to another county for trial.

2. **Kidnapping § 1; Indictment and Warrant § 17.1— purpose of kidnapping—variance between indictment and proof**

Where the indictment charged that defendant kidnapped the victim for the purpose of facilitating flight following commission of the felony of rape but

the evidence tended to show that defendant kidnapped the victim for the purpose of facilitating the commission of the felony of rape, there was a fatal variance between the indictment and the proof, and the trial court erred in denying defendant's motions to dismiss the kidnapping charge.

3. Rape § 5— first degree rape—use of knife—sufficiency of evidence

Evidence in a first degree rape prosecution was sufficient to show that the rape of the victim was procured by the use of a deadly weapon where it tended to show that, when defendant approached the victim's car, he brandished a knife and threatened "to cut her guts out"; as they rode in the car and then parked, the knife was on the dash close to defendant's hand; at the time of the rape the knife was stuck in the ground two or three feet from defendant; and the victim submitted to defendant because of the fear that he would cut her with the knife.

4. Rape § 6— deadly weapon—jury instructions adequate

Though the Supreme Court has defined a deadly weapon as "any instrument likely to produce death or great bodily harm, under the circumstances of its use," the trial judge did not err in defining a deadly weapon as one "which is likely to cause death or serious body injury."

5. Robbery § 4.3— robbery with knife—sufficiency of evidence of armed robbery

The trial court properly submitted to the jury a charge of armed robbery where the evidence tended to show that at the time the victim surrendered her $80 to defendant, defendant had a knife in his possession; though the knife was on the dash of the victim's car, it was within inches of his hand and readily accessible to him; defendant's entrance to the car was gained by brandishing the knife and threatening to cut the victim; and soon after entering the car and placing the knife on the dash, defendant told the victim that all he was after was money.

6. Criminal Law § 112.3— reasonable doubt—jury instruction proper

The trial court's brief definition of reasonable doubt as "a sane, rational doubt that arises out of the evidence or the lack of evidence . . ." and "an honest, substantial misgiving generated by some insufficiency of the proof . . ." was sufficient for the jury to understand the meaning of the term.

7. Criminal Law § 169—failure to show what evidence would have been—no prejudice shown by exclusion

When objections to evidence are sustained and the record fails to show what the evidence would have been, prejudice is not shown and the exclusion of such evidence cannot be held prejudicial.

8. Criminal Law § 140— three offenses—cumulative sentences—no error

In a prosecution for kidnapping, first degree rape and armed robbery, the trial court did not err in failing to provide for all sentences to run concurrently, since the three crimes, though arising from the same incident, were separate offenses.

APPEAL by defendant from *Brown, J.*, 26 June 1978 Session NEW HANOVER Superior Court.

Upon pleas of not guilty, defendant was tried on indictments charging him with (1) felonious larceny of an automobile, (2) kidnapping, (3) armed robbery and (4) first-degree rape. Barbara Elaine Cameron (Barbara) was the alleged victim of the offenses.

Evidence presented by the State is summarized in pertinent part as follows:

On 30 December 1977 Barbara was 18 years of age and lived with her mother and two little brothers. On the evening of said date, she and other relatives, including her mother and a little brother, visited her grandfather who was a patient in New Hanover Memorial Hospital.

Around 9:15 or 9:30 Barbara, her mother and little brother decided to leave the hospital and go home. As they reached the outside entrance to the building, they discovered that it was raining. Since her mother had been sick, Barbara suggested that her mother and brother remain at the hospital door while she went to the parking lot and returned with her car.

While walking from the hospital to her car, a 1967 goldish Barracuda, she passed defendant who was walking toward the hospital; she did not know defendant at that time. When she reached her car, she got in and cranked the motor. At that time defendant opened her car door and Barbara began screaming and tried to kick him away. Defendant then held a knife (described at times as a clam knife and at other times as an oyster knife) to her throat and told her if she did not stop screaming he would cut her guts out. She stopped screaming and at defendant's command she slid over in the seat and he occupied the driver's position.

Defendant proceeded to drive the car out of the parking lot and onto a city street. Barbara's mother heard her scream and when the car left the parking lot instead of coming to the hospital entrance, she notified hospital security guards who in turn notified police. The police then began looking for a 1967 goldish Barracuda.

After driving out of the parking lot, defendant proceeded toward the State Port. Barbara asked him if he was going to kill her and he replied that he would not kill her if she did what he wanted her to. He further stated that all he wanted was money. Barbara told him that she had $94 (she having been paid that

day). Defendant told her that he would not take all of her money, only $80 of it, and she placed that amount on the dash of the car.

After defendant entered the car, he kept his knife in his hand for several minutes but then laid it on the dash "right by his hand where he could grab it". The knife was so situated on the dash when Barbara placed the $80 there.

After driving for some distance on Shipyard Boulevard, defendant turned onto River Road and later drove off from that road onto a dirt road where he stopped the car. He then asked Barbara to take off all of her clothes. The knife was still on the dash and she told him she would feel better if he would put the knife outside the car. He proceeded to open the car door, remove the knife from the dash and stick it in the dirt just outside of the car.

While they were riding and after they stopped, Barbara talked "nice" to defendant, telling him if he would let her go she would not tell anyone about the money. Eventually defendant got "ill" with her stalling and again ordered her to remove her clothing. Out of fear she did so and submitted to his having sexual intercourse with her.

Following the intercourse, Barbara put her clothing back on and defendant talked with her about a date for the next night, which would be New Year's Eve. While they were talking, a police car drove up. Defendant removed his knife from the ground and placed it in the car near him. After conversing with Barbara and defendant, the police arrested defendant and one of them carried Barbara to the hospital. She told police that she had been raped.

Barbara was examined at the hospital emergency room. Acid phosphatase and spermatozoids were found in her vaginal fluid.

Defendant testified as a witness for himself and his testimony is summarized in pertinent part as follows: He is 27 years of age and separated from his wife. On the night in question he saw Barbara, whom he had met before and danced with at a night spot, on the hospital parking lot. He engaged her in conversation and she agreed to go riding with him. They rode down the River Road and onto a dirt road where they parked. After "making out" for awhile, they had intercourse with her full consent.

Although he had an oyster knife with him at the time, he did not threaten Barbara with it. He told her that he needed some money and she voluntarily loaned him $80.00. He did not kidnap, rob or rape her. He had had several previous "scrapes with the law" including four convictions of breaking and entering, one conviction of misdemeanor escape and several convictions of giving worthless checks.

At the close of all the evidence the court allowed defendant's motion to dismiss the larceny of an automobile charge.

The jury found defendant guilty of kidnapping, first-degree rape and armed robbery. On the kidnapping and rape charges, the court entered judgments imposing a life sentence on each charge. On the armed robbery charge, the court entered judgment imposing a prison sentence of 30 years to begin at expiration of sentence imposed in the first-degree rape case. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Leigh Emerson Koman, for the State.

Franklin L. Block and Chambers, Stein, Ferguson & Becton, by Adam Stein, for defendant-appellant.

BRITT, Justice.

For the reasons hereinafter stated, we find no error in defendant's trial and the judgments imposed on the rape and armed robbery charges. However, we conclude that the judgment imposed on the kidnapping charge must be reversed.

I

[1] Defendant's contention that the trial court erred in failing to grant his motion for change of venue is without merit. He argues that he was entitled to a removal of his trial to another county because prejudicial publicity prevented his getting a fair trial in New Hanover County.

G.S. 15A-957 provides: "If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either: (1) Transfer the proceeding to another county in the

judicial district or to another county in an adjoining judicial district, or (2) Order a special venire under the terms of G.S. 15A-958. The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue."

It is firmly settled in this jurisdiction that motions for change of venue on the grounds of unfavorable publicity are addressed to the discretion of the trial judge and his ruling thereon will not be disturbed on appeal unless a manifest abuse of discretion is shown. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, death sentence vacated, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1211 (1976). The burden of showing "so great a prejudice" against the defendant that he cannot obtain a fair and impartial trial is on the defendant. *State v. Boykin, supra.*

In the case at hand, defendant presented excerpts from the 1, 20 and 21 January 1978, 1 February 1978 and 13, 15 and 19 April 1978 issues of the *Wilmington Star-News*. The information set forth in the January issues related to defendant's arrest, the charges against him, police statements as to what the victim had said, and evidence presented at the preliminary hearing. A reading of the January issues discloses that substantially the same information contained therein was submitted to the jury at trial.

The news item appearing in the 1 February 1978 issue was very brief and related to defendant's indictment by the grand jury. The 13 April 1978 item related to the first trial of the case (presided over by Judge Gavin) and for the most part merely set forth the evidence given by the victim and police; this evidence was substantially the same as given by the victim and police at the trial now being reviewed. The 15 April 1978 item related to Judge Gavin's declaring a mistrial due to the fact that one of the jurors had read in the newspaper the preceding day about defendant's prior criminal record; the item also stated that Judge Gavin had also denied defendant's motion to remove the case to another county for trial.

The 19 April 1978 excerpt is an editorial criticizing Judge Gavin for declaring a mistrial because of information published in the newspaper. (In defense of Judge Gavin, it appears that at the time he declared a mistrial defendant had not taken the witness

stand, therefore, His Honor did not know that defendant's criminal record would properly get before the jury.)

The trial now under review took place during the week of 26 June 1978. We cannot believe that the minor bits of information contained in issues of the newspaper appearing in January, February and April of 1978 that did not properly get to the jury as evidence at trial, prejudiced defendant to the extent that he was entitled to have his case removed to another county for trial. We hold that the trial court did not abuse its discretion.

[2] We find merit in defendant's contention that the trial court erred in denying his motions to dismiss the kidnapping charge.

Our kidnapping statute, G.S. 14-39, provides in pertinent 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 * * * 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."

The bill of indictment under which defendant was tried and convicted reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30th day of December, 1977, in New Hanover County Mackie Wayne Faircloth unlawfully and wilfully did feloniously kidnap Barbara Elaine Cameron without her consent a person who had attained the age of 16 years, but unlawfully removing her from one place to another *for the purpose of facilitating flight* following the commission

of the felony of rape, and that Mackie Wayne Faircloth did fail to release the said Barbara Elaine Cameron in a safe place and did sexually assault the said Barbara Elaine Cameron during such period of confinement and restraint; in violation of G.S. 14-39." (Emphasis ours.)

It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969); *State v. Lawrence*, 264 N.C. 220, 141 S.E. 2d 264 (1965); *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946); *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143 (1940). It is also settled that a fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment. *State v. Cooper, supra; State v. Law, supra; State v. Jackson, supra.*

Defendant argues that there was no evidence presented in the case at hand tending to show that he confined, restrained, or removed Barbara from one place to another for the purpose of "facilitating flight following the commission of the felony of rape"; therefore, there was a fatal variance between the indictment and proof. He further points out that the trial judge in charging the jury on kidnapping stated that one of the five things they must find beyond a reasonable doubt was that he "removed Barbara Cameron for the purpose of facilitating his flight after committing the felony of rape". Defendant's argument is persuasive.

In *State v. Law, supra*, Chief Justice Stacy, speaking for the court, said:

> "The question of variance may be raised by demurrer to the evidence or by motion to nonsuit. 'It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. *In other words, the proof does not fit the allegation, and therefore, leaves the latter without any evidence to sustain it.* It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as a matter of law, that the State

has failed in its proof'—*Walker, J.*, in *S. v. Gibson*, 169 N.C., 318, 85 S.E., 7 . . . ." 227 N.C. 103, 104. (Emphasis ours.)

In *State v. Lawrence, supra*, the defendant was charged with second offense escape from prison. The indictment alleged that at the time of his escape he was serving a sentence imposed by the Nash County Recorder's Court but the proof showed that he was serving a sentence imposed by the Recorder's Court of Edgecombe County. This court held that there was a fatal variance between the actual facts and the allegations of the bill of indictment.

In *State v. Cooper, supra*, in an opinion by Justice (later Chief Justice) Bobbitt, this court held that where the indictment charged defendant, a prisoner, with willful failure to return to custody "after being removed from the prison on a work-release pass", a violation of G.S. 148-45(b) (now G.S. 148-45(g)(1)), the trial court erred in denying defendant's motion to dismiss the action where the state's evidence was to the effect that the prison unit superintendent granted defendant weekend leave to visit his home and family, and there was no evidence that defendant had been granted work release privileges or that his pass, if any, was related to the work release plan.

See also State v. Daye, 23 N.C. App. 267, 208 S.E. 2d 891 (1974), a case in which the court held that defendant's motion for nonsuit based on fatal variance should have been granted where the indictment charged him with uttering a forged check but the evidence offered at trial tended to show that he uttered a check with a forged endorsement.

Had defendant in the case at hand been tried on an indictment alleging that he restrained or removed Barbara from one place to another for the purpose of facilitating the commission of the felony of rape, the conviction could be upheld. But, the evidence does not support the charge as laid in the indictment. That being true, the judgment in the kidnapping case must be reversed.

III

There is no merit in defendant's contention that the trial court erred in failing to dismiss the charge of first-degree rape, in instructing the jury regarding the circumstances under which de-

fendant could be convicted of rape procured by the use of a deadly weapon, and in defining "deadly" weapon.

[3] Defendant argues that the evidence fails to show that any rape of Barbara was procured by the use of a deadly weapon; that at the time of the alleged rape, the knife was on the outside of the car, therefore, it was not a threat to her. We reject this argument.

In *State v. Thompson*, 290 N.C. 431, 444, 226 S.E. 2d 487 (1976), Chief Justice Sharp, speaking for this court, said:

> "The decision in *Dull* [289 N.C. 55, 220 S.E. 2d 344 (1975)] is authority for the proposition that a deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21(a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. In other words, the deadly weapon is used, not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by his threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use."

Barbara's testimony clearly tended to show that when defendant approached her car he brandished the knife and threatened "to cut her guts out"; that as they rode in the car and then parked, the knife was on the dash close to his hand; that at the time of the rape the knife was stuck in the ground two or three feet from defendant; and that Barbara submitted to him because of the fear that he would cut her with the knife.

We hold that the evidence was sufficient to meet the proof of first-degree rape as outlined in *Dull* and *Thompson*. Barbara knew, or had reasonable grounds to believe, that the knife was readily accessible to defendant. We further hold that the trial judge properly instructed the jury in conformity with the principles set forth in *Dull* and *Thompson*.

[4] Defendant complains that the trial judge incorrectly instructed the jury that a deadly weapon "is a weapon which is likely to cause death or serious body injury". He argues that this court has defined a deadly weapon as "any instrument likely to produce death or great bodily harm, under the circumstances of its use", and cites *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956), and *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931).

While we adhere to the definition of deadly weapon given in *Cauley* and *Watkins*, we hold that the trial judge in this case did not err in failing to charge the exact words set forth in those cases. When the words used by the trial judge are considered in context, and along with other instructions given, we think they were sufficient.

IV

[5] We find no merit in defendant's contention that the trial court erred in submitting to the jury the charge of armed robbery and its instructions to the jury on that charge.

Defendant argues that in order to sustain a conviction of armed robbery the evidence must show that the victim was "endangered or threatened by the use or threatened use of a firearm or other dangerous weapon". He further argues that there was no evidence that defendant pointed a weapon at Barbara or threatened her with one at the time she gave him $80.00. We reject this argument.

Our armed robbery statute, G.S. 14-87, provides in pertinent part that "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 . . . shall be guilty of a felony. . . ."

The evidence in this case clearly tended to show that at the time Barbara surrendered her $80 to defendant, he had the knife in his possession; that although the knife was on the dash, it was within inches of his hand and readily accessible to him. His entrance to her car was gained by brandishing the knife and threatening to cut her. Soon after entering the car and placing the knife on the dash, he told her that all he was after was money.

We hold that the evidence was sufficient to support the verdict of armed robbery and the court's jury instructions on that charge were free from error.

V

[6] We find no merit in defendant's contention that the trial judge erred in his jury charge when he defined reasonable doubt as follows:

> "A reasonable doubt is not an imaginary or fanciful doubt, but is a sane, rational doubt that arises out of the evidence or the lack of evidence of (sic) some deficiency in it. A reasonable doubt, as that term is employed in the administration of justice, is an honest, substantial misgiving generated by some insufficiency of the proof, an insufficiency that fails to convince your mind and judgment, and to satisfy your reasoning of the defendant's guilt."

The quoted definition is in substantial accord with the definition of reasonable doubt approved by this court in many cases. *See, State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972). As was said by Justice Huskins in *State v. Wells, supra*, ". . . [w]hen the various definitions of reasonable doubt, approved in numerous decisions, are distilled and analyzed, the true meaning of the term is adequately expressed in the brief definition here assigned as error. Brevity makes for clarity and we think the jury fully understood the meaning of reasonable doubt as that term is employed in the administration of the criminal laws. . . ." 290 N.C. 492.

VI

We find no merit in defendant's contention that the trial court committed prejudicial error in limiting his cross-examination of Barbara and her mother.

In cross-examining Barbara, defendant's counsel asked her if her mother objected to her visiting a named night spot, if she had arguments with her mother regarding places where she went, and if, prior to the date in question, she ever discussed with her mother her sexual relations with men. On cross-examination, defendant's counsel asked Barbara's mother, Mrs. Guyton, several questions regarding her knowledge of Barbara's going to several night spots and with whom she went; as to whether Barbara ever discussed her sex life with her mother; and with respect to Mrs. Guyton's marital status at the time of the trial. The court sustain-

ed the state's objections to these questions propounded to Barbara and her mother.

[7] Assuming, *arguendo*, the questions asked were relevant and proper, defendant has failed to show prejudice because the record does not reveal what the answers to the questions would have been. We have held many times that when objections to evidence are sustained and the record fails to show what the evidence would have been, prejudice is not shown and the exclusion of such evidence cannot be held prejudicial. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Little*, 286 N.C. 185, 209 S.E. 2d 749 (1974).

VII

[8] Finally, defendant contends the trial court committed prejudicial error in failing to provide for all sentences to run concurrently. This contention has no merit.

Defendant argues that when one criminal offense is entirely an element of another offense, separate punishment for the two offenses constitutes double jeopardy and cites *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967). He further argues that in this case the alleged armed robbery was an essential element of the offense of kidnapping, therefore, a separate sentence for armed robbery should not have been imposed.

While we adhere to the principle stated in *Midyette*, it is not applicable to the case at hand. Almost directly in point is *State v. Banks*, *supra*, where this court upheld separate sentences for kidnapping, armed robbery, assault on a female with intent to commit rape and crime against nature. In that case the court held that the charges of armed robbery, assault with intent to commit rape and crime against nature were the *purposes* for which the victim was confined and restrained and not *elements* of the offense of kidnapping.

In the instant case, clearly the armed robbery was not an element of the offense of rape. Neither was the armed robbery alleged or shown to be an element of the kidnapping offense.

* * *

In the kidnapping case, the judgment is reversed.

In the trial of the rape and armed robbery cases, we find no error and the judgments entered in those cases remain in full force and effect.

HENDERSON COUNTY AND LINCOLN K. ANDREWS v. FRANK OSTEEN (NOW DECEASED), HARLEY OSTEEN (IN HIS CAPACITY OF ADMINISTRATOR OF THE ESTATE OF FRANK OSTEEN), AND ELLIE O. CHEATWOOD, UFAULA O. STEPP, HAZEL O. STEVENSON, BLANCHE O. KING, HARLEY OSTEEN, SYLVENE O. SPICKERMAN, GRETA O. ALLEN, JEAN O. HOLDEN, MITCHELL M. OSTEEN, CARL M. OSTEEN, MARTHA SUE O. BROWN, JAMES D. OSTEEN AND THELMA O. TAYLOR AS ALL THE HEIRS AT LAW OF FRANK OSTEEN, DECEASED

No. 3

(Filed 20 April 1979)

1. **Public Officers § 8.1; Taxation § 41.2— presumption of regularity of official acts—applicability to mailing of tax sale notice**

The presumption of the regularity of official acts applies to the mailing of notice to a taxpayer of a foreclosure sale of his property as required by G.S. 105-392(c) (now G.S. 105-375(i)), and the party attacking the foreclosure sale has the burden of proving that such notice was not mailed to the taxpayer.

2. **Taxation § 41.2— tax foreclosure sale—finding that notice not mailed to taxpayer**

The trial court's finding that the sheriff's office failed to mail notice of a 1970 tax foreclosure sale to the taxpayer was supported by the evidence where the parties stipulated that no record of mailings by the sheriff's office in 1970 can now be found, and movant offered evidence that the taxpayer died prior to the sale, no notice of the tax foreclosure sale was found among deceased taxpayer's personal papers during a diligent search following his death, and no letter addressed to the taxpayer had been returned to the sheriff's office, although evidence that a regular procedure for mailing notices of tax foreclosures was followed by the sheriff's office would have supported a contrary finding.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by plaintiff Lincoln K. Andrews pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 38 N.C. App. 199, 247 S.E. 2d 636 (1978), (*Martin, Robert J.*, concurred in by *Brock, C.J.*, with *Arnold, J.*, dissenting) which affirmed the order of *Smith (David), J.*, entered at the 26 July 1977 Session of HENDERSON Superior Court. Argued as No. 125 at Fall Term 1978.

The facts giving rise to this appeal are set out in *Henderson County v. Osteen*, 28 N.C. App. 542, 221 S.E. 2d 903 (1976), *rev'd and remanded*, 292 N.C. 692, 235 S.E. 2d 166 (1977). We, therefore, do not set them out fully here but limit ourselves to a recitation

of those additional facts adduced at the hearing on remand which are pertinent to resolving the issues presented by this appeal.

This case was "remanded to the Superior Court for a finding by it as to whether the notice of the execution sale required by G.S. 105-392(c) (now G.S. 105-375(i)) was mailed by registered or certified mail by the sheriff addressed to Frank Osteen, at his last known address, at least one week prior to the date fixed for the execution sale." 292 N.C. 692 at 711. On remand, the trial court, after presentation of evidence by defendants and plaintiffs, found as a fact that notice was not mailed in the prescribed manner by the sheriff of Henderson County and entered an order setting aside the sale of the property.

At the hearing defendants' evidence tended to show: (1) that Frank Osteen died on 17 July 1970; (2) that Harley Osteen duly qualified as the administrator of decedent on 27 July 1970; (3) that the valuable papers of the decedent had been carefully examined by the administrator and another brother of the decedent and that they had found no notice of sale addressed to Frank Osteen; (4) that defendant administrator orally notified the post office authorities to forward the mail addressed to Frank Osteen to him, and that no notice concerning the property in question was thereafter received by him although he received a notice mailed by the sheriff's office pertaining to taxes on some other property of the decedent.

It was then stipulated that no records of mailings made by the sheriff's office in 1970 could now be found. At the close of the defendants' evidence, plaintiffs moved for dismissal on the ground that defendants' evidence was insufficient as a matter of law to prove that the notice had not been mailed. This motion was denied.

Plaintiffs' evidence at the hearing tended to show: (1) Henderson County Assistant Clerk of Superior Court, Edith Hesterley, who had a reputation for reliable work, prepared and addressed the envelopes and execution forms for mailing the notices of foreclosure in 1970 from a list of judgments on which Frank Osteen's name and address appeared. The notices were prepared with a group of approximately 130 others, and she had "no particular recollection" of preparing Frank Osteen's notice. (2) Edith Hesterley customarily gave the prepared notices to the sheriff's

office for signing and mailing. (3) J. Neal Grissom was the chief deputy sheriff in Henderson County in 1970. He was responsible for administrative work in the office of Sheriff Kilpatrick in 1970, and the work included the mailing of notices of foreclosure. He mailed the notices delivered to him in 1970 as a group after making an entry of the names of persons to whom notices were sent in a record book maintained by the sheriff's office. He did not "particularly recall" who entries were made for in 1970. (4) G. L. Smith's name was on the list of notices prepared by Edith Hesterley in 1970, and he received a notice of sale addressed to him and delivered by certified mail more than one week prior to the sale date. (5) Records of certified mailings are kept by the Hendersonville post office for three years, and the records for 1970 have been destroyed.

At the close of the evidence, the trial court found as a fact that the Sheriff of Henderson County did not mail by registered or certified mail addressed to Frank Osteen, at his last address, at least one week prior to the date fixed for the execution sale, a notice of the sale required by G.S. 105-392(c) (now G.S. 105-375(i)), and entered the order setting aside the sale for lack of notice.

Plaintiff Andrews appealed and the Court of Appeals affirmed.

Prince, Youngblood, Massagee & Creekman, by James E. Creekman, for plaintiff-appellant.

James C. Coleman for defendant-appellees.

BRITT, Justice.

[1] Plaintiff Andrews (appellant) contends the trial court erred in denying his motion for dismissal at the close of defendants' evidence as that evidence fails to rebut the presumption of regularity which attaches to official acts of public officers. He further contends that defendants' evidence, even if sufficient to overcome the presumption, is inadequate as a matter of law to sustain the burden of proving that notice of the sale was not duly mailed by the sheriff's office.

The Court of Appeals affirmed the trial court's order setting aside the sale, holding that the presumption of regularity does not apply to tax sales of realty and that the burden of prov-

ing the validity of the tax sale is on the purchaser at the sale. While we agree with the Court of Appeals that the order appealed from should be affirmed, we cannot agree with the rationale upon which its decision is based.

We accept appellant's contention that the presumption of regularity is applicable to this case but we do not agree with him that movant Osteen's evidence was so inadequate as to require dismissal as a matter of law. It is well settled that the trial court, except in the clearest of cases, should decline to rule on a motion to dismiss under G.S. 1A-1, Rule 41(b), until the close of all the evidence. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). The trial court wisely chose that course of action in this case.

The presumption of regularity of official acts is applicable to tax proceedings in this state. *In Re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975) (*ad valorem* tax assessment); *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972) (tax valuation by State Board of Assessment); *Henderson County v. Johnson*, 230 N.C. 723, 55 S.E. 2d 502 (1949) (validity of service in tax certificate foreclosure); *Clifton v. Wynne*, 80 N.C. 145 (1879) (tax list properly prepared). While the regularity presumption is not applied in tax cases in all jurisdictions, a substantial number of decisions have permitted the use of the presumption where the validity of the tax proceeding was assailed. *Davis v. State*, 1 Ariz. App. 264, 401 P. 2d 749 (1965) (tax sale); *Canyon Crest Villas South v. Board of County Commissioners of Arapahoe County*, 36 Col. App. 409, 542 P. 2d 395 (1975) (notice of assessment increase presumed to be properly and timely mailed); *Wells v. Thomas*, 78 So. 2d 378 (Fla. 1955) (clerk of court presumed to have mailed notice of sale); *Kight v. Gilliard*, 215 Ga. 152, 109 S.E. 2d 599 (1959) (taxing authorities presumed to perform duties regularly and at proper time); *Staring v. Grace*, 97 So. 2d 669 (La. App. 1957) (tax sale presumed regular); *Shoemaker v. Tax Claim Bureau*, 27 Pa. Cmwlth Ct. 211, 365 A. 2d 1320 (1976) (presumption of regularity supplies fact that notice of sale was properly posted); *Poster v. Wilson*, 389 S.W. 2d 650 (Tex. 1965) (tax assessment); *Row v. M & R Pipeliners, Inc., and Keystone Acceptance Corp. v. M & R Pipeliners, Inc.* --- W. Va. ---, 202 S.E. 2d 816 (1973) (presumption of proper issuance of order of attachment necessary to validity of sale).

In *Henderson County v. Johnson, supra*, movant Johnson sought to have a tax certificate foreclosure set aside for insufficient service of process. The presumption of regularity was employed in favor of plaintiff to provide additional support for the court's finding that defendant had been adequately apprised of the sale proceeding. The court said that "[i]n addition to the facts found by the Judge . . . the regularity of the proceeding is further supported by the principle *omnia rite acta praesumuntur.*" 230 N.C. 723, 724. The case at bar is analogous. Under G.S. 105-392 (now G.S. 105-375) the taxpayer has constructive notice of the tax lien. Before the tax sale can take place, however, the sheriff is required to mail notice of the sale to the taxpayer at his last known address. G.S. 105-392(c) (now G.S. 105-375(i)). We believe the presumption of regularity of official acts should be applicable to the mailing of this notice by the sheriff's office. We, therefore, hold that plaintiffs were entitled to the benefit of the presumption in this case. The question which then arises is the effect to be given this presumption.

Presumption is a term which is often loosely used. It encompasses the modern concept of an inference where the basic fact (in this case, the regular performance of official duties) is said to be *prima facie* evidence of the fact to be inferred (that notice was duly mailed). It also encompasses the modern concept of a *true presumption* where the presumed fact must be found to exist unless sufficient evidence of the nonexistence of the basic fact is produced or unless the presumed fact is itself disproven. 2 Stansbury's N.C. Evidence § 215 (Brandis Rev. 1973). "The presumption has a technical force of weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but in the case of a mere inference there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence and in the other case the jury draws it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." *Cogdell v. R.R.*, 132 N.C. 852, 44 S.E. 618 (1903); *cf.*, *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

In the majority of cases in which this court has invoked the presumption of regularity, we have treated it as a true presumption rather than an inferential one. *See, e.g., Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977) (Sheriff's return); *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961) (annexation proceeding); *Johnson v. Sink*, 217 N.C. 702, 9 S.E. 2d 371 (1940) (judicial sale); *Sutton v. Jenkins*, 147 N.C. 11, 60 S.E. 643 (1908) (mortgage foreclosure); *Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428 (1895) (execution sale); *see*, Stansbury, *supra* at § 235 and cases cited therein. Justice Copeland, speaking of the effect of the presumption in a case where it was employed to aid in sustaining a tax assessment, said, ". . . the presumption is only one of fact and is therefore rebuttable. But, in order for the taxpayer to rebut the presumption he must produce 'competent, material and substantial' evidence. . . ." *In Re Appeal of Amp, Inc., supra* at 563.

We do not believe that the nature of the official act in this case, the mailing of a constitutionally-required notice of a tax foreclosure sale, demands that the treatment customarily afforded the presumption of regularity be altered. While strict compliance with the notice provisions of G.S. 105-392 (now G.S. 105-375) is essential to a valid sale, the purchaser at a sale under the statute is entitled to rely on the presumption that official duties in connection with the sale were regularly and properly performed until a party challenging the validity of the sale has produced ample evidence to the contrary. To decide otherwise would expose tax foreclosure sales to groundless attacks. The remedy of sale would ultimately become worthless, and the means for ensuring that the taxes due are collected would be weakened. When the law imposes the burden of producing evidence on the party claiming that a public official has failed to do his job, it strikes a reasonable balance between the public's interest in discouraging frivolous litigation over meritless claims and the individual's right to procedural regularity.

We also accept appellant's contention that the burden of proof is on the party attacking the validity of a tax foreclosure sale. Again, however, we are unable to agree with him that movant Osteen's evidence was so inadequate as to require dismissal as a matter of law.

The Machinery Act, G.S. 105-271—G.S. 105-398 (now G.S. 105-271—G.S. 105-395), does not explictly allocate the burden of proof. Prior to the adoption of the Act, the burden of proof had at various times been placed on both parties to a tax sale. Before 1887, the common law rule that placed the burden of proof on the purchaser was given effect. By Chapter 137 of the Session Laws of 1887, however, the legislature modified the common law rule and imposed the burden of proof on the party attacking the sale. *Moore v. Byrd*, 118 N.C. 688, 23 S.E. 968 (1896); *Board of Education v. Remick*, 160 N.C. 562, 76 S.E. 627 (1912). The enactment had as its purpose the bolstering of tax titles. "[U]p to 1889 no tax deed had ever been held valid on appeal to the Supreme Court and the State was a heavy loser; besides, the taxation which should have been borne by tax defaulters was thrown upon those who had already borne the burden of their own taxes. To remedy this evil, A Tax Commission was appointed to examine into the provisions for the sale of land for taxes in other states, and on their report, chapter 137, Laws 1887 (now with some modification, Revisal 2909), was adopted, which made certain recitals in a tax deed presumptive evidence and certain others conclusive evidence. The effect of the act was to change the burden of proof." 160 N.C. 562 at 566-567. Substantially similar legislation remained in force until the adoption of the Machinery Act. We do not believe that in adopting the Act the legislature intended to revert to the common law rule under which "the State was a heavy loser."

Our decision that the burden of proof is on the party attacking the validity of the tax foreclosure sale is consistent with the allocation of the burden of proof in other types of official sales. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E. 2d 681 (1963) (judicial sale); *Walston v. Applewhite & Co.*, 237 N.C. 419, 75 S.E. 2d 138 (1953) (execution sale); *Johnson v. Sink*, 217 N.C. 702, 9 S.E. 2d 371 (1940) (execution sale); *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918) (mortgage foreclosure). A tax foreclosure under the statute applicable to this case is analogous to an execution sale. G.S. 105-392(c) (now G.S. 105-375(i)) provides that a tax foreclosure sale shall be conducted "in the same manner as other property is sold under execution."

Walston, *supra*, involved an execution sale where the plaintiff who had the burden of proof as to the sale's invalidity challenged

the sufficiency of the notice given by the sheriff concerning the sale. The court, ruling on defendant's motion for nonsuit, said: "Mrs. Walston, one of the plaintiffs, testified that the Sheriff of Wayne County did not serve on her a copy of so much of the advertisement as related to the real property of the plaintiffs herein, and that she did not receive a copy of such advertisement through the mail before the purported execution sale on 1 June 1931, as required by G.S. 1-330 (now G.S. 1-339.54). This evidence is admissible and sufficient to carry the case to the jury on the question of notice." 237 N.C. 419 at 423-424.

In the case before us an analogous sale is involved, and the evidence offered by the party with the burden of proof is similar to, if not stronger, than the evidence offered in *Walston*. Defendant administrator and his brother testified that both of them had carefully examined the papers of their dead brother, the taxpayer, and that neither of them could find any notices from the sheriff's office concerning the sale. Defendant administrator further testified that he informed the post office of his brother's death and asked that mail be forwarded to him. Thereafter, a tax notice concerning some other property of the decedent was received. Finally, it was stipulated that no record of any mailing of the notice could be found in the Henderson County Sheriff's Office. As we said in the former appeal, this evidence would support, but does not compel, a finding that the notice was not mailed. *Henderson County v. Osteen*, 292 N.C. 692, 707. We hold that this evidence was sufficient to raise an issue of fact for the fact-finder and that the court properly refused to grant plaintiff's motion to dismiss.

[2] We also uphold the trial court's finding that the sheriff's office had failed to mail the notice of tax foreclosure required by G.S. 105-392(c) (now G.S. 105-375(i)) and the entry of judgment based on said finding of fact.

The well-established rule is that findings of fact made by the court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). In this case neither side offered direct evidence on the issue in question. Plaintiffs' evidence tended to show that a

regular procedure for mailing notices of tax foreclosures was followed by the Henderson County Sheriff's Office. From this evidence the court might have inferred that the notice was properly mailed. Movant's evidence, on the other hand, showed that no record of a mailing of the notice could be found in the Sheriff's Office, that no letter addressed to decedent Frank Osteen had been returned to that office, and that no notice of tax foreclosure was found among the decedent's personal papers during a diligent search following his death. From this evidence the court could infer, as it did, that the notice was not mailed as required by law. The court, as trier of fact, chose to believe the evidence favorable to the movant and we will not now disturb its finding of the fact or the order based thereon.

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

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAVAN JOLLY

No. 21

(Filed 20 April 1979)

1. **Searches and Seizures § 18— voluntariness of consents to searches of car**

Findings by the trial court supported the court's conclusions that defendant's consent to a search of his car when he was detained at a service station immediately prior to his arrest for burglary and armed robbery and his consent to a search of his car at the police station after his arrest were voluntarily given, that neither consent was a mere submission to authority, and that the consents were not the result of duress or coercion, express or implied.

2. **Searches and Seizures § 18— consent to search of vehicle—alleged failure to take defendant before magistrate without unnecessary delay**

There is no merit in defendant's contention that a consent search of his car after his arrest was illegal because he was not taken before a magistrate "without unnecessary delay" as required by G.S. 15A-501(2) before he gave his written consent for the search where defendant failed to show how the alleged noncompliance with G.S. 15A-501(2) affected the voluntariness of his written consent.

3. **Burglary and Unlawful Breakings § 1— distinction between first and second degree burglary**

The sole distinction between the two degrees of burglary is the element of actual occupancy of the dwelling house or sleeping apartment at the time of the breaking and entering.

4. **Burglary and Unlawful Breakings § 7— burglary prosecution—necessity for submitting felonious breaking or entering**

To justify submission of felonious breaking or entering as a permissible verdict in this prosecution for first degree burglary, there must be evidence tending to show that defendant could have gained entry to the victim's motel room by means other than a burglarious breaking, *i.e.*, a forcible entry.

5. **Burglary and Unlawful Breakings § 7— burglary prosecution—failure to submit felonious breaking or entering**

The trial court in this first degree burglary case properly refused to submit felonious breaking or entering as a possible verdict where the evidence tended to show that defendant gained entry into the victim's motel room by a constructive breaking accomplished by pushing the victim into the room as he opened the door.

6. **Criminal Law § 120— failure to charge on punishment**

The trial judge did not abuse his discretion in failing to charge as to the possible punishment for all the offenses submitted to the jury

7. **Burglary and Unlawful Breakings § 5— pushing victim into motel room—no actual occupation of room—second degree burglary only**

The State's evidence failed to show that the victim was in the actual occupation of his motel room at the time of an alleged breaking and entry by defendant, and defendant's motion for nonsuit of first degree burglary should have been allowed and only second degree burglary should have been submitted to the jury, where such evidence tended to show that defendant was behind the victim as the victim approached the door to his motel room, the victim opened the door to the motel room, and as the victim was stepping inside the door he was pushed into the room by defendant.

DEFENDANT appeals from judgment of *Martin (John C.), J.*, 10 July 1978 Session, CUMBERLAND Superior Court.

Defendant was tried upon a two-count bill of indictment proper in form charging him with (1) burglary in the first degree and (2) armed robbery.

The State offered evidence tending to show that Mr. and Mrs. Morris Friedman checked into the Americana Motel in Fayetteville, North Carolina, on the afternoon of 22 December 1977. The Friedmans stayed in the motel room for an hour and then went out for dinner, returning to the motel at approximately

eight o'clock that evening. As they drove to their room they noticed two black men walking toward the back of the motel. Upon arriving at their room Mr. Friedman got out of the car first and proceeded to the room followed by Mrs. Friedman. Mrs. Friedman never saw her husband enter the motel room. As she approached she heard noises as if someone had pulled or pushed her husband into the motel room. As she entered she heard her husband say, "What are you doing?" Mrs. Friedman turned to the door and saw a black man pointing a pistol at her. She and her husband were told to lie facedown on the floor, which they did. The Friedmans were tied up and Mrs. Friedman was gagged. The intruders demanded money. Mrs. Friedman told them they didn't have any more money. The intruders then took jewelry and other possessions of the Friedmans and left. Mrs. Friedman managed to untie herself and reported the robbery. The desk clerk, Joe Brown, had noticed several black men just sitting in an automobile near the laundry room, had become suspicious, and had written down the license number of the vehicle. He called the police and reported the robbery.

Richard Bryant, a Spring Lake Police Officer, received a call to be on the lookout for a late model Cougar automobile with a certain license number. He saw the suspect automobile stopped at a self-service gas station and asked defendant, who was driving the car, to come to his patrol car. He read defendant his rights and searched him. Defendant gave permission to search his car and several items belonging to the Friedmans were found in it. Defendant and two other people who were in the car were then taken to the Law Enforcement Center and booked for burglary and armed robbery.

A fingerprint found at the scene of the robbery matched the defendant's fingerprint.

Defendant subsequently made a confession in which he stated that he and his friends had gone to the motel for the purpose of robbing someone since they needed some money. He stated that when they saw Mr. Friedman going to the room, they ran behind him and just as he was "coming in the door" they pushed him into the room, knocked him down, and made Mrs. Friedman also lie down between the beds while they went through Mrs. Friedman's pocketbook and other belongings. They then tied up the Friedmans, took their jewelry and money and left.

Defendant offered no evidence.

The trial court submitted as permissible verdicts, guilty of first degree burglary or not guilty, and guilty of armed robbery or not guilty. The jury convicted defendant of first degree burglary and armed robbery. Defendant was sentenced to life imprisonment for first degree burglary and ten to fifteen years for armed robbery to begin at the expiration of the life term. Defendant appealed the burglary conviction to this Court and the armed robbery conviction to the Court of Appeals. His motion to bypass the Court of Appeals as to the armed robbery conviction was allowed.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

Neill H. Fleishman, for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends the two searches of his automobile by the police were illegal and that the items seized during the searches were erroneously admitted into evidence. Upon Defendant's motion to suppress this evidence, the trial court found facts and concluded that the searches of defendant's car were valid consent searches and ruled that the items seized were admissible into evidence.

Defendant does not except to the findings made by the trial court at the voir dire hearing held pursuant to defendant's motion to suppress. These findings show that Richard Bryant, a Spring Lake Police Officer, received a radio call to be on the lookout for a late model Cougar automobile with a certain license number. Officer Bryant saw an automobile matching this description enter a self-service gas station. Defendant Jolly was the driver of this automobile. Officer Bryant followed the Cougar into the service station and radioed for back-up help. When the two vehicles stopped defendant got out and headed toward the rear of his car. Officer Bryant told defendant to come to his patrol car and advised him of the radio transmission concerning an armed robbery and motor vehicle description which matched the automobile being driven by defendant. At this point Officer Welch, another Spring Lake Police Officer, arrived at the scene in response to Of-

ficer Bryant's call for help. Welch stayed with defendant Jolly while Bryant got the other two passengers out of the detained automobile. In response to a question from Welch, defendant Jolly stated he was the owner of the Cougar car. After all three passengers were out of the automobile they were informed of the radio advisory. All three suspects were searched and given the *Miranda* warnings. No weapons were found on any of the three suspects.

Officer Welch requested and was granted permission by defendant Jolly to look into his car. With Jolly looking on, Welch searched the interior of the car and discovered various items including a gray shoulder bag bearing a name tag with the name of a subject who lived in New York. Officer Welch placed the other items discovered by him inside the shoulder bag and left the bag in the back seat of the automobile. Welch then asked Jolly for permission to look inside the trunk. Jolly consented, took the keys out of the ignition, and opened the trunk for Welch.

The Cougar automobile was towed to the Cumberland Law Enforcement Center. Defendant and the other suspects were arrested and taken there. Defendant gave Sergeant Weldon written permission to search the Cougar automobile. Weldon first tried to enter the Cougar from the driver's side but the key would not work. Jolly said, "It does not work. You have to go to the passenger's side." Weldon entered the automobile from the passenger side and conducted his search.

The foregoing findings amply support the conclusion of the trial court that consent to both searches was voluntarily given; that neither consent was a mere submission to authority; and that the consents were not the result of duress or coercion, express or implied. When a person voluntarily consents to a search, he cannot complain that his constitutional rights were violated. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976), and cases cited therein. Consent to search freely and intelligently given renders competent the evidence thus obtained. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973), and cases cited therein. *See also, Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). Thus, the trial court correctly ruled that the items seized pursuant to these searches were admissible.

[2] Defendant also contends that the items seized during the second consent search were erroneously admitted into evidence on the ground that said search was conducted in violation of G.S. 15A-501(2) which provides that after arrest the officer "[m]ust . . . take the person arrested before a judicial official without unnecessary delay." Defendant argues that subsequent to his arrest he was not taken before a magistrate until after he had given his written consent to the second search. According to defendant this constitutes unnecessary delay within the meaning of the statute.

G.S. 15A-1446(a) states that "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." Defendant failed to raise the alleged illegality of the second consent search under G.S. 15A-501(2) before the trial court and therefore he cannot assert on appeal that violation of that statute renders inadmissible the items seized during the search. We note that the error asserted by defendant is not one of those which may be the subject of appellate review even though no objection, exception, or motion has been made in the trial division. *See* G.S. 15A-1446(d).

Notwithstanding defendant's failure to object, errors relating to rights arising under the statutory law of the State will not entitle defendant to a new trial unless he demonstrates that the error was material and prejudicial. *See* G.S. 15A-1443(a); *State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978); *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). Defendant fails to show how the alleged noncompliance with G.S. 15A-501(2) affected the voluntariness of his written consent to the search of his car.

In sum, defendant fails to show that the consents to search given by him were involuntary and further fails to demonstrate prejudice arising from the alleged violation of G.S. 15A-501(2). Defendant's first and second assignments of error are therefore overruled.

By his third assignment of error defendant contends the trial court erred in concluding his statement to police was voluntary and admissible into evidence. Defendant brings forward this assignment as the third question in his brief but makes no argument and cites no authorities upon which he relies in support of his position. Under Rule 28, Rules of Appellate Procedure, this as-

signment is deemed abandoned. Rule 28, *supra*; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976).

Defendant assigns as error certain portions of the charge relating to first degree burglary and to the sufficiency of the evidence to sustain a conviction for first degree burglary.

[3] Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling house or sleeping apartment of another with intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); G.S. 14-51. Burglary in the second degree consists of all the elements of burglary in the first degree save the element of actual occupancy. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). If the dwelling house or sleeping apartment is unoccupied at the time of the alleged breaking and entry by defendant, then the offense is burglary in the second degree. *Id.* Thus, the sole distinction between the two degrees of burglary is the element of actual occupancy of the dwelling house or sleeping apartment at the time of the breaking and entering. *State v. Allen*, 279 N.C. 115, 181 S.E. 2d 453 (1971).

Defendant contends the trial court erred by refusing to submit felonious breaking or entering as a possible verdict. Felonious breaking or entry is defined as the breaking or entry of any building with intent to commit any felony or larceny therein. G.S. 14-54(a). The statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first and second degree. *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973). "The jury should be instructed on a lesser included offense when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979) (citations omitted). *See also State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978).

[4, 5] To justify submission of felonious breaking or entering as a permissible verdict there must be evidence tending to show that defendant could have gained entry to victim's motel room by means other than a burglarious breaking, *i.e.*, a forcible entry. *State v. Bell, supra*; *State v. Chambers*, 218 N.C. 442, 11 S.E. 2d 280 (1940). Here, all the evidence tends to show a burglarious breaking. A breaking in the law of burglary constitutes any act of force, however slight, "employed to effect an entrance through

any usual or unusual place of ingress, whether open, partly open, or closed." *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). A breaking may be actual or constructive. *Id.* A constructive breaking occurs where entrance is obtained in consequence of violence commenced or threatened by defendant. *Id.* The evidence in this case tends to show that defendant gained entry into victim's motel room by pushing victim into the room as he opened the door. This clearly constitutes a constructive breaking. Accordingly, it was not error for the trial court to exclude felonious breaking or entering as a permissible verdict. This portion of defendant's fifth assignment of error is overruled.

In a related assignment defendant argues that the evidence does not justify a jury instruction on constructive breaking. This contention is unsound in light of our conclusion that the evidence in this case tends to show a constructive breaking. Defendant's sixth assignment of error is overruled.

Defendant challenges portions of the jury charge in which the elements of burglary are defined. We have carefully reviewed the challenged portions of the charge and find them free of error. The charge on burglary accurately defines the elements of the offense and correctly applies the law to the evidence. Defendant's seventh, eighth and ninth assignments of error are overruled.

[6] Defendant contends the trial court erred in failing to charge as to the possible punishment for all the offenses submitted to the jury. This contention is without merit. The trial judge is not required to instruct the jury regarding punishment. Such an instruction may be given or withheld in the court's discretion, and the exercise of that discretion will not, absent abuse, be disturbed on appeal. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977). *Accord, State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). No abuse of discretion is shown. This contention, which constitutes part of defendant's fifth assignment of error, is overruled.

At the close of all the evidence defendant moved to dismiss the action for insufficiency of the evidence to sustain a conviction for first degree burglary and armed robbery. The motion was denied. Failure to dismiss *as to first degree burglary* is assigned as error.

A motion to dismiss will be treated the same as a motion for judgment as of nonsuit. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977). Defendant's motion for nonsuit draws into question the sufficiency of all the evidence to go to the jury. *Id.* On motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from it. *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the court in ruling on the motion. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). If there is substantial evidence—whether direct or circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made out and nonsuit should be denied. *Id.* Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant nonsuit. *Id.* On the other hand, evidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand nonsuit. *State v. Lee*, supra.

[7] Specifically, defendant contends there was no substantial evidence from which a jury could find that the motel room was occupied at the time of the alleged breaking and entry by defendant. If at the time the breaking and entry occurs, the house is unoccupied, "however momentarily, and whether known to intruder or not, the offense is burglary in the second degree." *State v. Tippett, supra.* Thus, if there is no substantial evidence from which a jury could find actual occupancy then nonsuit as to first degree burglary should have been granted.

With respect to the element of occupancy, the State's evidence tends to show that defendant ran behind the victim as the victim approached the door to his motel room. Victim opened the door to the motel room. As victim was stepping inside the door he was pushed into the room by defendant. When the foregoing evidence is considered in the light most favorable to the State, and the State is given every reasonable inference to be drawn therefrom, it fails to show that victim was in the actual occupation of the motel room at the time the breaking and entry occurred. Since there was no substantial evidence of "actual occupation," it follows that the trial judge erred in submitting first degree burglary to the jury. Defendant's motion for nonsuit on

first degree burglary should have been allowed and second degree burglary should have been submitted.

As previously noted, the sole distinction between the two degrees of burglary is the element of actual occupancy. *State v. Allen, supra.* Otherwise, the elements of the two offenses are identical. *State v. Tippett, supra.* Thus, in finding defendant guilty of first degree burglary, the jury necessarily had to find facts establishing the offense of burglary in the second degree. Since there was insufficient evidence from which a jury could find actual occupancy of the motel room at the time of the breaking and entering, it follows that the verdict returned by the jury must be considered a verdict of guilty of burglary in the second degree. *Compare State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972). Hence, leaving the verdict undisturbed but recognizing it for what it is, the judgment upon the verdict of guilty of first degree burglary is vacated and the cause is remanded to the Superior Court of Cumberland County for pronouncement of a judgment as upon a verdict of guilty of burglary in the second degree. The Clerk of the Superior Court of Cumberland County shall thereupon issue a revised commitment with respect to the revised judgment on the first count in case number 77CRS52772 bearing the same date as the original commitment for first degree burglary. The effect will be, and it is so intended, that defendant will receive credit upon the new commitment for all the time heretofore served for first degree burglary.

The valid judgment of imprisonment for ten to fifteen years for armed robbery pronounced on the second count in the bill of indictment was made to begin at the expiration of the life sentence imposed on the first count. Upon remand of this case the valid judgment for armed robbery shall be modified to provide that the ten-to-fifteen year sentence shall commence at the expiration of the sentence which may be imposed on the burglary count, or shall run concurrently with it, as the court in its discretion may determine. A new commitment shall issue accordingly.

Defendant's tenth assignment relates to the charge and is based on Exceptions 20 and 21. We have examined the challenged portion and find that it correctly states and applies the law. Defendant's final assignment is overruled without discussion.

As to the burglary count—Remanded for Judgment as for Verdict of Guilty of Second Degree Burglary.

As to the armed robbery count—No error.

STATE OF NORTH CAROLINA v. ADNELL HUNT

No. 65

(Filed 20 April 1979)

1. **Constitutional Law § 56— jurors in courtroom during guilty pleas and evidence in other cases—G.S. 15A-943—right to impartial jury**

The fact that defendant was tried by jurors who, on the morning of his trial, had the opportunity to hear "a number of pleas and sentences imposed" in other and unrelated cases did not violate the spirit of G.S. 15A-943 and create a jury biased against defendant, since that statute dealt with calendaring of arraignments and was therefore inapplicable to defendant's case, and since there was no showing that the jurors acquired any bias because of anything they heard when the court disposed of three or four unrelated cases upon pleas of guilty.

2. **Criminal Law § 88.4— cross-examination of defendant—prior conviction—denial—no prejudice**

Defendant was not prejudiced by the district attorney's question on cross-examination as to whether defendant had been convicted of first degree burglary and rape since there was no evidence in the record tending to show that the district attorney asked the question in bad faith or that defendant attempted to develop such evidence, and since defendant answered the question with a positive denial before the judge had time to rule on defense counsel's objection.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

APPEAL by defendant under G.S. 7A-27 from *Hobgood, J.*, 5 April 1978 Session of the Superior Court of ROBESON. This case was docketed and argued as Case No. 63 at the Fall Term 1978.

Defendant was convicted of an assault with the intent to commit rape and first-degree rape. He appeals concurrent sentences of fifteen years and imprisonment of life in the State Prison. Evidence for the State tended to show the following events:

On the evening of 11 November 1977 Jack Jacobs, Robert Hunt, Mrs. Margaret Louise Edwards (a prosecuting witness) and her two daughters, Lizzie Ann Edwards, aged 16 (a prosecuting witness), and Debra Lee Edwards, went to the home of Liza Mae Hunt where they joined others who had come to drink beer, listen to music and dance. All but Lizzie Ann and Debra drank some beer. While they were at Liza's house defendant Adnell Hunt, whom Lizzie had not known before, arrived and joined the party.

When Mrs. Edwards and her daughters left Liza Mae's house Jack Jacobs drove them home and then went on his way. Although they had not been invited to do so, defendant and Robert Hunt followed the Jacobs car to the Edwards home and entered the house with them. Mrs. Edwards testified, "I didn't tell them not to come in [and] I didn't ask them to come in."

Once inside, the group sat in the front room and listened to music for a while. The two men drank beer which they had brought with them; the women drank nothing. After a while Mrs. Edwards told the men to leave, that she wished to retire. Defendant said his car was hot and wouldn't crank until it had cooled off. When told to try it anyway, he made an unsuccessful effort to start the car and came back into the house. Mrs. Edwards retired to her bedroom and in about ten minutes the two men again went out to the car. Debra and Lizzie walked to the front porch with them, but when the car would not start they reentered the house.

The girls were in their mother's bedroom when they heard defendant go down the hall and into the kitchen. From the kitchen defendant entered the bedroom, closed the door, "snatched out a knife" from under his shirt, and said, "he wouldn't leave until he got to see what he wanted to see." Mrs. Edwards grabbed the knife and tried to take it from him. At that time the light, which "had a string hanging down from it," went off. The two girls were screaming and Lizzie Ann "hollered" to Robert Hunt, who was in the front room, to "call the law." Robert made a vain attempt to push the door open, and at that point the light came back on.

Lizzie Ann observed that Mrs. Edwards' hand had been cut, that there were four slits in the back of her bloody nightgown, and that defendant was holding the knife next to her neck. Defendant told Debra and Lizzie that if they did not have their

clothes off in two minutes he would kill their mother. However, because it was cold in the bedroom, defendant directed everyone into the front room. When they went in they found that Robert Hunt had gone. Defendant then ordered Debra and Mrs. Edwards to return to the bedroom, and forced Lizzie to undress by threatening to kill her with the knife if she didn't do what he said. Immediately thereafter he proceeded to have sexual intercourse with her, all the while holding the knife against her back. After about 10 minutes he called Mrs. Edwards into the front room and told her to watch what he and Lizzie were doing. Both Lizzie and Mrs. Edwards were crying and defendant threatened to kill Lizzie if Mrs. Edwards didn't stop crying. Mrs. Edwards stopped. Lizzie testified that at all times during the events detailed herein defendant held the knife by the handle and the sharp side of the blade against her.

After finishing with Lizzie, defendant ushered her and Mrs. Edwards back into the bedroom. Not seeing Debra he demanded to know where she was. Mrs. Edwards told him Debra had gone for help. With the knife at Lizzie's back he marched the two women out on the back porch and forced Lizzie to call Debra. When Debra did not answer he returned them to the bedroom where, at knife point, he again penetrated Lizzie and threatened to kill her unless Mrs. Edwards made oral contact with his scrotum. After three to five minutes of this he required Mrs. Edwards to have sexual intercourse with him and directed Lizzie to lie beside him. Some minutes later he required Mrs. Edwards to perform cunnilingus upon Lizzie and then fellatio upon him. All this time he had the knife at Lizzie's throat. In about ten minutes he told Mrs. Edwards to stop and again ordered Lizzie to mount him. Shortly thereafter he directed her to lie down beside him.

He was lying on the bed between the two women, the knife still on Lizzie, when they heard sirens approaching and cars stop in the yard. Defendant threatened the women if they moved or made a sound. Nobody moved until they heard the order from outside, "Break in the door!" Defendant then leaned over Mrs. Edwards and put the knife on the floor. At that moment four uniformed officers came into the room. Defendant was arrested and the two women were taken to the emergency room of the Southeastern General Hospital. There they were examined by Dr. W. E. Neal, Jr., who testified that Mrs. Edwards had multiple

superficial lacerations of the left hand, back and right side of the neck and that a pelvic examination revealed motile sperm in both the mother and daughter. Each one told the doctor that, at knife point and upon threat of death, defendant had forced her to have intercourse with him.

Defendant, aged 29, testified in his own behalf and called three witnesses. The record states without further explanation that the testimony of these witnesses "is omitted." Defendant's testimony tended to show:

He was among those present at the home of his cousin, Liza Mae Hunt, on the evening of 11 November 1977. While there he danced with Lizzie Edwards, and she asked him to go home with her. When the Edwards left the party, he and Robert Hunt followed them in defendant's car, which contained a case of beer. At the Edwards' home they listened to music, drank beer and danced. Then there came a time when Robert and Debra walked out of the house and Mrs. Edwards was not in the room, and that's when he and Lizzie "had sexual intercourse but [he] didn't have it by no force."

Defendant admitted he had sexual intercourse with Lizzie Ann three times that night, once in the front room and twice in the bedroom. However, he insisted it was all by consent. He said, "I at no time threatened her. I don't recall threatening her at any time. I don't recall threatening her mother at any time. I don't recall threatening her sister." Defendant denied going into the kitchen, taking a knife into the bedroom, cutting Mrs. Edwards, and being in the bed with Mrs. Edwards. He insisted that the account which Lizzie and Mrs. Edwards gave of events transpiring in the bedroom that night was "all made up on him by somebody." His testimony was that Lizzie Ann was in the bedroom with him when the officers got there and he didn't know where her mother was.

Upon cross-examination, defendant testified that he had been convicted of assaulting a police officer, disorderly conduct, assault on a female, carrying a concealed weapon, driving without a license, driving under the influence of an intoxicant, hit and run, assault with a deadly weapon, and that he had escaped while serving a six-month's sentence.

Rufus L. Edmisten, Attorney General, and Thomas F. Moffitt, Assistant Attorney General, for the State.

Adelaide G. Behan for defendant.

SHARP, Chief Justice.

[1] Defendant's first assignment of error is that the trial judge permitted his case to be tried by jurors who, on the morning of his trial, had the opportunity to hear "a number of pleas and sentences imposed" in other and unrelated cases. Defendant argues that this situation violated the spirit of G.S. 15A-943 and "created a jury biased against him." His thesis is that "after hearing police officers testify in three or four other cases in which there has been an admission of guilt" jurors would be more inclined to credit the officers' testimony in cases in which the defendant's plea was not guilty, and might be inclined to desert their true function and become a vigilance committee. We find no merit in these contentions.

G.S. 15A-943 has no application to this case. Subsections (a) and (c) of this statute deal with the calendaring of arraignments and subsection (b) only provides that no defendant may be tried during the week in which he is arraigned unless he consents. *See State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977). Defendant does not suggest that he was arraigned the same week of his trial. Nor does the record disclose any reason to suspect that the jurors might have been prejudiced against defendant by anything they heard when the court disposed of "three or four" unrelated cases upon pleas of guilty.

There is no way in which a criminal session of court can be held and jury trials conducted without exposing jurors to the courthouse environment. However, "our system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1937). Defendant had ample opportunity during the selection of the jury to question the jurors about possible bias and to challenge those who indicated they had acquired any bias. *See State v. Baldwin*, 276 N.C. 690,

174 S.E. 2d 576 (1970); *State v. Corl*, 250 N.C. 258, 108 S.E. 2d 615 (1959). No evidence of bias was disclosed.

[2] Defendant next contends that the following incident which occurred during the cross-examination of defendant demonstrated bad faith on the part of the district attorney and was sufficiently prejudicial to require a new trial:

Q. 1973, did you not get convicted of first-degree burglary and rape?

Objection by defendant.

A. No, Sir, I did not. Found me not guilty on it.

With reference to this question and answer we note: (1) No evidence in the record tends to show that the district attorney asked the question in bad faith or suggests that defendant attempted to develop such evidence. (2) Before the judge had time to rule on the objection defendant answered the question with a positive denial. *See State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660 (1967). We find no error prejudicial to defendant in this exchange.

The third assignment which defendant brings forward attacks "numerous incidents in the argument of the district attorney as having such a prejudicial effect on the jury as to constitute reversible error when reviewed cumulatively." The arguments of both defense counsel and the district attorney are in the record, and we have carefully considered each in its entirety and in relation to the other. Having done so, we conclude that the district attorney's remarks did not exceed the bounds of legitimate argument and overrule this assignment also. Numerous decisions of this Court hold that the argument of counsel must be left largely to the control and discretion of the presiding judge whose discretion we will not review "unless the impropriety of counsel was gross and well calculated to prejudice the jury." *State v. Barefoot*, 241 N.C. 650, 657, 86 S.E. 2d 424, 429 (1955). *See State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975).

The conscientious trial judge carefully monitored the arguments of counsel in this case from beginning to end. During the course of the district attorney's speech to the jury he was interrupted twenty-five times by the objections of defense counsel. All but one were overruled. In sustaining the one, Judge Hobgood

corrected the district attorney's misinterpretation of a totally irrelevant and inconsequential opinion expressed by defense counsel in her argument. This action by the judge removed any possible prejudice that might have been engendered by the misstatement. *State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977).

Appropriate in this case is Justice Higgins' comment in *State v. Barefoot*, supra at 658, 86 S.E. 2d at 430, "In view of the evidence of this case it is difficult to see how the solicitor's argument could have influenced the verdict." So far as we know, conduct more bestial and depraved than that attributed to this defendant by the State's witnesses cannot be found in the pages of our Reports.

Defendant's fourth and final assignment of error charges that his right of confrontation under N.C. Const., Art. I, § 23 was abridged when the court "permitted the witness, Lizzie Ann Edwards, to respond to the questioning of the district attorney in a narrative manner." As to this assignment, it suffices to say that in the record statement of this witness's evidence we perceive no irregularity in the manner in which she gave her testimony.

In the trial below we find

No error.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES HOWARD ROSS

No. 37

(Filed 20 April 1979)

Criminal Law § 75.14— mental capacity to confess—admission of confession erroneous

The trial court erred in denying defendant's motion to suppress his confession made approximately twenty-four hours after commission of the crime charged where defendant offered evidence that he was mentally incompetent at the time he confessed, such evidence including a history of mental illness

and hospitalization therefor, accounts of strange behavior such as running through the woods without his shirt on when he and his brother attended a baseball game, testimony by defendant's brother that it was necessary to keep a person with defendant because he could not care for himself, and testimony by a psychiatrist that defendant was suffering from schizophrenia and had memory problems and delusions; the State's only evidence with respect to defendant's competence at the time of his confession was the testimony of a deputy sheriff that defendant appeared to be comfortable and that defendant's statements made sense to him; portions of defendant's statements revealed that defendant's story to the deputy sheriff was not logical and sensible; and defendant's confession could not be admitted on the chance that it was made during a lucid interval.

APPEAL by defendant from the judgment of *Herring, J.*, entered in the 14 August 1978 Criminal Session of UNION County Superior Court.

The defendant was charged, in an indictment proper in form, with first degree burglary. On 14 August 1978 he entered a plea of not guilty by reason of insanity.

At trial the evidence for the State tended to show the following:

On 25 June 1978 Joe Hudson, his wife and his son went to bed at approximately 11:00 p.m. Mr. Hudson, who was the last one to retire, testified that the outside doors and the windows were all closed because his house is air conditioned. A short time later, at about 12:30 a.m. on 26 June 1978, Mr. Hudson woke up to the barking of his dog who slept in the bedroom with him and his wife. His wife got up to let the dog out of the room, and he heard her say, "Could I help you?" Mr. Hudson then jumped out of bed, and the defendant was in the hallway of his house. The defendant asked for a drink of water. The two men went into the kitchen, and the defendant drank two glasses of water. Mr. Hudson testified that the defendant was "sweating a good bit" and that he "looked strange."

The defendant and Mr. Hudson went outside, and the defendant started walking away from the house. Mr. Hudson went inside and called the sheriff's office. The defendant came back to the door of the Hudson residence and asked to be let in. Mr. Hudson said no, and the defendant replied, "I'll break in." Mr. Hudson got his shotgun, and the officers arrived a few minutes later.

The officers searched the defendant and found a steak knife in his front pocket. Mr. Hudson identified the knife as belonging to him. The defendant made a formal incriminating statement to the officers at about 11:00 p.m. on 26 June 1978 that was introduced into evidence at trial.

The evidence for the defendant tended to show the following:

Dr. James Groce is a staff psychiatrist at Dorothea Dix Hospital. The defendant was sent to that institution on 29 June 1978, and he was released on 27 July 1978 for trial.

Dr. Groce testified as to what the defendant had told him of his past. The defendant had been admitted to several psychiatric hospitals in the past, primarily in New York. He had recently come to North Carolina where some of his family lives. The defendant had gotten a job at a horse farm in Greensboro for two or three days, but because of a "misunderstanding" he was fired and at the same time was involuntarily committed to John Umstead Hospital in Butner. The defendant was discharged a few days later, and he went to live with his brother in Union County three or four days before the incident in question occurred.

The defendant had told Dr. Groce that on the evening of 25 June 1978, his brother had left him home alone. He was feeling restless and was resentful that his brother was out having a good time. There were two telephone calls, and the defendant became upset and tore the telephone out of the wall. He left the house to go into town; however, he was not certain in which direction or how far away town was. As the defendant was walking along the highway, he began seeing strange lights behind him in the trees, and he felt he was being observed by flying saucers or UFO's. The defendant became hot and tired. He saw a house with some lights on, and he thought the people inside could tell him how to get to town. The door was unlocked, so the defendant walked in. The rest of defendant's story to Dr. Groce was basically the same as Mr. Hudson's account of the events, except that when the police arrived, the defendant was apprehensive. He was uncertain whether the officer was a real policeman or whether he was from outer space.

Based on his observations of and interviews with the defendant at Dorothea Dix Hospital, Dr. Groce testified that he felt the

defendant was suffering from "chronic, undifferentiated schizophrenia." The doctor concluded that in his opinion at the time of the incident in question the defendant "did know the nature of his behavior but did not appreciate the quality of that behavior. . . . [H]e was not able to distinguish right from wrong in the usual sense."

Mr. Ray Flynn, an adult therapist at the Piedmont Area Mental Health Center, testified that on 23 June 1978 the defendant came into the clinic without an appointment. The defendant requested medication and treatment, and an appointment for him to meet with a staff psychiatrist was made for the following week. Mr. Flynn stated that in his opinion the defendant's judgment was "poor" and that "he was suffering from some form of psychosis."

Mr. A. C. Ross, the defendant's brother, testified that he brought the defendant to his home from Greensboro a few days before the defendant was found in the Hudson house. Mr. Ross farmed during the day, but he had a woman come to his home to stay with the defendant while he was working because "I [Mr. Ross] felt that he [the defendant] was in such condition that he simply couldn't look after himself without having somebody watch him."

On 25 June 1978 Mr. Ross took the defendant to a baseball game in Pineville. The defendant would not talk with anyone, and twice he took his shirt off and ran through some woods. The two men went home, and the defendant went to lie down at about 10:00 p.m. at his brother's request. Mr. Ross fell asleep on the couch, and he did not wake up until the police came to his house after they had picked the defendant up at the Hudson residence. Mr. Ross stated that "it looked like he [the defendant] was just off that day [25 June 1978]."

The judge submitted the charges of first degree burglary and nonfelonious breaking or entering to the jury. The jury found the defendant guilty of first degree burglary. After receiving a sentence of life imprisonment, the defendant appealed to this Court.

Other facts relevant to the decision will be included in the opinion below.

L. K. Biedler, Jr. and James C. Fuller, Jr. for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Guy A. Hamlin for the State.

COPELAND, Justice.

The defendant contends the trial court erred in not granting his motion to suppress his confession made to the police officers on 26 June 1978. We agree; therefore, the defendant must be granted a new trial.

Defendant argues that he was incompetent at the time the confession was made. The United States Supreme Court considered this issue in *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242, 80 S.Ct. 274 (1960). That case makes it clear that an accused's confession cannot be used against him when "the evidence indisputably establishes the strongest probability that [the defendant] was insane and incompetent at the time he allegedly confessed." *Id.* at 207, 4 L.Ed. 2d at 248, 80 S.Ct. at 280.

In making this determination, we must look at all the circumstances and the entire record. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death penalty vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). The evidence as to this defendant's probable incompetence at the time he confessed is as follows:

1. The defendant had a long history of mental illness, dating back some twelve or thirteen years, and he had been hospitalized for it several times in the past.

2. The last time he had worked for any significant period of time was in 1974.

3. Approximately one week before the confession was made, the defendant was involved in "an incident" in Greensboro resulting in his involuntary commitment to John Umstead Hospital.

4. Three days before the crime and confession in question, the defendant went to a mental health clinic. He was given medication, and an appointment with a psychiatrist was made for him for the following week. The therapist who saw him testified that the defendant's mood and affect were "inappropriate," he

had "poor judgment," and "there was a very high likelihood that he was suffering from psychotic conditions," specifically schizophrenia.

5. Mr. A. C. Ross, defendant's brother, testified that when he brought the defendant to his home from Greensboro a few days before this crime occurred and the incriminating statement was made, he was going to have the defendant go to work with him, "but after I [defendant's brother] saw his condition, he wasn't able to work." Mr. Ross had to have somebody stay with the defendant during the day while he was at work because Mr. Ross felt the defendant was not capable of looking after himself. The defendant's brother stated that he was the one who arranged for the defendant to go to the mental health clinic for medication and treatment. He related defendant's bizarre behavior of running through the woods two times without his shirt on 25 June 1978 while the two men were at a baseball game. Mr. Ross testified "it looked like he [the defendant] was just off that day [25 June 1978, the day of the crime and the day before defendant made the confession]."

6. Mr. Hudson testified that when the defendant was found in his home about 12:30 a.m. on 26 June 1978, he "looked strange" and in fact Mr. Hudson commented to the defendant that he looked strange.

7. Dr. Groce, a psychiatrist, observed and interviewed the defendant beginning on 29 June 1978, three days after the statement in question was made. He testified that the defendant at times "seemed to be confused" and had had memory problems in the past. The doctor stated that defendant was suffering from "chronic, undifferentiated schizophrenia," which includes delusions and a "misinterpretation of reality." Defendant's problem is a long standing one, and the doctor testified that it may continue "indefinitely." Dr. Groce did state, however, that defendant's condition is "variable" or "fluctuating," and the defendant is much more likely to be sane when he takes his medication, thorazine.[1]

1. There was evidence that the defendant had a week's prescription of thorazine issued to him on 23 June 1978. Defendant's brother testified that a few hours before the defendant was found in the Hudson home, he had told the defendant to take his medicine before going to bed. Therefore, one can infer that the defendant was properly on his medication at the time of the crime. At the time of defendant's confession, however, he had been in custody for almost twenty-four hours. There is absolutely no evidence that he had access to his medication while in jail. In fact, one of the officers who was present at the time of the statement testified during *voir dire* not only that "[t]he defendant did not appear to be under the influence of any alcoholic beverages, drugs, narcotics or medicine of any kind," but also that "I [the officer] did ask him if he was taking *any* medication." Thus, this inference cannot apply to the time defendant made his incriminating statement.

The only evidence the State introduced as to defendant's mental competence at the time of his confession was the testimony of Joe Moore, a Deputy Sheriff of Union County who was present when the statement was given. Officer Moore stated that the defendant appeared to be comfortable and "[w]hatever he said to me on that occasion, it did appear to be logical and make [sic] sense to me." Yet portions of the statement itself reveal that defendant's story to Officer Moore was not logical and sensible:

> "I, James Howard Ross, went to bed [on 25 June 1978] and laid down and tried to go to sleep. And something seemed to be going wrong, and I got the urge to have sex. And I, James Howard Ross, got out of bed and tore the telephone out of the wall and threw it under the bed and started packing my bags. And I was confused, and I, James Howard Ross, just left everything there and left A. C. Ross' residence and went walking up the road. And I had sex on my mind. I walked for a while, and then I would run for a while."

The State would have us uphold the admission of defendant's confession on the mere chance that it was made during a lucid interval of the defendant. This we cannot do. In rejecting this argument, the United States Supreme Court stated:

> "It is, of course, quite true that we are dealing here with probabilities. It is *possible*, for example, that [the defendant] confessed during a period of complete mental competence. Moreover, these probabilities are gauged in this instance primarily by the opinion evidence of medical experts. But this case is novel only in the sense that the evidence of insanity here is compelling, for this Court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was 'of low mentality, if not mentally ill,' or had a 'history of emotional instability.' " *Blackburn v. Alabama*, supra at 208, 4 L.Ed. 2d at 249, 80 S.Ct. at 281. (Emphasis in original.) (Citations omitted.)

When all this evidence is weighed and considered, the inescapable conclusion is that "the confession most probably was not the product of any meaningful act of volition." *Id.* at 211, 4 L.Ed. 2d at 250, 80 S.Ct. at 282. In *Blackburn* the state had introduced evidence of that defendant's sanity when he confessed through the testimony of a policeman that the accused was clear-

eyed, talked sensibly and did not appear nervous when the statement was made and through the deposition of a doctor that in his opinion the defendant's mental condition was "normal" when the crime was committed and "good" when the confession was given. Nevertheless, after scrutinizing the entire record, the Supreme Court reversed the conviction because the trial court had admitted a confession made when the accused was in all probability mentally incompetent. Under the compelling facts in this case, we must do the same.

For the foregoing reason, we order that defendant be granted a

New trial.

STATE OF NORTH CAROLINA v. GLENN WOOD FORD

No. 59

(Filed 20 April 1979)

1. **Bills of Discovery § 6; Constitutional Law § 30— no statutory right to discover criminal record of witness**

North Carolina law does not grant a criminal defendant the right to discover the criminal record of a State's witness.

2. **Constitutional Law § 30— failure to disclose criminal record of witness—no denial of due process**

Defendant was not denied due process by the prosecutor's failure to disclose information about prior convictions and misconduct of a State's witness where defendant failed to show (1) that the witness in fact had a significant record of degrading or criminal conduct; (2) that the State knew of such conduct by its witness and withheld such information; and (3) that its disclosure considered in the light of all the evidence would have created a reasonable doubt of his guilt which would not otherwise exist.

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 that a witness intervened at a party to prevent a fight between defendant and the victim; a few minutes later, two other witnesses saw defendant strike the drunken victim, who immediately slumped over an automobile; when the first witness went to investigate, he found the victim slumped against the car and defendant standing over him with an open knife in his hand; defendant told the witness on the

way to the hospital that he had cut the victim twice; and after it became apparent that the victim's condition was serious, defendant told the witness, "Look, man, don't say nothing."

4. **Criminal Law § 175.2— denial of recess to locate witness**

The trial judge did not abuse his discretion in the denial of defendant's motion for a recess to locate an allegedly newly discovered witness.

5. **Homicide § 30.2— second degree murder case—failure to submit voluntary manslaughter**

The trial court in a second degree murder case did not err in failing to instruct the jury on the lesser included offense of voluntary manslaughter where all the evidence tended to show that the person who stabbed the victim intentionally assaulted him with a deadly weapon, the use of which proximately caused his death; there was no evidence tending to show a killing in the heat of passion or the use of excessive force in self-defense; and defendant's evidence was to the effect that someone else assaulted and killed the victim.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by the defendant pursuant to G.S. 7A-27(a) from *Seay, J.*, 5 December 1977 Criminal Session of the Superior Court of GUILFORD, docketed and argued as Case No. 29 at the Fall Term 1978.

Defendant, charged with the murder of Robert J. Enoch in an indictment drawn under G.S. 15-144, was tried for murder in the second degree. The State's evidence tended to show:

On the evening of 17 June 1977 Robert Enoch (the deceased), Larry Lee Smith (the prosecuting witness), and Glenn Ford (the defendant) went in Smith's car to The Paradise, "a drive-in place." There they drank beer and defendant "tried to talk to Connie Boykin." She joined the group, and the four went to a party on Clapp Street, where 30-40 persons had gathered. Smith testified that en route to the party defendant appeared to be "mad" because he was sitting in the front seat and Enoch was in the back with Connie Boykin.

According to Smith's further testimony, after they arrived at the party, the four "sort of separated and Connie got to arguing with some guys." Enoch, who had been drinking and was "really drunk," stepped between the guys and said something to the effect, "Don't you be arguing with my woman." When defendant heard this imperative he said, "That's not even Robert's woman."

When defendant and Enoch then began arguing with each other, Smith left his car, got in between the two and said, "You all cut that out because we are supposed to be together." This stopped the arguing and Smith got under the wheel. Enoch started to get in beside him but, for some reason, walked away.

After waiting two or three minutes for Enoch and defendant to come back, Smith went to look for them. Two or three car lengths down the street he saw Enoch slumped down against the car. Defendant was standing in front of Enoch and no one else was around. When Smith asked defendant what had happened to Enoch, defendant said he had hit him. Smith saw blood around Enoch's teeth and observed that defendant was holding an open knife with a blade three or four inches long. He "sort of" pushed him back away from Enoch and said, "What are you doing, man?" Smith then picked Enoch up under his arms and dragged him back to the car, where defendant helped put him in the back seat.

When Smith stated his intention to take Enoch to his home "to let him sleep it off," defendant told Smith he'd better take him to the hospital because he had cut Enoch twice. On the way to the hospital defendant kept insisting that Smith drive faster; that he should "not worry about the red lights and things." In the emergency room of the Moses Cone Hospital where they remained several hours, defendant said to Smith, "Look man, don't say nothing." Sometime before 12:30 a.m. on June 18th Enoch died from the stab wound in his chest. He had also been stabbed in the back, but the pathologist who performed an autopsy testified that this cut was not in itself a fatal wound.

From the hospital Smith and defendant were taken by the police "down to the Homicide Squad," where they remained about two hours. However, neither Smith nor defendant told the police anything at that time. The two left the police station in Smith's car and, while Smith was driving defendant to his mother's house, defendant reached back and pulled a knife from the back seat. Smith told defendant the police had searched the car and he didn't understand how they had missed the knife. As they drove along Smith asked defendant if he didn't "feel anything" and he said, "I'm just sorry it happened that way."

During the next two days, June 18th and 19th, Smith said the fact that defendant had stabbed Enoch and the police didn't know

who did it, plus the fact that defendant was the brother of his girl friend, Hannah Rose Ford, "was messing up his head and he didn't know how to deal with it." During that time Smith sought the advice of several friends, including his ex-wife Jacquelin Smith and Larry Laverne Jones. (Inter alia, Jacquelin said she told Smith that if she were he, she would leave.) For the purpose of corroborating Smith's testimony Larry Laverne Jones and Jacquelin Smith each testified that Smith had told him the defendant had stabbed Robert Enoch.

Connie Boykin and Charles Lee Williams, who were also at the party when Enoch was stabbed, testified that they saw Enoch slump over after defendant hit him in the back at a time when nobody else was around those two.

The defendant himself did not testify, but he called witnesses whose testimony tended to show:

Kenneth Eugene Street was among those present at the party on Clapp Street on 17 June 1977. He testified that shortly after 11:10 p.m. he saw the prosecuting witness Smith come from the passenger side of his car and go out into the street where Enoch was standing. When he got to Enoch, Smith hit him with a knife which he had in his right hand. At that time defendant Ford was leaning on a Plymouth, his back to the street. When Street saw what had happened he ran back to his car, put his two sisters inside and went to see about his girl friend. He then returned to the scene of the stabbing, where he observed Enoch on his knees between Smith's legs and defendant still leaning on the Plymouth. "Larry Smith hollered over to Glenn and told him to help him put Robert Enoch in the car. It took Glenn a few minutes to get adjusted to what had happened and he helped Larry put him in the car, and they stood there about five minutes arguing about where to take him . . . and after they argued they entered the car and left off Clapp Street." Street also testified that he did not see defendant take part in any of the arguments at the party and that he did not see defendant have a knife or make any aggressive movements toward Enoch.

Alice Faye Ford, sister of defendant, testified that in the summer of 1976 Enoch and her sister, Hannah Rose, were living together. At the time Enoch was stabbed, however, Hannah Rose and Smith were going together. In May of 1977 Smith "busted

Hannah Rose's lip and gave her a black eye" because he found her, Enoch, and Alice Faye drinking together in the latter's home. On cross-examination Smith acknowledged "that Hannah Rose went with Robert Enoch" before she started going with him, but he insisted that he and Enoch had "never changed no words over Hannah Rose. Me and Robert was friends." At the time of the trial Smith said he had "gone with Hannah Rose about a year and one-half and they had been living together"; that they had only discussed what happened on the night of 17 June 1977 "once or twice"; that they "just didn't talk about it with each other."

The jury found defendant guilty of second degree murder and he appealed a sentence of life imprisonment.

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

Richard W. Gabriel for defendant.

SHARP, Chief Justice.

Defendant's first assignment of error is that the court's denial of his motion "for disclosure of impeaching information" constituted a denial of his constitutional rights of due process. In this motion defendant requested that the State be ordered to disclose (1) all prosecutions, investigations or possible prosecutions which had been brought or which were pending against the State's prosecuting witness Larry Lee Smith; (2) "all records and information revealing felony convictions attributed to this witness"; and (3) "all records and information showing prior misconduct or bad acts committed by this witness."

[1] We note first that North Carolina law does not grant defendant the right to discover the criminal record of a State's witness. This right did not exist at common law and G.S. 15A-903 does not grant the defendant the right to discover the names, addresses, or criminal records of the State's witnesses. *See State v. Smith*, 291 N.C. 505, 523, 231 S.E. 2d 663, 674-5 (1976). The only issue, therefore, is whether the information which defendant sought from the prosecution was of such significance that the prosecutor's failure to disclose it resulted in the denial of the defendant's due process right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). The answer is most certainly *No*.

[2] To establish a denial of due process defendant would have had to show (1) that Smith *had* a significant record of degrading or criminal conduct; (2) that the impeaching information sought was withheld by the prosecution; and (3) that its disclosure considered in light of all the evidence would have created a reasonable doubt of his guilt which would not otherwise exist. *United States v. Agurs, supra* at 112, 49 L.Ed. 2d at 354-55; 96 S.Ct. at 2401-2. In this case, the defendant failed to show that the State knew of any criminal convictions against its witness Smith or that Smith, in fact, had any criminal record. Indeed, during his cross-examination of Smith defense counsel did not once ask him if he had ever been convicted of a violation of the law. Such an inquiry of course, would have been a proper subject for cross-examination. *State v. Foster*, 293 N.C. 674, 684-685, 239 S.E. 2d 449, 456-7 (1977). Defendant's first assignment of error is overruled.

[3] Defendant's eighth assignment is that the court erred in overruling defendant's motion for judgment as of nonsuit made at the close of all the evidence. In his brief defendant "maintains" that no evidence in this case "can reasonably be construed to show an intentional killing with a deadly weapon." This assertion sets at naught the testimony of Larry Lee Smith, Connie Boykin, and Charles Lee Williams, which tended to show:

En route from The Paradise to the Clapp-Street party defendant made an extremely obscene remark about the deceased Enoch, who was then sitting in the back seat of Smith's automobile with Connie Boykin. At the party defendant again expressed resentment toward Enoch when he ordered "a guy" who was disputing with Connie "not to be arguing with my woman." In consequence, Smith intervened to prevent a fight between Enoch and defendant. A few minutes later, Boykin and Williams saw defendant strike the drunken Enoch, who immediately slumped over a Plymouth automobile. When Smith went to investigate he found Enoch slumped against the car and defendant standing in front of him. In his hand defendant held an open knife with a blade three or four inches long. Defendant, who helped Smith put the bleeding Enoch in Smith's car, urged him to drive fast to the hospital because, he said, he had cut Enoch twice. In the emergency room, after it became apparent that Enoch's condition was serious, defendant said to Smith, "Look, man, don't say nothing."

This evidence was clearly sufficient to take the issue of defendant's guilt of second degree murder to the jury. The credibility of the State's and defendant's witnesses was for the jury and their decision was to accept the State's version of the knifing on Clapp Street. Defendant's eighth assignment of error is overruled.

[4] We next examine defendant's 13th assignment of error, that the trial judge erred in denying defendant's motion for a recess to locate an allegedly newly discovered witness. Just prior to the judge's charge, after defendant had rested his case, he requested the court to grant a recess for the purpose of allowing him to locate Ricky Johnson. Defense counsel said that Ricky Johnson "is alleged to have been the occupant of the apartment on Clapp Street at which the party was held and in which the defense is informed was an eyewitness to this matter."

A motion to recess is addressed to the sound discretion of the trial judge, and nothing in the record of the case suggests that the judge abused his discretion in denying defendant's motion. The record shows that the defense attorney had been appointed six months before the trial. No subpoena had been issued for Ricky Johnson, whose presence at the party was well known to defendant's main witness, Kenneth Eugene Street, who testified that it was Ricky who broke up Connie Boykin's first argument after she arrived at the party. He did not, however, mention his presence in the street when he testified he saw Smith stab Enoch. It is hardly plausible that Street would have overlooked a witness who would have corroborated his testimony had one been available. Assignment No. 13 is overruled.

[5] Defendant's assignment No. 14 challenges the court's failure to instruct the jury on the lesser included offense of voluntary manslaughter.

A trial judge's duty to instruct the jury as to a lesser included offense of the crime charged arises only when there is evidence from which the jury could find that the defendant committed the lesser offense. When there is no such evidence the court should refuse to charge on the unsupported lesser offense. *State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). In this case all the evidence tends to show that the person who stabbed Enoch intentionally assaulted him with a deadly weapon, the use

of which proximately caused his death. This evidence was sufficient to raise the inference that the killing was unlawful and done with malice. *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978); *State v. Price*, 271 N.C. 521, 157 S.E. 2d 127 (1967). The record is devoid of any evidence tending to show a killing in the heat of passion or the use of excessive force in the exercise of the right of self-defense. Defendant's evidence was to the effect that he never assaulted the deceased, but that the witness, Larry Lee Smith, was the killer. This evidence did not tend to raise the issue of malice or unlawfulness but to show that defendant was not the killer and thus not guilty of any crime. We hold, therefore, that there was no evidence to support the lesser included offense of manslaughter. *See State v. Hampton, supra.*

Defendant's remaining assignments disclose no prejudicial error and merit no discussion. We find no cause to disturb the jury's verdict.

No error.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JOHN EXCELL McCOMBS, JR.

No. 29

(Filed 20 April 1979)

Homicide § 28.4— defense of habitation—deceased in defendant's home—no duty to retreat—jury instructions proper

The use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances that the occupant reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony, but once the assailant has gained entry, the usual rules of self-defense replace the rules governing defense of habitation with the exception that there is no duty to retreat; therefore, where the evidence tended to show that deceased had entered defendant's home, was proceeding down the hall and was within three feet of defendant when the fatal shot was fired, the trial judge properly instructed that defendant was under no duty to retreat and correctly left it to the jury to determine whether, under the facts

and circumstances found by the jury, the State had proved beyond a reasonable doubt that defendant did not act in self-defense.

APPEAL by the State from the decision of the Court of Appeals reported in 38 N.C. App. 214, 247 S.E. 2d 660 (1978), finding error in the trial before *Baley, S.J.*, at the 1 November 1976 Session of PERSON Superior Court.

Defendant was charged in separate bills of indictment with first degree murder, possession with intent to distribute marijuana, possession of lysergic acid diethylamide, and manufacturing marijuana. 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 on 29 April 1976 at approximately 9:20 p.m. Larry D. Bullock and four other officers of the City of Durham's Narcotics Squad armed with a search warrant proceeded to Apartment L-5 at 410 Pilot Street in Durham for the purpose of searching that apartment for marijuana. The officers were operating unmarked automobiles and were dressed in blue jeans and denim jackets. After Officer Bullock knocked on the door of the apartment, defendant came to the front window, raised a sheet which was hanging over the window and looked toward Officer Bullock. He dropped the sheet, and the officers immediately heard running steps. Some ten or fifteen seconds later the officers called out, "Police officers, search warrant." Upon hearing no response, Bullock kicked the door open, and the officers again identified themselves as policemen with a search warrant. Officer Bullock proceeded through the living room to a hallway, where defendant, who was standing in the doorway to his bedroom or in the hallway, shot and fatally wounded him.

Sandra Yvonne Gaither testified that she, defendant and other persons were in defendant's bedroom. She was watching television, and defendant was working at his desk. There was a knock at the front door, and defendant left the room. She heard voices saying, "Police officers." Defendant then came back to the bedroom and obtained a pistol from the windowsill. Shortly thereafter, she heard a shot, and she ran into the bedroom closet.

The police officers searched the apartment and seized a quantity of marijuana, a pair of scales, some marijuana stems, and a vial of lysergic acid diethylamide.

The State offered expert testimony to the effect that Officer Bullock died as a result of a gunshot wound in his chest.

Defendant offered evidence to the effect that he was in his bedroom studying at about 9:25 p.m. when he heard a knock on the front door of his apartment. He went to the front window and observed a black man dressed in blue jeans. Since he did not know this person, he started to his roommate's bedroom to ask him if he knew the person standing at the front door. He then heard a "banging" on the door and thereupon went to his own room where he obtained a pistol. He returned to the doorway of the bedroom and fired at a man armed with a pistol who was proceeding from the living room toward him. He was about three feet from this man when he fired. He never heard anyone identify himself as a policeman until after he had fired the shot.

Defendant also offered evidence tending to show that he bore a good reputation.

The jury returned verdicts of guilty of murder in the second degree and guilty as charged on all other counts. Judge Baley imposed a sentence of imprisonment for a term of sixty years on the verdict of guilty of second degree murder. He sentenced defendant to imprisonment for a term of five years on the charge of possession of marijuana with intent to distribute to commence at the expiration of the sentence pronounced in the second degree murder case. On the verdicts of guilty of possession of lysergic acid diethylamide and manufacturing marijuana, defendant was sentenced to imprisonment for five years on each count to run concurrently with the sentences imposed in the murder case and the case of possession of marijuana with intent to distribute.

Defendant appealed and the Court of Appeals granted a new trial on the homicide charge for error in the trial judge's instructions. The State pursuant to G.S. 7A-31 petitioned this Court to certify for discretionary review that portion of the decision of the Court of Appeals which ordered a new trial in the homicide case. We granted the State's petition on 5 January 1979.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, and Nonnie F. Midgette, Assistant Attorney General, for the State.

C. C. Malone, Jr., and Albert L. Willis for defendant appellant.

BRANCH, Justice.

The single question before us for decision is whether the Court of Appeals erred in granting a new trial on the ground that the trial court failed to give a full instruction on the defense of home and property. In his oral argument, defense counsel conceded, and properly so, that the trial judge in all other respects correctly charged on self-defense. In the admittedly correct charge on self-defense, the trial judge, in part, charged:

> . . . If defendant reasonably believed that a murderous assault was being made upon him in his own home, he was not required to retreat but could stand his ground and use whatever force he reasonably believed to be necessary to save himself from death or great bodily harm. It is for you, the jury, to determine the reasonableness of the defendant's belief, from the circumstances as they appeared to him at the time. . . .

The right to defend one's habitation has been considered by this Court on many occasions, and there is little difficulty in stating the rules formulated by the Court. However, we believe the right is more limited than the decision of the Court of Appeals would indicate. The distinction between defense of habitation and ordinary self-defense has become somewhat blurred due to the varied factual situations in which these defenses arise. We must, therefore, review some of the applicable rules of law.

In *State v. Gray*, 162 N.C. 608, 77 S.E. 833 (1913), the deceased and two other persons in the nighttime came to defendant's home which was occupied by defendant, his wife and children. The intruders, who were cursing and using threatening language, tried to force an entrance into the house thereby terrifying the occupants of the household. Defendant observed a pistol in the hand of deceased and heard a shot. He asked deceased and his companions to leave, but deceased replied that he was coming in. Defendant then obtained his shotgun and shot deceased as he raised his foot to kick out a window. At trial, the judge charged the jury as follows:

> The court charges you that if you find from the evidence that the deceased came with three other young men to the home of the defendant and began shooting and cursing on the

porch of defendant's house, and threatened defendant, and refused to leave when ordered, and was attempting with violence to force an entrance into defendant's home, and that defendant had reasonable grounds to believe and did believe that he or some member of his family was in danger of losing their lives or suffering great bodily harm at the hands of the deceased, then defendant had a right to defend his house even to the extent of taking the life of the deceased; and if you further find from the evidence that defendant shot deceased, believing from the surrounding circumstances and the conduct of deceased that it was necessary to do so to protect himself or his family, then you should find the defendant not guilty.

However, the court further charged that the above instruction should be considered by the jury "only in the event that they should find that one of the men on the porch was armed with a pistol. 'If one was not armed with a pistol, you should not consider this; for the court charges you that if one was not armed with a pistol, there is no evidence of the use of gentle means by defendant.' "

In holding this charge to be erroneous, this Court stated:

The guilt or innocence of the defendant does not depend upon the presence of a pistol in the hands of the deceased, as stated by his Honor, but in the existence of a reasonable apprehension that he or some member of his family was about to suffer great bodily harm, or of the reasonable belief that it was necessary to kill in order to *prevent* the violent and forceful entry of an intruder into his home. [Emphasis added.]

* * *

Mr. Wharton, in his work on Criminal Law, 9th Ed., vol. 1, sec. 503, says: "An attack on the house or its inmates may be resisted by taking life. The occupant of a house has a right to resist even to the death the *entrance* of persons attempting to force themselves into it against his will, when no action less than killing is sufficient to defend the house from entrance. A man's house, however humble, is his castle, and his castle he is entitled to protect against *invasion*," and the same doctrine is enunciated in Bishop's New Criminal Law,

vol. 1, sec. 858; Hale's Pleas of the Crown, vol. 1, sec. 458. [Emphasis added.]

The principle that one does not have to retreat regardless of the nature of the assault upon him when he is in his own home and acting in defense of himself, his family and his habitation is firmly embedded in our law. *State v. Anderson*, 222 N.C. 148, 22 S.E. 2d 271 (1942); *State v. Bryson*, 200 N.C. 50, 156 S.E. 143 (1930). However, this rule does not allow one to use excessive force in repelling an attack, and whether excessive force is used is a question for the jury. *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419 (1910).

In *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966), the distinction between the rules governing defense of habitation and ordinary self-defense was clarified. There Justice Sharp (now Chief Justice) wrote:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally *prevent* the entry, even by the taking of the life of the intruder. Under those circumstances, "the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension". [Emphasis added.]

It is important to note that in *State v. Miller*, *supra*, this Court for the first time stated that "the rules governing the right to defend one's *habitation* against *forcible entry by an intruder* are substantially the same as those governing his right to defend himself."

The North Carolina cases indicate that the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances (e.g., attempted entry accompanied by threats) that the occupant rea-

sonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony. *See, State v. Miller, supra* (attempted forcible entry accompanied by threat to "tear the place up"); *State v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142 (1945) (attempted forcible entry); *State v. Baker*, 222 N.C. 428, 23 S.E. 2d 340 (1942) (attempted forcible entry accompanied by threat to kill); *State v. Gray, supra* (attempted forcible entry accompanied by threat to kill).

In our opinion, one of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them. Once the assailant has gained entry, however, the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat. 40 Am. Jur. 2d *Homicide*, Sec. 174 (1968). This is so because the occupant is then better able to ascertain whether the assailant intends to commit a felony or possesses the means with which to inflict serious personal injury upon the occupants of the dwelling.

Our conclusion that defense of habitation is available only in limited circumstances is further supported by the fact that different rules apply to invasions not accompanied by danger to the occupants. In this regard, it is well settled that a person is entitled to defend his property by the use of reasonable force, subject to the qualification that, in the absence of a felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted. *State v. Lee*, 258 N.C. 44, 127 S.E. 2d 774 (1962); *Curlee v. Scales*, 200 N.C. 612, 158 S.E. 89 (1931). Likewise, when a trespasser invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, he should lay his hands gently upon him, and if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object. *State v. Crook*, 133 N.C. 672, 45 S.E. 564 (1903); *State v. Taylor*, 82 N.C. 554 (1880). Should we extend the availability of the defense of habitation to cover *any* invasion of the home, every oc-

cupant who kills a person present in his home without authorization would be entitled to an instruction on defense of habitation. Such extension is both unwarranted and unnecessary. The previously cited cases dealing with defense of habitation are factually limited to the *prevention* of a forcible entry. Moreover, the rules governing defense of habitation, self-defense, defense of property, and eviction of trespassers are designed to allow an individual to defend his family, home and property in virtually any situation which might arise with respect to an invasion of his home while at the same time affording maximum protection of human life. To allow the distinctions between these rules to become blurred or to extend any of them to situations for which they were not intended would dilute the safeguards designed to protect human life.

It is apparent that the distinction between the rules governing defense of habitation and self-defense in the home is a fine one indeed. As we have noted, however, the importance of the distinction between the two lies in the different factual situations to which each applies. What constitutes "reasonable apprehension" in the face of an attempted forcible entry into one's home may well differ from that which constitutes "reasonable apprehension" when one is face to face with his assailant. We are of the opinion that a defendant is entitled to the benefit of an instruction on defense of habitation where he has acted to *prevent* a forcible entry into his home. Such an instruction would be more favorable to a defendant than would an instruction limited to self-defense. We are aware that occurrences necessitating such instruction may be rare indeed. We do not think it prudent, however, to abandon the rules governing defense of habitation and rely, for the sake of simplicity, solely on the rules of self-defense.

In instant case, the facts show that defendant did not shoot Bullock to *prevent* an entry into his habitation. Bullock had entered the door, crossed the living room, was proceeding down the hall and was within three feet of defendant when the fatal shot was fired. Under these circumstances, only the rules of self-defense were applicable, except that there was no duty upon defendant to retreat. The trial judge clearly charged on the exception that defendant was under no duty to retreat and correctly left it to the jury to determine whether, under the facts and cir-

cumstances found by the jury, the State had proved beyond a reasonable doubt that defendant did not act in self-defense.

We, therefore, hold that under the facts of this case the trial judge's charge was adequate. The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. JAMES EARL BUIE

No. 73

(Filed 20 April 1979)

1. **Criminal Law § 29— mental competency to stand trial—supporting evidence**

The trial court's conclusion that defendant was competent to stand trial was supported by the expert opinion testimony of a psychiatrist that defendant was competent to stand trial as a result of receiving medication.

2. **Searches and Seizures § 12— stop and frisk—reasonable grounds**

An officer had reasonable grounds to stop and frisk defendant, and stolen property found on defendant's person was admissible in evidence, where the officer had received a report of a burglary; he saw defendant shortly afterward, around 4:30 a.m., near the crime scene; defendant roughly matched the description of the suspect; defendant's clothing was wet as if he had been running or perspiring heavily; defendant could not produce identification, became nervous and began fumbling through his pockets; the officer became concerned that defendant might have a weapon and frisked him; and the officer noted a hard bulge in defendant's left front pocket, reached in and pulled out the object and discovered it to be a watch stolen during the burglary.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Giles Clark* at the 3 October 1977 Criminal Session of CUMBERLAND Superior Court and on bills of indictment proper in form, defendant was convicted of first degree burglary and felonious larceny. He was sentenced to imprisonment for life on the burglary conviction and ten years on the felonious larceny conviction, the sentences to run concurrently. We allowed a motion to bypass the Court of Appeals on the felonious larceny conviction. This case was argued as No. 35 at the Spring Term 1978.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the state.

Gregory A. Weeks, Attorney for defendant.

EXUM, Justice.

Defendant's principal assignments of error challenge the trial court's finding that he was competent to stand trial and its denial of his motion to suppress certain evidence on the ground that it was the fruit of an allegedly illegal search. We conclude that the trial court was correct in both these rulings as well as in denying defendant's motions to set aside the verdict and to arrest judgment.

The state's evidence tends to show that at approximately 4:10 a.m. on the morning of 7 October 1974, Mrs. Martha DeGlandon awoke to find a man standing by her bedside in her suite in the Downtowner Motor Inn in Fayetteville. She screamed and the man ran from the suite. Afterwards, she and her husband found they were missing two watches, a ring and around $100.00 in cash. They immediately called the police. Shortly thereafter, Officer Marable of the Fayetteville Police stopped defendant on a street near the Downtowner. Upon frisking defendant he found the two watches and the ring as well as $700.00 in cash, and a motel passkey.

Defendant took the stand and denied he was the intruder. He said a man named James Johnson had given him the stolen items to keep and that he had the $700.00 on his person because he was supposed to make a car payment the next day.

[1] Defendant's first assignment of error challenges the trial court's determination that he was competent to stand trial. At defense counsel's request, the trial court held a hearing on the question of defendant's capacity to proceed, as required by G.S. 15A-1002(b)(3).[1] Two witnesses testified at this hearing, defendant and Dr. Timothy Gridley, a psychiatrist, who had been treating

1. G.S. 15A-1002(b)(3) reads, in pertinent part:

"When the capacity of the defendant to proceed is questioned, the court:

. . . .

(3) Must hold a hearing to determine defendant's capacity to proceed."

defendant for approximately one week before the trial. Defendant testified that he was aware he was charged with first degree burglary but said he did not feel he would be able to assist in his defense because he was too disturbed at the prospect of having to stand trial. Dr. Gridley stated that in his opinion defendant suffered from paranoid schizophrenia. He added, however, that defendant's condition was under control as a result of medication and that he believed without reservation that defendant was capable of proceeding with trial and of assisting counsel in his defense. The trial court found facts consistent with Dr. Gridley's testimony and held that defendant was capable of proceeding with trial.

"The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E. 2d 305, 316 (1975).[2] The question of a defendant's capacity to proceed may be raised at any time. G.S. 15A-1002(a). Defendant here was emotional and obviously upset at the prospect of being tried. There was, however, competent, uncontradicted expert opinion that he was capable of standing trial. This opinion was based on personal observation of defendant and was clearly sufficient to support the trial court's conclusion that defendant was capable of proceeding. The additional fact that defendant was competent only as a result of receiving medication does not require a different result. *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974).

Defendant's first assignment of error is overruled.

[2] Defendant next assigns as error the denial of his motion to suppress evidence seized from his person on 7 October 1974 and testimony concerning that seizure. A voir dire was held pursuant to this motion, after which the trial court found facts consistent with the testimony below and concluded that defendant's motion should be denied.

2. As set out in G.S. 15A-1001, the test is whether "by reason of mental illness or defect [the defendant] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner."

The state's evidence on voir dire tended to show Mrs. DeGlandon told Officer J. D. Harrell that the intruder in her room was a black male wearing dark clothing, approximately 5' 11" tall and weighing about 190 pounds. She said he might have had a moustache but she wasn't sure. The DeGlandons also told Officer Harrell they were missing a Seiko watch with the engraving "Love, Martha" on it, a Timex watch, a University of Texas class ring and over $100.00 in cash.

Officer Harrell transmitted this information over police radio. This transmission was heard by Officer Marable.

About five to ten minutes later Officer Marable saw defendant near the Downtowner Motor Inn. Defendant fit the description of the intruder except that he was wearing a gold-colored leisure suit. On closer observation Officer Marable noted that defendant's T-shirt was wet as if he had been running or perspiring heavily. Officer Marable then asked him for some identification. Defendant pulled out his wallet and fumbled through it for 15 to 20 seconds. He then started fumbling through his pockets and appeared nervous. Officer Marable became concerned as a result of this behavior and worried that defendant might have a weapon. He patted defendant down and noted a hard bulge in defendant's left front pocket. He reached in and pulled it out and discovered it to be one of the watches stolen from the DeGlandons.

Defendant argues that under these facts Officer Marable did not have reasonable grounds to stop and frisk him. "[I]f the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect. If, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection." *State v. Streeter*, 283 N.C. 203, 210, 195 S.E. 2d 502, 507 (1973). Here Officer Marable had received a report of a burglary. He saw defendant shortly afterward, around 4:30 a.m., near the scene of the crime. Defendant roughly matched the description of the suspect. His clothing was wet as if he had been running or perspiring heavily. He could not produce identification, became nervous and began fumbling through his pockets. Officer Marable became concerned that

defendant might have a weapon and frisked him. Under these circumstances, we cannot say that Officer Marable was unjustified in stopping defendant or that the concern which led to his frisking defendant was unreasonable.

Defendant's second assignment of error is overruled.

Defendant's third and fourth assignments of error relate to the trial court's denials of motions to set aside the verdict and to arrest judgment. Defendant moved to set aside the verdict (1) because the verdict was contrary to the evidence and (2) for errors assigned and to be assigned. There was evidence here to support the conviction; therefore it was within the trial court's discretion to grant or deny defendant's motion to set aside the verdict as contrary to the weight of the evidence. *State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971). There is no showing that the court abused its discretion; nor did the errors assigned by defendant compel the trial court to set aside the verdict on that ground. With regard to the motion to arrest judgment, it could have been properly granted only if there were some defect or error on the face of the record proper. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). There was none here.

Defendant's third and fourth assignments of error are overruled.

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

GEARY BLACKWOOD, JEWEL BLACKWOOD AND DEWARD BLACKWOOD v. FRED S. CATES, ELIZABETH CATES COX, LARRY BIGGS, TOWN OF HILLSBOROUGH, LARRY EDWARDS AND THE TOWN OF CARRBORO

No. 32

(Filed 20 April 1979)

1. Trespass § 7— implied consent to enter—subsequent wrongful act

Even if there was implied consent for defendant and two policemen to enter plaintiffs' property, defendant was liable for trespass because of his subsequent wrongful act of participating in a false arrest of one plaintiff.

2. False Imprisonment § 2.1— actual arrest by policeman—liability of private citizen

Defendant could be held liable for a false arrest and imprisonment of plaintiff even though a police officer actually made the arrest where there was plenary evidence that the officer arrested plaintiff at defendant's "request, direction, or command."

3. False Imprisonment § 3; Damages § 11.1— trespass and false imprisonment—punitive damages

Defendant's conduct in a trespass and false imprisonment case was sufficiently outrageous to warrant the submission of issues of punitive damages to the jury.

APPEAL by defendant Fred S. Cates from *Bailey, J.*, in the 9 January 1978 Session and the 3 April 1978 Session of ORANGE County Superior Court. On 4 January 1979, pursuant to G.S. 7A-31, we granted defendant Cates' petition for review of the case prior to a determination by the Court of Appeals.

The parties both agreed to a bifurcated trial before different juries. In the first trial the jury decided only the defendants' liability; in the second trial the jury determined only damages. We will give a combined recitation of the evidence from both trials.

The relevant evidence for the plaintiffs tended to show the following:

Betsy Cates Cox is the daughter of defendant Fred Cates, who was the Mayor of Hillsborough at the time of the events in question. Plaintiff Geary Blackwood knew Betsy Cox, and on 18 December 1974 she invited him to her home. Thereafter, plaintiff Geary Blackwood and Betsy Cox had consensual intercourse, and she demanded that he spend the night with her. When Geary refused, she told him, "I'll have your ass and your job by morning."

Officer Larry Biggs of the Hillsborough police department went to defendant Fred Cates' home after a telephone call from him. The policeman asked the defendant whether he wanted him to call the chief of police. Defendant Cates answered by saying, "If you can't handle this job, you wouldn't be a policeman." Officer Biggs testified that "I felt my job was on the line if I refrained from going," and he said that in his opinion defendant Cates "really had the real authority and the power to hire and fire

policemen." The two of them then proceeded to Carrboro where they met Officer Larry Edwards from the Carrboro police department.

Defendant Fred Cates, Officer Biggs and Officer Edwards went to the Blackwood home. Mr. Blackwood was on the front porch. The men said they wanted to talk to Geary. The two policemen identified themselves, and Mr. Blackwood said, "And you're Mayor Cates" to the defendant Fred Cates. He replied, "You said that, I didn't." Shortly thereafter, everyone went into the Blackwood's house.

Geary arrived at his parents' house. He said to defendant Cates, "I believe you are Fred Cates," and again the defendant answered by saying, "You said that, I didn't." Geary then said, "Well, I just assumed you were," and the defendant replied, "You can assume any damn thing you want."

Officer Biggs then arrested plaintiff Geary Blackwood. The policeman grabbed him off the couch, put his hands over his head, frisked him and handcuffed him. Geary was put into the back of Officer Biggs' police car, and the policeman and defendant Fred Cates got in the front seat. Officer Biggs asked defendant if he wanted Officer Edwards to follow them to Hillsborough, and the defendant said no. On the way to Hillsborough, the defendant Fred Cates told plaintiff Geary Blackwood, "You can thank Officer Biggs you're alive," and defendant Cates told Officer Biggs that "if the court didn't take care of Geary that he would."

While at Hillsborough, Geary Blackwood, still handcuffed, was put into a little room with just defendant Cates for about thirty or forty minutes. He testified that he was very scared, and "I thought I was going to be killed." Plaintiff Geary Blackwood also stated that "I felt like [the defendant Fred Cates] was in charge."

Officer Larry Biggs testified that when he arrested plaintiff Geary Blackwood on 18 December 1974, he had neither a search warrant nor an arrest warrant. He stated that "I [Officer Biggs] followed the directions and requests of Fred Cates that night," and he also said that "I went to Carrboro because Mayor Cates told me to." Officer Edwards of the Carrboro police department stated that his impression was that Officer Biggs arrested Geary Blackwood because of defendant Cates' presence.

The relevant evidence for the defendant tended to show the following:

Mrs. Cates, defendant's wife, testified that on 18 December 1974 her daughter, Betsy Cates Cox, rushed into her house about 10:30 or 11:00 p.m. She was naked and had a bedspread wrapped around her and her three-year old daughter. Betsy Cox had bruises on her cheek and neck, and there was blood on her face.

The defendant Fred Cates stated that after he had found that Geary Blackwood was involved, he called the Hillsborough sheriff's office, and Officer Biggs came to the Cates' house. Defendant Cates also called to have someone meet them in Carrboro and "direct us to where Geary Blackwood lived."

Defendant Fred Cates declared that Officer Biggs told him that he was going to arrest Geary Blackwood and that he rode with the policeman only to direct him to where they were to meet the person in Carrboro. The defendant testified that "[i]t was my clear understanding that the purpose of the trip was to arrest Geary Blackwood but I had no intention of arresting anyone." He also stated that he never threatened Officer Biggs' job; his statement that "if you can't handle the job, you wouldn't be a policeman" was only meant to indicate the officer's capability of handling the matter.

The jury at the first trial found defendant Fred Cates liable for trespass and for the false imprisonment of plaintiff Geary Blackwood. The jury at the second trial awarded plaintiffs $120 in actual damages and $70,000 in punitive damages against defendant Cates.

Graham & Cheshire by Lucius M. Cheshire for the defendant.

Coleman, Bernholz & Dickerson by Douglas Hargrave and Alonzo B. Coleman, Jr. for plaintiffs.

COPELAND, Justice.

[1] In his first assignment of error, defendant Fred S. Cates [hereinafter referred to as the defendant] claims he could not be held liable for trespass upon the Blackwood property because he and the officers had the implied consent of the owners, Mr. and Mrs. Blackwood, to enter it. This Court has stated, however, that

"[o]ne who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in excess or abuse of his authority to enter, become liable in damages as a trespasser." *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E. 2d 524, 528 (1973). The defendant concedes that a false arrest occurred in the Blackwood house. Therefore, even assuming *arguendo* that there was implied consent for the defendant and the two policemen to enter the Blackwood property, they were liable for trespass because of this later wrongdoing. This argument is without merit.

[2] Defendant next argues that although a false arrest and imprisonment of plaintiff Geary Blackwood occurred, he could not be held liable for it because Officer Biggs, a policeman, actually made the arrest. However, the rule is that "a private citizen at whose request, direction, or command a police officer makes an arrest without a warrant is liable if the arrest turns out to be unlawful." 32 Am. Jur. 2d, *False Imprisonment*, § 34 (1967) and cases cited therein. *See also Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573 (1938). There was plenary evidence from which the jury could find that Officer Biggs arrested plaintiff Geary Blackwood at defendant's "request, direction, or command." This assignment of error is overruled.

[3] Defendant contends the trial court erred in submitting the issues of punitive damages to the jury. The law on this subject in North Carolina is clear:

> "[I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury and within reasonable limits . . . . There must be an element of aggravation accompanying the tortious conduct which causes the injury . . . . as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E. 2d 785, 787 (1953), *partly overruled on other grounds in Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). *See also Caudle v. Benbow*, 228 N.C. 282, 45 S.E. 2d 361 (1947).

Suffice it to say that defendant's conduct in this case was sufficiently outrageous to warrant submitting issues of punitive

damages to the jury, and that body did not abuse its discretion in its award. This assignment of error is overruled.

We have examined defendant's remaining assignments of error and find them all totally without merit.

At this point we note what questions are not before the Court for our consideration of this case:

1. Defendant made no objection to the bifurcated trial, and he in fact agreed to it before trial.

2. Defendant made no objection to the judge's charges to the juries in either trial.

3. Defendant made no objection to any of the issues submitted to the juries in either trial.

4. Although the defendant originally moved to set aside the verdicts as being excessive after the second trial, he abandoned any argument relating to this motion on appeal.

5. Defendant unequivocally asserted that he did not want a new trial, and the only relief he sought was the grant of nonsuit.

For the foregoing reasons, the judgment of the trial court is

Affirmed.

STATE OF NORTH CAROLINA v. STEVEN M. STINSON

No. 71

(Filed 20 April 1979)

1. Criminal Law § 76.6— inducement to make statement—court's finding of fact sufficient

In a prosecution for second degree murder where defendant testified that a deputy sheriff had told him that it would be to his benefit to talk, the trial court's finding that "no hope of reward or inducement was made by the law enforcement officers for the defendant to make these statements" sufficiently resolved the evidentiary conflict against defendant, and the trial court did not err in failing to suppress defendant's statement.

2. Criminal Law § 71 — burns on child's body — shorthand statements of fact

In a prosecution for second degree murder of defendant's two year old child, the trial court did not err in allowing two lay witnesses to testify that they had observed burns on the body of the child, since such statements were admissible as shorthand statements of fact.

3. Homicide § 15.5 — cause of death — expert's opinion testimony

An expert forensic pathologist who conducted an autopsy on the body of a homicide victim could properly testify that the cause of deceased's death could have been human blows, since the witness's opinion was clearly based on the autopsy, and an expert may give an opinion based on facts within his personal knowledge.

4. Homicide § 20.1 — photographs of deceased — admissibility

The trial court in a second degree murder prosecution did not err in admitting into evidence four color photographs of deceased's body since the photographs were properly authenticated, were used to illustrate the testimony of an expert witness, and were accompanied by proper limiting instructions.

5. Homicide § 21.7 — second degree murder — malice — sufficiency of evidence

Where the jury could properly have found that defendant inflicted a number of injuries on the body of his two year old son over a period of time and then finally inflicted blows sufficient to cause death, the jury could have inferred the necessary malice to support a conviction of second degree murder.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Gavin* at the 18 July 1977 Criminal Session of ONSLOW Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of second degree murder. He appeals under G.S. 7A-27(a). This case was argued as No. 23 at the Spring Term 1978.

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

Billy Sandlin, Attorney for defendant.

EXUM, Justice.

After consideration of defendant's assignments of error challenging, among other things, the sufficiency of the trial court's findings of fact on a motion to suppress, the admission of certain evidence and the sufficiency of the evidence to support second degree murder, we find that defendant received a fair trial free from prejudicial error.

The state's evidence tended to show that in the early morning hours of 8 May 1977 members of the Jacksonville Rescue Squad responding to a call at defendant's home found defendant's two-year-old son Patrick dead. An autopsy showed the cause of Patrick Stinson's death to be laceration of the duodenum, jejunum and ileum with hemorrhage and peritonitis. The doctor who conducted the autopsy testified that in his opinion the cause of the fatal injury could have been human blows. He further stated that there were multiple burns and bruises of varying ages on the deceased's body. Testimony of other witnesses corroborated the presence of the burns and bruises and the fact that they were of some duration. Defendant originally told deputy sheriffs investigating the case that Patrick had drowned. He later stated that he had beaten the child but had not intended to kill him.

Defendant offered no evidence.

[1] Defendant's first assignment of error challenges the sufficiency of the trial court's findings of fact on defendant's motion to suppress his statements to the deputy sheriffs. On voir dire defendant testified that Deputy Sheriff Woodward told him it would be to his benefit to talk. Woodward denied making any such statement. Defendant argues that if his confession was induced by hope of benefit it was involuntary and should have been suppressed. *See State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (1967). He argues that an evidentiary conflict was raised on this point and the trial court failed to resolve it. We note, however, that among the findings of fact by the trial court on the motion to suppress was the following: "That no hope of reward or inducement was made by the law enforcement officers for the defendant to make these statements." Although not couched in the exact language of the testimony, this finding sufficiently resolves the evidentiary conflict against defendant. It is supported by the evidence and therefore conclusive on appeal. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934 (1971). Defendant's first assignment of error is overruled.

[2] Defendant next argues that it was error to allow two lay witnesses to testify that they had observed burns on the body of Patrick Stinson. He contends that these statements were impermissible expressions of opinion. We disagree. "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), *death penalty vacated*, 428 U.S. 904 (1976); *accord State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977) (witness allowed to testify he saw bloodstains on defendant's shirt). We think the witnesses' testimony that they observed burns on the deceased's body is clearly permissible under this rule. Defendant's second assignment of error is overruled.

[3] Defendant's third assignment of error challenges the admissibility of Dr. Walter Gable's opinion that the cause of deceased's death could have been human blows. Dr. Gable, who was qualified as an expert forensic pathologist, had conducted an autopsy on the body of Patrick Stinson. His opinion was clearly based on that autopsy. "It is a well-settled rule that an expert may give an opinion based on facts within his personal knowledge . . . ." *State v. Wade*, 296 N.C. 454, 458, 251 S.E. 2d 407, 409 (1979). Defendant's third assignment of error is overruled.

[4] Defendant next assigns as error the introduction into evidence of four color photographs of deceased's body. "Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E. 2d 745, 753 (1971). Here the photographs were properly authenticated. They were clearly used to illustrate Dr. Gable's testimony. Proper limiting instructions were given. Finally, we have examined the photographs themselves and find they were neither excessive in number nor unduly prejudicial.

[5] Defendant by his fifth assignment of error contends that the evidence was not sufficient to show the element of malice necessary for a conviction of second degree murder. Defendant bases this argument primarily on his statements to police officers that he did not mean to kill or hurt Patrick Stinson. "While an in-

tent 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. Wilkerson*, 295 N.C. 559, 580, 247 S.E. 2d 905, 917 (1978). As the trial court properly instructed the jury this necessary element of malice can be found even in the absence of an intent to kill or inflict serious injury when a defendant has acted wantonly "in such a manner as to manifest a depravity of mind, [a] heart devoid of a sense of social duty and a callous disregard for human life." In considering defendant's argument, which is based on his motion for nonsuit, we must consider the evidence in the light most favorable to the state and give the state the benefit of every reasonable inference that can be drawn therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The jury could properly have found that defendant inflicted a number of injuries on the body of his two-year old son over a period of time and then finally inflicted blows sufficient to cause death. From this the jury could have inferred the necessary malice to support a conviction for second degree murder. Defendant's fifth assignment of error is overruled.

We have examined defendant's remaining assignments of error and find they do not merit discussion. In the trial there was

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

J. B. WADSWORTH, JR., J. B. WADSWORTH, III, JEAN L. WADSWORTH, GUARDIAN FOR HENRY WADSWORTH AND FRANCIS WADSWORTH, MINORS v. GEORGIA-PACIFIC CORPORATION

No. 96

(Filed 20 April 1979)

Boundaries § 8.2— children not properly before court—judgment determining boundary improper

The trial court erred in entering a judgment determining the boundary line between the parties' tracts of land, the question having been raised by

defendant's counterclaim, since plaintiff children, who were the remaindermen of plaintiff father's tract, were never brought into court properly so as to give the court jurisdiction over their persons and never had their day in court with respect to the true location of the boundary line.

APPEAL by plaintiffs from a decision of the North Carolina Court of Appeals affirming the judgment of *James, Judge*, entered 23 February 1977 in Superior Court, BERTIE County. The opinion of the Court of Appeals was by *Webb, Judge*, with *Morris, Judge (now Chief Judge)*, concurring in the result, and *Hedrick, Judge*, dissenting (38 N.C. App. 1, 247 S.E. 2d 25 (1978)). Plaintiffs appealed as a matter of right under G.S. 7A-30(2). This case was argued as No. 122 at the Fall Term 1978.

Satisky & Silverstein, by Howard P. Satisky, for plaintiffs.

Pritchett, Cooke & Burch, by Stephen R. Burch and Roswald B. Daly, Jr., for the defendant.

Per curiam.

This action was commenced on 22 December 1975 by J. B. Wadsworth, Jr. for damages for wrongful cutting of trees on his land by defendant Georgia-Pacific Corporation. Defendant answered pleading, among other things, that defendant is in possession of certain lands, and as a counterclaim that defendant is entitled to damages for wrongful cutting of trees on its land by plaintiff J. B. Wadsworth, Jr.

On 22 March 1976 defendant's counsel notified J. B. Wadsworth, Jr.'s counsel by letter that "Mr. Wadsworth has only a life estate in the lands and we would have no objection to your making his children parties and appointing a guardian and making him a party for unborn children. We believe this necessary to a proper and final judicial termination of the matter." Thereafter, plaintiff's counsel purported to amend his complaint by leave of court and "with written permission from defendant's attorney" to say that the children of J. B. Wadsworth, Jr., to wit: J. B. Wadsworth, III, age 24; Jean L. Wadsworth, age 21; Henry Wadsworth, age 17; and Francis Wadsworth, age 13, are necessary parties plaintiff. Thereafter, Jean L. Wadsworth was appointed guardian *ad litem* for the minors, Henry Wadsworth and Francis Wadsworth. Jean L. Wadsworth then purported to

adopt for her complaint "each and every allegation of the complaint heretofore filed by J. B. Wadsworth, Jr." and prayed for the same relief as set out in the original complaint. We assume she did this in her capacity as guardian but the record does not say. Defendant filed motion on 30 July 1976 pursuant to Rule 12(b)(2) to strike "that certain paper writing entitled 'Adopting Previous Complaint' " for that "the same is improper to bring the parties within the jurisdiction of this court." This motion was never passed upon insofar as the record reveals.

The case came on for hearing before Judge James who, by consent, heard it without a jury at the 14 February 1977 Session of Bertie Superior Court. In the meantime, defendant had filed on 3 February 1977 a motion pursuant to Rule 15(a) for leave to amend its answer "to allege with specificity" the boundary line between the lands of the plaintiffs and the defendant. This motion to amend was never passed upon insofar as the record reveals. Yet defendant amended its further answer and defense to allege by course and distance a specified boundary line which it contended was the true dividing line between the parties. The record shows no counter pleading on behalf of any of the plaintiffs.

When the trial commenced Judge James inquired: "The original claim of J. B. Wadsworth in this case was dismissed by reason of the fact that he was only a life tenant and could not pursue this matter?" Defense counsel replied: "Yes sir. His father had reserved the light [sic] right and the right to cut the timber." Yet the record contains nothing to show that the original claim of J. B. Wadsworth, Jr. had ever been dismissed. Judge James then observed that this suit "concerns only the counterclaim of Georgia-Pacific for damages and the determination of the boundary line." Defense counsel said: "Yes sir. The determination of the boundary line." Judge James said: "That is understood and agreed by all?" Plaintiffs' counsel replied: "Yes sir."

All claims of plaintiffs were thereupon treated as having been dismissed and the case was tried upon defendant's counterclaim alone. Each side offered evidence concerning the location of the boundary line according to its respective contentions, but *neither side offered any deed or other record title* in evidence! Judge James then found that the line was located as contended by defendant and rendered judgment accordingly.

Plaintiffs appealed and the Court of Appeals affirmed with Judge Hedrick dissenting.

It is our view that the jumbled record before this Court is insufficient to support the finding that the claim of J. B. Wadsworth, Jr.'s children had been previously disposed of by way of summary judgment. We do not understand how any court could dispose of the claims of these children, especially the minors, before they ever became parties to the lawsuit. Since no deed or other record title was offered in evidence, *we assume* the children of J. B. Wadsworth, Jr. owned the fee, as remaindermen, in a tract of land claimed by plaintiffs and that J. B. Wadsworth, Jr. owned a life estate therein. Since defendant offered no deed or other record title in evidence, we assume it owned in fee a tract of land adjoining the Wadsworth land. Since the record contains no order permitting defendant to amend its counterclaim to include allegations setting out its contention as to the correct location of the boundary line between its property and property owned by plaintiffs, we think it was error to permit defendant to try the case on those allegations. Since defendant moved to dismiss the paper writing entitled "Adopting Previous Complaint" on the ground that "same is improper to bring the parties within the jurisdiction of this court," we assume defendant itself thought the pleadings "adopted" were insufficient to bring the children of J. B. Wadsworth, Jr. into court so as to confer jurisdiction over their persons. *See* Rule 12(b)(2), Rules of Civil Procedure. As we see it, these children were never brought into court properly and have never had their day in court with respect to the true location of the dividing line between the Wadsworth property and the Georgia-Pacific Corporation property. We take the position that the judgment herein rendered is not binding on any of these children. Without a single muniment of title being offered, and with the jumbled state of this record, we are unwilling to uphold the location of a dividing line which determines the ownership of twenty-two acres of land. It is the duty of every court to protect the interests of minors and incompetents. In our view, the judgment must be vacated and the controversy remanded for trial according to applicable law.

Judgment vacated. Cause remanded.

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

BULLOCK v. INSURANCE CO. AND BULLOCK v. WHITE

No. 27 PC.

Case below: 39 N.C. App. 386.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 April 1979.

BURGESS v. BREWING CO.

No. 43 PC.

Case below: 39 N.C. App. 481.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 April 1979.

F.D.I.C. v. LOFT APARTMENTS

No. 47 PC.

Case below: 39 N.C. App. 473.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 April 1979.

GUILFORD COUNTY v. BOYAN

No. 36 PC.

Case below: 39 N.C. App. 501.

Peteitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 4 April 1979.

IN RE HACKETT

No. 3 PC.

Case below: 39 N.C. App. 501.

Petition for discretionary review under G.S. 7A-31 denied 4 April 1979.

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

PRESSLEY v. CAN COMPANY

No. 38 PC.

Case below: 39 N.C. App. 467.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 April 1979.

SEDERS v. POWELL, COMR. OF MOTOR VEHICLES

No. 30 PC.

Case below: 39 N.C. App. 491.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 April 1979. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 4 April 1979.

STATE v. DICKERSON

No. 94 PC.

Case below: 39 N.C. App. 736.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 April 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 April 1979.

STATE v. HODGES

No. 37 PC.

Case below: 39 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1979.

STATE v. HORNE

No. 84 PC.

Case below: 40 N.C. App. 280.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 March 1979.

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

STATE v. JEFFUS

No. 18 PC.

Case below: 39 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1979.

STATE v. LEFFINGWELL

No. 80 PC.

Case below: 39 N.C. App. 736.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 March 1979. Appeal dismissed 29 March 1979.

STATE v. LIDDELL

No. 26 PC.

Case below: 39 N.C. App. 373.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 April 1979.

STATE v. MOORE

No. 104.

Case below: 39 N.C. App. 643.

Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 4 April 1979.

STATE v. MORROW

No. 53 PC.

Case below: 31 N.C. App. 654.

Application by defendant for further review denied 4 April 1979.

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

STATE v. PREVETTE

No. 45 PC.

Case below: 39 N.C. App. 470.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 April 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1979.

STATE v. RAY

No. 2 PC.

Case below: 39 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 April 1979.

STATE v. RUDOLPH

No. 25 PC.

Case below: 39 N.C. App. 293.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 April 1979.

STATE v. SMITH

No. 48 PC.

Case below: 39 N.C. App. 11.

Application by defendant for further review denied 4 April 1979.

STATE v. STARR

No. 52 PC.

Case below: 32 N.C. App. 398.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 April 1979.

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

STATE v. TISE

No. 35 PC.

Case below: 39 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 April 1979.

STATE v. WILLIAMS

No. 54 PC.

Case below: 38 N.C. App. 243.

Application by defendant for further review denied 4 April 1979.

TUCKER v. TUCKER

No. 44 PC.

Case below: 39 N.C. App. 502.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 April 1979.

UTILITIES COMM. v. INDUSTRIES, INC.

No. 31 PC.

Case below: 39 N.C. App. 477.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 April 1979.

VANITA B. STANBACK v. FRED J. STANBACK, JR.

No. 94

(Filed 17 May 1979)

1. Contracts § 29.3— breach of contract—mental anguish damages

A claim for mental anguish damages resulting from breach of a contract is stated only when plaintiff's complaint reveals: (1) that the contract was not one concerned with trade and commerce with concomitant elements of profit involved; (2) that the contract was one in which the benefits contracted for were other than pecuniary, *i.e.*, one in which pecuniary interests were not the dominant motivating factor in the decision to contract; and (3) that the contract was one in which the benefits contracted for related directly to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which directly involved interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.

2. Contracts § 29.3— separation agreement—breach of provision for payment of taxes—no damages for mental anguish

Plaintiff wife was not entitled to recover damages for mental anguish suffered as a result of defendant husband's alleged breach of a provision of a separation agreement that he would pay any deficiency in plaintiff's 1968 income taxes resulting from a disallowance of her attempted deduction of counsel fees.

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

When a breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for the recovery of punitive damages.

4. Damages § 12.1— breach of contract—intentional infliction of emotional distress—punitive damages

Plaintiff's complaint stated a claim for punitive damages for the tort of intentional infliction of serious emotional distress accompanying breach of contract where it alleged that plaintiff suffered great mental anguish and anxiety as a result of defendant's breach of a separation agreement provision that he would pay any deficiency in plaintiff's 1968 income taxes resulting from a disallowance of her attempted deduction of counsel fees, and that defendant acted willfully, maliciously, recklessly and with full knowledge of the consequences which would result from his conduct, plaintiff's allegation that she suffered great mental anguish and anxiety being sufficient to permit her to go to trial on the question of whether the mental anguish and anxiety caused physical injury.

5. Process § 18— elements of abuse of process—improper act

Abuse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding.

6. Process § 19— abuse of process—improper act—insufficiency of complaint

Plaintiff's complaint failed to state a claim for abuse of process where it alleged that defendant's suit against her in a federal court was brought with ulterior motives but it failed to allege that defendant committed any willful act not proper in the regular course of the proceeding once he initiated the suit against her.

7. Rules of Civil Procedure § 8.1— notice pleading—mislabeled claim

When the allegations of the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations of the complaint are sufficient to state a claim under some legal theory.

8. Malicious Prosecution § 2— claim based on civil action—necessity for interference with plaintiff's person or property

When a claim for malicious prosecution is based on the institution of a prior civil proceeding, plaintiff must show not only that defendant initiated the prior proceeding, that he did so maliciously and without probable cause, and that the prior proceeding terminated in plaintiff's favor, but also that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases.

9. Malicious Prosecution § 6— termination of prosecution—adjudication on merits not necessary

The plaintiff in an action for malicious prosecution may allege merely that the prior civil proceeding on which the action is based was dismissed without alleging that the prior proceeding was terminated in plaintiff's favor "on the merits."

10. Malicious Prosecution § 8— claim based on civil suit—interference with plaintiff's person or property—insufficient allegations

Plaintiff's complaint failed to state a claim for malicious prosecution based on a prior civil suit where it contained no allegation of a substantial interference with either the plaintiff's person or her property as contemplated by the special damage requirement for such a claim, plaintiff's allegation that she incurred expenses in defending the suit and suffered embarrassment because of it being insufficient to meet such requirement.

11. Rules of Civil Procedure § 12— consideration of material incorporated into complaint—motion to dismiss not converted into motion for summary judgment

Defendant's Rule 12(b)(6) motion to dismiss a complaint for abuse of process based on a federal civil suit for failure to state a claim for relief was not converted into a Rule 56 motion for summary judgment by the court's consideration of the complaint in the prior federal action where plaintiff specifically incorporated the federal complaint into her complaint by reference and attached a copy thereof to her complaint, and the federal complaint was, therefore, not a matter outside the pleadings.

Justices EXUM and BRITT took no part in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 324, 246 S.E. 2d 74 (1978), affirming an order of *Rousseau, J.*, allowing defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Order entered 15 April 1977 in Superior Court, ROWAN County. This case was argued as No. 119 at the Fall Term 1978.

Plaintiff-wife brought this action seeking to recover actual, consequential and punitive damages from defendant-husband for breach of contract; and, in a second Count, to recover damages for abuse of process. The complaint alleges that defendant-husband breached a part of their separation agreement, a supplementary letter-agreement given in consideration of the formal separation agreement's provision allocating the burden of payment of plaintiff-wife's attorneys' fees to her and increasing four of defendant's periodic payments to her by 25% of the wife's attorneys' fees as set by the court. The supplementary agreement was an agreement between the parties' attorneys, and reads in part as follows:

> "We agree that if Vanita Stanback is unable to deduct the fees she is required to pay you during 1968 that Fred Stanback will pay to her through you the difference in the federal and state income tax that she is required to pay by virtue of being unable to make this deduction for attorneys' fees.
>
> It is understood that a valid effort will be made by Mrs. Stanback to claim such deduction and that the tax returns for 1968, both federal and state, will be prepared under the supervision of one of you."

Plaintiff's complaint in Count Number I alleges: That plaintiff paid her attorneys $31,000.00, the fee set by the court, and claimed both federal and state income tax deductions in that amount; that the I.R.S. audited her 1968 tax return and disallowed $28,500.00 of the $31,000.00 deduction; that the North Carolina Department of Revenue also audited plaintiff's 1968 tax return and disallowed $28,500.00 of the $31,000.00 deduction; that defendant, upon demand, refused to pay her tax deficiency; that as a result of this failure to honor their agreement, plaintiff was unable to pay her tax deficiency, and the United States subsequently filed a lien against her property; that in 1974 plaintiff bor-

rowed $18,099.51, secured by a deed of trust on her home, to pay off her deficiency to the I.R.S. thus avoiding the sale of her home by the United States to satisfy the tax deficiency; that she has been unable to pay off the loan, and the lender is in the process of foreclosing on her home; that the State of North Carolina, as a means of collecting her State income tax deficiency, issued a garnishment against the defendant and, as a result of the garnishment, the defendant paid $2,989.00 plus interest to the State "using funds which he had agreed under the deed of separation between the parties to pay to the [plaintiff] for support and maintenance."

Plaintiff requested that the court award her $16,357.30 plus interest from December 31, 1968 as actual general damages. She also requested $250,000.00 consequential damages as compensation for mental anguish and loss of reputation in the community and $100,000.00 punitive damages for defendant's alleged breach of their agreement. Plaintiff was allowed to amend her complaint to allege specifically that the consequential mental anguish damages were within the contemplation of the parties at the time they entered into the agreement.

Plaintiff joined in her complaint a Count Number II labeled "abuse of process", alleging that defendant had initiated a suit against the I.R.S. in federal court and had joined her as a codefendant for no legitimate reason but rather "to harass, embarrass and annoy the plaintiff . . . and to cause her to incur expenses for the defense of said action and to cause her to forego her legal rights and remedies." The complaint further alleged that the federal court action had been dismissed.

The defendant moved under G.S. 1A-1, Rule 12(b)(6) to dismiss both Counts. He also moved under G.S. 1A-1, Rule 37 to dismiss the Counts because of plaintiff's wilful failure to answer interrogatories. The trial court denied the motion to dismiss under Rule 37 but granted the Rule 12(b)(6) motion to dismiss both Counts with the exception of that part of plaintiff's Count Number I requesting actual general damages for breach of the agreement.

From this order of the court, plaintiff appealed to the Court of Appeals, which affirmed the dismissals by the trial court. We

granted plaintiff-appellant's petition for discretionary review of the decision of the Court of Appeals.

Brinkley, Walser, McGirt, Miller & Smith, by Walter F. Brinkley and Benjamin G. Philpott for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and George L. Little, Jr.; and Kluttz & Hamlin, by Clarence Kluttz for defendant-appellee.

BROCK, Justice.

The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). The motion performs substantially the same function as the old common law demurrer, *Sutton v. Duke, supra*, and in applying the rule we look to the interpretation of the federal rule for guidance. As a general rule, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *2A Moore's Federal Practice*, § 12.08, pp. 2271-74 (2d ed. 1975). The motion to dismiss the claims in Count Number I in this case was directed to the absence of any law to support the requests for relief. We therefore are required to examine the various requests for relief set forth in the claims in Count Number I and determine whether or not the law of this jurisdiction offers support for the requests made.

Count Number I—Breach of Contract

a. Actual Damages

Plaintiff's request for actual general damages was not dismissed by the trial court, and the sufficiency of that part of the claim is not before us.

Count Number I—Breach of Contract

b. Consequential Damages

In addition to her request for actual general damages under Count Number I, plaintiff requested that the court award her $250,000.00 in consequential damages as compensation for the "great mental anguish and anxiety [she suffered] as a result of the failure of the defendant to comply with his agreement." In support of this request plaintiff alleged: That she had insufficient resources to pay the deficiency assessed when the I.R.S. disallowed the major portion of her attempted deduction of the total amount paid to her attorneys; that upon her failure to pay, the I.R.S. filed a tax lien against her home, which became a matter of public record; that subsequently the I.R.S. came to her home and seized the property, posting a formal notice of seizure on the front door, visible to her neighbors and the public; that the I.R.S. subsequently levied on the property and published notice of sale of her home at public auction; that all the foregoing actions taken by the I.R.S. were given publicity in the local media thereby causing her to suffer great embarrassment, humiliation, and degradation in the eyes of her friends and the public in that "this information has been interpreted by the members of the public as indicating that she has failed to pay taxes which were justly due the Internal Revenue Service and indicating a lack of public responsibility and personal integrity"; that she was forced to borrow the sum needed to pay the deficiency, and because she is unable to pay off that loan, the private lender is in the process of foreclosing on a deed of trust given on her home to secure the loan.

The trial court's action in granting defendant's motion to dismiss this request for relief raises the following issue on appeal: In an action based on an alleged breach of a tax deficiency indemnification agreement supplementing a general marital separation agreement is the plaintiff entitled to recover damages for mental anguish suffered as a result of the defendant's alleged breach?

When an action for breach of contract is brought, the damages recoverable are those which may reasonably be supposed to have been in the contemplation of the parties at the time they contracted. *Price v. Goodman*, 226 N.C. 223, 37 S.E. 2d 592 (1946); *Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945).

This limitation on the recovery of damages for breach of contract was first enunciated in the famous English case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). In applying this test we have often relied on the following declaration of it in the Restatement of the Law of Contract, § 330, p. 509:

> "Foreseeability of harm as a Requisite for Recovery. In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury."

Damages for injury that follows the breach in the usual course of events are always recoverable provided the plaintiff proves that such injury actually occurred as a result of the breach. Whether damages are recoverable for injury that does not follow breach of a particular contract in the usual course of events (special damages) depends upon the information communicated to or the knowledge of the breaching party at the time of contracting. *Troitino v. Goodman, supra; Iron Works Co. v. Cotton Oil Co.*, 192 N.C. 442, 135 S.E. 343 (1926); 22 Am. Jur. 2d, Damages, § 59, p. 90. The test is generally described as one of foreseeability. In the first instance the damages recoverable are foreseeable because they are such that will follow in the ordinary course of events from breach of the particular kind of contract. In the second instance the damages recoverable are foreseeable because the party contracting had knowledge at the time he entered into the particular contract of the special circumstances giving rise to special damages upon breach, *i.e.*, damages that would not be expected to follow in the ordinary course of events from breach of the contract. This test of foreseeability generally achieves its purpose, *i.e.*, providing a workable method of imposing limitations on contractual liability, when strictly commercial contracts are involved and only damages for pecuniary loss are sought.

When recovery is sought for mental anguish suffered as the result of breach of contract, however, the rule has proven to be less than adequate, and courts as a general rule have denied recovery on policy grounds of limiting contractual risk with or

without formal application of the *Hadley v. Baxendale* test. *See, e.g., Hall v. Encyclopaedia Britannica, Inc.*, 325 Mich. 35, 37 N.W. 2d 702 (1949); *Seidenbach's Inc. v. Williams*, Okl. 361 P. 2d 185 (1961). *See D. Dobbs, Remedies*, § 12.4, p. 819; *McCormick on Damages*, § 145, p. 592; Comment, *Recovery for Mental Anguish from Breach of Contract: The Need for an Enabling Statute*, 5 Cal. West. L. Rev. 88 (1968); 38 Am. Jur. 2d, Fright, Shock, and Mental Disturbance, § 33, p. 40; *Annot.* 23 A.L.R. 361; *Annot.* 44 A.L.R. 428; *Annot.* 56 A.L.R. 657.

It is generally acknowledged that financial loss inflicted on an individual by breach of contract may often cause the party to suffer disappointment and mental anguish. *McCormick on Damages, supra*, at § 145, pp. 592-93. Despite the probability of such mental anguish damages, recovery for them has been routinely denied in contract actions, generally on the stated grounds that mental anguish damages are too remote to have been in the contemplation of the parties to the contract. *E.g., Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W. 2d 803 (1955). This judicial reluctance to award damages for mental anguish in contract actions is reflected in the Restatement of the Law of Contracts, § 341, p. 559:

> "In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss."

The rule set forth in this section of the Restatement incorporates most of the exceptions which courts have created to the general rule against recovery of mental anguish damages in a breach of contract action. The earliest exceptions to the general rule came in cases involving breach of contract to convey a telegraph message. *SoRelle v. Western Union Telegraph Co.*, 55 Tex. 308 (1881), the first case in the United States to hold that mental anguish damages were recoverable for breach of contract, involved the defendant's failure to transmit a message to plaintiff announcing his mother's death, which prevented him from attend-

ing her funeral. This Court adopted this limited exception for cases involving failure to transmit messages concerned with death or illness in *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890) and applied it in subsequent decisions. *Russ v. Telegraph Co.*, 222 N.C. 504, 23 S.E. 2d 681 (1943); *Betts v. Telegraph Co.*, 167 N.C. 75, 83 S.E. 164 (1914); *Cashion v. Telegraph Co.*, 123 N.C. 267, 31 S.E. 493 (1898). Recovery in those cases was not limited by a requirement that the plaintiff suffer bodily harm as well as mental anguish. *Young v. Telegraph Co., supra.*

Other exceptions to the general rule against mental anguish damages in contract actions have been created. In *Allen v. Baker*, 86 N.C. 91 (1882), this Court held that such damages may be recovered for breach of contract to marry. Courts of other jurisdictions have allowed recovery of mental anguish damages when the breach amounts in substance to a wilful or independent tort. *E.g., Wall v. St. Louis & S.F. RR.*, 184 Mo. App. 127, 168 S.W. 257 (1914); and when the breach of contract involves the duty of an innkeeper or common carrier. *E.g., Southeastern Greyhound Corp. v. Graham*, 69 Ga. App. 621, 26 S.E. 2d 371 (1943); *Milner Hotels Inc. v. Brent*, 207 Miss. 892, 43 So. 2d 654 (1949). As the number of exceptions to the general rule has grown, some courts have attempted to formulate a rule to encompass them and provide a standard for determining whether a claim for mental anguish damage may be made in a contract action. In his treatise on remedies, Professor Dobbs notes this trend:

> "Another group of cases have tried to formulate a broader doctrine, allowing recovery for mental distress resulting from breach of contract in a wide range of non-tortious breach situations. The formula for expressing the broader rule of recovery probably has not reached its ultimate form and it is expressed in various ways. The essential idea seems to be that some contracts clearly have what might be called personal rather than pecuniary purposes in view, and that the purpose of such contracts is utterly frustrated until mental damages are awarded for the breach." Dobbs, *supra*, at § 12.4, p. 819.

Professor Dobbs correctly points out that in an attempt to formulate a rule to encompass the various exceptions courts have

gone beyond the mere creation of isolated exceptions to the general rule and by doing so have formulated a principle that has the potential of allowing recovery for mental anguish in a wider range of cases. *See Crisci v. Security Ins. Co. of New Haven, Conn.*, 66 Cal. 2d 425, 426, P. 2d 173, 58 Cal. Rptr. 13 (1967); *Westervelt v. McCullough*, 68 Cal. App. 198, 228 P. 734 (1924).

The case of *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E. 2d 810 (1949) represents this Court's formulation of a flexible rule to encompass the various exceptions to the general rule against allowing mental anguish damages in a contract action. *Lamm* involved breach of a burial contract. Several months after defendant had performed his contract to bury plaintiff's husband, the vault in which plaintiff's husband's casket had been buried rose above the level of the ground during a very rainy spell of weather. Upon being informed of this, defendant took steps to reinter the body. The plaintiff was present at the time defendant raised the vault and it was discovered that the locks on the vault had either not been fastened or had broken and the vault had filled with water and mud, wetting the casket. Plaintiff sought damages for the shock and resulting nervous condition she alleged she had suffered as a result of viewing the damage to the casket. This Court held that the plaintiff's action was for breach of the contract made with defendant to bury plaintiff's husband and not an action in tort. The Court first took note of the general rule against mental anguish damages in contract actions stating:

> "[C]ontracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations. Pecuniary interest is dominant. Therefore, as a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss. Yet damages therefor are deemed to be too remote to have been in the contemplation of the parties at the time the contract was entered into to be considered as an element of compensatory damages." *Id.* at 14, 55 S.E. 2d at 813.

Taking note of the various isolated exceptions to this general rule this Court in *Lamm* adopted what it described as "a definite ex-

ception" to the general rule, indicating that this formulation of the exception was sufficient to encompass the various isolated exceptions to the general rule and allow plaintiff to maintain her action for mental anguish damages:

> "*Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefore may be recovered.* 15 A.J. 600; McCormick on Damages 592; *Warner v. Allen*, 34 A.L.R. 1348. In such case the party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of contract. (Emphasis added.) *Id.* at 14-15, 55 S.E. 2d at 813.

Applying this formulation of the exception to the alleged breach of the burial contract plaintiff had made with defendant, the Court in *Lamm* observed:

> "The tenderest feelings of the human heart center around the remains of the dead. When the defendants contracted with plaintiff to inter the body of her deceased husband in a workmanlike manner they did so with the knowledge that she was the widow and would naturally and probably suffer mental anguish if they failed to fulfill their contractual obligation in the manner here charged. The contract was predominately personal in nature and *no substantial pecuniary loss would follow its breach. Her mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part.* It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made." (Emphasis added.) *Id.* at 15, 55 S.E. 2d at 813-14.

In *Stewart v. Rudner*, 349 Mich. 459, 84 N.W. 2d 816 (1957), the Michigan Supreme Court formulated an exception to the general rule against mental anguish damages in contract actions similar to that adopted in *Lamm v. Shingleton, supra. Stewart* involved an alleged breach of an agreement by defendant doctor to perform a Caesarian section delivery of plaintiff's child which failure resulted in the stillbirth of the child. Finding that plaintiff's complaint did indeed state a cause of action for mental anguish damages the Court in *Stewart* observed:

> "Few areas of our law, however, are more shrouded in mists of history and of doubt than this area of recovery for mental distress, for grief, anxiety, or sorrow. . . . We have come to realize, slowly it is true, that the law protects interests of personality, as well as the physical integrity of the person, and that emotional damage is just as real (and as compensable) as physical damage. . . ."
>
> * * *
>
> "It is true, in the ordinary commercial contract, damages are not recoverable for disappointment, even amounting to alleged anguish, because of breach. Such damages are, in the words of defendant's required charge, 'too remote.' But these are contracts entered into for the accomplishment of a commercial purpose. *Pecuniary interests are paramount.* In such cases breach of contract may cause worry and anxiety varying in degree and kind from contract to contract, depending upon the urgencies thereof, the state of mind of the contracting parties, and other elements, but it has long been settled that recovery therefor was not contemplated by the parties as the 'natural and probable' result of the breach. *Hadley v. Baxendale,* (9 Exch. 341, 156 Eng. Rep. 145 5 Eng. Rul. Cas. 502); *Clark v. Moore,* 3 Mich. 55; *Miholevich v. Mid-West Mutual Auto Insurance Co.,* 261 Mich. 495, 246 N.W. 202, (86 A.L.R. 633); *Frederick v. Hillebrand,* 199 Mich. 333, 165 N.W. 810.
>
> "Yet not all contracts are purely commercial in their nature. *Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal.* In

such cases the award of damages for mental distress and suffering is a commonplace, even in actions *ex contractu* . . . ."

* * *

"*When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering.* In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it." (Emphasis added.) *Id.* at 465-71, 84 N.W. 2d at 821-24.

The Alabama Supreme Court has also enunciated a rule intended to encompass the various exceptions to the general rule. In the case of *F. Becker Asphaltum Co. v. Murphy*, 224 Ala. 655, 141 So. 630 (1932) it was stated thusly:

"Yet where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefore be taken into consideration and awarded." *Id.* at 657, 141 So. at 631.

See also Hill v. Sereneck, 355 So. 2d 1129 (Ala. Civ. App. 1978).

There is a line of cases in California allowing recovery for mental anguish damages in contract actions. One of the earliest of these was *Westervelt v. McCullough*, 68 Cal. App. 198, 228 P. 734 (1924), wherein the plaintiff was allowed to recover for injuries she suffered as a result of defendant's breach of promise to provide plaintiff a home for the duration of plaintiff's life. Although the case involved physical suffering and illness resulting from mental anguish rather than mental anguish alone, the California court relied predominantly on contract cases from other jurisdictions in which recovery for mental anguish alone was allowed to hold:

> "Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach." *Id.* at 208-09, 228 P. at 738.

Subsequent California cases have applied this principle to recovery of damages in a contract action for mental anguish damages. *See Windeler v. Scheers Jewelers*, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970).

The standard for recovery adopted by the California courts appears to be the broadest in this area of the law. We think it is overly broad and imposes too great a burden on parties to a contract.

[1] Having reexamined our own holding in *Lamm v. Shingleton*, *supra*, and cases from other jurisdictions in the same vein, we hold that a claim for mental anguish damages resulting from breach of contract is stated only when the plaintiff's complaint reveals the following. First, that the contract was not one concerned with trade and commerce with concomitant elements of profit involved. Second, that the contract was one in which the benefits contracted for were other than pecuniary, *i.e.*, one in which pecuniary interests were not the dominant motivating factor in the decision to contract. And third, the contract must be one in which the benefits contracted for relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which *directly* involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.

Upon breach of contract of the nature just described, the mental anguish suffered will in almost every case result from other than pecuniary loss. And when a contract of such nature is involved, mental anguish damages are a natural and probable consequence of breach, and it can reasonably be said that such damages were within the contemplation of the parties at the time they contracted. In such an event, it is presumed that they contracted with reference to the payment of such damages in the

event of breach. *Lamm v. Shingleton, supra,* at 14-15, 55 S.E. 2d at 813; *McCormick on Damages, supra,* § 595, p. 592.

[2] Applying the foregoing principles to the present case, we affirm the opinion of the Court of Appeals holding that the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss plaintiff's claim for mental anguish consequential damages. Although plaintiff's complaint reveals the contract she made with defendant husband was clearly not one concerned with trade and commerce and elements of profit, it also clearly reveals pecuniary interest was the motivating factor in the decision to enter into the contract. The agreement was one for the payment of money in the event plaintiff was unable to deduct fees she had paid to her attorneys and consequently assessed a deficiency on her income tax return for the year 1968. That plaintiff may also have sought to protect herself from the mental anguish which might or might not have resulted in the event of breach of such an agreement was a subordinate factor in her decision to enter into such a contract, if indeed a factor at all. *See Farmers Ins. Exchange v. Henderson,* 82 Ariz. 335, 313 P. 2d 404 (1957); *Bolden v. John Hancock Mut. Life Ins. Co.,* 422 F. Supp. 28 (E.D. Mich. 1976). *But see Crisci v. Security Ins. Co. of New Haven, Conn., supra.*

Moreover, plaintiff's complaint clearly fails to show that the agreement was one in which the benefits she contracted for were directly related in any way to matters of mental concern or solicitude or her sensibilities, and that it directly involved interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected. The agreement she made was for the payment of money to protect her from the economic loss she would suffer in the event her attempted deduction of the fees paid to her attorneys was disallowed. The contract is clearly distinguishable from those for breach of which mental anguish damages are recoverable, such as burial contracts, *Lamm v. Shingleton, supra,* contracts to marry, *Allen v. Baker, supra,* contracts to perform funeral services, *Meyer v. Nottger,* Iowa, 241 N.W. 2d 911 (1976), and contracts to perform certain medical services, *Stewart v. Rudner, supra.*

The trial court was correct in dismissing, and the Court of Appeals was correct in affirming the dismissal of plaintiff's claim for consequential mental anguish damages contained in Count

Number I of her complaint. Accordingly we affirm the Court of Appeals upon this aspect of the case.

Count Number I—Breach of Contract

c. Punitive Damages

[3] In Count Number I, plaintiff also requested that she be awarded punitive damages in the amount of $100,000.00 for defendant's alleged breach of their agreement. The general rule as it has often been stated in the opinions of this Court is that punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). But when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. *Newton v. Insurance Co., supra.* Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton* the further qualification was stated thusly: "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton, supra*, at 112, 229 S.E. 2d at 301. *See* Comment, *Remedies—"Extra-Contractual" Remedies for Breach of Contract in North Carolina*, 55 N.C.L. Rev. 1125 (1977).

[4] Because we think the allegations in plaintiff's complaint with respect to punitive damages are sufficient at least to state a claim for damages for an identifiable tort accompanying a breach of contract, the trial court's dismissal of that claim must be reversed. Plaintiff's allegations are sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress. Plaintiff has alleged that defendant intentionally inflicted mental distress. This tort has been recognized in many states. William Prosser states that liability arises under this tort when a defendant's "conduct exceeds all bounds usually tolerated by decent society" and the conduct "causes mental distress of a very serious kind." *Prosser, The Law of Torts*, § 12, p. 56 (4th ed. 1971).

Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) stands at the head of this line of cases. The plaintiff in *Kirby* had made purchases of merchandise from the defendant on credit. The defendant's collection agent subsequently went to the plaintiff's home to attempt to collect the amounts due on her account. The plaintiff told him she was unable to pay at that time because she was in her seventh month of pregnancy and unable to work. Defendant's collection agent proceeded to abuse the plaintiff verbally in a profane and malicious manner. There was evidence that he had done so in a similar fashion two weeks before. The plaintiff testified that she became ill from the fright she suffered as a result of the verbal abuse. She also testified that her illness and accompanying pain continued for a week at which time her baby was born prematurely. The baby was born dead. There was medical testimony to the effect that the premature birth could have been caused by the defendant's conduct.

A verdict was returned in favor of the plaintiff. On appeal, defendant interposed a demurrer to the complaint in this Court on the ground that it failed to state a cause of action. In an opinion by Chief Justice Stacy, this Court overruled the demurrer, holding that the plaintiff had stated a cause of action for "trespass to the person," which may be either wilfully or negligently inflicted. Relying on *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890) and supportive rationale in North Carolina decisions, the Court held that damages for fright are recoverable when some physical injury contemporaneously, naturally, and proximately results from the fright caused by a defendant's negligent and wilful misconduct. *Kirby* was subsequently applied to allow recovery in similar situations in *Sparks v. Tennessee Mineral Products Corp.*, 212 N.C. 211, 193 S.E. 31 (1937); *Martin v. Spencer*, 221 N.C. 28, 18 S.E. 2d 703 (1942); *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962); and *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E. 2d 683 (1965).

The most recent opinion of this Court applying the *Kirby* decision is *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E. 2d 381 (1967). Plaintiff's evidence in *Crews* showed: That she had borrowed money from defendant and had been required to secure the loan with a chattel mortgage on her furniture; that defendant caused claim and delivery papers to be issued to obtain posses-

sion of her furniture; that when the papers were served on her she paid the arrearage demanded; that defendant's collection agent subsequently came to her and demanded that she pay more money; that upon her refusal to do so, he verbally abused her; that she became angry and upset as a result; that she subsequently became extremely nervous, suffered an attack of angina and an alarming increase in her blood pressure as a result. The jury returned a verdict in plaintiff's favor.

Defendant contended on appeal that plaintiff's claim should have been dismissed because *Kirby* was not applicable. The basis of this contention was the plaintiff's failure to present evidence that she was frightened by the conduct of defendant's collection agent. In an opinion by Justice Pless, we held that *Kirby* is not limited to recovery for physical harm resulting from fright only. Plaintiff's evidence that she became angry and upset as a result of the agent's conduct was held to be sufficient. Relying on Section 436 of the *American Law Institute's Restatement of the Law of Torts*, we held that recovery under *Kirby* may be based on fright or *other emotional disturbance* resulting from the defendant's conduct. *Id.* at 689, 157 S.E. 2d at 386.

Plaintiff in this case alleges that defendant's conduct in breaching the contract was "wilful, malicious, calculated, deliberate and purposeful . . . ." In paragraph 13 of the first Count of her complaint plaintiff alleges that "she has suffered great mental anguish and anxiety . . ." as a result of defendant's conduct in breaching the agreement. She further alleges that defendant acted recklessly and irresponsibly and "with full knowledge of the consequences which would result. . . ."

Plaintiff's allegation that she suffered great mental anguish and anxiety as a result of defendant's allegedly wilful, malicious, and calculated conduct is sufficient allegation of "other emotional disturbance" to state a claim under *Kirby* as interpreted in *Crews*. By alleging that defendant acted with full knowledge of the consequences of his actions she has sufficiently indicated that the harm she suffered was a foreseeable result of his conduct. *See Slaughter v. Slaughter*, *supra*, at 735, 142 S.E. 2d at 686. Although it is clear that plaintiff must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct, given the broad interpretation of "physical in-

jury" in our case law, we think her allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety (which she alleges) has caused physical injury.[1]

The requirement that there be some element of aggravation to the tortious conduct before punitive damages will be allowed is also met by the allegations of plaintiff's complaint. "Such aggravated conduct was early defined to include 'fraud, *malice*, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness . . .' *Bake v. Winslow* citing *Holmes v. R.R.*, 94 N.C. 318 (3 Davidson) (1886)." *Newton, supra*, at 112, 229 S.E. 2d at 301. Plaintiff here alleges that defendant acted wilfully, maliciously, recklessly, and with full knowledge of the consequences which would result from his conduct. She is entitled to have at least the opportunity to prove those allegations.

The trial court was in error in dismissing, and the Court of Appeals erred in affirming the dismissal of, plaintiff's claim for punitive damages contained in Count Number I of her complaint. Accordingly, we reverse the Court of Appeals upon this aspect of the case.

Count Number II—Abuse of Process

Plaintiff's Count Number II, labeled abuse of process, was also dismissed under Rule 12(b)(6) for failure to state a claim. This claim against defendant was predicated on his conduct in bringing a prior suit in federal court against the I.R.S. and joining the plaintiff as a co-defendant therein. A copy of the complaint filed in that action was attached to and explicitly incorporated as part of plaintiff's complaint in this proceeding. The copy attached reveals that defendant sought in bringing the prior action to restrain and enjoin the I.R.S. and the plaintiff from "acting in concert to deprive [him] of his property and civil rights guaranteed under the Constitution and laws of the United States." This claim for injunctive relief was supported by allegations to the effect

1. *E.g., Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906) where it was held: "The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted and when 'out of tune' cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

that the I.R.S. had taken inconsistent positions on the question of whether the sums paid by defendant-husband to plaintiff-wife pursuant to their agreement allocating the payment of plaintiff-wife's attorneys' fees to her were deductible. The complaint further alleged that plaintiff-wife "encouraged and actively participated in the illegal and inconsistent position taken by [the I.R.S.] in order to force [defendant-husband] into paying to her . . . the amount of the deficiency assessed against her by [the I.R.S.]."

Plaintiff's claim labeled abuse of process alleged:

> "3. The true purpose of said action [brought in federal court against her and the I.R.S.] was not to seek legitimate relief but to harass, embarrass and annoy the plaintiff, Vanita B. Stanback, and to cause her to incur expenses for the defense of said action and to cause her to forego her legal rights and remedies.
>
> 4. The action of the defendant was malicious, wrongful and unjustified and without probable cause since his claim, if any, against the United States was unrelated to this separate obligation to the plaintiff herein and the defendant instituted the said action for an ulterior and wrongful purpose of restraining the plaintiff from exercising her rights."

[5] Protection against wrongful litigation is afforded by a cause of action for either abuse of process or malicious prosecution. The legal theories underlying the two actions parallel one another to a substantial degree, and often the facts of a case would support a claim under either theory. *See Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938); *Railroad Co. v. Hardware Co.*, 138 N.C. 174, 50 S.E. 571 (1905). In *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E. 2d 398, 401 (1965), it was observed that "abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended (sic) to be secured." *See Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955); *Finance Corp. v. Lane*, 221 N.C. 189, 19 S.E. 2d 849 (1942); *Wright v. Harris*, 160 N.C. 542, 76 S.E. 489 (1912). In an excellent article analyzing the cases in which this Court has considered both malicious prosecution and abuse of pro-

cess, Professor Robert Byrd observes that abuse of process "requires both an ulterior motive and *an act* in the use of the legal process not proper in the regular prosecution of the proceeding," and that "[b]oth requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect." R. Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. Rev. 285, 288 (1969). The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisified when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter. *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E. 2d 410 (1957); *Barnette v. Woody, supra; Finance Corp. v. Lane, supra; W. Prosser, Torts*, § 121 p. 857 (4th ed. 1971). An example of such a wilful act not proper in the regular prosecution of the proceeding is an offer made after the proceeding has been initiated to discontinue it in return for the payment of money. *Ellis v. Wellons*, 224 N.C. 269, 29 S.E. 2d 884 (1944).

[6] Plaintiff's complaint sufficiently alleges that defendant's suit against her in federal court was brought with ulterior motives. Her complaint fails, however, to allege that defendant committed any wilful act not proper in the regular course of the proceeding once he initiated the suit against her. As was said in *Finance Corp. v. Lane, supra*, at 196-97, 19 S.E. 2d at 853, "[t]here is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." For that reason, the complaint fails to state a claim for abuse of process.

[7] Plaintiff contends in her brief that even if her allegations fail to state a claim for abuse of process they are sufficient to state a claim for malicious prosecution. The requirements of N.C. R. Civ. P. 8(a) are met when a pleading "gives sufficient notice of the events, or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104,

176 S.E. 2d 161, 164 (1970). We note also that N.C. R. Civ. P. 54(c) requires that every final judgment, with the exception of judgments rendered by default, "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Thus when the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory. Our interpretation of the concept of notice pleading embodied in N.C. R. Civ. P. 8(a) supports that conclusion. *Sutton v. Duke, supra.* We also note that Fed. R. Civ. P. 8(a)(2), which differs to some extent from N.C. R. Civ. P. 8(a) but which also embodies the concept of notice pleading, has been interpreted in a similar fashion. *See New Amsterdam Cas. Co. v. Waller*, 323 F. 2d 20 (4th Cir. 1963); *Dotschay v. National Mut. Ins. Co.*, 246 F. 2d 221 (5th Cir. 1957); *2A Moore's Federal Practice*, ¶ 8.14, p. 1713 (2d ed. 1975). In order to survive a motion to dismiss, however, the allegations of a mislabeled claim must reveal that plaintiff has properly stated a claim under a different legal theory. We turn now to a consideration of whether the plaintiff's allegations in this instance sufficiently state a claim for malicious prosecution.

[8] To recover for malicious prosecution the plaintiff must show that defendant initiated the earlier proceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor. *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966); *Fowle v. Fowle, supra; Barnette v. Woody, supra; Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936); *Railroad Co. v. Hardware Co.*, 138 N.C. 175, 50 S.E. 571 (1905). At common law a malicious prosecution claim could be brought only on the basis of prior criminal proceedings brought by defendant against plaintiff. *W. Prosser, Torts*, § 120, pp. 850-51 (4th ed. 1971). In a rather large minority of American jurisdictions, however, including North Carolina, the protection afforded by an action for malicious prosecution has been extended to include an action for wrongful institution of civil proceedings. *Brown v. Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645 (1954); *Nassif v. Goodman*, 203 N.C. 451, 166 S.E. 308 (1932); *Estates v. Bank*, 171 N.C. 579, 88 S.E. 783 (1916); *Ely v. Davis*, 111 N.C. 24, 15 S.E. 878 (1892); *Williams v. Hunter*, 10 N.C. 545 (1825). Those decisions

indicate that when the plaintiff's claim for malicious prosecution is based on the institution of a prior civil proceeding against him he must show not only that defendant initiated the prior proceeding, that he did so maliciously and without probable cause, and that the prior proceeding terminated in plaintiff's favor but also that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases. *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964); *Jerome v. Shaw*, 172 N.C. 862, 90 S.E. 764 (1916). The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as causing execution to be issued against the plaintiff's person, *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921), causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920), causing a receiver to be appointed to take control of plaintiff's assets, *Nassif v. Goodman*, *supra*, causing plaintiff's property to be attached, *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645 (1954), or causing plaintiff to be wrongfully committed to a mental institution, *Barnette v. Woody*, *supra*. In the recent case of *Carver v. Lykes*, *supra*, in which this Court held that a claim for malicious prosecution based on proceedings brought against plaintiff before an administrative board could be maintained, the interference thereby caused by defendant with plaintiff's property right in his license to sell real estate was deemed sufficient to constitute special damages.

[9] The Court of Appeals found that plaintiff's complaint properly alleged defendant had initiated the prior civil proceeding against plaintiff and that he had done so maliciously and without probable cause. With that conclusion, we concur. The court held, however, that plaintiff's claim was properly dismissed because plaintiff failed to alleged that the prior proceeding had terminated in plaintiff's favor *on the merits*. With this application of the law of malicious prosecution by the Court of Appeals we cannot agree. The requirement that the former proceeding has been terminated favorably to the plaintiff in a malicious prosecution action is satisfied in many instances by a disposition of the proceeding prior to a consideration of the merits. For example, in *Cook v. Lanier*, *supra*, it was held that plaintiff had sufficiently shown favorable termination of the prior proceeding by showing

that the prior proceeding was dismissed for failure of the complainant to appear and prosecute. *See Winkler v. Blowing Rock Lines*, 195 N.C. 673, 143 S.E. 213 (1928); *Hadley v. Tinnin*, 170 N.C. 84, 86 S.E. 1017 (1915); 52 Am. Jur. 2d, Malicious Prosecution, § 42, pp. 210-11; *Annot.*, 135 A.L.R. 784. Comment (g) to § 674, Restatement of the Law of Torts, endorses the generally accepted rule that for the purpose of maintaining an action for malicious prosecution the prior civil proceeding on which it is based may be terminated in favor of the person against whom it is brought in several ways that do not involve an adjudication on the merits. We think therefore, that it is sufficient for the purpose of withstanding a motion to dismiss under Rule 12(b)(6) that plaintiff in an action for malicious prosecution allege merely that the prior civil proceeding was dismissed.

[10] Although we find error in the grounds on which the Court of Appeals affirmed the dismissal of plaintiff's Count Number II, we nevertheless affirm the dismissal on other grounds. The requirement that plaintiff in a malicious prosecution action based on a prior civil proceeding show some special damage resulting therefrom, as discussed *supra*, is an essential, substantive element of the claim. *Sutton v. Duke*, *supra*, established the principle that despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6). Moreover, N.C. R. Civ. P. 9(g) requires that "[w]hen items of special damage are claimed each shall be averred." Thus "[w]here the special damage is an integral part of the claim for relief, its insufficient allegation could provide the basis for dismissal under Rule 12(b)(6)." *1 McIntosh, N.C. Civil Practice & Procedure*, § 970.20(6), p. 918 (2d ed. 1970 Supp.). Plaintiff's complaint in this instance fails to allege anything which could possibly be construed as special damages as required by the substantive law of malicious prosecution. Paragraph number 6 of her complaint alleges only that "the plaintiff has been damaged in that she has incurred expenses in defending said claim and has suffered embarrassment, humiliation, and mental anguish in the amount of $100,000.00." Such an allegation fails completely to allege a substantial interference with either the plaintiff's person or her property as contemplated by the special damage requirement. Had she alleged the issuance

of a temporary restraining order or something of like nature, the complaint would clearly have been sufficient. But where, as here, the complaint reveals the nonexistence of an essential substantive element of the only legal theory under which plaintiff can proceed, the trial court may properly dismiss it for failure to state a claim for which relief can be granted.

The trial court was correct in dismissing, and the Court of Appeals was correct, for reasons other than stated in the opinion of the Court of Appeals, in affirming the dismissal of plaintiff's claim for abuse of process contained in Count Number II of her complaint. Accordingly, we affirm the Court of Appeals upon this aspect of the case on different grounds for the reasons stated.

[11] The Court of Appeals held that the dismissal of plaintiff's Count Number II was "with prejudice" because in ruling on the 12(b)(6) motion the trial judge examined the pleadings in defendant's suit brought against plaintiff in federal court. A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). And a grant of summary judgment operates as a final judgment on the particular claim to which the motion is addressed. There is a multitude of federal cases considering the issue of when a Rule 12(b)(6) motion is converted into a Rule 56 motion for summary judgment by consideration of matters outside the pleadings under the Federal Rules of Civil Procedure. *See Annot.* 2 A.L.R. Fed. 1027. We need not consider at this time, however, what matters outside the pleadings presented to and considered by the court will result in conversion to a Rule 56 summary judgment proceeding. In paragraph (2) of the Count Number II of her complaint, plaintiff specifically incorporated by reference as an exhibit the complaint in the federal court action and a copy of it was attached to her complaint in this action. N.C. R. Civ. P. 10(c) provides in part, "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof *for all purposes.*" (Emphasis added.) The complaint in the federal court action was not, therefore, a matter outside the pleadings, and the motion to dismiss under Rule 12(b)(6) remained just that. Should plaintiff be able to state a claim for relief based on the occurrences underlying her allegations in this Count Number II, the dismissal of that

claim under Rule 12(b)(6), which we now affirm, will not affect her right to do so.

Affirmed in part.

Reversed in part.

Remanded to the Court of Appeals for further remand to the Superior Court.

Justices EXUM and BRITT took no part in the consideration or decision of this case.

WILLIAM HENRY MITCHELL BY AND THROUGH HIS GUARDIAN AD LITEM, ESTHER FERGUSON MITCHELL v. FRED OVID FREULER, ADMINISTRATOR; CAROLYN F. TOWNSEND AND HUSBAND CLYDE RICHARD TOWNSEND; KATIE F. BARNES AND HUSBAND, RICHARD L. BARNES; AND THE STATE OF NORTH CAROLINA

No. 84

(Filed 17 May 1979)

Descent and Distribution § 8; Constitutional Law § 23.7— illegitimate child—statutes governing intestate succession upon father's death—constitutionality

The N.C. statute governing the right of an illegitimate child to inherit from, by, and through his father, G.S. 29-19 and the statutes in *pari materia*, do not violate the Equal Protection and Due Process Clauses of the U.S. Constitution, since those statutes are substantially related to the lawful State interests they are intended to promote, those interests being: (1) to mitigate the hardships created by former N.C. law which permitted illegitimates to inherit only from the mother and from each other; (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

ON plaintiff's petition under G.S. 7A-31(a) for discretionary review of the judgment entered by *Browning, S.J.*, at the 13 February 1978 special civil session of HALIFAX, docketed and argued as Case No. 100 at the Fall Term 1978.

On 5 July 1977, by and through his duly appointed guardian ad litem, plaintiff brought this action for a declaratory judgment adjudicating his right to one third of the estate of William Henry Freuler, who died intestate on 25 December 1976. Plaintiff claims to be the illegitimate son of Freuler. The defendants are Freuler's two daughters, their husbands, and Freuler's administrator, who was appointed on 6 January 1977. In his complaint plaintiff alleges:

On 29 March 1962 plaintiff was born to Evelyn Mitchell and William Freuler. Evelyn Mitchell and Freuler were never married; nor did Freuler either legitimate or adopt plaintiff. During the last seven years of his life, however, Freuler lived with Miss Mitchell and plaintiff. He "acknowledged" plaintiff to be his son, purchased insurance policies for him, maintained savings accounts for him, and had plaintiff work with him at his automobile parts shop. Although he had expressed his intention to provide for plaintiff after his death, he died suddenly without having executed a will.

Plaintiff further avers that, under the statutory law of North Carolina—G.S. 29-19 (1976) and the statutes referred to therein—he is not entitled to share in Freuler's estate. He asserts, however, that the United States Supreme Court, in *Trimble v. Gordon*, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S.Ct. 1459 (1977), has invalidated G.S. 29-19 as "an invidious discrimination on the basis of illegitimacy . . . and is, in violation of the Fourteenth Amendment to the Constitution of the United States."

Plaintiff's prayer for relief is that the Court (1) set aside the State's intestate succession statutes insofar as they operate to prevent plaintiff from sharing Freuler's estate equally with his two daughters, and (2) order Freuler's administrator to distribute his net estate in equal shares to the two daughters and plaintiff.

In answering the complaint, inter alia, defendants deny that plaintiff is Freuler's child and assert that the decision of the United States Supreme Court in *Trimble v. Gordon* has no application to the North Carolina statutes with reference to the right of an illegitimate child to inherit from his father. However, in the event the Court should hold G.S. 29-19 invalid, defendants request a jury trial on the issue whether plaintiff is the son of Freuler.

On 17 January 1978, pursuant to G.S. 1A-1, Rule 12(b), defendants moved to dismiss the complaint because it shows that plaintiff is an illegitimate child who does not meet the requirements of G.S. 29-19. Judge Browning granted defendants' motion and dismissed the case. Plaintiff appealed to the Court of Appeals and, upon his petition to bypass that court, we allowed discretionary review under G.S. 7A-31(a).

Rufus L. Edmisten, Attorney General, and Charles J. Murray, Assistant Attorney General, for the State.

Allsbrook, Benton, Knott, Cranford & Whitaker by Thomas L. Benton for plaintiff.

Wendell C. Moseley for Fred Ovid Freuler, Administrator, Carolyn F. Townsend, and Katie F. Barnes, defendants.

SHARP, Chief Justice.

The sole issue in this case is whether the North Carolina Statutes governing the right of an illegitimate child to inherit from, by, and through his father[1] violate the equal protection clause of the United States Constitution. The applicable statutes in effect at the time of Freuler's death are quoted or summarized below.

1. G.S. 29-19(b) and (d) (1976) provide:

"(b) For the purpose of *intestate succession*, an illegitimate child shall be entitled to take by, through and from:

(1) Any person who has been judicially determined to be the father of such child pursuant to the provisions of G.S. 49-14 through 49-16.[2] [G.S. 49-14 through G.S. 49-16

1. Under the Intestate Succession Act an illegitimate child is treated in every respect as if he were the legitimate child of his mother. G.S. 29-19(a) (1976).

2. Effective September 1, 1977, G.S. 29-19(b)(1) was rewritten by N.C. Sess. Laws, ch. 757, §§ 3, 4, (1977) to read as follows: "Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16."

G.S. 49-1 through 49-9, inter alia, makes a parent's wilful failure to support his or her illegitimate child a misdemeanor and authorizes the prosecution of the putative father within (1) three years next after the birth of the child; or (2) where the paternity of the child has been judicially determined within three years next after its birth, at any time before he attains the age of 18 years; or (3) where the reputed father has acknowledged the paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter. The court before which the prosecution comes is first required to determine whether the defendant is a parent of the child on whose behalf the proceeding is instituted. If this issue is determined in the affirmative the court then determines whether the defendant is guilty of nonsupport and, if so, enters an appropriate judgment.

authorize the establishment of paternity by proof beyond a reasonable doubt in a civil action commenced during the lifetime of the putative father and within three years next after the birth of the child or within three years next after the date of the last payment by the putative father for the support of the child.]

(2) Any person who has acknowledged himself during his own lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-6(c) and filed during his own lifetime in the office of the clerk of superior court of the county where either he or the child resides.[3]

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors."

"(d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said *will* or, in the absence of any express provisions, the same as a legitimate child."

2. G.S. 49-10 (1976) permits the putative father of an illegitimate child to file a special proceeding in the superior court of the county of his residence, or that of the child "praying that such child be declared legitimate." The mother (if living) and the child are necessary parties to this proceeding. If the court finds that the petitioner is the father of the child it will enter an order declaring the child legitimate and the clerk shall record the decree. G.S. 49-11 (1976) specifies that the effect of such legitimation is (1) to impose upon the father and mother all the lawful rights, privileges, and obligations of parenthood; and (2), in case of

3. G.S. 29-19(b)(2) was amended by 1977 N.C. Sess. Laws, ch. 375 §§ 6 and 17, and ch. 591, § 1 so that it now reads as follows:

"(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides."

The substitution of G.S. 52-10(b) for G.S. 52-6(c) merely added notaries public to the list of certifying officers authorized to take acknowledgments.

death and intestacy, to make the child an heir of his father and mother as if he had been born in wedlock and, similarly, to make them heirs of the child also entitled to share in his estate as provided in the Intestate Succession Act.

3. G.S. 49-12 (1976) provides that when the mother of any child born out of wedlock and the reputed father of such child shall intermarry after the birth of the child, from this date the child shall be deemed legitimate and "entitled, by succession, inheritance or distribution, to real and personal property, by, through, and from his father and mother as if he had been born in lawful wedlock." Similarly, the child's property shall descend and be distributed according to the Intestate Succession Act.

Plaintiff bases his claim as an heir of Freuler entirely upon the case of *Trimble v. Gordon*, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S.Ct. 1459, decided 26 April 1977 (hereinafter referred to as *Trimble*). Plaintiff's reliance upon this case is without foundation. In the first place, the Illinois statute which the Court held unconstitutional in *Trimble* differs significantly and determinatively from the North Carolina Statute we consider here. Second, on 11 December 1978 the United States Supreme Court decided *Lalli v. Lalli*, ---- U.S. ----, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978), which clearly distinguishes the statute which *Trimble* declared unconstitutional from the statutes which we consider in this case.

At issue in *Trimble* was the constitutionality of an Illinois statute (§ 12) which provided that a child born out of wedlock could inherit from his intestate father *only* if the father had acknowledged the child as his child *and* had married the child's mother. The appellant in *Trimble*, Deta Mona Trimble, was a child born out of wedlock. Her father, Sherman Gordon, had openly acknowledged her as his child, but he never married her mother. He had, however, been found to be her father in a judicial decree ordering him to contribute to her support. When Sherman Gordon died intestate, Deta Mona was excluded as a distributee of his estate because she had not met the statutory requirements for inheritance. The Supreme Court held in a five-to-four decision that the Illinois statute discriminated against illegitimate children in a manner prohibited by the Equal Protection Clause in that the statute was not substantially related to permissible state interests.

The Illinois statute, the Supreme Court said, could not be justified on the grounds it would encourage legitimate family relationships or foster the maintenance of an accurate and efficient method of disposing of an intestate decedent's property.[4] The Court recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." Notwithstanding, it held that the Illinois statute was "constitutionally flawed" because, by requiring not only that the father acknowledge the child as his but that he also marry the mother, the legislature had excluded at least some significant categories of illegitimate children whose inheritance right could be recognized without jeopardizing the orderly settlement of estates or the dependability of titles passing under intestacy laws.[5]

The Illinois statute, the Court declared, was not "carefully tuned to alternative considerations. . . . Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The facts of this case graphically illustrate the constitutional defect of § 12. Sherman Gordon was found to be the father of Deta Mona in a state-court paternity action prior to his death. On the strength of that finding, he was ordered to contribute to the support of his child. That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances."[6]

At the time *Trimble* was decided the plaintiff's appeal in *Lalli v. Lalli*, 38 N.Y. 2d 77, 378 N.Y.S. 2d 351, 340 N.E. 2d 721 (1975) was pending in the United States Supreme Court. In brief summary the facts in *Lalli* are as follows:

The plaintiff, Robert Lalli, alleged that he and his sister, Maureen, are the illegitimate children of Mario Lalli, who died in-

4. *Lalli v. Lalli*, --- U.S. ---, 58 L.Ed. 2d 503, 509, 99 S.Ct. 518 (1978).

5. Trimble at 770-72, 52 L.Ed. 2d 39-40, 97 S.Ct. 1465-66.

6. Trimble at 772, 52 L.Ed. 2d 40-41, 97 S.Ct. 1466.

testate on 7 January 1973 in New York. At that time they were 25 and 23 years old respectively. It was not contested that during his lifetime Mario had provided financial support for both Robert and Maureen, and that he had openly and often acknowledged them as his children. It was agreed, however, that there was never any order of filiation, and that the mother of Robert and Maureen, who died 11 October 1968, was never married to Mario.

After Mario's widow (who had lived with him as his wife for the 34 years preceding his death) was appointed administratrix of his estate plaintiff petitioned the Surrogate's Court for a compulsory accounting. He asserted that he and Maureen were entitled to inherit from Mario as his children. The administratrix contested the claim on the ground that, even if Robert and Maureen were Mario's children, they were not entitled as distributees because they failed to meet the requirements of § 4-1.2 of the New York Estate, Powers and Trusts Law. In pertinent part § 4-1.2 provided:

"An illegitimate child is the child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child."

The plaintiff contended that § 4-1.2 was invalid because it denied him and his sister the equal protection of the law guaranteed by the State and Federal constitutions and the due process of law as provided by the Federal Constitution. The Surrogate granted the administratrix' motion to dismiss, and the plaintiff appealed directly to the Court of Appeals. In sustaining the statute against this attack, and affirming the decree of the Surrogate's Court, the Court of Appeals reasoned:

Section 4-1.2 does not discriminate against illegitimacy; the difference in treatment exists only with respect to the means by which the fact of fatherhood is to be established. Once fatherhood is established in the manner required by the statute, the right of the illegitimate child to inherit is the same as if he had been born in wedlock. Since the identification of a natural mother is both easier and far more conclusive than the identification of a natural father, the legislature acted reasonably in requiring the formality

and conclusiveness of a court order adjudicating the fact of paternity. This procedure minimizes the risk of misrepresentation, fraud, duress, and other circumstances which might vitiate written acknowledgments of paternity, financial support, *et cetera. Lalli v. Lalli*, 38 N.Y. 2d 77, 81-82, 378 N.Y.S. 2d 351, 354-55, 340 N.E. 2d 721, 724 (1975).

Finally, the court deemed it not unreasonable "to lay down as a condition precedent that the order of filiation must be during the lifetime of the natural father. . . . His availability should be a substantial factor contributing to the reliability of the fact-finding process." Further, when a father dies intestate the statutes governing descents and distributions are presumed to express his wishes regarding the distribution of his property. Since by will he can disinherit a legitimate child and provide for an illegitimate one, "it is not unreasonable to require, in addition to a highly reliable standard of proof of parenthood, that the alleged father have personal opportunity to participate, if he chooses, in the procedure by which the fact of fatherhood is established." *Id.*

On 16 May 1977 (20 days after *Trimble* was decided) the Supreme Court vacated the judgment in *Lalli v. Lalli, supra*, and remanded the case to the Court of Appeals of New York "for further consideration in the light of *Trimble v. Gordon*, ..."

Upon remand and reconsideration the Court of Appeals found the Illinois statute which was before the Court in *Trimble* to be "significantly and determinatively different" from the New York Statute and it adhered to its previous decision. *In re Lalli*, 43 N.Y. 2d 65, 400 N.Y.S. 2d 761, 371 N.E. 2d 481 (1977). The Court of Appeals reiterated and emphasized that under the Illinois law the right of an illegitimate child to inherit from the father depended not only on proof of paternity by way of the father's acknowledgment but also on proof that the parents had intermarried. By contrast, under the New York statute the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father. In requiring that the family relationship be "legitimatized" by the subsequent marriage of the parents, the Court of Appeals said the Illinois Legislature had manifested an impermissible hostility to illegitimacy, even when there was no doubt as to paternity. Thus, Illinois was penalizing children born out of

wedlock for the sins of their parents. Conversely, New York concerned itself only with "the fact of paternity" and "with the form and manner of its proof, *i.e.*, a court order of filiation."

The determinative question, the Court of Appeals decided, was "whether a State may constitutionally require as proof of paternity a judicial determination made during the lifetime of the father." It found nothing in *Trimble* which prohibited this requirement, held that the State could constitutionally require a judicial decree during the father's lifetime as the exclusive form of proof of paternity, and reaffirmed the decree of the Surrogate's Court. Robert Lalli again sought, and obtained, review by the Supreme Court.

Upon Lalli's second appeal, Justice Powell (who also wrote the majority opinion in *Trimble*) distinguished the Illinois and New York statutes substantially as the Court of Appeals had done. He then stated the question to be "whether the discrete procedural demands that § 4-1.2 placed on illegitimate children bear an evident and substantial relation to the particular state interest this statute is designed to serve." The inquiry under the Equal Protection Clause, he said, "does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." This time the Court concluded that the relationship was not so tenuous and affirmed the New York Court of Appeals in a five-to-four decision. *Lalli v. Lalli*, ---- U.S. ----, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978). The rationale of the majority opinion is summarized as follows:

The purpose of § 4-1.2 is the just and orderly disposition of property at death—a matter in which the State has a substantial interest. Paternal inheritance by illegitimates involves peculiar problems of proof which may make it difficult to expose false claims of paternity. Ordinarily such problems do not exist in establishing maternity. Quoting from the report of the Bennett Commission,[7] Justice Powell suggested that without § 4-1.2 unknown illegitimates would create an almost insuperable burden.

7. This Commission was created by the New York Legislature in 1961 to recommend, inter alia, needed changes in the law pertaining to the descent and distribution of property and the practice and procedure relating thereto. *Lalli v. Lalli*, --- U.S. ---, n. 7, 58 L.Ed. 2d 512, n. 7, 99 S.Ct. 525, n. 7.

"How achieve finality of decree in any estate when there always exists the possibility, however remote, of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries?" The "strictures" of § 4-1.2, he noted, not only mitigate serious difficulties in the administration of the estates of both testate and intestate decedents but also protect innocent decedents "and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs."

Finally, Mr. Justice Powell concluded that the history of § 4-1.2 disclosed that the legislature had attempted to "grant to illegitimates *in so far as practicable* rights of inheritance on a par with those enjoyed by legitimate children," and that the section "represents a carefully considered legislative judgment as to how this balance best could be achieved."

We now compare N.C. Gen. Stat. §§ 29-19, 49-10 through -12, 49-14 through -16 (1976) with both New York's § 4-1.2 and Illinois' § 12, and consider the impact of the *Trimble* and *Lalli* decisions upon plaintiff's contention that the North Carolina statutes dealing with the intestate succession rights of illegitimates contravene the Equal Protection Clause. As noted earlier, at all times pertinent to this case North Carolina law[8] allowed an illegitimate child to inherit by, through and from his putative father upon proof of paternity by any one of the following methods: (1) a judicial decree entered during the life of the putative father; (2) the father's written admission of paternity, duly acknowledged and recorded in his lifetime in the appropriate office of the clerk of the superior court; (3) the father's acknowledgment of paternity in his duly probated will; and (4) the intermarriage of the mother and putative father at any time after the birth of the illegitimate child.

As previously pointed out, the vice in the Illinois statute was that it denied to the illegitimate child the right to inherit from his father *unless* he had married the child's mother, albeit the child's paternity was not in doubt. North Carolina statutes manifest no

8. On 1 September 1977 the legislature added another method of proving paternity. G.S. 29-19(b)(1) was amended to allow an illegitimate child to inherit from the putative father whose paternity had been established in a criminal prosecution under G.S. 49-1 through -9 for failure to support the child. Had this statute been in effect at the time of Freuler's death it would not have affected this case because Freuler was neither charged with nor convicted for the nonsupport of plaintiff.

such hostility to illegitimates. While the intermarriage of the mother and father will legitimate the child, our statutes also provide several alternate methods by which paternity can be established. The decision in *Trimble*, therefore, does not control the decision in this case.

By specifying the manner and time in which an illegitimate may establish his paternity, this State—like New York—has sought (1) to mitigate the hardships created by our former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. The exposition of Mr. Justice Powell in his opinion upholding the constitutionality of § 4-1.2 in *Lalli*, and that of the New York Court of Appeals in its opinion in the same case, are equally applicable to plaintiff's attack upon G.S. 29-19 and the alternative statutes comprising this State's scheme for proving paternity.

Upon the authority of *Lalli v. Lalli*, we hold that G.S. 29-19 and the statutes in *pari materia* are substantially related to the lawful State interests they are intended to promote. We therefore find no violation of the Equal Protection and Due Process Clauses.

The judgment of the Superior Court of Halifax County is

Affirmed.

Justices BRITT and BROCK did not participate in this decision.

STATE OF NORTH CAROLINA v. NATHANIEL PHIFER

No. 35

(Filed 17 May 1979)

1. Searches and Seizures § 11— inventory of contents of impounded vehicle—failure to follow standard procedures—pretext concealing investigatory motive

A warrantless search of the locked glove compartment of defendant's car after his arrest on the basis of an outstanding warrant for traffic violations

cannot be justified as a valid inventory search where: (1) the unilateral determination by one of the arresting Charlotte police officers to have the vehicle towed and inventoried was inconsistent with Charlotte standards on towing and inventory of impounded vehicles, which standards required the officer to seek permission from a superior to have the vehicle towed and, in any event, to give defendant an opportunity to make a disposition of his vehicle; and (2) the arresting officers knew that defendant was a drug dealer and it appears that the officers utilized the towing and inventory procedure as a "pretext concealing an investigatory motive." However, cocaine found in the glove compartment was not the fruit of the illegal inventory search where the record shows that, by the time the glove compartment was opened, the officers, through lawful means, had independently obtained probable cause to suspect that the glove compartment contained contraband.

2. **Searches and Seizures § 11— probable cause to search glove compartment of car**

Officers had probable cause to search the locked glove compartment of defendant's car for narcotics without a warrant, and cocaine was lawfully seized from the glove compartment, where defendant was stopped for speeding and was then lawfully arrested on the basis of an outstanding warrant for his arrest on file at the police station; the arresting officer searched defendant's person as an incident of the arrest; the officer discovered $1,099 in bills of various denominations rolled up in defendant's left sock; defendant attempted, unsuccessfully, to throw away a key which was in his right shoe; the arresting officer gave the key to another officer who used it to open the glove compartment; and the officers knew that defendant had a reputation as a drug dealer.

3. **Criminal Law § 78; Searches and Seizures § 10— stipulation of no probable cause for search—invalidity**

The courts are not bound by a stipulation that officers had no probable cause to conduct a warrantless search of the glove compartment of defendant's car, since stipulations as to the law are invalid.

DEFENDANT appeals from decision of the Court of Appeals, 39 N.C. App. 278, 250 S.E. 2d 309 (1979), upholding judgment of *Smith (David I.), S.J.*, entered at the 27 February 1978 Schedule "B" Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment charging him with felonious possession of cocaine, a controlled substance listed in Schedule II of the North Carolina Controlled Substances Act. Upon the call of the case for trial defendant moved to suppress the evidence obtained from the glove compartment of his car. After a hearing and findings of fact the motion to suppress was denied, and defendant thereupon entered a plea of guilty, preserving his right under G.S. 15A-979(b) to contest on appeal the validity of the warrantless search of the glove compartment.

The State's evidence on the voir dire hearing tends to show that Police Officer W. F. Christmas saw defendant driving his 1972 Lincoln automobile on Beatties Ford Road near the intersection of Celia Avenue in Charlotte and clocked his speed at 48 miles per hour in a 35-mile-per-hour zone. When defendant made a right turn onto Booker Avenue, the officer stopped him at a vacant lot just off the traveled portion of Booker Avenue and on the city right-of-way. Officer Christmas stopped his patrol vehicle immediately behind defendant's vehicle. Defendant got out of his car and met the officer beside his patrol car. The officer asked for defendant's driver's license and advised him he had been speeding. Defendant replied that he did not have a license. At that time Officer T. G. Barnes arrived on the scene, recognized defendant as a known drug dealer, and so informed Officer Christmas. Officer Christmas asked Officer Barnes to run a driver's license check on defendant and also determine if any warrants were on file against him. The checks revealed that defendant was named Nathaniel Phifer and that there was on file a warrant for his arrest for other traffic offenses as to which defendant had failed to appear in court in obedience to citation. Officer Christmas thereupon advised defendant that he was under arrest and instructed Officer Barnes to start a vehicle inventory form on the car. Since there had been quite a few break-ins at the particular corner where defendant was stopped by the officers, it was adjudged that a wrecker should be called to tow defendant's car.

After Officer Barnes had been directed to commence an inventory on the vehicle, Officer Christmas instructed defendant to place his hands on the car so he could be searched. In searching him the officer found One Thousand Ninety-nine Dollars in bills of various denominations rolled up in defendant's left sock. The officer then asked defendant to remove his shoes, which he did. There was a key in his right shoe which defendant attempted to throw away but was prevented from doing so. Defendant was then handcuffed and placed in the patrol car. Officer Barnes used the key to open the glove compartment. Found therein was a plastic bag containing rice, some marijuana, including marijuana cigarettes, and a smaller bag of white powder which was later determined to be cocaine. Defendant's car was towed by a wrecker to the police garage. Thereafter a search warrant was

obtained to search the trunk of the car. Found in the trunk was a set of scales, other plastic bags, and residue of a white powdery substance, all of which were listed on the search warrant inventory.

Defendant offered no evidence and, upon his plea of guilty, was sentenced to five years in prison. The Court of Appeals found no error with Judge Arnold dissenting, and defendant appealed to this Court as of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Marilyn R. Rich, Assistant Attorney General, for the State.

Plumides, Plumides and Shuster by John G. Plumides, for defendant appellant.

HUSKINS, Justice.

The State contends the warrantless search of the glove compartment of defendant's car was part of a valid police inventory of the car's contents. The State relies on *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed. 2d 1000, 96 S.Ct. 3092 (1976), where the United States Supreme Court held that a police inventory search, when conducted pursuant to standard police procedures, was not unreasonable under the Fourth Amendment. In upholding the validity of such searches, the Court carefully delineated the context within which an inventory search constitutes a constitutionally permissible intrusion:

> "In the interests of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.
>
> Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic

or threatening public safety and convenience is beyond challenge.

> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger."

428 U.S. at 368-69 (citations omitted). The Court in *Opperman* reasoned that given the frequency with which police have occasion to impound automobiles in contexts totally divorced from the investigation of criminal activities, it is reasonable to permit them to inventory the contents of such automobiles and secure valuable items of property found within them until the automobiles are reclaimed by their owners. The Court also noted that an inventory tends to insure that explosives, ammunition, weapons, and other hazardous materials are not left unattended in impounded vehicles. In sum, the benefits in safety and protection of private property provided by a *standardized* police inventory outweigh the intrusion upon the diminished privacy interests of an owner whose automobile has been *lawfully* impounded.

Since an inventory search may be undertaken without a warrant or probable cause, it is potentially subject to abuse by police officers intent upon ferreting out evidence of criminal activity. Cognizant of this danger, the Court in *Opperman* made it clear that the validity of an inventory search under the Fourth Amendment is premised upon its being a benign, neutral, administrative procedure designed primarily to safeguard the contents of lawfully impounded automobiles until owners are able to reclaim them. Accordingly, the Court stressed that inventory searches should be "carried out in accordance with *standard procedures* in the local police department, a factor tending to insure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." 428 U.S. at 375 (citations omitted). The Court also pointed out that standardized inventory procedures could not be utilized as a "pretext concealing an investigatory motive." *Id.* at 376. Finally, while generally approving

the reasonableness of standardized inventory searches, the Court noted that the reasonableness of any given inventory search depended upon the circumstances presented by each case. *Id.* at 372-73.

[1] Application of the above principles to the circumstances of this case leads us to conclude that the instant search cannot be justified as a valid inventory search. Examination of the record indicates that Officers Christmas and Barnes did not comply with pertinent portions of standard procedures in effect at the time of defendant's arrest for the towing, inventory, storage and release of impounded vehicles. See City of Charlotte Code §§ 20-20 through 24 (superseded 24 July 1978). Hence, at the time Officers Christmas and Barnes commenced their inventory of defendant's car they in fact had no authority to impound, tow or inventory the car.

Defendant was initially stopped for a speeding violation. He was placed under arrest when it was discovered that there was on file a warrant for his arrest for other traffic offenses as to which defendant had failed to appear in court in obedience to citation. Officer Christmas testified that in light of defendant's past failures to appear in court he determined that the better course of action would be to take defendant before a magistrate and have him post bond. Defendant's arrest raised the question of how to dispose of his car. Officer Christmas testified that since there had been quite a few break-ins at the particular spot where defendant's car was stopped he thought it best to inventory its contents and have a wrecker tow it. Accordingly, a tow truck was summoned and an inventory was commenced by Officer Barnes.

Review of pertinent portions of the procedures established by the City of Charlotte with respect to the impoundment of vehicles demonstrates that Officers Christmas and Barnes had no authority to summon a tow truck and commence an inventory on defendant's car. The Charlotte standards effective at the time of defendant's arrest expressly provide that whenever a traffic violator must be brought before a magistrate to post bond, "the violator's vehicle will not be towed for this purpose unless authorized by the officer's supervisor." The proper procedure in such instance is to have the violator drive the car to the magistrate's office, or if that is not advisable, to have an assisting

officer drive the car. Only if violator is unable to post bond are the officers authorized to have the car towed. Any towing prior to arrival at the magistrate's office must be authorized by a supervisor. Defendant was arrested for the purpose of having him appear before a magistrate; yet, at no time did Officer Christmas seek authorization from a supervisor to have defendant's vehicle towed to the magistrate's office. Nor did Officer Christmas consider whether his assisting officer, Barnes, should drive the car to the magistrate's office.

The Charlotte standards also give priority to another means of vehicle disposition which does not involve towing and inventory:

> "B. Citizens should be allowed to make disposition of their vehicles when:
>
> 1. The driver or owner is on the scene.
>
> 2. In the officer's judgment the subject is capable of making such disposition.
>
> 3. Said disposition does not interfere with the case or create a traffic problem.
>
> C. When an officer decides that conditions permit leaving the owner's or driver's vehicle parked in an area where it does not create a traffic problem he will fill out a Vehicle Disposition Form. The owner or driver will sign this form releasing the Department of all responsibility for the vehicle."

The record indicates that defendant was present at the scene of the arrest and was capable of determining what he wanted done with his vehicle. Yet, at no time did Officer Christmas consult with defendant as to how he wished to dispose of his vehicle. Rather, Officer Christmas, contrary to the standards, unilaterally determined what was to be done with the car. It should be noted that the primary reason given by Officer Christmas for having defendant's car towed was the danger of theft and vandalism. Defendant's car was stopped on a city right-of-way adjacent to a vacant lot. Thus, it is highly unlikely that a traffic problem would have been created had defendant desired to risk exposure to theft by leaving his car temporarily parked on the right-of-way, the vacant lot, or a nearby parking space.

Finally, due consideration of all the circumstances surrounding the disputed search and seizure leads to the inescapable inference that Officers Christmas and Barnes utilized the inventory procedure as a "pretext concealing an investigatory motive." *South Dakota v. Opperman, supra,* 428 U.S. at 376. Shortly after Officer Christmas had stopped defendant for speeding, Officer Barnes arrived on the scene and informed Officer Christmas that defendant was known to him as a drug dealer. Radio checks revealed an outstanding warrant on file for other traffic offenses which precipitated defendant's arrest. It is at this juncture that the inescapable inference of pretextual searches arises. Officer Christmas unilaterally determined that defendant's car had to be towed and asked Officer Barnes to commence an inventory of the vehicle's contents. The abrupt, unilateral determination to have the vehicle towed and inventoried was inconsistent with the Charlotte standards on the towing and inventory of impounded vehicles. Those standards required Officer Christmas to seek permission from a superior to have the vehicle towed and, in any event, to give defendant an opportunity to make a disposition of his vehicle. When the officers' disregard for Charlotte's towing and inventory standards is juxtaposed against their knowledge that defendant was a drug dealer, the inescapable inference arises that the towing and inventory procedure was used as a pretext to search defendant's car for contraband. The inference of pretextual search is supported by the testimony of Officer Barnes:

"Q. And you knew that this man was a drug dealer, no question about that, is there?

A. No, sir, I knew.

Q. And you knew you all were looking for him and keeping out an eye for him and would stop him any chance you got to check him out, didn't you? Wouldn't you?

A. Yes, sir.

Q. You would have done that?

A. Yes, sir.

Q. And that's exactly why he was stopped on this day in question to be searched to see if he had any drugs on him, wasn't it?

A. I didn't stop him.

Q. Well, you would have stopped him had you seen him, wouldn't you?

A. Yes, sir, I would have.

Q. Yes, sir. And the pretext of the inventory is no more than a cover for the lack of a search warrant, isn't it?

A. Sir, I don't know what the department . . . the department sets forth the guidelines and I just follow them."

In summary, the instant search cannot be justified as a constitutionally valid inventory search under the guidelines enunciated in *South Dakota v. Opperman*, supra. The Charlotte standards were not followed by the officers and therefore they had no authority to have defendant's car towed and no authority to commence a pre-tow inventory of the vehicle's contents. Additionally, the circumstances indicate that Officers Christmas and Barnes utilized the towing and inventory procedures as a "pretext concealing investigatory motives."

Our determination that the warrantless search of the glove compartment cannot be justified as an inventory search, however, is not dispositive of this appeal, for the contraband found in the glove compartment was not the fruit of the illegal inventory search. Review of the record indicates that by the time the glove compartment was opened the officers, through lawful means, had independently obtained probable cause to suspect that the glove compartment contained contraband. This is so because defendant, after being stopped for speeding, was lawfully arrested on the basis of an outstanding warrant for his arrest on file at the police station. After lawfully arresting defendant, Officer Christmas had the right to make a contemporaneous, warrantless search of the person of the accused. *Preston v. United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964). *Accord, State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). Thus, while Officer Barnes began to inventory the contents of defendant's car, Officer Christmas commenced a

valid search of defendant's person. During the course of that search Officer Christmas found One Thousand Ninety-nine dollars in bills of various denominations rolled up in defendant's left sock. The officer then asked defendant to remove his shoes, which he did. There was a key in the right shoe which defendant attempted, unsuccessfully, to throw away. Officer Christmas handed the key to Officer Barnes who then used the key to open the glove compartment. Prior to his receipt of the glove compartment key, Officer Barnes' inventory had proceeded no further than the unlocked areas of the passenger compartment and had not uncovered anything of significance.

Probable cause to search in the setting of this case may be defined as a reasonable ground of suspicion supported by circumstances sufficiently strong to lead a man of prudence and caution to believe defendant's car contained contraband of some sort. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). " 'To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. . . . The existence of "probable cause" . . . is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.' " *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971), quoting 5 Am. Jur. 2d, Arrest §§ 44, 48. A warrantless search of an automobile is constitutionally permissible if the "automobile is stopped on or near a public street or highway and there is *probable cause to search at the scene. . . .*" *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978) (emphasis added). *Accord, Texas v. White*, 423 U.S. 67, 46 L.Ed. 2d 209, 96 S.Ct. 304 (1975) (per curiam); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978); *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Allen, supra*; *State v. Ratliff, supra*; *State v. Simmons*, 278 N.C. 468, 180 S.E. 2d 97 (1971).

[2] Here, the totality of the circumstances would lead a man of prudence and caution to believe that the glove compartment of defendant's car contained contraband of some sort. The officer's

knowledge of defendant's reputation as a drug dealer, the substantial sum of money found rolled in defendant's sock, and defendant's attempt to throw away a key hidden in one of his shoes would alert any officer to the fact that defendant had something to hide. *Compare, State v. Ratliff, supra.* Given this probable cause, the warrantless search of the glove compartment was reasonable by Fourth Amendment standards and the fruits of the search were properly admitted into evidence. *Accord, Texas v. White, supra; Chambers v. Maroney, supra.*

Since the evidence sought to be suppressed was obtained through lawful means unrelated to the invalid inventory search, it follows that the "fruit of the poisonous tree" doctrine has no application to this case. *Accord, Wong Sun v. United States*, 371 U.S. 471, 485, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963); *Nardone v. United States*, 308 U.S. 338, 341, 84 L.Ed. 307, 60 S.Ct. 266 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 64 L.Ed. 319, 40 S.Ct. 182 (1920).

[3] We are cognizant of the fact that at the suppression hearing the District Attorney stipulated that the officers had no probable cause to suspect that the glove compartment of defendant's car contained contraband. This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity. *Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975); *In re Edmundson*, 273 N.C. 92, 159 S.E. 2d 509 (1968); *Auto Co. v. Insurance Co.*, 239 N.C. 416, 80 S.E. 2d 35 (1954); *Moore v. State*, 200 N.C. 300, 156 S.E. 806 (1931); *Sanders v. Ellington*, 77 N.C. 255 (1877). Whether the facts in this case give rise to probable cause is a legal determination reserved for the courts. "[W]here a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring." Annot., 92 A.L.R. 663, 670 (1934). *Accord, Sanders v. Ellington, supra.*

For the reasons stated in this opinion, the result reached by the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JOSEPH SLEDGE, JR.

No. 34

(Filed 17 May 1979)

1. Constitutional Law § 30— names of State's witnesses—no discovery—no error

The trial court did not err in denying defendant's motion for the names of prison inmates who would testify to incriminating statements defendant had allegedly made to them, since G.S. 15A-903 does not afford an accused the right to discover the names and addresses of the State's witnesses and since, by virtue of an earlier trial of the case which resulted in a mistrial, defendant had the names of inmates who were to testify against him in his second trial as well as a copy of the witnesses' prior recorded testimony.

2. Constitutional Law § 30— slides of homicide victims—no discovery—no error

The trial court in a murder prosecution did not err in failing to require the prosecution to furnish to defendant, prior to trial, photographic slides of the bodies of the victims, since defendant viewed the slides at his first trial and his counsel cross-examined the doctor who illustrated his testimony by the use of those slides.

3. Homicide § 20.1— use of photographs—murder—no prejudice

Though the State in a murder prosecution likely could have illustrated medical testimony fully as well with fewer pictures of the exhumed bodies of the victims, the use of nine photographs of the two victims which were not repetitious was not prejudicial to defendant.

4. Homicide §§ 15, 15.5— autopsy—pepper can—competency of evidence

In a homicide prosecution a 64-day delay in performing autopsies on the bodies of the victims went to the weight of such evidence rather than its competency; likewise, a seventeen month delay in ascertaining the relevancy of a black pepper can found at the scene of the murder went to the weight of the evidence rather than its competency.

5. Criminal Law § 119— request for instructions—instructions given in substance

The trial court's instruction on circumstantial evidence was correct and substantially in accord with defendant's request, and the court was not required to give defendant's requested instruction verbatim.

6. Homicide § 20.1— photographs and sketches—use for illustration only

The trial court in a homicide prosecution did not err in permitting the district attorney to use various photographs and sketches for illustrative purposes where the judge gave an appropriate limiting instruction when each exhibit was tendered for illustrative purposes; the judge instructed the jury during his charge that the photographs and sketches were admitted solely to illustrate the testimony of the witnesses and for no other purpose; and in each instance the witness did in fact use the exhibits to illustrate his testimony.

State v. Sledge

DEFENDANT appeals from judgments of *Clark, J.*, entered at the 21 August 1978 Session, COLUMBUS Superior Court.

Defendant was charged in separate bills of indictment with the murders of Aileen Davis and Josephine Davis on 6 September 1976 in Bladen County. On motion by defendant the case was removed to Columbus County for trial. His first trial at the May 1978 Session of Columbus Superior Court resulted in a mistrial. Upon retrial defendant was convicted of second degree murder in each case and received two life sentences, to run consecutively.

In addition to technical evidence dealing with hair and blood, the crux of the State's evidence rested on the testimony of Donald L. Sutton and Herman Baker, Jr., inmates of the North Carolina Department of Corrections, who testified to incriminating statements made to them by the defendant. Both inmates testified they had been in prison with defendant at the White Lake Prison Camp in Bladen County; that defendant, in separate conversations with each witness, said that he had been in prison previously and had escaped from the White Lake Camp; that after his escape he was running through the woods and came to an old house and went in; that a lady came out hollering "what are you doing in my house?" and started screaming; that he knocked her down and stabbed her many times; that another lady came in and he pushed her down and stabbed her many times; that as he was leaving through the back door he spread black pepper around the doorstep to keep the "she-devil spirit" from following him; that white women were she-devils and it was best to kill them all.

The State offered further evidence tending to show that the bodies of the victims were discovered about 4 p.m. on 6 September 1976. The body of Aileen Davis was lying on the floor. There were pools of blood beneath her body, especially around her head. She had stab wounds about her face and neck and her clothing was pulled up around her waist exposing her lower torso. The body of Josephine Davis had stab wounds about the face and neck and there were heavy concentrations of blood about her face and beneath her upper torso. Her clothing was also pulled up exposing the lower half of her body. Heavy spatterings of blood were observed on the wall, floor and on a green refrigerator located next to the head of Aileen Davis. There were blood spat-

terings on areas of the floor over the entire living room and bloody footprints were found inside the kitchen leading toward the back door.

Phillip Little, an investigator for the Bladen County Sheriff's Department, testified that after defendant was apprehended in Dillon, South Carolina, and returned to Bladen County, he and another officer took defendant back to the White Lake Prison Camp on 12 September 1976. The officers stopped their vehicle on the highway directly in front of the Davis residence and sat there for a few minutes. Defendant had not been told the house in view was the Davis home. Defendant was in handcuffs with his hands in front of him. He raised both hands and pointed to the Davis house and stated: "A black man did not kill those two women. A white man did it. A black man wouldn't cut them up like they were." This statement was volunteered and seemingly spontaneous.

Defendant testified as a witness in his own behalf. He said he escaped from the White Lake Prison Camp on 5 September 1976 by jumping over the fence in the afternoon and hiding nearby until it got dark; that he then walked the highway facing traffic to Elizabethtown, stepping into the shadows and bushes when a car would approach. When he got to Elizabethtown he took some clothing from a clothes line to wear in lieu of his prison garb, then stole a car and drove to Fayetteville. He denied killing the two Davis women and denied hating white women. When recaptured later in South Carolina, he said he was returned to prison and placed in a cell with Donald Sutton. He denied having any conversation with Sutton about killing the two women and denied talking with Herman Baker, Jr. about killing the women or about anything else.

Additional evidence necessary to an understanding of defendant's assignments of error will be narrated in the opinion.

Rufus L. Edmisten, Attorney General, by Lester V. Chalmers, Jr., Special Deputy Attorney General, for the State.

Reuben L. Moore, Jr., for defendant appellant.

HUSKINS, Justice.

Pursuant to G.S. 15A-903 defendant filed a pretrial motion "for information necessary to receive a fair trial" and a motion to

inspect, examine, and test physical evidence. By his first assignment of error defendant asserts the trial court erred (a) in denying his motion for the names of other prison inmates who would testify to incriminating statements defendant had allegedly made to them; and (b) in failing to require the prosecution to furnish to defendant, prior to trial, photographic slides of the bodies of the two victims.

[1] We find no merit in this assignment. Defendant, in compliance with G.S. 15A-903(a)(2), was advised by the prosecution that incriminating statements he had made to other unnamed inmates would be used against him at trial. Moreover, during the first trial of this case Donald L. Sutton and Herman Baker, Jr., inmates of the North Carolina Department of Corrections, testified for the State and gave substantially the same testimony as they gave in this trial. Each of these witnesses was cross-examined at length. Defendant therefore had their names as well as a copy of their prior recorded testimony. In any event, G.S. 15A-903 affords an accused no right to discover the names and addresses of the State's witnesses and does not require the State to furnish the accused a list of the witnesses who will be called to testify against him. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

[2] With respect to the motion to inspect the physical evidence, we note the trial court, after a hearing, allowed defendant to examine and inspect all photographs taken by the State in the investigation of the accusations against him. This included State's Exhibits Nos. 13-A through 13-D and 14-A through 14-E. These exhibits were photographic slides of the bodies of the two deceased women. Defendant complains the slides were not furnished to him prior to trial. Yet the record discloses that Dr. Reavis testified at the first trial and illustrated his testimony by the use of these exhibits. Defendant viewed the slides at the first trial and his counsel cross-examined Dr. Reavis concerning them. Thus defendant had examined the slides and had the benefit of the doctor's prior recorded testimony during his preparation for this trial. We perceive nothing prejudicial by the failure to produce these slides prior to trial. Defendant's first assignment of error is overruled.

[3] Defendant's second assignment of error is grounded on the contention that State's Exhibits Nos. 13-A through 13-D and 14-A

through 14-E, photographic slides of the bodies of Josephine Davis and Aileen Davis, respectively, were grossly inflammatory and their introduction denied defendant a fair and impartial trial.

We note that the photographs, four of one body and five of the other, were made 9 November 1976 after the bodies had been exhumed by the State for the second autopsy. The photographs generally illustrate the various knife wounds inflicted upon the bodies of the two victims. Admittedly, the slight decomposition of the bodies since the date of death—6 September 1976—made the photographs in question somewhat more gory and gruesome than would otherwise have been true. Even so, the murder scene itself was a gory sight. There were pools of blood beneath and around the bodies. Each body bore stab wounds about the face and neck with heavy concentrations of blood in the wound areas. The wall and floor and a nearby refrigerator bore heavy spatterings of blood. Normal human revulsion could be accentuated but little by viewing the photographs under attack.

It is settled law that the unnecessary use of inflammatory photographs in excessive numbers solely for the purpose of arousing the passions of the jurors may deny defendant a fair and impartial trial. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). It is equally well settled that photographs are admissible to illustrate the testimony of a witness and their admission for that purpose under proper limiting instructions is not error. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903 (1976); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). *See generally* 1 Stansbury, N.C. Evidence § 34 (Brandis Rev. 1973). The fact that a photograph depicts a horrible, gruesome or revolting scene does not render it incompetent. When properly authenticated as a correct portrayal of what it purports to show, a photograph may be used by the witness to illustrate his testimony, and its admission for that purpose is not error. *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969).

Applying the foregoing principles to the photographs challenged by this assignment, we perceive no prejudicial error, although the State likely could have illustrated the medical testimony fully as well with fewer pictures. Excessive use of

photographs is not favored. "What constitutes an excessive number of photographs must be left largely to the discretion of the trial court in the light of their respective illustrative values. The photographs in the present case were not merely repetitious. They portrayed somewhat different scenes and we find in the use of the total number no abuse of discretion." *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977). So it is here. This assignment is overruled.

[4] The two victims were killed on 6 September 1976 and their bodies were exhumed and examined by Dr. Reavis on 9 November 1976 incident to the second autopsy. Dr. Reavis was then permitted, over objection, to testify concerning the second autopsy he performed and to give his opinion as to the cause of death. Defendant contends that evidence concerning the second autopsy, performed sixty-four days after burial, was too remote to have any probative value and was erroneously admitted.

Phillip Little, an investigator with the Bladen County Sheriff's Department, was permitted to testify, over objection, that on 6 September 1976, while investigating the murders, he first saw a can of black pepper lying on the floor in the hall that leads to the rear exit of the Davis home. He attached no particular significance to it until Herman Baker, Jr., told him in February 1978 that defendant Sledge said he escaped from the White Lake Prison Unit, stabbed two women, and "sprinkled black pepper around the back door so that the she-devils' spirits could not follow him." Officer Little further testified that the pepper can thereupon became a part of his official file and that it was in the same condition at trial as it was when he found it. Defendant contends that evidence concerning the pepper can was too remote to have any probative value and was erroneously admitted. Admission of evidence concerning the second autopsy and evidence concerning the pepper can constitute defendant's third assignment of error.

In *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967), we held that a medical expert may testify from his autopsy, even though the autopsy was made five months after the death of the deceased, and give his opinion as to the cause of death. The delay in making the autopsy goes to the weight of the testimony rather than its competency.

Defendant also complains that the trial court erred in refusing to allow him to cross-examine Dr. Reavis regarding the first autopsy. Defendant had a right to such cross-examination and the court erred in refusing to allow it, but we cannot know whether the ruling was *prejudicial* because defendant failed to place in the record the answers the witness would have given had he been permitted to do so. "The record does not show what the State's witnesses . . . would have said had they been permitted to answer the questions. Therefore we cannot know whether the rulings were prejudicial. The burden is on appellant not only to show error but to show *prejudicial error. State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342." *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972). Moreover, there is no reason to believe that the excluded cross-examination concerning the first autopsy would have produced a different result. Unless a different result likely would have ensued had the evidence been admitted, its exclusion must be regarded as harmless. G.S. 15A-1443(a); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied,* 404 U.S. 1023 (1972); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969).

With respect to the admission of the pepper can and the testimony concerning it, the general rule is that any object which has a relevant connection with the case is ordinarily admissible in evidence. "Any evidence which is relevant to the trial of a criminal action is admissible." *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). *Accord, State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698 (1972); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969). *See generally* 1 Stansbury, N. C. Evidence § 118 (Brandis Rev. 1973). The relevancy of evidence concerning the pepper can is quite apparent in light of defendant's statement to the witness Baker that he sprinkled pepper around the back door. Officer Little testified that the can had been in his care, custody and control from the time he found it on 6 September 1976 until he brought it into court at the first trial in May and that it was "in the same condition now as it was at the time" he found it. Such evidence was properly admitted. Here again, the delay of seventeen months in ascertaining its relevancy goes to the weight of the evidence rather than its competency. There is no merit in either prong of defendant's third assignment, and it is therefore overruled.

[5] Defendant requested the court to instruct the jury as follows:

> "Circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis that the accused is guilty, and at the same time are inconsistent with the hypothesis that he is innocent and with every other reasonable hypothesis except that of guilt. In brief, if all the material circumstances proven are of such a nature and so connected or related as to point unerringly to guilt, and to exclude to a moral certainty every other reasonable hypothesis except that of guilt, a conviction is warranted. If all the circumstances taken together are as compatible with innocence as with guilt, the jury should acquit. (Unless the circumstantial evidence, as the jury finds it to be, meets the above standard to convict, the jury should acquit.)"

The trial judge gave the requested instruction except that portion which appears in parentheses. In lieu of the omitted portion in parentheses the judge charged as follows:

> "Now, it is for you, the members of the jury, to determine the weight and credit, if any, to be given to the circumstances shown by the evidence and the inferences that are to be drawn therefrom. As I have said, before you may rely upon circumstantial evidence to find the defendant guilty, you must be satisfied beyond a reasonable doubt that not only is circumstantial evidence relied upon—that not only is the circumstantial evidence which is relied upon by the State consistent with the defendant being guilty, but that it is inconsistent with him being innocent."

Defendant's fourth assignment of error is grounded on the court's failure to charge the omitted portion in parentheses and giving the additional charge in lieu thereof.

The requested charge, including the portion in parentheses, is taken verbatim from *State v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64 (1965). In *Lowther*, however, we stressed that "[n]o set form of words is required which the court must use to convey to the jury the rule relating to the degree of proof required for conviction on circumstantial evidence in a criminal case." *Id.* Moreover, the trial court is not required to give a requested instruction in

the exact language of the request. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). When the request is correct in itself and supported by the evidence in the case, it suffices if the requested instruction is given in substance. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968). We think a fair appraisal of the charge as given impels the conclusion that it was correct and substantially in accord with defendant's request. We perceive no reasonable cause to believe that the jury was misled or misinformed by the charge as given. Defendant's fourth assignment is overruled.

Defendant's fifth assignment is grounded on his contention that the court permitted the prosecutor, over objection, to ask a long series of leading questions. We have examined them all and find the questions to be innocuous and entirely harmless. Although most of them are leading in that they may be answered yes or no, 1 Stansbury, supra, § 31, it is within the sound discretion of the trial judge to determine whether such questions shall be permitted; and in the absence of abuse, the exercise of such discretion will not be disturbed on appeal. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). If the testimony is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975). Here, the testimony was competent, no abuse of judicial discretion is shown, and defendant has not been prejudiced. We find no merit in defendant's fifth assignment of error.

[6] Defendant contends the court erred by permitting the district attorney to use various photographs as substantive evidence and without laying a proper foundation for their use for any purpose. This constitutes defendant's sixth and final assignment of error.

This assignment challenges the competency of nine photographs and a diagram or sketch purporting to show the floor plan of the Davis residence. The record reveals that the sketch and the photographs were consistently offered and admitted for the purpose of illustrating the testimony of various witnesses and the jury was so instructed. These exhibits were all competent for illustrative purposes. A witness may use sketches and diagrams,

on a blackboard or otherwise, to illustrate his testimony. *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977); *State v. Cox*, 271 N.C. 579, 157 S.E. 2d 142 (1967); 1 Stansbury, supra, § 34. As to the photographs, "[w]e have said many times that photographs, though gruesome, which fairly portray a scene observed by a witness and which can be used to illustrate his testimony may be admitted in evidence." *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971), *death sentence vacated*, 408 U.S. 940 (1972); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972); *State v. Cutshall, supra; State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970); *State v. Atkinson, supra; State v. Porth, supra.* The photographs under discussion depicted the refrigerator in the Davis home, a corner of the living room and the south wall of the Davis home, the bodies of Josephine and Aileen Davis, an exterior view of the Davis home, and a 1969 Chevrolet automobile defendant allegedly stole following the murders. When each of these exhibits was tendered for illustrative purposes, the painstaking trial judge gave an appropriate limiting instruction and again, in the charge, instructed the jury that the photographs and diagrams were admitted into evidence solely to illsutrate the testimony of the witnesses and for no other purpose. In each instance the witness used the exhibit to illustrate his testimony. Thus it appears that the rules of evidence were meticulously followed. Defendant's sixth assignment of error is overruled.

We conclude that defendant had a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. HORACE WILKINS

No. 49

(Filed 17 May 1979)

1. Criminal Law § 162— objection to evidence—failure to raise at proper time

In a prosecution for second degree murder where defendant allegedly shot his wife with a shotgun, defendant was not prejudiced by the admission into evidence of results of a trigger-pull test performed on the weapon by the State, though defendant was given no notice that such a test had been conducted and that its results would be used in evidence, since defendant did not object to the challenged testimony when it was presented or make a motion to have it stricken; he did not mention the testimony in his post-judgment motions for a new trial and to set the verdict aside; the first time he complained about the testimony was in his motion for appropriate relief which was filed seven days after judgment was passed; and, since the testimony was included in a lengthy description of the weapon and its operation, it is doubtful that the jury gave the statement complained of any significance.

2. Criminal Law § 89.5— corroborating evidence—slight variance

The trial court in a second degree murder prosecution did not err in admitting as corroborating evidence a statement allegedly made by an eyewitness to police, though in the statement the witness quoted defendant as telling his wife he would kill her and at trial the witness quoted defendant as telling his wife he would shoot her, since there was no material variation, particularly in view of the fact that the murder weapon was a .12 gauge shotgun.

3. Homicide § 24.1— second degree murder—jury instructions

The trial court in a second degree murder prosecution did not err in using the phrase "If the State proves beyond a reasonable doubt *or it is admitted*" when instructing on presumptions arising from the intentional infliction of a wound proximately causing death.

4. Criminal Law § 122.1— additional instructions—no necessity to repeat original instructions

In a second degree murder prosecution where the jury, after deliberating for one hour, requested additional instructions on second degree murder, voluntary manslaughter and malice, the trial court was not required to repeat its original instructions on intent and heat of passion.

5. Criminal Law § 138.7— sentencing—consideration of eligibility for parole

There was no merit to defendant's contention that the trial court erred in sentencing him in that it took into consideration when he would be eligible for parole if given a life sentence, since the trial judge indicated no dissatisfaction with the parole system and no mistaken assumption as to when a person serving a life sentence is eligible for parole; he did not impose a more severe sentence for a cause not embraced within the indictment; and the sentence imposed was within the statutory limit.

State v. Wilkins

APPEAL by defendant from *Crissman, J.*, 11 September 1978 Criminal Session of GUILFORD Superior Court, High Point Division.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of Miriam Huskey Wilkins, his wife. The state elected to seek no verdict greater than second-degree murder.

Evidence presented by the state is summarized in pertinent part as follows:

Between 1:00 a.m. and 2:00 a.m. on 11 March 1978 defendant, his wife, Eddie Lawrence and Sally Mae Lee Little met at the home of some mutual acquaintances in High Point. Defendant had driven his Buick Riviera to the home and on the backseat he had a television set that he was trying to sell. He invited Lawrence and Mrs. Little to go with him and his wife to try to sell the set.

The four of them, with defendant driving, his wife sitting in the right front seat, and Lawrence and Mrs. Little sitting in the backseat with the television set, drove to another home in High Point. Defendant and Lawrence went into the home while the two women remained in the car. A short while later the two men returned to the car, got the television set and, accompanied by the two women, went into the house. Thereafter, with the men carrying the set, they all came back out of the house and reentered the automobile.

Defendant proceeded to drive and he and his wife began arguing about the television set. Evidently, someone at the house had made them an offer for the set which defendant thought they should accept but Mrs. Wilkins was not willing to sell it for the price offered. When they approached an intersection with Pershing Street, defendant stopped the car, got out, obtained a gun from the trunk of the car, returned to the driver's side, stuck the barrel of the gun inside the car toward his wife and said: "Don't do this to me, don't do this to me". He then told Mrs. Wilkins he would shoot her and she said, "You see me". Immediately thereafter the gun fired and Mrs. Wilkins slumped over.

Mrs. Little and Lawrence got out of the car and defendant sped away to the hospital. On arriving there he asked a nurse to help him get his wife out of the car and into the hospital. When

the nurse checked Mrs. Wilkins in the automobile, she determined that Mrs. Wilkins was dead. She also observed that defendant was inebriated.

Police arrived very shortly thereafter and found a .12 gauge bolt-action shotgun on the backseat and two unfired .12 gauge shells in the console of defendant's car. At the Pershing Street intersection they found a spent .12 gauge shell. At the police station defendant removed two .12 gauge shells from his pocket and gave them to police.

An autopsy revealed that Mrs. Wilkins was shot in her left chest area and that she died from massive injuries to her left lung, heart, aorta, liver and colon. A blood test disclosed that she was under the influence of alcohol at the time of her death.

Defendant testified as a witness for himself and his testimony is summarized as follows:

Prior to the night in question he and his wife had decided to leave High Point and move to Norfolk, Virginia. They had terminated their respective jobs on the preceding day and were spending that night visiting various friends and taking care of several business matters. While visiting friends he and his wife consumed several drinks of whiskey.

They owned a television set that they wanted to sell but he did not get mad with his wife about it. The reason he stopped at the Pershing Street intersection was that Lawrence and Mrs. Little were complaining that they did not have sufficient room in the backseat and he intended to make them more comfortable.

After stopping the car he removed some clothing he had on the backseat and placed it in the trunk. He intended to put the television set in the trunk but feeling that the gun would scratch the set, he decided to put the gun in the foot of the backseat. As he was holding the gun and trying to get the back of the driver's seat turned down so he could put the gun in the backseat area, the gun accidentally discharged. He had no intention of shooting his wife or anyone else and immediately rushed her to the hospital to try to save her life.

Other testimony will be referred to in the opinion.

The court instructed the jury that they might return a verdict finding defendant guilty of second-degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter or not guilty. They found defendant guilty of second-degree murder and the court entered judgment that defendant be imprisoned for the remainder of his natural life.

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

Assistant Public Defender Frederick G. Lind for defendant appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court erred in not allowing his motion for a new trial because of the admission of certain testimony. We find no merit in this assignment.

The testimony complained of was given by Special S.B.I. Agent S. T. Carpenter who was stipulated to be an expert in the field of firearms identification. The witness was shown the shotgun found in defendant's car and was asked to explain the way the gun operated. Included in a detailed description of the weapon and how it functioned, Mr. Carptenter stated that if there was a round of ammunition in the chamber, the gun could then be fired by pulling the trigger; that to pull the trigger "it requires seven and one-quarter pounds of force to make the weapon fire."

Defendant argues that he was given no pretrial notice that a trigger-pull test was conducted on the gun and that the state would offer evidence relating thereto; that in April before the trial in September, pursuant to G.S. 15A-902, he had requested the district attorney to provide him with a copy of, or to permit him to inspect and copy or photograph, results or reports of tests or experiments made in connection with the case; and that the admission of evidence relating to the trigger-pull test was very prejudicial to his plea of accident.

We note that defendant did not object to the challenged testimony when it was presented or make a motion to have it stricken; that in his post-judgment motions for a new trial and to set the verdict aside, he did not mention the testimony; and that

the first time he complained about the testimony was in his motion for appropriate relief which was filed seven days after judgment was passed.

"It is well settled that with the exception of evidence precluded by statute in furtherance of public policy [which exception does not apply to this case], the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal." 4 Strong's N.C. Index 3d, Criminal Law § 162, p. 825; *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1206 (1976); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973). *See also:* Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698. While recognizing the quoted rule, defendant argues that by virtue of G.S. 15A-1446(b) this court is authorized to consider his exception to the challenged testimony in the interest of justice "if it determines it appropriate to do so."

We do not think the ends of justice require us to honor defendant's belated exception to the testimony in question. Since the testimony was included in a lengthy description of the weapon and its operation, it is very doubtful that the jury gave the statement complained of any significance. In fact, defendant's counsel admitted on oral argument in this court that the statement escaped his attention until after the trial. That admission would indicate that the trigger-pull test evidence was not argued to the jury. We perceive no prejudice to defendant.

[2] By his second assignment of error, defendant contends the trial court erred in admitting as corroborating evidence a statement allegedly made by Mrs. Little to the police for the reason that the statement materially differed from the trial testimony of Mrs. Little. This assignment has no merit.

In the statement Mrs. Little told about the four of them going to a certain house and the men carrying the television set; that someone at the house offered $75 for the set; that defendant and his wife talked about it and she said she was not going to accept $75 for it. The statement then reads in pertinent part (defendant being referred to by his nickname "Goodtime"):

"Goodtime and his wife began arguing and we all began walking towards the car. When we got to the car, he told her to hush, he was doing this. We all got into the car and left. The argument continued in the car. When we almost got to Green Street, he stopped the car and said don't do this to me, don't do this to me, I'll kill you.

"He then got out of the car and went to the trunk. He unlocked the trunk, got out the shotgun and came back to the car on the driver's side. The door to the car was still open. He pointed the shotgun at her, his wife head, and said I'll kill you. She said you see me.

"I started screaming and said don't play with the gun, don't play with the gun. The gun went off. I heard her screaming. Then I started hollering to Eddie to let me out. Eddie opened the passenger door and we both got out of the car."

In her testimony Mrs. Little stated that as defendant stopped the car he said, "Don't do this to me, don't do this to me". The record then reveals:

"Then he came back with a gun and stuck it into the car in this position (indicating) and says I'll shoot you. She said you see me. Then he said I'll shoot you and—well, she didn't ever say nothing else. And she grabbed at the gun once, but it didn't go off right then. But just in a second then it went off.

"Well, about all I heard him say was I'll shoot you, because I was screaming so bad at the time he stuck the gun in the car."

"Where proper instructions are given, slight variances in corroborating testimony, including such variances between a witness' testimony and his prior statement, do not render the corroborating testimony inadmissible, but go only to its credibility and weight, it being for the jury to determine whether or not the testimony does in fact corroborate the witness. And a discrepancy in minor details between testimony of the prosecuting witness and testimony offered in corroboration thereof does not warrant a new trial." 4 Strong's N.C. Index 3d, Criminal Law § 89.5, pp. 427-28.

The only variation we observe between the alleged statement of the witness and her testimony at trial that approaches significance is that in the statement she quoted defendant as telling his wife that he would *kill* her and at trial she quoted him as saying that he would *shoot* her. Certainly this is not a material variation, particularly in view of the fact that the weapon was a .12 gauge shotgun. The trial judge properly instructed the jury with respect to corroborating evidence. We perceive no error.

[3] By this third assignment of error defendant contends the trial court in its charge to the jury on second-degree murder erred in giving the following instruction:

> "If the State proves beyond a reasonable doubt *or it is admitted* that the defendant intentionally killed Marian Wilkens with a deadly weapon or intentionally inflicted a wound upon Marian Wilkens with a deadly weapon or intentionally inflicted a wound upon Marian Wilkens with a deadly weapon that proximately caused her death, the law implies, first, that the killing was unlawful; and second, that it was done with malice; and if nothing else appears, the defendant would be guilty of second degree murder." (Emphasis added.)

Defendant argues that the instruction suggests that he admitted intentionally killing his wife, that there was no evidence that he made such an admission, and that charging the jury on a principle of law not supported by the evidence was prejudicial to him. We do not find this argument persuasive.

It has long been the law in this state that in instructing the jury the trial judge must declare and explain the law arising on the evidence and that he must not express an opinion on the evidence. G.S. 15A-1232 (formerly G.S. 1-180). The primary purpose of the jury charge is to give clear instructions which apply the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971).

While there was no evidentiary basis for the trial judge to include the clause "or it is admitted" in the quoted instruction, and the instruction would have been more accurate without it, we perceive no prejudice to defendant. The court in effect was stating a well established principle of law and we believe defend-

ant's conviction was brought about primarily by the strong and direct testimony of Mrs. Little rather than the inclusion of this clause in the charge. Furthermore, when the jury asked for additional instructions as hereinafter discussed, the court did not include the clause complained of.

[4] By his fourth assignment of error defendant contends the trial court erred in its supplemental instructions to the jury. This assignment has no merit.

After the jury had deliberated for approximately one hour they returned to the courtroom. The record discloses:

"THE FOREMAN: The jury needs to be instructed, Your Honor, again on the difference between guilty of murder in the second degree or guilty of voluntary manslaughter; particularly, around the word 'malice.'

"THE COURT: Well, members of the jury, of course, the Court stated to you that murder in the second degree is the unlawful killing of a human being with malice and that voluntary manslaughter is the unlawful killing without malice and without premeditation and deliberation. That's the two differences.

"Of course, the Court also instructed you that if the State proves beyond a reasonable doubt that the defendant intentionally killed his wife with a deadly weapon or intentionally inflicted a wound upon his wife with a deadly weapon that proximately caused her death, then that the law implies that the killing was unlawful and that it was done with malice and if nothing else appears, that the defendant would be guilty of second degree murder.

"Now, as to malice. Aside from that, malice means not only hatred, ill will or spite as it's ordinarily understood. To be sure, that is malice. But it also means that condition of the 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 that person's death without just cause or excuse, without justification.

"Does that clear it up? Any other questions?

"THE FOREMAN: Thank you, Your Honor."

Defendant argues that the supplemental instructions were incomplete for the reason that the court did not repeat its original instructions on intent and heat of passion. We are not impressed with this argument. An analogous situation arose in *State v. Murray*, 216 N.C. 681, 6 S.E. 2d 513 (1940), where defendants were tried for first-degree murder and pled insanity. After deliberating for some period of time the jury returned to the courtroom and asked for additional instructions as to whether defendants would be guilty upon a particular state of facts. The trial judge correctly charged on the point presented and this court held that he was not required to repeat his instructions on the defense of insanity.

Furthermore, when the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point, then he should request further instructions; otherwise, he cannot complain. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973). Defendant did not request additional instructions in this case. The trial judge is not required to reiterate the entire charge when the jury requests an additional instruction to clarify a particular point. *State v. Dawson*, 278 N.C. 351, 365, 180 S.E. 2d 140 (1971).

[5] By his sixth assignment of error, defendant contends the trial court erred in sentencing him in that it took into consideration when he would be eligible for parole. We find no merit in this assignment.

After the jury had returned its verdict and as the court was about to pass judgment on defendant, the trial judge asked the assistant district attorney: "What do you understand that would be the minimum length of time if the Court gives him life?" The assistant district attorney replied: "Twenty years. But the parole board would have it in their option to do what they wanted, I guess, at that time." The court thereupon ordered that defendant be imprisoned for the remainder of his natural life.

While defendant recognizes that a sentence within the statutory limit is presumed regular and valid, he aruges that the presumption is not conclusive; and if the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome and the sentence is in violation of the defendant's rights. He contends that the trial judge in this case improperly

considered when he might be eligible for parole and cites *State v. Snowden*, 26 N.C. App. 45, 215 S.E. 2d 157, *cert. denied*, 288 N.C. 251, 217 S.E. 2d 675 (1975).

In *Snowden* the Court of Appeals held that sentences imposed on the defendants for narcotics offenses must be vacated and the cause remanded for resentencing where the record affirmatively discloses that the severity of the sentences was based on the trial judge's dissatisfaction with the length of time committed offenders remain in prison and his mistaken assumption that the prisoners would automatically be released on parole at the expiration of one-fourth of their sentences. The Court of Appeals rendered a similar decision in *State v. Hodge*, 27 N.C. App. 502, 219 S.E. 2d 568 (1975).

The Court of Appeals in *Snowden* relied on *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967). In that case, the defendant had participated in a drinking party with her husband before fatally shooting him. This court, in a four-three decision, concluded that the trial court's sentence was based not on involuntary manslaughter but on defendant's participation in the party. The sentence was vacated and the case was remanded for resentencing.

The ills appearing in *Swinney* and *Snowden* do not appear in this case. Here, the trial judge indicated no dissatisfaction with the parole system and no mistaken assumption as to when a person serving a life sentence is eligible for parole. *See:* G.S. 15A-1371. He did not impose a more severe sentence, as in *Swinney*, for a cause not embraced within the indictment.

Trial judges have broad discretion in making a judgment as to the proper punishment for crime. Their judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness. Pre-sentence investigations are favored and encouraged. *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). This assignment of error is overruled.

Defendant's remaining assignments of error relate to the failure of the trial judge to grant his motions to set aside the verdict and arrest the judgment, and to signing and entering the

judgment. He makes no argument in support of these assignments and we find no merit in any of them.

In defendant's trial and the judgment entered, we find

No error.

STATE OF NORTH CAROLINA v. GREGORY DEAN PATTERSON

No. 60

(Filed 17 May 1979)

1. Homicide § 24.2— instructions placing burden on defendant to rebut presumptions of malice and unlawfulness

The trial court in a homicide case erred in instructing the jury that it could infer that defendant acted unlawfully and with malice if the State satisfied it beyond a reasonable doubt that defendant intentionally inflicted a wound on deceased with a deadly weapon causing death "and there is no other evidence which raises in your mind a reasonable doubt that the defendant acted without (sic) malice or without justification or excuse," since the instruction was susceptible to an interpretation that the jury should infer malice and unlawfulness in the absence of evidence raising a reasonable doubt as to the existence of these elements, and the instruction therefore impermissibly placed upon defendant a burden to raise a reasonable doubt as to the facts to be inferred or, in other words, to rebut the inferences themselves or else be found guilty as a result of the inferences.

2. Homicide § 14.4— presumptions of malice and unlawfulness—when mere permissible inferences of fact

In a homicide case in which there is evidence tending to rebut the inferences of malice and unlawfulness that may arise upon proof of the intentional infliction of a wound with a deadly weapon proximately resulting in death, the inferences of malice and unlawfulness are mere permissible inferences of fact, and the jury should weigh the reasonableness of drawing the inferences against the contrary evidence in determining whether the State has proved malice and unlawfulness beyond a reasonable doubt.

3. Homicide § 14.4— presumptions of malice and unlawfulness—effect of absence of contrary evidence

There is one important difference in the legal effect of the State's proof of the intentional infliction of a wound in a homicide case and its proof of recent possession of the stolen property in a larceny case: In a larceny case proof of recent possession raises only a permissible factual inference even if no other evidence contrary to the inference is produced, but in a homicide case, in the absence of evidence of a killing in the heat of passion or in self-defense, proof

of the intentional infliction of a wound raises not mere possible inferences but mandatory presumptions of the existence of malice and unlawfulness entitling the State at least to a conviction of murder in the second degree.

4. Homicide §§ 14.4, 24.2— malice and unlawfulness—burden of producing evidence of nonexistence of these elements

A defendant in a homicide case has no burden to produce evidence sufficient to raise a reasonable doubt as to the existence of malice or unlawfulness, his burden being simply to produce some evidence from which a jury could find the nonexistence of these elements, *i.e.*, to produce some evidence of a killing in the heat of passion or some evidence of self-defense from which a jury could find the existence of these things. Upon production of such evidence the burden is upon the State to prove beyond a reasonable doubt the existence of malice and the absence of self-defense.

5. Homicide §§ 14.4, 24.2— presumptions of malice and unlawfulness—functions of court and jury

Whether there is evidence in a homicide case from which a jury could find a killing in the heat of passion or self-defense so that the mandatory presumptions of malice and unlawfulness are transformed into permissible inferences depends largely on the quantum of the evidence rather than its quality or credibility, and this is a question for the court, not the jury. On the other hand, whether such evidence is sufficient to raise in the jury's mind a reasonable doubt as to the existence of malice and unlawfulness depends largely on its quality and credibility rather than its quantum, and this question is always for the jury under proper instructions from the court.

6. Homicide §§ 14.4, 24.2— evidence of heat of passion and self-defense—presumptions of malice and unlawfulness—mere inferences of fact

Where defendant produced evidence from which the jury could have found that he killed in the heat of passion suddenly aroused or that he killed in self-defense, the State was not entitled to the benefit of the mandatory presumptions of malice and unlawfulness but was entitled at most to the benefit of permissible inferences that these elements existed if the jury should find it had proved beyond a reasonable doubt defendant's intentional infliction of a wound with a deadly weapon resulting in death.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Snepp* at the 4 April 1977 Session of CATAWBA Superior Court defendant was tried on an indictment charging him with murder in the first degree of one Michael Millsap. The jury convicted defendant of second degree murder. He was sentenced to imprisonment for not less than 20 nor more than 30 years. The Court of Appeals, in an opinion by *Judge Arnold* in which *Judges Parker* and *Robert Martin* concurred, found no error. We allowed defendant's petition for further review and

denied the state's motion to dismiss defendant's appeal to this Court on 7 June 1978. The case was argued as No. 36 at the Fall Term 1978.

Rufus L. Edmisten, Attorney General, by R. W. Newsom III, Associate Attorney, for the State.

Chambers, Stein, Ferguson & Becton, P.A., by J. LeVonne Chambers and Louis L. Lesesne, Jr., and Young M. Smith, Sr., Attorneys for defendant.

EXUM, Justice.

The parties stipulated at trial that the deceased, Michael Millsap, "died March 2, 1976, as a proximate result of gunshot wounds inflicted upon him by the defendant Gregory Dean Patterson." The defense was self-defense. Defendant has presented only one assignment of error. It questions the correctness of Judge Snepp's instructions to the jury regarding the inferences of malice and unlawfulness which may arise upon proof that defendant intentionally inflicted a wound upon deceased which caused death. Disagreeing with the conclusion of the Court of Appeals, we find error in this instruction entitling defendant a new trial.

The state's evidence consisted essentially of the testimony of three witnesses to the shooting. They observed defendant and Millsap arguing at the home of Theodoria Hunter. Defendant had parked his car in the driveway. Millsap blocked the driveway with his car, got out and walked to defendant's car in which defendant was sitting. The argument ensued. Millsap jerked the keys from defendant's car, grabbed defendant by the shirt, and began hitting him. Defendant did not fight back. Millsap then threw defendant's keys at defendant and began walking toward Hunter's house. Defendant shot Millsap twice with a pistol. Millsap ran into the house and defendant followed and shot him three more times. The deceased was a large man, six feet four inches tall and weighing approximately 240 pounds. Theodoria Hunter had dated the deceased for eight years and has one five year old child by him, but she had not dated him for about three months at the time of the shooting. She was at that time dating defendant.

Defendant testified in his own behalf and offered corroborating witnesses as well as evidence of his good character and reputation. This evidence tended to show that the deceased on one occasion two months before this shooting had assaulted and threatened defendant. Defendant testified that on the day of the killing he had gone to see Theodoria Hunter. Before he could get out of his car, which was parked in her driveway, the deceased accosted him saying, "I got you now." The deceased ripped defendant's shirt, took defendant's car keys, and beat defendant severely. Defendant, temporarily blinded in his right eye, got his pistol and began shooting at the deceased. Defendant testified:

> "I got out of the car, and I couldn't see with my right eye. I just started shooting like with a water pistol; just started shooting; just started shaking, just started shooting. I do not know how many times I shot. I was excited. I was scared."

After the shooting defendant went directly to the Catawba County Sheriff's office, turned in his weapon, and reported the incident. Defendant is a relatively small man, five feet four inches tall and weighing 165 pounds.

Judge Snepp submitted four alternative verdicts to the jury: murder in the first degree, murder in the second degree, voluntary manslaughter, and not guilty. He correctly charged that in order to convict defendant of second degree murder:

> "[T]he State must prove beyond a reasonable doubt three things: First, that the defendant intentionally shot Millsap with a deadly weapon without justification or excuse;
>
> Second, that the shooting produced Millsap's death; and
>
> Third, that the defendant acted with malice."

Judge Snepp had earlier defined malice as meaning "hatred, ill-will or enmity," and also that state of mind "which prompts a person . . . to intentionally inflict a wound with a deadly weapon upon another person which proximately results in his death without just cause, excuse or justification." Immediately after giving this definition of malice he charged on the inferences which may arise from proof that defendant intentionally inflicted a wound on deceased with a deadly weapon causing death, as follows:

"Now if the State satisfies you beyond a reasonable doubt that Gregory Patterson intentionally shot Michael Millsap with a deadly weapon or that he intentionally inflicted a wound upon Millsap with a deadly weapon and thereby proximately caused Millsap's death, *and there is no evidence which raised in your mind a reasonable doubt that the defendant acted without malice or without justification or excuse*, that is, I say, that if the State satisfies you beyond a reasonable doubt that Gregory Patterson intentionally shot Michael Millsap with a deadly weapon or that he intentionally inflicted a wound upon Millsap with a deadly weapon thereby proximately causing Millsap's death, *and there is no evidence which raises in your mind a reasonable doubt that the defendant acted without malice*, you may infer that the defendant acted unlawfully and with malice.

"However, if there is other evidence, then you will also consider it in determining whether the State has proved beyond a reasonable doubt that the defendant acted with malice and without justification and excuse." (Emphasis supplied.)

Soon after the jury retired to consider their verdict they returned to the courtroom to ask for additional instructions regarding the definitions of first and second degree murder. During these additional instructions Judge Snepp charged as follows:

"Now if the State satisfies you beyond a reasonable doubt that Gregory Patterson intentionally shot Michael Millsap with a deadly weapon or that he intentionally inflicted a wound upon Millsap with a deadly weapon and thereby proximately caused Millsap's death *and there is no other evidence which raises in your mind a reasonable doubt that the defendant acted without malice or without justification or excuse* you may infer that the defendant acted unlawfully, and with malice.

"However, if there is other evidence and you will also consider it in determining whether the State has proved beyond a reasonable doubt that the defendant acted with malice and without justification and excuse." (Emphasis supplied.)

[1] Defendant contends, and we agree, that Judge Snepp committed error in utilizing the language emphasized in the above instructions.[1]

Nowhere in his instructions did Judge Snepp tell the jury that it was not compelled to nor need it necessarily infer malice and unlawfulness, *i.e.*, absence of justification. The instructions say, in essence, that unless the jury has a reasonable doubt as to the existence of malice and unlawfulness it "may infer" their existence upon proof of the necessary underlying facts. In this context, it is likely the jury understood the word "may" to mean "should." The complained of instructions are thus susceptible to an interpretation that the jury should infer malice and unlawfulness in the absence of evidence raising a reasonable doubt as to the existence of these elements.

So interpreted the instructions impermissibly placed upon defendant a burden to raise a reasonable doubt as to the facts to be inferred or, in other words, to rebut the inferences themselves or else be found guilty as a result of the inferences. This Court has consistently disapproved instructions which place this kind of burden upon a defendant in a criminal case. *State v. Hayes*, 273 N.C. 712, 161 S.E. 2d 185 (1968); *State v. Holloway*, 262 N.C. 753, 138 S.E. 2d 629 (1964); *State v. Ramsey*, 241 N.C. 181, 84 S.E. 2d 807 (1954); *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725 (1943); *State v. Baker*, 213 N.C. 524, 196 S.E. 829 (1938); *State v. Harrington*, 176 N.C. 716, 96 S.E. 892 (1918).

All of the cases cited dealt with instructions on the so-called "presumption" which arises in larceny cases upon proof of possession of stolen property by the defendant recently following its theft. While the word "presumption" is oftentimes used in this context, it is clear that recent possession is merely an evidentiary fact from which a jury may, but is not compelled, to infer that the defendant was indeed the thief. "This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *State v. Baker, supra*, 213 N.C. at

1. We note that Judge Snepp obviously intended to say in the emphasized portions of these instructions "with malice" rather than "without malice." This inadvertent misstatement, while not controlling in our decision, does contribute to the confusion which these instructions must have engendered in the jury's mind.

526, 196 S.E. at 830. In the cases cited the trial judge in instructing the jury either made express reference to the defendant's duty, in the presence of the presumption, to "raise a reasonable doubt" that he in fact stole the property or phrased his instructions in such a way that they could be interpreted to place this duty upon the defendant. This Court, in each case, held the instructions to be prejudicially erroneous on the ground that the instruction either (1) placed upon the defendant a burden to raise a reasonable doubt as to his guilt (*Holloway, Baker* and *Harrington*) or (2) impermissibly placed upon the defendant a burden to rebut a "presumption" of guilt (*Hayes, Ramsey* and *Holbrook*).

[2] As we tried to make clear in *State v. Hankerson*, 288 N.C. 632, 649-52, 220 S.E. 2d 575, 588-89 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977), the inferences of malice and unlawfulness that may arise upon proof of the intentional infliction of a wound with a deadly weapon proximately resulting in death have the same legal effect, at least in the presence of evidence tending to rebut these inferences, as does the inference of guilt in a larceny case arising from proof of recent possession. In such circumstances the inferences of malice and unlawfulness are mere inferences of fact flowing logically from proof of the intentional infliction of the wound. The inferences are rooted in human experience. Normally a person who intentionally inflicts such a wound upon another acts with malice and unlawfully. The jury, however, is not compelled to draw the inferences. It should weigh the reasonableness of drawing the inferences against the contrary evidence in determining whether the state has proved malice and unlawfulness beyond a reasonable doubt. In explaining this effect of the inferences we alluded in *Hankerson* to *United States v. Barnes*, 412 U.S. 837 (1973), a case which dealt with the inference arising from defendant's possession of recently stolen property. We said, *id.* at 650-51, 220 S.E. 2d at 588-89:

> "If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumptions of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts proved may be weighed against this evidence. In *United States v. Barnes*, 412 U.S. 837 (1973), the Supreme Court said:

> 'Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is "satisfactory." . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government.' "

[3] There is, however, one important difference in the legal effect of the state's proof of the intentional infliction of a wound in a homicide case and its proof of recent possession of the stolen property in a larceny case. It is this difference which might have led to some confusion in the application of the principles announced in *Hankerson* and, indeed, to the instructions given by the learned trial judge in this case. In a larceny case proof of recent possession raises only a permissible factual inference even if no other evidence contrary to the inference is produced. In a homicide case, in the *absence* of evidence of a killing in the heat of passion and the *absence* of evidence of self-defense, proof of the intentional infliction of a wound raises not mere permissible inferences but mandatory presumptions of the existence of malice and unlawfulness entitling the state at least to a conviction of murder in the second degree. The effect of this mandatory presumption, as we said in *Hankerson*, 288 N.C. at 650, 220 S.E. 2d at 588,

> "is simply to impose upon the defendant a burden to go forward with or produce some evidence 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. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence."

We summarized the effect of all these principles on jury instructions in *Hankerson* by saying, *id.* at 651-52, 220 S.E. 2d at 589:

> "*Mullaney*, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty."

[4, 5] Under these principles, defendant has no burden to produce evidence sufficient to raise a reasonable doubt as to the existence of malice or unlawfulness. His burden is simply to produce some evidence from which a jury *could* find the nonexistence of these elements, *i.e.*, to produce some evidence of a killing in the

heat of passion or some evidence of self-defense from which a jury *could* find the existence of these things. Upon production of such evidence the burden is upon the state to prove beyond a reasonable doubt the existence of malice and the absence of self-defense. Although the state may be aided by the inferences discussed above, these inferences do not shift to defendant any burden to raise a reasonable doubt as to the existence of the inferred facts. Whether there is evidence in the case from which a jury could find a killing in the heat of passion or self-defense so that the mandatory presumptions are transformed into permissible inferences depends largely on the quantum of the evidence rather than its quality or credibility. This is a question for the court, not the jury. No instructions on this principle should be given the jury. On the other hand whether such evidence is sufficient to raise in the jury's mind a reasonable doubt as to the existence of malice and unlawfulness depends largely on its quality and credibility rather than its quantum. This question is always for the jury under proper instructions from the court. The instructions should, however, be put in terms of the state's burden to prove every element beyond a reasonble doubt, not defendant's burden to raise a reasonable doubt since defendant has no such burden.

The state must always bear the burden throughout the trial of proving all elements of a criminal offense beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *State v. Hankerson, supra*, 288 N.C. 632, 220 S.E. 2d 575. If after considering *all* the evidence, including any permissible inferences and evidence contrary to the inferences, the jury is left with a reasonable doubt as to the existence of any element, it should find in favor of the defendant on that element. It is necessary to so instruct the jury. This much was said in *Hankerson*, as set out above. It does not follow, however, from these principles that defendant has any burden to raise a reasonable doubt. It is error to so instruct the jury. Defendant may always rest ultimately on the weakness of the state's case and the state's failure to carry its burden of proof.

[6] Here defendant produced evidence from which a jury could have found that he killed in the heat of passion suddenly aroused or that he killed in self-defense. The state, therefore, was not entitled to the benefit of mandatory presumptions of malice and unlawfulness. It was entitled at most to the benefit of permissible

inferences that these elements existed if the jury should find it had proved beyond a reasonable doubt defendant's intentional infliction of a wound with a deadly weapon resulting in death. As we have shown, these permissible inferences place no burden upon defendant to rebut them by raising a reasonable doubt as to the existence of the inferred elements. It was error to so instruct the jury.

It is true, here, that the trial judge, in several instances, correctly placed the burden of proof on the state to satisfy the jury beyond a reasonable doubt of the existence of malice and unlawfulness, *i.e.*, the absence of self-defense. The complained of instructions, however, are susceptible to an interpretation that in order to avoid being found guilty by reason of the inferences of malice and unlawfulness the defendant must offer evidence sufficient to raise a reasonable doubt as to the existence of malice and unlawfulness. Under similar circumstances this Court said in *State v. Holloway, supra*, 262 N.C. at 755, 138 S.E. 2d at 630:

> "After telling the jurors that the burden was on the State to satisfy them beyond a reasonable doubt that defendant was guilty, the judge charged that it was defendant's duty to raise in the minds of the jury a reasonable doubt that he had neither entered the building nor stolen the televisions. The jury is not supposed to know which of two conflicting instructions is correct."

For the reasons stated, therefore, the decision of the Court of Appeals finding no error is reversed and the case is remanded to the Court of Appeals with instructions to award defendant a new trial.

Reversed and remanded.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROZELL OXENDINE HUNT

No. 44

(Filed 17 May 1979)

1. **Homicide § 20— murder by poisoning—bottles of rat poison—admissibility**

In a prosecution for first degree murder where defendant allegedly poisoned her husband, bottles of rat poison purchased by the sheriff from a drugstore approximately nine months after commission of the crime charged were properly admitted into evidence, since the bottles looked the same as bottles allegedly purchased by defendant just prior to the crime; the drugstore in question had continuously carried Singletary's Rat Treatment since 1954; the size bottle purchased by the sheriff was available throughout the year in which the murder occurred; bottles bought at the time the sheriff made his purchase were kept in the same area of the store during the time defendant bought her bottle of poison, and the bottles bought by the sheriff were therefore admissible to show that Singletary's Rat Treatment was available at the drugstore on the day the witness testified she saw defendant purchase a bottle of liquid rat poison.

2. **Homicide § 15.4— expert opinion evidence—basis of opinion**

There was no merit to defendant's contention that the trial court erred in permitting an expert in toxicology to testify concerning the contents of two bottles, which the State had introduced into evidence, without requiring the expert first to relate the basis of his opinion, since the opinion was based on facts within the expert's knowledge, and defendant was free on cross-examination to test fully the accuracy and validity of the tests which formed the basis of the witness's opinion.

3. **Criminal Law § 99.2— questions by court—no expression of opinion**

The trial judge did not, by asking certain questions, impermissibly comment on the evidence, since the trial court sought by his questioning to insure that the witnesses understood what was being asked or sought affirmation and clarification by the witness of the witness's answer.

4. **Homicide § 15.4— expert opinion evidence—liver sample—identification adequate**

In a prosecution for first degree murder where defendant allegedly poisoned her victim, there was no merit to defendant's contention that experts' testimony as to cause of death and as to the level of arsenic found in tissue analyzed by one expert should have been excluded because the State did not sufficiently trace and identify the tissue sample, where the evidence tended to show that the body of the victim was exhumed in the presence of an SBI agent who accompanied the casket to the office of the Chief Medical Examiner in Chapel Hill where the casket was opened by one expert who commenced an autopsy; the expert removed a piece of liver tissue and gave it to a morgue supervisor with instructions to take it to the second expert in a laboratory downstairs in the same building; and the second expert received the sample from the morgue supervisor.

State v. Hunt

5. Homicide § 23— first degree murder—jury instructions

In a prosecution for first degree murder, the trial court did not err in his jury instructions in (1) devoting more time to recapitulation of the State's evidence than defendant's evidence, since the evidence of the State was lengthier and more detailed; (2) stating to the jury that defendant contended certain things, though she did not take the stand, since the judge was referring to favorable evidence elicited by defendant; and (3) stating that defendant testified to a certain matter, since that constituted a slip of the tongue which defendant should have called to the court's attention if she wanted it corrected.

DEFENDANT appeals from judgment of *McConnell, J.*, 5 September 1978 Criminal Session, ANSON Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging her with the first degree murder of Joseph Hunt on 1 September 1973.

The State offered evidence tending to show that on 31 August 1973 Brenda Horne was living with defendant Rozell Hunt, Joe Hunt, and their children in Lilesville. On that morning Brenda Horne accompanied Rozell and Joe Hunt to Wadesboro. After Rozell and Joe Hunt had finished some business at the courthouse, they went to the Hi-Lo store where Joe started ordering groceries. While Joe was at the Hi-Lo store Brenda Horne accompanied defendant to a nearby drugstore where defendant purchased some liquid rat poison. Defendant told Brenda Horne the poison was to be used to kill rats. They all went back home about noontime.

After they got home defendant began to prepare lunch while Joe went to the garden. Since Joe was a diabetic his tea had to be prepared differently. His tea was customarily prepared in a jug that had a dent in the side. While defendant was preparing the tea Brenda Horne looked through two holes in the kitchen door and saw defendant pour rat poison into the tea prepared for Joe Hunt. During lunch Joe Hunt drank some of the poisoned tea. He took a nap after lunch, but woke up "weak eyed and throwing up." He threw up a white looking liquid.

Joe Hunt got progressively sicker and was eventually taken to a hospital in Wadesboro, then transferred to a hospital in Charlotte where he died. Brenda Horne stated that defendant had told her on many occasions prior to Joe Hunt's death that she had

tried to poison Joe Hunt, but that he always seemed to survive. Brenda Horne identified the rat poison which defendant had bought as being like Singletary's Rat Treatment.

Sheriff Jarman testified that on 14 May 1974 Brenda Horne accompanied him to the drugstore where on 31 August 1973 she had observed defendant purchase liquid rat poison. After entering the drugstore, Brenda Horne pointed out some boxes underneath the counter where she had seen the proprietor reach for the rat poison allegedly ordered by defendant. The proprietor then reached into those boxes and took out two bottles of Singletary's Rat Treatment. Brenda Horne stated to Sheriff Jarman that this was the same type of rat poison defendant bought and carried home with her on 31 August 1973. These bottles were purchased by Sheriff Jarman. Sheriff Jarman identified State's Exhibits 2 and 3 as the same bottles he had purchased on 14 May 1974. Brenda Horne testified that State's Exhibits 2 and 3 looked the same as the bottle of rat poison bought by defendant in 1973.

Mr. Charles Kiser, proprietor of the drugstore, testified that he was selling a brand of rat poison known as Singletary Single Treatment during August and September of 1973; that the bottles of Singletary's purchased by the sheriff in 1974 were the same type he stocked during 1973: "It was the same size bottle. It would have been the same appearance." Mr. Kiser added that he had been selling the Singletary brand continously since he opened the drugstore in 1954.

Robert Lindsey testified that prior to Joe Hunt's death he had heard defendant say she had tried to poison Joe Hunt unsuccessfully.

Pursuant to a court order Joe Hunt's body was exhumed on 17 April 1974 and transported to Chapel Hill where Dr. Page Hudson, the Chief Medical Examiner, conducted an autopsy. Dr. Hudson removed some liver tissue from the body for further analysis by Dr. Arthur McBay, Chief Toxicologist in the Medical Examiner's office. Dr. McBay testified that Joe Hunt's liver tissue contained a fatal amount of arsenic and that Singletary's Rat Treatment contained lethal amounts of arsenic. Dr. Hudson testified that in his opinion Joe Hunt's death was caused by arsenic poisoning.

Defendant offered evidence tending to show that defendant nursed Joe Hunt during his illness; that she told her daugther and Brenda Horne to summon the rescue squad; that she had been upset by Joe Hunt's death; that there had been no animosity between defendant and Joe Hunt; that the area of the kitchen where defendant allegedly put poison in Joe Hunt's tea could not be seen from the two holes in the closed kitchen door; and that Brenda Horne never made any statements as to the cause of Joe Hunt's sickness.

The jury found defendant guilty as charged, and she was sentenced to life imprisonment. She appeals as of right to this Court.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

Henry T. Drake, attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends the trial judge erroneously admitted into evidence State's Exhibits 2 and 3. These exhibits were bottles of Singletary Rat Treatment, a rat poison, bought on 14 May 1974 by Edward Jarman, then Sheriff of Anson County, from the same drugstore where on 31 August 1973 defendant had allegedly bought the same type of rat poison. Defendant argues these exhibits were irrelevant and immaterial.

It is well established that "in a criminal case every circumstance calculated to throw any light on the supposed crime is admissible and permissible. *State v. Hamilton*, 264 N.C. 267, 141 S.E. 2d 506; *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101; *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it . . . reasonably allows the jury to draw an inference as to a disputed fact." *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). "Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition has changed in the meantime." 1 Stansbury, N. C. Evidence, § 90, p. 283 (Brandis Rev. 1973). Here, the evidence showed that

the bottles purchased by Sheriff Jarman in 1974 looked the same as the bottles allegedly purchased by defendant in 1973; that the drugstore in question had continuously carried Singletary's Rat Treatment since 1954; that the size bottle purchased by Sheriff Jarman in 1974 was available throughout 1973; and that the bottles bought in May, 1974 were kept in the same area of the drugstore during August and September of 1973. Accordingly, State's Exhibits 2 and 3 were admissible to show that Singletary's Rat Treatment was available at the drugstore on the day Brenda Horne testified she saw defendant purchase a bottle of liquid rat poison. Proof of this circumstance tends to bolster the State's contention that defendant purchased a bottle of liquid rat poison at Wade's Drugstore on 31 August 1973. Defendant's first and fifth assignments of error are therefore overruled.

[2] Defendant next contends the trial judge improperly allowed Dr. Arthur McBay to testify as to the contents of State's Exhibits 2 and 3 without requiring him first to relate the basis of his opinion. This contention is without merit. When an expert's opinion is based on facts within the expert's own knowledge he may relate those facts himself and then 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, supra, § 136, p. 446; *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

Dr. McBay was qualified as an expert in toxicology and testified that he had previously tested bottles of Singletary's Rat Treatment identical to State's Exhibits 2 and 3. Dr. McBay then testified that Singletary's Rat Treatment when ingested contained sufficient arsenic to kill a person. It follows that the trial judge acted within his discretion in permitting Dr. McBay to give his opinion as to the contents of State's Exhibits 2 and 3 without requiring him to give also the basis thereof. Defendant was free on cross-examination to test fully the accuracy and validity of the tests which formed the basis of Dr. McBay's opinion. Defendant's eighth assignment is overruled.

Defendant contends the trial court abused its discretion by allowing the District Attorney to ask leading questions throughout the course of the trial. A leading question is one that

suggests the desired answer. Frequently, questions that may be answered "yes" or "no" are regarded as leading. Even so, the trial court has discretionary authority to permit leading questions in proper instances, and absent a showing of prejudice the discretionary rulings of the court will not be disturbed. If the testimony is competent and there is no abuse of discretion, defendant's exceptions thereto will not be sustained. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977), and cases cited therein. *See generally*, 1 Stansbury, *supra*, § 31.

We have carefully examined defendant's exceptions and find no abuse of discretion. Eleven of the questions excepted to (Exceptions 5, 6, 7, 10, 15, 16, 22, 25, 34, 36, 37) are not leading; one (Exception 4) is not a question; two (Exceptions 30, 32) are phrased in a mode best calculated to elicit the truth; two (Exceptions 2 and 3) direct attention to the subject matter at hand without suggesting an answer; and three (Exceptions 12, 13, and 14) elicit preliminary or introductory testimony. *See generally, State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). In any event, we cannot say from an examination of this record that the trial judge abused his discretion or deprived defendant of a fair trial by the rulings here challenged. Defendant's second assignment of error is overruled.

[3] Defendant next contends that, by asking certain questions, the trial judge impermissibly commented on the evidence. It is proper for a trial judge to direct questions to a witness which are designed to clarify or promote a better understanding of the testimony being given. As stated in *Eekhout v. Cole*, 135 N.C. 583, 47 S.E. 655 (1904): "[J]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the 'truth, the whole truth, and nothing but the truth' be laid before the jury." *Accord, State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969). The trial judge must take care, however, that his questioning does not amount to an expression of opinion as to guilt or innocence of a criminal defendant, credibility of a witness, or any other matter which lies in the province of the jury. *See State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978), and cases cited therein. The trial judge commits

prejudicial error if at any stage of the trial his questioning by its tenor, frequency, or persistence tends to convey to the jury the impression of judicial leaning. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Colson, supra.*

Due consideration of the questions here challenged leads us to conclude that the trial judge at all times acted within the bounds of his discretion. By his questioning the trial court sought to insure that the witnesses understood what was being asked, or sought affirmation and clarification by the witness of the witness' answer. We find nothing in any of the challenged questions which a juror could reasonably interpret as the court's opinion on any matter before the jury. Rather, the questions posed served only to clarify and promote a proper understanding of the testimony. Defendant's fourth, sixth, and tenth assignments of error are overruled.

[4] Defendant contends the trial court erred in allowing Dr. Page Hudson and Dr. Arthur McBay to testify to the cause of death of Joe Hunt and to the level of arsenic found in tissue analyzed by Dr. McBay. Defendant does not challenge the qualifications of the experts or the efficacy of the tests they performed. Rather, she contends the State did not sufficiently trace and identify the tissue sample that was analyzed by Dr. McBay. *See e.g., State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Webb*, 265 N.C. 546, 144 S.E. 2d 619 (1965); *Robinson v. Insurance Co.*, 255 N.C. 669, 122 S.E. 2d 801 (1961). This contention is without merit. The State's evidence tends to show that Joe Hunt's casket was exhumed on 17 April 1974 by Archie Watson, the funeral director who buried Joe Hunt, in the presence of SBI Agent Hawley. On that day Agent Hawley accompanied the casket to the Office of the Chief Medical Examiner in Chapel Hill where the casket was opened by Dr. Page Hudson who commenced an autopsy. During the course of the autopsy a piece of embalmed liver tissue was removed from the body. Dr. Hudson gave the tissue sample to Ron Boone, morgue supervisor, with instructions to deliver the tissue sample to Dr. McBay who was in the laboratory downstairs. On 17 April 1974 Dr. McBay received the embalmed liver tissue from Mr. Boone. Thus, the State's evidence is sufficient to establish that the tissue removed by Dr. Hudson and analyzed by Dr. McBay came from the liver of Joe Hunt. Accordingly, it was permissible for Dr. McBay to testify as to the

arsenic content of the liver as revealed by his tests and for Dr. Hudson to testify as to cause of death based, in part, on Dr. McBay's findings. Defendant's seventh, ninth, and eleventh assignments of error are overruled.

[5] Defendant presents several assignments relating to the judge's charge to the jury. She first contends that in recapitulating the evidence and the contentions of the parties, the trial judge gave more stress to the evidence presented by the State. *See generally, State v. Hewett,* 295 N.C. 640, 247 S.E. 2d 886 (1978). This contention is unsound. Careful review of the charge indicates that the trial judge fairly and accurately summarized the evidence and contentions of both parties. The eivdence presented by the State was lengthier and more detailed than that presented by defendant. It was therefore natural and reasonable that review of the State's evidence and contentions should take somewhat longer. *See State v. Pearce,* 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Sparrow,* 244 N.C. 81, 92 S.E. 2d 448 (1956).

Defendant claims the trial judge committed error in stating to the jury that defendant "contended" certain things when in fact defendant did not take the stand. In context, it is clear the trial judge was properly referring to favorable evidence elicited by defendant on direct examination of her witnesses and cross-examination of State's witnesses. *See State v. Warren,* 292 N.C. 235, 232 S.E. 2d 419 (1977).

Defendant alleges that the trial judge, in his recapitulation of the evidence, misstated several facts. She asserts the trial court charged that "Rozell Hunt testifed she had tried to poison Joe Hunt before, and that the Lord had saved him or that he had been saved and she did not succeed." Defendant points out that Rozell Hunt did not *testify* at all and further that defense witness Sara Horne never testified to such fact.

In reviewing this contention, we first note that defendant has taken the quoted sentence out of context. The quotation is part of a sentence in which the trial judge was attempting to restate the testimony of Sara Horne. When the sentence is considered in the context in which it was used, the judge is saying that Sara Horne had testified about a conversation between Brenda Horne and her mother, *i.e.,* that her mother Rozell Hunt said she had tried to

poison Joe Hunt before and that the Lord had saved him or that he had been saved and she did not succeed. Thus, in attempting to summarize the testimony of Sara Horne, the trial judge mistakenly attributed to Sara the earlier testimony by Brenda Horne regarding inculpatory statements made to Brenda by Rozell Hunt. In this context, the trial judge's use of the phrase "Rozell Hunt *testified*" (emphasis ours) constitutes an inadvertent slip of the tongue which should have been brought to the court's attention. Defendant, however, did not bring this inaccuracy in the recapitulation of the evidence to the attention of the trial judge so as to afford opportunity for correction; hence, it cannot now be assigned as prejudicial error. *See State v. Hewett, supra; State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). Nonetheless, we note the trial judge instructed the jury that his recapitulation of the testimony did not constitute evidence and that if its recollection of the evidence differed from his, the jury's recollection should control. Thus, assuming the slight inaccuracies in the judge's charge were subject to appellate review, it is clear they did not constitute prejudicial error.

Defendant contends the trial judge did not properly explain the concept of reasonable doubt to the jury. This assignment is overruled. The instruction on reasonable doubt given by the trial judge is virtually identical to the instruction approved by this Court in *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976).

We have carefully reviewed the remaining objections to the charge and find them to be without merit. Further discussion will serve no useful purpose. In summary, the court's charge correctly states the law and applies it to the varying aspects of the evidence in a manner calculated to assist the jury in understanding the case and in reaching a correct verdict. Assignments of error 12, 13, 14, 15, 16 and 18 are therefore overruled.

Another assignment relating to the charge—No. 17—is not presented and discussed in defendant's brief. It is therefore deemed abandoned under Rule 28, Rules of Appellate Procedure.

No prejudicial error having been shown in defendant's trial, the judgment of the trial court must be upheld.

No error.

STATE OF NORTH CAROLINA v. ROBERT LEE DRUMGOLD

No. 105

(Filed 17 May 1979)

Rape § 6.1 — first degree rape case — error in failing to submit second degree rape

In this prosecution for first degree rape in which the State presented evidence that defendant overcame the victim's resistance by the use of a gun, the trial court erred in failing to submit second degree rape to the jury as a possible verdict where defendant presented evidence through several witnesses that he did not have a gun on the day in question, and where evidence that defendant at one point threatened to kill the victim and that the victim had an abrasion on her face would support a jury finding that the victim submitted to intercourse with defendant because of fear or duress.

APPEAL by defendant from the judgment of *Graham, S.J.*, entered in the 27 September 1978 Criminal Session of FRANKLIN County Superior Court.

The defendant was charged, in an indictment proper in form, with first degree rape.

At trial the evidence for the State tended to show the following:

At about 9:00 a.m. on 6 June 1978 the defendant went to Mrs. Lizzie Epps' house in Vance County with a person named Jethro. Mrs. Epps was separated from her husband, and she had known the defendant for about two years, during which time she had seen the defendant often. Mrs. Epps asked the defendant to take her and her baby to the doctor because the baby was sick.

The defendant, Jethro, Mrs. Epps and her baby left in defendant's car and went to Harry Mitchell's house. While there Mrs. Epps drank some milk, and the defendant drank "some whisky mixed with milk." Mrs. Epps stated that she did not drink any alcohol. The four of them left after about fifteen minutes and went to Jethro's house. Mrs. Epps, her baby and Jethro entered the house. The defendant took a gun from the back of his car and shot it two times into an open field, reloaded it and put it back into his car.

Mrs. Epps, her baby and the defendant then left and drove to Albert Terry's house. The defendant asked Mrs. Epps if she were

going inside. When she replied no, the defendant pointed the gun at her and said, "I got something that can make you get out." Mrs. Epps testified that she then went into the house with the defendant because she was scared.

Albert Terry and his girlfriend, later identified as Mamie Mitchell, were inside. Mrs. Epps sat on a bed. The defendant came over to her with the gun in his hand, forced her to lie down and started sucking her breasts. He then made her go into the other room and forced her to take off her clothes. The defendant laid the gun on a table beside the bed and had sexual intercourse with Mrs. Epps two or three times. She testified that "I [Mrs. Epps] had sexual intercourse with [the defendant] because I was scared and he had the gun. . . . I did not want to have sexual intercourse with [him] on each of these times."

At one point the defendant put some "hickies" on Mrs. Epps, and he told her that she could show them to her boyfriend, Bay Boy. "He [the defendant] told me [Mrs. Epps] to tell Bay Boy that it didn't make no difference because he had killed one man and got away with it and he feel like he could kill another one and he would do the same thing to me if I tell it."

Astor Bowden, a Deputy Sheriff of Franklin County, testified that he saw Mrs. Epps at about 6:00 p.m. on 6 June 1978, and she appeared nervous and upset. The officer recounted what Mrs. Epps had told him about the above events, which essentially corroborated Mrs. Epps' testimony.

The evidence for the defendant tended to show the following:

Mamie Seward testified that about 9:30 a.m. on 6 June 1978 the defendant, Jethro, Mrs. Epps and her baby came to the house in which she and Harry Mitchell lived. All of them, including Mrs. Epps, drank milk and vodka, and Mrs. Epps got up and was dancing by herself. The witness stated that when they arrived, "Mrs. Epps appeared to me to have been drinking" and that "when [the defendant] and Lizzie Epps were with each other they were just laughing and talking."

Carrie Pew Lemay testified that these same four people came to her house where she and Jethro lived on the morning of 6 June 1978 and that "Lizzie had been drinking. I could see it in

her eyes and tell it by her ways." Ms. Lemay saw Mrs. Epps drink some white vodka straight out of the bottle at her house. The witness wanted to ride with the defendant, Mrs. Epps and her baby when they left, but Mrs. Epps said no "because she and [the defendant] had something to do." Ms. Lemay stated that she never saw a pistol or a gun and did not hear any shots fired. "I [Ms. Lemay] am positive that [the defendant] did not go to the boot of the car to get a pistol out and shoot it. If that had happened, I would have seen it."

On cross-examination Ms. Lemay denied ever having been intimate with the defendant, and she denied ever having told a law officer that the defendant had raped her six times. She had told an officer that she and the defendant were friends. Ms. Lemay testified that she was not afraid of the defendant.

Albert Terry testified that the defendant, Mrs. Epps and her baby came to his house about noon on 6 June 1978. There are only two rooms in his house with no door between them. Mr. Terry and his girlfriend, Mamie Mitchell, had been working in the tobacco field. When they returned to the house from the fields, the defendant and Mrs. Epps were sitting on the front porch playing with the baby. Mr. Terry and Ms. Mitchell stayed at the house about ten or fifteen minutes and then went back to work. Neither the defendant nor Mrs. Epps entered the house while he was there, and those two left about ten minutes after Mr. Terry returned to the fields.

Mamie Mitchell testified that the defendant, Mrs. Epps and her baby were in the yard when she and Albert Terry came to their house from the tobacco field. They all went inside, and Mr. Terry and Ms. Mitchell ate lunch. When the two of them left to go back to work, the defendant and Mrs. Epps were just talking. Ms. Mitchell stated that she never saw the defendant and Mrs. Epps have sexual relations in the house. While in the field nearby, she would have heard any screams coming from the house if there had been any. This witness also testified that she had known the defendant for quite some time, and she had never seen him with a pistol or a gun.

On cross-examination Ms. Mitchell denied having told any law officer that the defendant had a gun, and she denied ever having

told Mrs. Epps that she could not help her because the defendant was her friend.

The defendant took the stand on his own behalf. He stated that he knew Mrs. Epps quite well and often took her places she needed to go. When he and Jethro went to Mrs. Epps' home on 6 June 1978 the house was in a shambles; the furniture was all moved around and the bed was torn up. Mrs. Epps asked him to get some liquor, so the defendant went out and bought a half-gallon of vodka. Mrs. Epps told the defendant that "I'm going to mess around and be drunk today and when Bay Boy comes I'm going to be drunk."

The defendant testified to the series of events on the morning of 6 June 1978; however, he said that he and Mrs. Epps did not engage in sexual intercourse at Albert Terry's house. After they left there, the defendant and Mrs. Epps went to a store, and he bought some condoms. Mrs. Epps asked the defendant for some money, and he gave her $13.00. The defendant then drove down a road, and he and Mrs. Epps had intercourse in the front seat of the car. The defendant stated that Mrs. Epps took off her clothes voluntarily, and "she did not resist in any way and she did not tell me not to do it."

Thereafter the defendant asked Mrs. Epps to return some of the money he had previously given her because she told him she was not going to take her baby to the doctor. She refused, so the defendant took it. Mrs. Epps got mad and hit the defendant on the side of his head with a rock, and the two of them were "tussling." The defendant then took Mrs. Epps home, but she was still mad at him and kept asking for the money. The defendant stated that "I did not have a pistol in the automobile at that time and I don't even own a pistol."

On rebuttal evidence for the State, Officer Aiken stated that during his investigation of this case, Carrie Pew Lemay told him that the defendant was at her house on 6 June 1978 with a gun, and he had shot it a few times in a field. She was upset and crying and told the officer that "she was afraid of him [the defendant] because he had raped her about six times."

Officer Aiken also testified that he had talked with Mamie Mitchell, who told him that Albert Terry was not at home on 6

June 1978 when the defendant and Mrs. Epps were there. Ms. Mitchell had also stated to the officer that the defendant had a gun and that Mrs. Epps had asked her for help but she told Mrs. Epps she could not help her because the defendant was her friend.

Both Ms. Lemay and Ms. Mitchell took the stand on defendant's surrebuttal evidence and denied having made those statements to Officer Aiken.

Thomas F. East and G. Hugh Moore, Jr. for the defendant.

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

COPELAND, Justice.

The defendant contends the trial court erred in not submitting second degree rape to the jury as an alternative to a verdict of first degree rape. We agree; therefore, the defendant must be granted a new trial.

It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E. 2d 406, 413 (1977). On the other hand, the trial court need not submit lesser degrees of a crime to the jury "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*, 281 N.C. 1, 13-14, 187 S.E. 2d 706, 714 (1972). (Emphasis added.)

In this case, a conviction of first degree rape depended, *inter alia*, on proof that the defendant overcame Mrs. Epps' resistance by the use of a deadly weapon. *See* G.S. 14-21(1)(b) (1977 Cum. Supp.). The defendant presented evidence through several witnesses that he did not have a gun on the day in question. Therefore, there was conflicting evidence on an essential element of the crime charged. Furthermore, there was evidence that at one point the defendant threatened to kill Mrs. Epps, and Officer Bowden testified that when he saw Mrs. Epps on 6 June 1978, "she had what appeared to be an abrasion on the left side of her face." The jury could have found that Mrs. Epps submitted to in-

tercourse with the defendant because of fear or duress. *See generally, State v. Dull*, 289 N.C. 55, 220 S.E. 2d 344 (1975), death sentence vacated in 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3211 (1976). Under these facts, the trial court should have submitted second degree rape to the jury as a possible verdict. Its failure to do so entitles the defendant to a new trial.

We need not discuss defendant's two other assignments of error, as they are not likely to recur at the new trial.

For the foregoing reason, we order that defendant be granted a

New trial.

STATE OF NORTH CAROLINA v. WILLIAM BENJAMIN HUNTER, JR., SHIKHAN TONY BARRIOS, AND RICKY LATTIMER

No. 26

(Filed 17 May 1979)

1. **Criminal Law § 74.3— confession by codefendant—no implication of defendant—admissibility**

In a prosecution of three defendants for murder and attempted armed robbery, the trial court did not err in permitting an SBI agent to testify with respect to a pretrial statement made to him by one defendant, since the statement was made freely and voluntarily and since it did not implicate the defendant who complained of its admission.

2. **Criminal Law § 165— district attorney's jury argument—failure to object**

There was no merit to defendant's contention that the district attorney in his jury argument "exceeded the bounds of propriety" to the prejudice of defendant, since defendant made no objection at trial to the jury argument, and since the argument of defense counsel was not transcribed, thereby prohibiting the court on appeal from considering fully the context in which the prosecutor's argument was made.

3. **Criminal Law § 169— failure to object to evidence—no prejudice to defendant**

There was no merit to defendant's contention that the trial court erred in admitting into evidence the in-custody statement of another defendant which tended to incriminate him, since defendant did not object to the introduction of the second defendant's statement.

4. Homicide § 21.5— first degree murder of towel store employee—sufficiency of evidence

In a prosecution for murder and attempted robbery, evidence was sufficient to be submitted to the jury where it tended to show that one defendant was acting in concert with the other defendants when they attempted to rob a towel store employee; defendant stayed in the getaway car while the offenses were being committed; defendant participated with his codefendants in fleeing from the scene of the crime; and the evidence was also sufficient to show that defendants conspired to commit the robbery and that the murder of the employee was committed by one conspirator in the attempted perpetration of the crime, thereby making each and all defendants guilty of murder in the first degree.

APPEAL by defendants from *Preston, J.*, 20 May 1977 Session of Superior Court for ROBESON County.

By separate indictments each defendant was charged with (1) the murder of Ted Rexford West and (2) the attempted armed robbery of a Cannon Towel Outlet store. Defendants pled not guilty to all charges.

Evidence presented by the state is summarized in pertinent part as follows:

On 25 November 1976, Thanksgiving Day, Ted West and Terry Lynn Farrell were employed at the Cannon Towel Outlet store on West Fifth Street in Lumberton, N. C. Around 6:55 p.m., as they were preparing to close the store for the night, a black male identified by Ms. Farrell at trial as defendant Hunter, entered the store. He obtained a soft drink from the drink box, carried it to the counter and paid West for it. Thereafter, he obtained some potato chips from a vending machine after which a second black male, identified by Ms. Farrell as defendant Barrios, entered the store with a large gun drawn. Defendant Hunter then put down his drink and potato chips and drew a smaller gun from his coat.

Defendant Barrios told West and Ms. Farrell that this was a stickup and for them to lie on the floor. Ms. Farrell hesitated for a moment and defendant Barrios repeated his instruction. West grabbed her by the arm and insisted that she lie on the floor. The area behind the counter being very small, West took Ms. Farrell by her arm and started pulling her toward the end of the counter. When they reached the end of the counter, West pulled her down on her knees.

Ms. Farrell then saw defendant Hunter open the cash register which contained approximately $350.00. Defendant Barrios asked West what he pushed (evidently referring to some type of button) as he travelled back of the counter. West replied, "Nothing, I didn't do anything" and begged defendant Barrios several times not to shoot him. West then turned toward Ms. Farrell and defendant Barrios shot him in his back.

Ms. Farrell testified: "[T]here was a big cloud of smoke that came from his (West's) chest. Then the blood came all over his chest and he fell down on his knees. . . . At that time I heard a gurgling sound from Ted and the taller man (Barrios) said, 'What did you say, if you say another word, I'll shot (sic) your God-damn head off', and he was pointing the gun at Ted's head".

At the time defendant Barrios shot West, defendant Hunter was standing at the cash register with his hand in it "but watching what was happening". Following the shot Ms. Farrell lay down on the floor with her hands covering her face and then heard a second shot. A little while later, she looked up, saw that the robbers were gone, went outside and summoned help.

When police and ambulance personnel arrived a few minutes later, they found West in a pool of blood near the end of the counter. He died very soon thereafter. His body was examined by a medical expert the next morning. He concluded that West had been shot in his back, that the bullet penetrated his intervertebral column, completely transacted his thoracic aorta, went through his left lung and came out his lower chest; and that West died from hemorrhage caused by the gunshot wounds.

At around 7:00 p.m. on the evening in question William J. Chavis was travelling on West Fifth Street by the Cannon Towel Outlet store. He saw two black males running from the direction of the store toward Starlite Drive which intersects West Fifth Street from the south. Chavis turned on Starlite Drive and on the shoulder of that road headed south he saw a large car "with some kind of stripe on the side of it across the doors". The two men he saw running entered the car which was already occupied by a third person and they drove off in a southerly direction. A check of the cash register disclosed that no money was taken.

Several days later law enforcement officers questioned defendants who were then serving in the Army at Fort Bragg.

Defenant Hunter admitted going to the store in question early in the evening of 25 November 1976 but did not admit participation in the attempted robbery or murder. He admitted ownership of a 1971 blue Oldsmobile 442 with white racing stripes on the sides, that he drove it to the store in question on said date and that he was with defendants Barrios and Lattimer that evening.

Defendant Lattimer admitted going to the "towel place" on the evening in question but insisted that "he hadn't pulled the trigger on no one." He further stated that he did not want to go through with the job after he arrived at the towel place but admitted that the .38 (used by Hunter) was his and that he drove part of the way back to Fayetteville.

Defendants elected not to testify but presented evidence by two fellow soldiers tending to show that they were in their barracks at Fort Bragg as late a 5:00 p.m. on the day in question. One of the witnesses testified on cross-examination that he saw the three defendants together later that night at a trailer house in Fayetteville.

Further elaboration on the testimony is hereinafter set forth in the opinion.

The jury found each defendant guilty of first-degree murder and attempted armed robbery. The court held that the armed robbery charges were merged with the first-degree murder charges and entered judgment imposing a life sentence on each defendant.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Thomas H. Davis and Charles M. Hensey, for the State.

Ertle Knox Chavis for defendant-appellant Barrios.

John Wishart Campbell for defendant-appellant Lattimer.

Ertle Knox Chavis and John Wishart Campbell for defendant-appellant Hunter.

BRITT, Justice.

After a careful consideration of all assignments of error argued in defendants' briefs, we conclude that there is no merit in any assignment, that defendants received a fair trial and that the

judgments entered are according to law. We will discuss briefly the questions raised by each defendant.

APPEAL OF DEFENDANT BARRIOS

[1] By his sole assignment of error, defendant Barrios contends the trial court erred in permitting S.B.I. Agent Frank Johnson to testify with respect to a pretrial statement made to him by defendant Lattimer.

It appears that this evidence is challenged for the reasons that (1) the statement was not given freely and voluntarily, and (2) it implicated defendant Barrios and was prejudicial to him, in violation of the principles set forth in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968).

Assuming, *arguendo*, that defendant Barrios has standing to challenge the voluntariness of the statement, we hold that the evidence presented at the *voir dire* hearing fully supports the court's findings and conclusions that the statement was given freely and voluntarily. The trial judge's finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

While we recognize the principles set forth in *Bruton*, we disagree with the contention that defendant Lattimer's pretrial statement implicated defendant Barrios and that it was prejudicial to him. The testimony of Agent Johnson relating to defendant Lattimer's statement and which defendant Barrios assigns as error is as follows:

> "He stated that he was going to tell me the truth, that he hadn't pulled the trigger on no one. He stated that he didn't even want to go through with the job after he got to the towel place. Mr. Lattimer further stated that he came back to Cooper's trailer in Fayetteville and that he was supposed to go in the place, but stated he changed his mind when he got there and decided not to go through with it. He stated that the reason for changing his mind was that he had a feeling that something was going to happen. He further stated that the .38 belonged to him.
>
> "Mr. Lattimer stated that both the magnum gun and the .38 were under the seat and that he—when they got to the

towel place. Mr. Lattimer also told this agent that he drove part of the way back to Fayetteville."

We are unable to perceive how defendant was prejudiced by the quoted statement, hence the assignment of error is overruled.

APPEAL OF DEFENDANT HUNTER

Defendant Hunter contends first that the court erred in admitting evidence relating to his pretrial in-custody statement. This contention is based primarily, if not solely, on the assumption that the trial judge did not make findings of fact that the statement was intelligently and voluntarily made, therefore, it was inadmissible. He cites *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976).

We note that following the trial, defendant Hunter's trial counsel died and that Messrs. Campbell and Chavis were appointed to perfect the appeal. In his brief defendant states that he was unable to find anywhere in the trial record any findings by the trial judge based upon evidence presented at the *voir dire*. Since defendant filed his brief, we have allowed the state's motion to file an addendum to the record which includes those findings. They are fully supported by the evidence and support the court's conclusion that the statement was intelligently and voluntarily made. That being true, the findings will not be disturbed on appeal. *State v. Harris, supra.*

[2] Defendant Hunter's other contention is that the district attorney in his jury argument "exceeded the bounds of propriety" to the prejudice of said defendant. We are not impressed with this contention.

The record discloses that no defendant made any objection at trial to the district attorney's jury argument. It also appears that the arguments of defense counsel were not transcribed, therefore, we are unable to consider fully the context in which the prosecutor's argument was made.

Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial court before the case is submitted to the jury in order that the impropriety might be corrected. *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied*, 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969). This

rule does not apply, however, when the impropriety is so gross that it cannot be corrected. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967).

We have held many times that wide latitude is allowed counsel in his argument to the jury, including the use of illustrations and anecdotes; and counsel is entitled to argue the law and the facts in evidence together with all reasonable inferences to be drawn therefrom. 4 Strong's N. C. Index 3d, Criminal Law § 102.1. The control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge and his rulings thereon will not be disturbed in the absence of gross abuse of discretion. *Ibid* § 102.2.

With the aforestated principles in mind, we have carefully reviewed the district attorney's jury argument, with particular reference to the portions designated by defendant, and conclude that the district attorney did not exceed the bounds of propriety in this case.

APPEAL OF DEFENDANT LATTIMER

Defendant Lattimer contends first that the trial court erred in admitting evidence of his in-custody statement for the reason that it was not freely and voluntarily given. This contention has no merit. Before admitting evidence of the statement, the court conducted a *voir dire* hearing at which evidence for the state and defendant was presented. Following the hearing the court made findings of fact and concluded that before making the statement defendant Lattimer knowingly and intelligently waived counsel and that he made the statement freely and voluntarily. The court's findings are fully supported by the evidence, therefore, will not be disturbed on appeal. *State v. Harris, supra.*

[3] Defendant Lattimer contends next that the trial court erred in admitting into evidence the in-custody statement of defendant Hunter which tended to incriminate Lattimer and cites *Bruton v. United States, supra.* There is no merit in this contention. Lattimer did not object to the introduction of Hunter's statement. "It is well settled that with the exception of evidence precluded by statute in furtherance of public policy [which exception does not apply to this case], the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even

if incompetent is not a proper basis for appeal." 4 Strong's N. C. Index 3d, Criminal Law § 162, p. 825. *See also:* Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698.

[4] Finally, defendant Lattimer contends the court erred in denying his motion to dismiss the charges against him because of lack of evidence. We disagree with this contention.

In the light most favorable to the state, the evidence against Lattimer tended to show: He was with defendants Barrios and Hunter in their barracks at Fort Bragg from noon until around 5:00 p.m. on the day in question. Thereafter, he rode with them in Hunter's car to Lumberton (approximately 45 miles), carrying his .38 pistol with him. While Barrios and Hunter entered the store, attempted the robbery with Hunter using Lattimer's gun, and Barrios shot West, Lattimer stayed with the car which was parked on the shoulder of a road some 300 feet from the store. When Barrios and Hunter returned to the car after committing the offenses, they entered the car and all three sped away together with Lattimer driving part of the way back to Fayetteville. After arriving in Fayetteville, the three of them went to a trailer house on Apache Street where they spent the remainder of the night and were together there the next morning.

On a motion by a defendant to dismiss the charges for lack of evidence, the evidence will be viewed in a light most favorable to the state; and the state is entitled to every reasonable inference arising therefrom; contradictions and discrepancies, even in the state's evidence, are for the jury to resolve and do not warrant dismissal. 4 Strong's N. C. Index 3d, Criminal Law § 104 and cases therein cited. The evidence was sufficient to support a finding by the jury that Lattimer was acting in concert with Barrios and Hunter when they attempted to rob the towel store; that he stayed with the getaway car and that he participated with his codefendants in fleeing from the scene of the crime. The evidence was also sufficient to support a finding by the jury that Lattimer and his codefendants conspired to rob the towel store; and that the murder of West was committed by Barrios in the attempted perpetration of the crime, thereby making each and all of the defendants guilty of murder in the first degree. 6 Strong's N. C. Index 3d, Homicide § 2.

* * *

In defendants' trial and the judgments entered, we find

No error.

CLARENCE W. VICK v. JAMES W. VICK, JR., CLARENCE WHITE VICK, JR., CURTIS RAY VICK, KATHY LOUISE VICK THROUGH HER GUARDIAN AD LITEM, T. PERRY JENKINS, UNBORN HEIRS OF CLARENCE W. VICK, THROUGH THEIR GUARDIAN AD LITEM, T. PERRY JENKINS

No. 33

(Filed 17 May 1979)

Wills § 34.1— devise to life tenants—remainders to children of life tenants—property of life tenant dying without children

Where testatrix's will devised property to three named persons for life with the remainder of each life tenant's share to go to his or her children, and further provided that, in the event of the death of any life tenant without leaving a child or children, the share of realty devised "to him or her shall go and vest in the survivor or survivors for his, her or their lifetime, and after his or her death, then to his, her or their children," a male life tenant died in 1976 survived by one child, and the female life tenant died in 1977 without child or children, it was *held* that at the death of the female life tenant without child or children, her one-third interest passed to the surviving male life tenant for his life, and that at his death the one-third interest which he received through the female life tenant will pass only to his children and not also to the child of the male life tenant who predeceased the female life tenant.

ON discretionary review of an unpublished decision of the Court of Appeals, reported at 38 N.C. App. 629, 248 S.E. 2d 473 (1978), reversing the judgment by *Clark, Judge*, entered 19 November 1977 in Superior Court, EDGECOMBE County.

Kate Tickle died 19 August 1952 leaving a will, the pertinent provisions of which are as follows:

> "Third: I give and devise all of my real property to the said James Walter Vick, Sallie Grimes Vick and Clarence White Vick, share and share alike, for and during the term of their natural lives, and after their respective deaths to their children, per stirpes.

Fourth: In the event of the death of the said James Walter Vick, Sallie Grimes Vick or Clarence White Vick without leaving child or children, then the share of my personal property herein bequeathed to him or her shall go and vest in the survivor or survivors, absolutely, and the share of my real property herein devised to him or her shall go and vest in the survivor or survivors for his, her or their lifetime, and after his or her death, then to his, her or their children."

James Walter Vick died 4 June 1976, survived by one child, James Walter Vick, Jr.

Sallie Grimes Vick died in 1977 without child or children surviving her.

Clarence White Vick is still living. He has three children, Clarence White Vick, Jr., Curtis Ray Vick, and Kathy Louise Vick.

This is a declaratory judgment action to construe the above provisions of the will of Kate Tickle.

The trial court concluded that James Walter Vick, Jr. was the owner of a one-third (1/3) undivided interest in fee simple in the real property devised under the will of Kate Tickle, that Clarence White Vick owned a life estate in a two-third (2/3) undivided interest in the realty, including the one-third (1/3) interest that passed to him at the death of Sallie Grimes Vick and that at the death of Clarence W. Vick, the one-third (1/3) interest which had been owned by Sallie Grimes Vick shall be divided between Clarence W. Vick's children and James W. Vick's children per stirpes.

The Court of Appeals reversed, holding that at the death of Sallie Grimes Vick, her one-third (1/3) interest passed to Clarence W. Vick for life, James W. Vick having predeceased her. At the death of Clarence W. Vick, the one-third (1/3) interest which he received through Sallie Grimes Vick will pass to his children.

Upon the petition of James Walter Vick, Jr. we granted discretionary review.

Bridgers & Horton, by H. Vinson Bridgers and Edward B. Simmons, for petitioner, James Walter Vick, Jr.

Hopkins & Allen, by Herbert Frank Allen, and T. Perry Jenkins, Guardian ad litem for the respondents.

BROCK, Justice.

We affirm the construction of the will as given by the Court of Appeals.

It is elementary that the intent of the testator is his will, and such intent as gathered from its four corners must be given effect unless it is contrary to some rule of law or is in conflict with public policy. *Kale v. Forrest*, 278 N.C. 1, 178 S.E. 2d 622 (1971).

This controversy focuses upon the proper interpretations of the Third and Fourth paragraphs of the will of Kate Tickle.

The third paragraph of the will creates a remainder after James Walter Vick's life estate in one-third of the realty in his children, a remainder after Sallie Grimes Vick's life estate in one-third of the realty in her children, and a remainder after Clarence White Vick's life estate in one-third of the realty in his children. These remainder interests vested in their children, who were alive at the death of the testator, subject to open up and admit afterborn child or children. The remainders in the child or children of those life tenants with no child or children at the death of the testator were, however, contingent remainders, which would vest, if at all, only upon the birth of such child or children.

James Walter Vick died 4 June 1976 survived by James Walter Vick, Jr. Under the terms of the Third paragraph, upon the death of James Walter Vick the interest in the remainder after the life estate of James Walter Vick in one-third of the realty of Kate Tickle vested in possession in his child, James Walter Vick, Jr.

Sallie Grimes Vick died in 1977. Not having had child or children, the contingent remainder created in such child or children by the Third paragraph of the will failed, and the entire one-third interest in the realty passed by operation of the Fourth paragraph to Clarence W. Vick for life, he being the sole survivor at that time of the three original life tenants.

Clarence W. Vick is alive and at this time has three children. Upon the death of Clarence W. Vick the interest in the remainder after the life estate of Clarence W. Vick in one-third of the realty of Kate Tickle as originally devised to him will, under

the terms of the Third paragraph, vest in possession in the children of Clarence W. Vick, share and share alike.

There seems to be no controversy, and correctly so, over the above three interpretations of the will. The controversy centers upon the devolution of the remainder interest after the life estate in one-third of the realty of Kate Tickle which vested in Clarence W. Vick for life by reason of his having survived Sallie Grimes Vick who died without child or children.

It is the contention of James Walter Vick, Jr. that upon the death of Sallie Grimes Vick, without child or children surviving, he (James Walter Vick, Jr.) became the vested remainderman of a one-half undivided interest in the one-third interest originally devised to Sallie Grimes Vick for life, and that upon the death of Clarence W. Vick, the remainder interest in the said one-half undivided interest will vest in possession in him (James Walter Vick, Jr.); and that the remainder interest in the other one-half undivided interest in the one-third interest originally devised to Sallie Grimes Vick for life will vest in possession in the children of Clarence W. Vick, share and share alike.

On the contrary, it is the contention of the children of Clarence W. Vick that upon the death of Sallie Grimes Vick, without child or children, and Clarence W. Vick having survived Sallie Grimes Vick, they (the children of Clarence W. Vick) became the vested remaindermen (with the remainder subject to open up and admit an additional child or children of Clarence W. Vick) of the entire one-third interest originally devised to Sallie Grimes Vick for life; and that upon the death of Clarence W. Vick the interest in the remainder after the life estate of Clarence W. Vick in the one-third interest originally devised to Sallie Grimes Vick for life will vest in possession in the children of Clarence W. Vick, share and share alike.

The Fourth paragraph of the will first provides that upon the death of an original life tenant without leaving child or children, the contingent remainder in such child or children having failed, the entire one-third interest passes for life to the survivor or survivors of the original life tenants. It further provides that upon the death of such survivor or survivors, the remainder interest in the realty passing by operation of the First provision is to go to "his, her or their children." The quoted phrase of the Fourth

paragraph clearly refers only to the children of a surviving life tenant or tenants. Under this provision of the Fourth paragraph, the children of Clarence White Vick, the sole survivor of the original life tenants, became the vested remaindermen (with the remainder subject to open up and admit an additional child or children of Clarence W. Vick) of the entire one-third interest originally devised to Sallie Grimes Vick for life with a remainder in her children. The child of James Walter Vick, takes no interest because James Walter Vick predeceased Sallie Grimes Vick, and therefore acquired no interest in Sallie Grimes Vick's one-third life interest in the realty with a contingent remainder in her child or children.

The provision of the will of Kate Tickle now under consideration is similar to the provision of the will of William W. Freshwater involved in *Skinner v. Lamb*, 25 N.C. 155 (1842). The provisions of the Will of Freshwater are reported and construed in that opinion as follows:

" 'The balance of my estate to be equally divided between my wife and children.' The testator at his death had three children—daughters, Matilda, Orange and Elizabeth. In another clause of the will the testator said, 'My wish and desire is, should either of my children die, without leaving an heir begotten by their body or bodies, that the survivor or survivors have the whole . . . .' Matilda married and then died, leaving an only child, which is still alive. Elizabeth married Henry W. Skinner, and they are the plaintiffs. Orange died without issue, and after the death of her sister Matilda." The Court in *Skinner* held: "The three original legacies were vested, on the death of the testator, subject each to be divested, and go over to the survivor or survivors, on the death of either legatee without issue. In this case, Elizabeth is the only *survivor*, and must take the entire legacy that had been assigned to Orange, who died without issue. The Court regrets that the child of Matilda is excluded, but we can only construe wills, and are not authorized to alter or make them." For similar holdings *see Threadgill v. Ingram*, 23 N.C. 577 (1841); *Gregory v. Beasley*, 36 N.C. 25 (1840).

The following language supportive of our interpretation of the will of Kate Tickle is found in Jarman on Wills (8th ed. 1951), Ch. 1.111, p. 1963:

"It may now be taken as settled that where the gift is to A, B, and C equally for their respective lives and after the death of any of his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over."

The Court of Appeals held, as do we, that the construction advanced by the children of Clarence W. Vick is correct.

The language of the Fourth paragraph of the will of Kate Tickle dictates the result as contended for by the children of Clarence W. Vick. When the controverted language of the Fourth paragraph is read in the light of the chronology of events leading up to the present it should be read as follows:

. . . the share of my real property herein devised to Sallie shall go and vest in Clarence for his lifetime, and after his death, then to his children.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES THOMPSON

No. 41

(Filed 17 May 1979)

Robbery § 5.4— threatened use of firearm—firearm real or toy—when common law robbery instruction required

When the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. A contrary holding in *State v. Bailey*, 278 NC 80, is overruled.

APPEAL by the State pursuant to G.S. 7A-30(2) from decision of the Court of Appeals reported in 39 N.C. App. 375 (1979).

Defendant was charged in a bill of indictment with armed robbery. He entered a plea of not guilty.

The State offered evidence tending to show that on 17 September 1976 at about 4:30 p.m., defendant, armed with a pistol and accompanied by another man armed with a shotgun, entered the offices of Associates Financial Services, Inc., in Charlotte, North Carolina, and by the use of these weapons ordered employees Myra Wright, Beverly Shinn and J. M. Lamond into a storage room. The robbers then took $1750 belonging to the business and fled. Defendant was positively identified by each of the employees.

Defendant did not testify but offered evidence in the nature of an alibi. The jury returned a verdict of guilty as charged, and defendant appealed from judgment imposing a sentence of fifty years with credit for pretrial confinement.

The Court of Appeals in an opinion by Judge Parker, with Judge Hedrick concurring and Judge Erwin dissenting, awarded a new trial. The State appealed.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, and Nonnie F. Midgette, Assistant Attorney General, for the State.

Tate K. Sterrett for defendant appellee.

BRANCH, Justice.

Defendant contended before the Court of Appeals and contends here that the trial court erred in failing to charge upon and submit to the jury an issue as to defendant's guilt or innocence of the lesser included offense of common law robbery. This contention is the principal and decisive question before us. In granting a new trial, the majority of the Court of Appeals relied upon the case of *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948. In his dissent, Judge Erwin reasoned that there was no evidence of probative value before the court on the lesser included offense of common law robbery.

In *State v. Bailey, supra*, Loretta Williams testified that on the afternoon of 23 March 1970, defendant came to her place of employment at One Hour Valet Cleaners in Raleigh, North Carolina, armed with a pistol and by the threatened use of that weapon forced her to give him $84 from the cash register. On

cross-examination, she stated, "I don't know whether it was a real or toy pistol or whether it was metal or rubber." The State also offered evidence of a confession by defendant in which he admitted that he committed the robbery.

Defendant's evidence was to the effect that on the day of the robbery he had been drinking wine and shooting heroin. He "passed out" at about noon and remembered nothing about a robbery. He recalled making the confession and testified that he made it because of continual questioning by the police officers. He did not recall that he was warned of his "Miranda rights" prior to making the confession.

The jury returned a verdict of guilty as charged, and defendant appealed from judgment entered. The appeal was brought to this Court pursuant to an existing general referral order entered by the court effective 1 August 1970.

On appeal, defendant, *inter alia*, assigned as error the failure of the trial court to submit the lesser included offense of common law robbery. In sustaining this assignment of error, we, in part, stated:

> Common law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction for common law robbery. When there is evidence of defendant's guilt of common law robbery, it is error for the court to fail to submit the lesser offense to the jury. *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582; *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906; *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545; *State v. Keller*, 214 N.C. 447, 199 S.E. 620.
>
> * * *
>
> The critical and essential difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means."

Applying the above-stated, well established rules, we held that there was a conflict in the testimony which raised an issue

for the jury as to whether defendant used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery.

In instant case, Myra Wright testified that the shotgun was held to her forehead and that it "felt like cold metal." On cross-examination, she stated that "she did not know whether the shotgun was a real gun, a fake gun, a toy gun or what kind of gun, it was metal and did not look like a toy."

Beverly Shinn testified that defendant had a gun in his hand and that it looked like a chrome pistol; that the weapon was held to her stomach; and that "it was definitely metal of some kind." It is noted that on cross-examination this witness did not qualify her testimony as to whether the weapon was real.

The witness Lamond testified that he observed one of the robbers holding a "sawed-off shotgun directly in Ms. Wright's face and that the other" was "carrying a chrome or silver pistol." On cross-examination, the witness Lamond testified:

> With respect to the pistol, I don't know whether it was a real pistol, fake pistol, or what kind of pistol. It looked very real. It was not a cap pistol.

Instant case might be distinguished from *Bailey* in that here three witnesses offered more forceful testimony to the effect that defendant used a firearm than was offered by the State in *Bailey*. Further, one of the witnesses in the case *sub judice* in no way modified her testimony on cross-examination. Even so, this Court does not don the robes of infallibility and the reasoning in Judge Erwin's dissent leads us to reconsider the holding in *Bailey*. The crux of our consideration is whether the conflicting testimony in *Bailey* and here was of sufficient probative value to raise an issue as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robberies.

Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. We cannot perceive how the victims in instant case could have determined with certainty that the firearm was real unless defendant had actually fired a shot. We would not intimate, however, that a robbery victim should force

the issue merely to determine the true character of the weapon. Thus, when a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value.

We conclude that when the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.

We, therefore, hold that Judge Ferrell correctly submitted only the possible verdicts of guilty of robbery with a firearm or not guilty. That portion of *Bailey* which is inconsistent with this opinion is no longer authoritative.

We have carefully considered every other assignment of error brought forward in the Court of Appeals and find that the able opinion by Judge Parker is in all other respects correct.

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

Reversed.

JAY ALLEN KANIA v. HUGH G. CHATHAM, RICHARD T. CHATHAM, ALAN T. DICKSON, FRANK B. HANES, ROBERT CLUETT, TRUSTEES OF THE JOHN MOTLEY MOREHEAD FOUNDATION, AND THE JOHN MOTLEY MOREHEAD FOUNDATION

No. 52

(Filed 17 May 1979)

1. **Trusts § 4— enforcement of charitable trust—necessity for special interest**

As a general rule, no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust; however, a person who has a "special interest" in the performance of a charitable trust can maintain a suit for its enforcement.

2. **Trusts § 4— action to require award of Morehead Scholarship—absence of standing**

Plaintiff's nomination for a Morehead Scholarship and his inclusion in a group of 1000 candidates from which 70 Morehead Scholars were selected in 1978 by the Trustees of the Morehead Foundation did not constitute the necessary special interest to give him standing to maintain an action to have the Trustees removed and to have the court award him a Morehead Scholarship on the ground that the Trustees abused their discretion in failing to award him such a scholarship when "his qualifications are superior to all of those chosen."

3. **Trusts § 4— enforcement of charitable trust—action by Attorney General or district attorney**

In the absence of a showing of special interest, a party seeking enforcement of a charitable trust should have the Attorney General or district attorney commence an action pursuant to the provisions of G.S. 36A-48 when it appears that the trust is being mismanaged through negligence or fraud.

4. **Trusts § 4— charitable trusts—discretion in trustees to select beneficiaries—authority of courts.**

Where discretion is vested in the trustees of a charitable trust to select or designate the beneficiaries, courts are without authority to make such selection or designation since it is the duty of the trustees to determine that question and effectuate it.

Justices EXUM and BROCK took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Browning, S.J.*, at the 30 October 1978 Session of LEE Superior Court.

Plaintiff instituted this action to have the Trustees of the John Motley Morehead Foundation removed and to have the court award him a Morehead Scholarship or alternatively $12,000

in damages. He alleges in his complaint that the Trustees abused their discretion by not awarding him an undergraduate Morehead Scholarship because "his qualifications are superior to all of those chosen."

The Morehead Foundation was established in 1945 by Mr. John Motley Morehead for the purpose of "promoting the education of the youth of the land by providing scholarships, preferably at the University of North Carolina at Chapel Hill . . . to such recipients as may be selected by the trustees . . . ." The trust instrument provided guidance for the Trustees in the selection process by including the following language:

> In awarding these scholarships particular attention shall be paid to academic standing, character, leadership and ambition. The recipients of these scholarships shall be selected by the trustees *in their sole discretion*, and the number and value of the scholarships, which may be changed from time to time, shall be in the sole and uncontrolled discretion of said trustees. [Emphasis added.]

In response to plaintiff's complaint, defendant moved to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. Defendant's motion to dismiss the action was granted, and plaintiff gave notice of appeal to the Court of Appeals. Thereafter, on 5 February 1979, we allowed plaintiff's petition for discretionary review prior to determination by the Court of Appeals.

J. Douglas Moretz for plaintiff appellant.

Fleming, Robinson, Bradshaw & Hinson by Russell M. Robinson, II, and Michael A. Almond for defendant appellees.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for the State, Amicus Curiae.

BRANCH, Justice.

The sole question presented by this appeal is whether plaintiff has standing to commence or maintain this action.

[1] It is well settled, as a general rule, that no private citizen can sue to enforce a charitable trust merely on the ground that he

believes he is within the class to be benefited by the trust. G. Bogert, Trusts & Trustees sec. 414 (2d ed. 1977); 4 A. Scott, The Law of Trusts sec. 391 (3d ed. 1967); 15 Am. Jur. 2d *Charities* sec. 143 (1976); Restatement (Second) of Trusts sec. 391 (1959). However, a person who has a "special interest" in the performance of a charitable trust can maintain a suit for its enforcement. 4 A. Scott, *supra* at 3007; R. Lee, North Carolina Law of Trusts sec. 36 (7th ed. 1978). Generally, whether an individual has a special interest which would entitle him to maintain such an action is determined by the posture of the party seeking enforcement and the nature of the trust. It is readily apparent that the necessary indefiniteness of charitable trust beneficiaries will leave few situations in which courts will hold that individuals have sufficient interest to have standing to sue for enforcement. 56 Va. L. Rev. 716, 722 (1970).

[2] By virtue of the fact that plaintiff was nominated for a Morehead Scholarship, he classifies himself as a "potential beneficiary." He contends that the status thus acquired gives him a special interest in the performance of the trust and standing to maintain this action. We do not agree that plaintiff's classification as a potential beneficiary confers upon him standing to maintain his suit. To the contrary, such classification is fatal to his claim. Plaintiff is a member of a group comprised of hundreds of candidates from which the Trustees, in their sole discretion, selected recipients of Morehead Scholarships. The mere fact that a person may, in the discretion of the Trustees, become a recipient of the benefit under the trust does not entitle him to maintain a suit for the enforcement of the trust. 4 A. Scott, *supra* at 3012; 15 Am. Jur. 2d *Charities* sec. 150 (1976). We, therefore, hold that plaintiff's inclusion in the group of candidates from which Morehead Scholars were selected does not constitute the necessary special interest to give him standing to maintain this action.

We note in passing that in 1978, there were more than 1,000 nominees for Morehead Awards. Of this number, 70 were ultimately chosen as recipients of the awards. Thus, plaintiff was merely a member of a group of more than 930 unsuccessful nominees. To grant plaintiff standing to maintain this action would only open the door to similar actions by other unsuccessful nominees now and in the future. This we refuse to do. To do

otherwise would not only impose upon our courts the burden of multiple litigation but would also require trustees to expend valuable time and resources in defending unwarranted law suits.

[3, 4] We do not mean to imply that a potential beneficiary of a charitable trust can never avail himself of legal process to enforce the provisions of such a trust. In the absence of a showing of special interest, however, a party seeking enforcement of a charitable trust should have the Attorney General or district attorney commence an action pursuant to the provisions of G.S. 36A-48 when it appears that the trust is being mismanaged through negligence or fraud. While the record does not indicate that plaintiff sought to avail himself of this procedure, it appears doubtful whether such an attempt would have been of benefit to him for the reason that the thrust of plaintiff's complaint is directed more toward the Trustees' abuse of discretion than to their mismanagement of the trust. Where discretion is vested in the trustees of a charitable trust to select or designate the beneficiaries, courts are without authority to make such selection or designation since it is the duty of the trustees to determine that question and effectuate it. 15 Am. Jur. 2d *Charities* sec. 76 (1976).

For the reasons stated herein, we hold that Judge Browning properly granted defendants' motion to dismiss plaintiff's action.

Affirmed.

Justices EXUM and BROCK took no part in this decision.

STATE OF NORTH CAROLINA v. DONNIE LEON WAY

No. 51

(Filed 17 May 1979)

Rape § 6— withdrawn consent—jury instructions improper

In a prosecution for second degree rape the trial court erred in instructing the jury that "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this could constitute the crime of rape," since, under the court's instruction, the jury could have found defendant guilty

of rape if they believed the victim had consented to have intercourse with defendant and in the middle of *that* act changed her mind, but the concept of withdrawn consent ordinarily applies to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused.

ON defendant's petition for discretionary review of the unpublished opinion of the Court of Appeals, 38 N.C. App. 628, 248 S.E. 2d 474 (1978) (*Webb, J.*, concurred in by *Vaughn* and *Arnold J.J.*), which found no error in the judgment of *Thornburg, J.*, entered in the 3 January 1978 Criminal Session of MECKLENBURG Superior Court.

The defendant was charged, in an indictment proper in form, with second degree rape.

At trial the evidence for the State tended to show the following:

On the evening of 16 May 1977 the defendant called Beverly Michelle Hester on the phone and asked her to go out with him on a date the following day. Beverly and the defendant had previously been introduced. They had talked on the phone regularly but had never before gone out together.

At about 2:30 p.m. on 17 May 1977 the defendant and his friend Michael Stinson picked up Beverly and her friend Patricia Simpson at the Hester home. They all went to Michael's apartment. The defendant, Michael and Patricia drank some beer and wine and smoked some marijuana; Beverly did not. The television was on, and there was loud music playing on the stereo.

At about 6:00 p.m. the defendant asked Beverly to go upstairs with him because he had something to show her. She went upstairs to a bedroom and sat on the bed. The defendant closed the door. At that point he tried to take off Beverly's pants. She said no, and the defendant replied that she had ten minutes to take her clothes off or he would beat her. Beverly started walking toward the door, and the defendant hit her in the face with his hand. She fell on the bed crying and tried to call her friend Patricia "but I [Beverly] knew she wouldn't hear me because of the loud music." The defendant then said that "by the time [Patricia] got up the steps my [Beverly's] head would be through the wall." The defendant stood over Beverly with his arm

raised as if he were going to hit her again; Beverly undressed because she was scared.

The defendant knocked Beverly on the bed and forced her to have anal intercourse. The defendant then made her perform oral sex on him "or he would kill me [Beverly]." Thereafter he made Beverly have sexual intercourse with him even though she begged him not to because she was a virgin. During the course of the sexual act Beverly started shaking and complaining of severe stomach pains. The defendant became scared. He got off her and called her friend Patricia. Patricia came to the bedroom and dressed Beverly, who was crying and kept asking to be taken to the hospital. Beverly testified she could not tell her friend what had happened because the defendant was constantly present and she was afraid of him.

The defendant, Michael and Patricia all took Beverly to the hospital, and Beverly's parents were called. Beverly first reported that she had been raped when she saw her mother at the hospital.

Dr. Chambers, who examined Beverly on the night of 17 May 1977, testified that there were bruises and puffiness on the right side of her face. The doctor also stated that "vaginal conditions showed evidence of recent trauma. The hymen ring had been torn recently."

The evidence for the defendant tended to show the following:

The defendant had met Beverly Hester in January of 1977. She had gotten defendant's phone number from a friend of his and had called him nearly every day. Mrs. Alexander, defendant's mother, testified that she remembered "a Beverly" calling her home and asking for the defendant. The defendant stated that Beverly had set up the date for 17 May 1977.

While they were at Michael's apartment on 17 May 1977, the defendant said "come on, let's go upstairs" to Beverly, and she went with him. While in the bedroom they talked for about thirty or forty minutes. Beverly then took off her clothes, the defendant took off his clothes, and they had sexual intercouse. Beverly had told the defendant she was a virgin, but the defendant thought she was "just kidding."

During the act of intercourse, Beverly started yelling about stomach pains, so the defendant asked Patricia to come upstairs

to help her. Thereafter, they all took Beverly to the hospital. Defendant denied ever having slapped Beverly, and he denied forcing her to have intercourse with him.

The judge submitted the charge of second degree rape to the jury, and they found the defendant guilty. He was sentenced to imprisonment for ten years. The Court of Appeals found no error in defendant's trial, and this Court granted his petition for discretionary review.

Grant Smithson, Assistant Public Defender, for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Rudolph A. Ashton, III for the State.

COPELAND, Justice.

The defendant contends the trial court erred in its instruction to the jury on withdrawn consent. We agree; therefore, the defendant must be granted a new trial.

After the jury's deliberations had begun, they returned to the courtroom and asked the judge "whether consent can be withdrawn." The court then instructed them that "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape."

It is true that consent can be withdrawn. This concept ordinarily applies, however, to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused. "If the particular act of intercourse was without her consent, the offense is rape without regard to the consent given for prior acts to third persons or the defendant." R. ANDERSON, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 302 (1957). *See also State v. Long*, 93 N.C. 542 (1885).

It is uncontroverted that there was only one act of sexual intercourse involved in this case. Under the court's instruction, the jury could have found the defendant guilty of rape if they believed Beverly had consented to have intercourse with the defendant and in the middle of that act, she changed her mind. This is

not the law. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions. The court's instruction on this matter was erroneous, entitling the defendant to a new trial.

For the foregoing reason, the defendant is granted a

New trial.

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

BANK v. HAMMOND

No. 88 PC.

No. 41 (Fall Term)

Case below: 40 N.C. App. 34.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 May 1979.

BRANTLEY v. NEAL

No. 59 PC.

Case below: 39 N.C. App. 734.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 May 1979.

BROOKS, COMR. OF LABOR v. ENTERPRISES, INC.

No. 42 PC.

No. 37 (Fall Term).

Case below: 39 N.C. App. 529.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 1 May 1979. Defendants' notice of appeal allowed 1 May 1979.

BURKHIMER v. GEALY

No. 46 PC.

Case below: 39 N.C. App. 450.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 May 1979.

CAMBY v. RAILWAY CO. and WRIGHT v. RAILWAY CO.

No. 65 PC.

Case below: 39 N.C. App. 455.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 May 1979.

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

CAROLINAS-VIRGINIAS ASSOC. v. INGRAM, COMR. OF INSURANCE

No. 67 PC.

Case below: 39 N.C. App. 688.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 May 1979.

COZART v. CHAPIN

No. 73 PC.

Case below: 39 N.C. App. 503.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

FUR CO. v. WILDLIFE RESOURCES COMM.

No. 109 PC.

Case below: 40 N.C. App. 609.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 May 1979.

GARDNER v. GARDNER

No. 87 PC.

Case below: 40 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

GOODEN v. BROOKS, COMR. OF LABOR

No. 70 PC.

No. 39 (Fall Term).

Case below: 39 N.C. App. 519.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 May 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 1 May 1979.

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

HANKINS v. SOMERS

No. 66 PC.

Case below: 39 N.C. App. 617.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 May 1979.

HENNESSEE v. COGBURN

No. 57 PC.

Case below: 39 N.C. App. 627.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

LEWIS v. DOVE

No. 64 PC.

Case below: 39 N.C. App. 599.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

LINDER v. INSURANCE CO.

No. 39 PC.

Case below: 39 N.C. App. 486.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

McANINCH v. McANINCH

No. 63 PC.

Case below: 39 N.C. App. 665.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

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

MILLER v. MOTORS, INC.

No. 95 PC.

Case below: 40 N.C. App. 48.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

PRESNELL v. PELL

No. 69 PC.

No. 38 (Fall Term).

Case below: 39 N.C. App. 538.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 1 May 1979.

RANKIN v. RINK and DRESSER v. RINK

No. 72 PC.

Case below: 39 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

SEBASTIAN v. HAIR STYLING

No. 91 PC.

Case below: 40 N.C. App. 30.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 May 1979.

SIMPSON v. LEE

No. 83 PC.

Case below: 39 N.C. App. 736.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 May 1979.

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

STATE v. BROWN

No. 74 PC.

Case below: 39 N.C. App. 548.

Application by defendant for further review denied 1 May 1979.

STATE v. BURNETT and SANDERS

No. 68 PC.

Case below: 39 N.C. App. 605.

Application by defendants for further review denied 1 May 1979.

STATE v. HUNT

No. 89 PC.

Case below: 39 N.C. App. 736.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 May 1979.

STATE v. JEFFUS

No. 71 PC.

Case below: 39 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

STATE v. MASON and STREEPER

No. 62 PC.

Case below: 39 N.C. App. 735.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 May 1979.

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

STATE v. SADLER

No. 116.

Case below: 40 N.C. App. 22.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 May 1979.

STATE v. SEYMOUR

No. 33 PC.

Case below: 38 N.C. App. 243.

Application by defendant for further review denied 1 May 1979.

STATE v. STEVENS

No. 99 PC.

Case below: 40 N.C. App. 428.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

STATE v. TANNER

No. 58 PC.

Case below: 39 N.C. App. 668.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 May 1979.

STATE v. WATKINS

No. 90 PC.

Case below: 40 N.C. App. 17.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

STATE v. WINFREY

No. 100 PC.

Case below: 40 N.C. App. 266.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 May 1979.

TELEGRAPH CO. v. GRIFFIN

No. 92 PC.

Case below: 39 N.C. App. 721.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 May 1979.

WHEELER v. WHEELER

No. 76 PC.

No. 40 (Fall Term).

Case below: 40 N.C. App. 54.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 May 1979.

YOUNCE v. YOUNCE

No. 61 PC.

Case below: 39 N.C. App. 737.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 May 1979.

In re Greene

IN THE MATTER OF JUDGE GEORGE R. GREENE, DISTRICT COURT JUDGE, TENTH JUDICIAL DISTRICT

No. 152PC

(Filed 1 June 1979)

1. **Criminal Law § 142— no inherent power in courts to suspend sentence**

The courts of North Carolina do not have an "inherent" power to continue prayer for judgment on conditions or to suspend sentence where an active sentence is made mandatory by the General Assembly.

2. **Criminal Law § 142; Automobiles § 130; Prohibition, Writ of § 1— erroneous suspension of entire sentence for second offense of driving under the influence —Writ of Prohibition**

A district court judge did not have the inherent power to suspend the entire sentence imposed upon a defendant for a second offense of operating a motor vehicle while under the influence of intoxicating liquor since G.S. 20-179 required that defendant be sentenced to at least three days of active imprisonment or be assigned to an approved alcohol rehabilitation program. A Writ of Prohibition was issued by the Supreme Court directing the district court judge, upon a defendant's plea of guilty or plea of *nolo contendere* in his court to a charge of a second or third offense of operating a motor vehicle in violation of G.S. 20-138, G.S. 20-139(a) or G.S. 20-139(b), to pronounce judgment in accordance with the provisions of G.S. 20-179.

WRIT OF PROHIBITION

This cause is before the Supreme Court of North Carolina upon petition and allegations of District Attorney, Tenth Prosecutorial District, said petition being labeled Petition for Writ of Mandamus. Judge Greene has responded to the said petition stating that he is agreeable to the facts as outlined in the petition. The facts as set out below are, therefore, not controverted.

On 11 November 1978 Richard Allen Godwin was convicted in District Court, Wake County, in case No. 78CR63698 upon his plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor.

On 30 April 1979 Richard Allen Godwin was convicted in District Court, Wake County, in case No. 79CR18655 upon his plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor, *second offense*; and of driving while his operator's license was revoked.

On 30 April 1979 Judge George R. Greene was the presiding judge in District Court, Wake County, before whom Richard Allen Godwin entered his plea of guilty. Judge Greene entered a verdict of guilty as charged and sentenced Richard Allen Godwin to imprisonment for four months and suspended the entire sentence for four months upon the payment of a $300.00 fine and the costs of court. The defendant was not assigned to any alcohol rehabilitation program for treatment in lieu of imprisonment.

North Carolina General Statute 20-179 as amended by Session Laws 1977, Second Session, ch. 1222 became effective 1 March 1979 and was in effect as the sentencing provision for the second offense to which Richard Allen Godwin pleaded guilty on 30 April 1979. The statute as amended reads in pertinent part as follows:

> "(a) Every person who is convicted of violating G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b) shall be punished as follows:
>
> (1) . . . ;
>
> (2) for a conviction of a second offense, imprisonment for not less than three days nor more than one year and a fine not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00);
>
> (3) . . . .
>
> *The first three days of imprisonment pursuant to subsections (2) and (3) above shall not be subject to suspension or parole*; provided that in lieu of such imprisonment pursuant to subsection (2) above the court may allow the defendant to participate in a program for alcohol or drug rehabilitation approved for this purpose by the Department of Human Resources; and upon defendant's successful completion of such program the court may suspend all or any part of the term of imprisonment. Convictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subsections (2) and (3) above. (Emphasis added.)"

The Assistant District Attorney brought to the attention of Judge Greene the requirements of G.S. 20-179 that the defendant

be sentenced to at least three days of active imprisonment or be assigned to an approved alcohol rehabilitation program. Judge Greene stated that it was his opinion that he had the inherent power to suspend all of the sentence he imposed.

By his response to the petition filed in this Court Judge Greene asserts that he "had the inherent power to suspend the sentence given Richard Allen Godwin and any attempt by the Legislature to infringe on such inherent power is unconstitutional and therefore void."

At the outset we observe that the first offense of driving under the influence charged against Richard Allen Godwin occurred on 21 October 1978, which was subsequent to 1 July 1978 and within three years of the second offense of driving under the influence charged against him, the second offense having occurred on 26 March 1979. The provisions of the statute in question became effective 1 March 1979. Therefore the first and second offenses charged against Richard Allen Godwin fall clearly within the purview of the amended statute.

We are not here concerned with the plenary inherent powers of the courts to provide for, supervise, and direct the conduct of the business of the courts and the proceedings before them. Nor are we here concerned with the plenary inherent power of the courts temporarily to delay, for judicial purposes, pronouncement of judgment or execution of sentence under a pronounced judgment, so as to afford time to consider post-trial motions, to prevent a miscarriage of justice, and for other like purposes contemplated by law and justice. For these reasons the pronouncement of judgment may be deferred, but only for a reasonable time. We address only the claimed "inherent" power of the court to continue prayer for judgment on conditions or suspend execution of sentence on conditions.

When prayer for judgment is continued without conditions, the pronouncement of judgment is suspended. When judgment is pronounced and sentence is suspended on conditions, execution of sentence is stayed. When either judgment or sentence is suspended on conditions, the ultimate purpose is the same. *State v. Miller*, 225 N.C. 213, 34 S.E. 2d 143 (1945).

We begin with certain basic premises provided by the Constitution of North Carolina. Article I, Section 6, provides: "The legislative, executive and supreme judicial powers of the State Government shall be forever separate and distinct from each other." Article II, Section 1, provides: "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Article III, Section 5(6), provides: "The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, ..." Article IV, Section 1, provides: "The judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article."

Legislative powers and clemency powers are not constitutionally vested in the Judicial Branch of government. Those powers are constitutionally vested in the General Assembly and the Executive. Unfortunately, there are statements in numerous of our cases to the effect that the courts have the "inherent" power to suspend execution of sentence. *E.g.*, *State v. Simmington*, 235 N.C. 612, 70 S.E. 2d 842 (1952). This use of the term "inherent" is highly misleading and obscures the true source of the power to suspend the execution of sentence. The power to suspend execution of sentence derives from the legislative power to prescribe punishment. In prescribing punishment the Legislature may be very specific or it may grant the trial judge discretion to determine punishment within limits prescribed by the Legislature. The seminal statement of this principle was made by Justice Gaston in *State v. Bennett*, 20 N.C. 170, 178 (1838):

> "We are also of opinion that it was irregular to annex to the sentence any condition for its subsequent remission. We know that a practice has prevailed to some extent of inflicting fines with a provision that they should be diminished or remitted altogether upon matter thereafter to be done, or shown to the court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound upon this first occasion when it is brought judicially to

> our notice, to declare it illegal. A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional. When it has been rendered—except that during the term in which it is rendered it is open for reconsideration—the courts have discharged their functions, and have no authority to remit or mitigate the sentence of the law. Hawkin's, Book 2d, ch. 48, sec. 25; 1 Institutes, 260; *King v. Wingfield*, Cro. Car., 251. *This* is one of the high powers of the executive.
>
> In cases where the law gives to the judges a discretion over the quantum of punishment they may, with propriety, suspend the sentence for the avowed purpose of affording to the convicted an opportunity to make restitution to the person peculiarly aggrieved by his offense, or to redress its mischievous public consequences. And when judgment is to be pronounced, the use which has been made of such opportunity is very proper to be considered by the court in the exercise of that discretion. *Practically*, therefore, every salutary effect of these provisional judgments is attainable without a departure from the forms of law. But if it were not, no considerations of expediency, or of supposed public convenience, can justify a departure from these, which are among the strong safeguards of public right and private security."

The trial courts of North Carolina continued the practice of continuing prayer for judgment on conditions and of suspending execution of sentence on conditions, and ultimately this Court specifically approved the practice in *State v. Crook*, 115 N.C. 760, 20 S.E. 513 (1894). Nonetheless, *State v. Bennett, supra*, specifically identifies the source of the trial judge's power to suspend execution of sentence. The power to define a crime and prescribe its punishment originates with the Legislative Branch. The power to continue prayer for judgment on conditions or to suspend execution of sentence on conditions does not arise from an "inherent" power of the Judiciary for that is a mode of punishment for crime rightly for determination by the General Assembly. *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). The General Assembly, at times specifically, and at times by implica-

tion, accords to the Judiciary the discretion to prescribe the amount and the mode of punishment for a crime.

From 1894 to 1937 the General Assembly tacitly approved, by inaction, the practice of the Court in continuing prayer for judgment on conditions or suspending execution of sentence on conditions. *See* Coates, *Punishment For Crime in North Carolina*, 17 N.C.L. Rev. 205 (1939). In 1937 the General Assembly specifically authorized the Judiciary to suspend the imposition or the execution of sentence in all cases except for crimes punishable by death or life imprisonment. G.S. 15-197. This 1937 enactment was repealed by Session Laws 1977, ch. 711, § 33, effective 1 July 1978. Enacted in its place were Articles 81 and 82 of Chapter 15A of the General Statutes, specifically G.S. 15A-1331 and G.S. 15A-1341, which provide for supervised and unsupervised probation. The official Commentary to G.S. 15A-1341 states: "Subsection (b) specifies both supervised and unsupervised probation. These two categories replace the present probation and release on suspended sentence; in this Article unsupervised probation is the equivalent of the present release on suspended sentence without probation."

This general grant of authority by the General Assembly to the Judiciary to continue prayer for judgment and to suspend execution of sentence is addressed to convictions of crimes in general, except crimes the punishment for which is death or life imprisonment. G.S. 15A-1331(a). However, the provision of our present G.S. 20-179 providing that the first three days of imprisonment provided for in the statute "shall not be subject to suspension or parole", except by defendant's participation in a prescribed program for alcohol or drug rehabilitation, is addressed to a specific crime. When two statutes deal with the same subject matter the statute which is addressed to a specific aspect of the subject matter takes precedence over the statute which is general in application unless the General Assembly intended to make the general statute controlling. It seems clear the General Assembly intended the specific statute to control. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). Absent specific prohibition by the Legislature, courts have the power to suspend sentence in their discretion. However, where the Legislature mandates an active sentence, courts must apply the law as enacted by the Legislature. The North Carolina Court

of Appeals recently addressed a similar question in *State v. Vert*, 39 N.C. App. 26, 249 S.E. 2d 476 (1978). In *Vert* the defendant contended that the mandated prison term of seven years under G.S. 14-87(c) violated the separation of powers clause of the Constitution because the courts had the inherent power to suspend the execution of sentence. The Court of Appeals said:

> "In *State v. Lewis*, [226 N.C. 249, 37 S.E. 2d 691 (1946)], the court stated that the power of the trial courts to suspend judgment was both inherent and statutory. The power to suspend sentences referred to in *Lewis* does not mean exclusive power that cannot be abridged by the Legislature. Rather, it is the authority possessed by and exercised by the courts in administering the punishment for crime prescribed by the Legislature. *See* Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1 (1974)." *Id.* at 31, 249 S.E. 2d at 479.

Stated somewhat differently, the power to defer or suspend the imposition of sentence is not a judicial power beyond statutory limitation. This view is well expressed in *Commonwealth v. Jackson*, (Mass.) 344 N.E. 2d 166 (1976), in which defendant was convicted of carrying a pistol without a license and received a mandatory, minimum, active sentence of one year as provided by a Massachusetts statute. On appeal defendant challenged the constitutionality of the statute on grounds, *inter alia*, that a mandatory one-year jail sentence violates the separation of powers doctrine embodied in Article 30 of the Declaration of Rights of the Massachusetts Constitution. Held:

> "[W]e cannot say that these practices have attained a constitutional status. The ability to defer the imposition of sentence, although a valuable feature in our legal system, is not necessary to the very existence of a court, and, as such, is not an inherent power beyond statutory limitation.
>
> The logic of this position is demonstrated by considering that in our tripartite system of government it is unquestionable that the Legislature has the authority to determine what conduct shall be punishable and to prescribe penalties. Sheehan, petitioner, 254 Mass. 342, 345, 150 N.E. 231 (1926). Although it is the court's function to impose sentences upon conviction, it is for the Legislature to establish criminal sanc-

tions and, as one of its options, it may prescribe a mandatory minimum term of imprisonment. *Bel v. Chernoff*, 390 F. Supp. 1256, 1259 (D. Mass. 1975). If we were to conclude that the judiciary could exercise its discretion to suspend imposition or execution of sentence despite statutory proscription, a serious question concerning the separation of powers would arise, for, taking this proposition to its logical extreme, it would mean that the judiciary impliedly possesses the power to nullify the Legislature's authority. As recognized by the Supreme Court in *Ex parte United States*, petitioner, supra, 242 U.S. at 42, 37 S.Ct. at 74, 'if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other department, and hence leave no law to be enforced.' " *Id.* at 177-78.

[1] We hold that the Courts of North Carolina do not have an "inherent" power to continue prayer for judgment on conditions or to suspend sentence where the sentence is made mandatory by the General Assembly.

[2] It follows that Judge Greene's duty in the case of Richard Allen Godwin was to pronounce judgment and sentence as mandated by the General Assembly in G.S. 20-179. This he failed and refused to do.

It is argued to us by Judge Greene that Rule 22 of the North Carolina Rules of Appellate Procedure requires the district attorney to file his petition in the Superior Court. In view of the nature of the petition, we suspend the operation of Rule 22 in order "to expedite decision in the public interest . . . ." App. R. 2. Also we elect to exercise the Constitutional authority of the Supreme Court to issue "any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." North Carolina Constitution, Article IV, Section 12(1).

Although the district attorney's petition is labeled "Petition for Writ of Mandamus" we elect to treat it as a Petition for Writ of Prohibition.

IT IS THEREFORE ORDERED that Judge Greene, District Court Judge, Tenth Judicial District, be, and he is hereby, directed:

That upon conviction of a defendant in his court, or upon a defendant's plea of guilty, or plea of *nolo contendere* in his court to a charge of a second or third offense of operating a motor vehicle in violation of G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b), to pronounce judgment in accordance with G.S. 20-179; that is to say, he shall neither continue prayer for judgment on conditions or suspend the first three days of the sentence of a pronounced judgment, for a second or third offense of a violation of G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b); provided, however, that in lieu of such imprisonment for a *second* offense of violating G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b), he may allow the defendant to participate in a program for alcohol or drug rehabilitation approved for this purpose by the Department of Human Resources; and upon defendant's successful completion of such program he may suspend all or any part of the term of imprisonment.

The application of this Writ is prospective only and does not disturb the disposition of the case against Richard Allen Godwin.

It is further ordered that the Clerk of this Court is designated as Marshal of this Court to forthwith personally serve upon Judge Greene a certified copy of this Writ and make his return hereon.

By order of the Court in Conference this 1st day of June, 1979.

Brock, J.
For the Court

STATE OF NORTH CAROLINA v. KELLY DEAN SPARKS

No. 64

(Filed 12 June 1979)

1. **Constitutional Law §§ 34, 80— death penalty vacated—imposition of life sentence proper—retrial on same offense proper**

There is no merit to defendant's contention that imposition of a life sentence after the U.S. Supreme Court vacated the imposition upon him of the death penalty was illegal and that having once been sentenced illegally he could not be retried for the same offense, since the action of the N.C. Supreme Court in imposing the life sentence was consistent with the mandate of the U.S. Supreme Court pending its determination of whether *Mullaney v. Wilbur*, 421 U.S. 684, was retroactive, and a retrial of defendant after it was ultimately determined that he was entitled to rely on the *Mullaney* error in his original trial did not constitute double jeopardy.

2. **Constitutional Law § 50— speedy trial—delay caused by appeal process**

Defendant was not denied a speedy trial by the lapse of time between 6 July 1976, when the U.S. Supreme Court ordered reconsideration of his case in light of *Mullaney v. Wilbur*, 421 U.S. 684, and 12 September 1977, when the N.C. Supreme Court ordered that defendant receive a new trial, since defendant's case presented the difficult question whether *Mullaney* was to be retroactively applied, and delays in bringing a defendant to trial that result from the need to assure careful review of an unusually complex case on appeal do not constitute denial of a speedy trial.

3. **Arrest and Bail § 9.1— first degree murder—"capital offense" within meaning of bail statute**

Whether or not a particular defendant, depending upon the date his crime was committed, faces the death penalty, the crime of first degree murder is a "capital offense" within the meaning of G.S. 15A-533(b), so that the release of such defendant on bail is a matter to be determined within the discretion of the trial judge.

4. **Constitutional Law § 82; Prisons § 2— imprisoned defendant—adequate medical services provided**

Where defendant, who was confined in Central Prison, was stabbed by other inmates, was given immediate medical attention, and was subsequently evaluated and given physiotherapy, evidence was sufficient to support the trial court's finding that defendant was provided with "adequate medical, surgical and hospital services," and an interruption of defendant's physiotherapy program while confined in a county jail waiting for retrial would not have any serious, long-term adverse effect on his condition and therefore would not amount to a denial of adequate medical care and therapy.

5. **Constitutional Law § 82; Convicts and Prisoners § 3— defendant in prison—safety adequately provided for**

Where defendant was held in maximum security in Central Prison after his assault by other inmates and the trial court, upon imposing sentence after

retrial, recommended "that defendant be held in custody in a manner to protect him from danger to his person and life," the evidence clearly showed that reasonable steps were taken to protect defendant's safety after his injury.

6. Criminal Law § 128.2— homicide case—introduction of victim's widow to jury —no mistrial

In a prosecution for first degree murder, defendant was not entitled to a mistrial because the prosecutor introduced a lady to the jury as the widow of the victim, since the court sustained the defense attorney's objection to the introduction of the widow and no further references to her were made; she was introduced as a potential witness but a stipulation by the defense attorney subsequently rendered her testimony unnecessary; the trial court offered to give the jury instructions or to allow defendant to question the members of the jury to see if they had been prejudiced, but defendant declined; and the trial court made it clear that no emotional outbursts would be permitted in the courtroom.

7. Constitutional Law § 56— observation of court processes by jurors—no prejudice to defendant

Defendant was not entitled to a mistrial in a first degree murder case where, in the presence of the jury that tried defendant, the grand jury returned five unrelated first degree murder indictments and were thanked by the trial court for their "service as a necessary part of the process of enforcing the law and protecting society," since mere observation by the jury of other lawful courtroom processes will not be presumed to result in prejudice to defendant.

8. Criminal Law § 50.1— expert opinion—test of admissibility

The proper inquiry to make in determining the admissibility of an expert opinion is not whether it invades the province of the jury but is instead 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.

9. Criminal Law § 50.1— homicide—position of victim's body—expert opinion evidence admissible

The trial court in a first degree murder case did not err in admitting testimony by a forensic pathologist as to the possible position of the victim's body at the time of infliction of a bullet wound, since the witness, as a result of his expertise and his opportunity for personal observation of the body, was in a better position than the jury to form such an opinion.

10. Criminal Law § 57— gunshot residue on defendant's hand—chemist's testimony admissible

In a prosecution for first degree murder, the trial court properly admitted testimony by a forensic chemist that he performed tests on swabbings taken from defendant's hands, that gunshot residue was present on defendant's hand, and that defendant could have fired a gun with his left hand.

11. Criminal Law § 57— chemical test—possible presence of gunpowder—admissibility of expert evidence

The trial court in a first degree murder prosecution did not err in permitting a forensic chemist to testify that he performed certain tests on defendant's trousers, the tests showed the presence of nitrites, and nitrites are produced by, among other substances, burned gunpowder, since the tests were reliable for the purpose for which they were used, and the results of the tests were to some extent corroborative of other evidence tending to show defendant discharged a firearm and were therefore relevant.

12. Criminal Law § 88.1— testimony at earlier trial—cross-examination—searching transcript not permitted

There is no merit to defendant's contention that the trial court improperly limited his cross-examination of a prosecution witness where the witness testified that she "believed" she had made a similar statement in defendant's earlier trial; the trial court refused to permit the witness to search through a transcript of the earlier trial to find her statement; and the matter under inquiry was of only marginal relevancy.

13. Criminal Law § 73.1— hearsay statement—admission not prejudicial

The trial court erred in admitting testimony by a police officer, who arrived at the scene of a shooting several minutes after it occurred, that a witness, in response to the officer's question as to what happened, stated that defendant had shot the police chief, since such testimony did not corroborate the in-court testimony of the witness who had made the statement at the crime scene, and since the statement was not a spontaneous utterance but was inadmissible hearsay; however, in light of the State's strong evidence that defendant was the perpetrator of the crime in question, there was no reasonable possibility that a different result would have been reached had such testimony been excluded.

14. Criminal Law § 40.1— transcript of earlier trial—corroborative portions admissible

The trial court did not err in allowing the court reporter to read from the transcript of defendant's first trial in this same case, since the reporter read only those portions of the transcript containing testimony by persons who testified at the second trial, and testimony at a former trial is admissible for corroborative purposes.

15. Criminal Law § 101.2— transcript of earlier trial—no viewing by jury

There is no merit to defendant's contention that he was entitled to a mistrial because jurors who examined the transcript of his first trial might see his conviction and death sentence in the earlier case and he might thereby be prejudiced, since there was no indication in the record that the jury was allowed to examine the transcript.

16. Constitutional Law § 80; Homicide § 31.1— first degree murder—life sentence upon second conviction

On retrial the trial court did not err in imposing a life sentence upon defendant for conviction of first degree murder, and the defendant's contention

that the maximum penalty he could receive was imprisonment for ten years under G.S. 14-2 is without merit.

17. Arrest and Bail § 9.2— *bail pending appeal—discretionary matter*

Defendant failed to show an abuse of the trial court's discretion in refusing to set bail while the case was on appeal. G.S. 15A-536.

Justices COPELAND, BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Wood* at the 27 February 1978 Session of GUILFORD 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 G.S. 7A-27(a). The case was docketed and argued as No. 58 at the Fall Term 1978.

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

Robert S. Cahoon, Attorney for defendant appellant.

EXUM, Justice.

Defendant has sought to bring forward over 200 exceptions to the rulings of Judge Wood at trial and Judge Seay on various pre-trial motions. We discuss here only the more significant points he raises. As to the rest, suffice it to say that we have examined the record and briefs carefully and find that defendant has received a fair trial free from prejudicial error.

Defendant was charged with murdering George Lashley, Chief of Police of Gibsonville, on the morning of 30 June 1973. The state's evidence tended to show that defendant had spent the day before in the company of Darrell Stone, Paula Rogers and Robin Diane Phillips. They drove into the country and stopped at a lake where defendant and Stone shot a .25 caliber pistol belonging to defendant. The four then returned to Greensboro. The two girls went to a bar. Defendant and Stone met them there around 7:30 p.m. They "drove around" and decided to buy illegally or steal some drugs from a doctor's office in Gibsonville. In their possession at this time were defendant's .25 caliber pistol and a sawed-off shotgun apparently belonging to Stone. They went to Gibsonville but decided there were too many people near the of-

fice for them to go through with their plans at that time. They got something to eat and then parked near one of the city sewer system's pump stations to rest. All four fell asleep.

They were discovered on the morning of June 30th by Vance Thomas Evans, a city employee. He contacted the police, and Chief Lashley came to investigate. When Lashley arrived, he observed the sawed-off shotgun, placed defendant under arrest and handcuffed him. He told the other occupants to get out of the car. Defendant and Stone were on the driver's side; the two girls on the passenger side. Both doors to the car were left standing open. Chief Lashley then searched the car, first the driver's side and then the passenger side. Defendant's .25 caliber pistol had been left under the driver's seat. Lashley apparently did not discover it in his search. As he was searching the passenger side of the car, defendant positioned himself in the doorway on the driver's side. While Lashley was leaning over looking through a bag, defendant turned, looked over his shoulder at Lashley, and a shot was fired. It struck Lashley, and he died a few minutes later. Defendant ran into some nearby woods, dropping the .25 caliber pistol as he fled. The cause of Lashley's death was a wound from a .25 caliber bullet, which entered beneath his shoulder, passed through his aorta and lodged near his pancreas.

This case has had a lengthy history. It was first tried before Judge, now Justice, Copeland, at the 29 October 1973 Criminal Session of Guilford Superior Court. At that trial defendant was convicted and sentenced to death. This Court found no error in the trial or the sentence imposed. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974). On 6 July 1976 the United States Supreme Court vacated the imposition of the death penalty and remanded the case to this Court for further proceedings in light of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Sparks v. North Carolina*, 428 U.S. 905 (1976). On 1 September 1976 this Court remanded the case to Guilford Superior Court for imposition of a life sentence. That sentence was imposed on 14 September 1976. On 7 December 1976 we clarified our 1 September order by noting our holding in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), that *Mullaney v. Wilbur, supra*, was not retroactive. We stated that it would be inappropriate to grant defendant a new trial prior to a decision by the United States Supreme Court in *Hankerson*, which was then before it on writ of certiorari. On 17 June 1977 that Court

reversed our decision in *Hankerson* on retroactivity and held that *Mullaney* was fully retroactive. *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Thereafter, on 12 September 1977, we ordered that defendant Sparks receive a new trial. *State v. Sparks*, 293 N.C. 262 (1977).

On 26 June 1977 defendant Sparks was assaulted and stabbed by other inmates in Central Prison. He suffered neurological damage caused by an indirect injury to his spinal cord. As a result, he has a disordered gait, difficulties with balance and various other symptoms. He was hospitalized for some time with these injuries. After his release he was held in the maximum security area of Central Prison until September, 1977, when he was transferred to Guilford County Jail to await trial.

On 10 October 1977 defendant filed a motion to dismiss and for other relief. By this motion he sought (1) dismissal of the indictment against him, (2) bail, (3) provision of proper medical care and therapy, and (4) assurance of protection from abuse, terrorization and injury while in confinement. On 20 December 1977 Judge Seay, after painstakingly conducting a full evidentiary hearing, denied this motion and refused to grant the relief sought. Defendant's first assignment of error challenges this ruling.

[1] Defendant argues that the indictment against him should have been dismissed on grounds of (1) double jeopardy and (2) denial of his right to a speedy trial. With regard to his double jeopardy argument, defendant contends that the imposition of a life sentence on 14 September 1976 was illegal and that having once been sentenced illegally he cannot be retried for the same offense. Without commenting on the validity of the remainder of defendant's argument, we cannot agree with his conclusion because we disagree with his initial premise that he was illegally sentenced. The United States Supreme Court remanded defendant's case to this Court for reconsideration in light of *Mullaney v. Wilbur, supra*, 421 U.S. 684. It was our conclusion that *Mullaney* was not retroactive, *see State v. Hankerson, supra*, 288 N.C. 632, 220 S.E. 2d 575, and that defendant was thus not entitled to a new trial. Upon vacation of defendant's death sentence, the only alternative penalty was life imprisonment. *See State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). We therefore remanded defendant's case to Guilford Superior Court for the sole purpose

of imposing that penalty. Our actions were consistent with the mandate of the United States Supreme Court pending its determination whether *Mullaney* was retroactive. The sentencing of defendant in Guilford County Superior Court on 14 September 1976 was entirely proper. A retrial of defendant after it was ultimately determined that he was entitled to rely on the *Mullaney* error in his original trial does not constitute double jeopardy. *See State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968).

[2] Defendant's argument that he was denied a speedy trial is based on the interim between 6 July 1976, when the United States Supreme Court ordered reconsideration of his case in light of *Mullaney v. Wilbur*, *supra*, and 12 September 1977, when this Court ordered that he receive a new trial. Delays in bringing a defendant to trial that result "from the need to assure careful review of an unusually complex case" on appeal do not constitute denial of a speedy trial. *Harrison v. United States*, 392 U.S. 219, 221-22 n. 4 (1968). Defendant's case presented the difficult question whether *Mullaney v. Wilbur*, *supra*, was to be retroactively applied. This Court, after careful examination of the authorities, had expressed its opinion in *State v. Hankerson*, *supra*, that *Mullaney* was not retroactive. We initially denied defendant a new trial in accordance with that opinion. Shortly after the United States Supreme Court's reversal of our *Hankerson* decision as to retroactivity defendant was granted a new trial. The actions of this Court comported with the orderly functioning of the appellate process. We find no merit in defendant's contention that he was thereby deprived of a speedy trial.

Defendant contends Judge Seay erred in denying him bail. Even if it were error to do so defendant would not be entitled to relief on appeal unless he could show he was prejudiced in the preparation of his trial. *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). He has made no such showing.

[3] Moreoever, it was not error to deny defendant bail. G.S. 15A-533(b) provides: "A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial." Defendant was charged with first degree murder. At the time he allegedly committed the crime, it was a capital offense. *See* 1B N.C. Gen. Stat. § 14-17 (1969). At the time

his motion was before Judge Seay, this crime was likewise a capital offense. *See* G.S. §§ 14-17, 15A-2000. Defendant himself did not face the death penalty only because the United States Supreme Court had decided that its imposition according to the statute under which he was charged would be cruel and unusual punishment. *See Woodson v. North Carolina*, 428 U.S. 280 (1976). We hold that whether or not a particular defendant depending upon the date his crime was committed faces the death penalty the crime of first degree murder is a "*capital offense*" within the meaning of G.S. 15A-533(b). This is so notwithstanding that the trial itself may not be a "capital case" within the meaning of the jury selection statute, G.S. 15A-1217. *See State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978); *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978). Thus the grant or denial of bail here was within the trial court's discretion, abuse of which was not shown.

[4] Defendant next complains of Judge Seay's denial of his motion to "provide him with proper and adequate medical care and therapy." This Court recognized the duty of prison officials acting as agents of the public to provide necessary medical care to prisoners under their charge in *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926): "The prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." More recently the United States Supreme Court has held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

The evidence presented on the motion showed that the stab wounds defendant received on 26 June 1977 were potentially fatal. He received immediate medical attention from doctors at the prison. Their treatment saved his life. As he recovered, these doctors noted symptoms of a spinal cord injury and referred him to a neurologist for evaluation. The eventual diagnosis was that a blood vessel supplying the spinal cord had been punctured when defendant was stabbed, resulting in permanent damage to the spinal cord itself. This condition is not correctible by surgery or medication. Defendant's motor functions can be kept from deterioration by physiotherapy, but it is doubtful that any signifi-

cant improvement is possible. While defendant was at Central Prison, he was on a rehabilitation program. This was halted when he was transferred to Guilford County Jail in preparation for the trial of this case.

Judge Seay found as a fact that defendant had been provided with "adequate medical, surgical and hospital services." This finding was supported by the evidence. There was no substantial evidence to show that defendant had been denied necessary medical care or that corrections officials had shown "deliberate indifference" to his serious medical needs. Indeed, the evidence is completely to the contrary. While defendant's detention in Guilford County Jail interrupted his physiotherapy program, which may have resulted in some temporary discomfort, there is nothing in the record to indicate that such a relatively brief interruption would have any serious long-term adverse effect on his condition. There is, in fact, testimony in the record tending to show that defendant might have suffered many of the same symptoms even had therapy continued. Taking all these circumstances into account, we conclude that Judge Seay did not err in denying this motion.

[5] The last of defendant's requests for relief was that the court "take necessary steps to prevent the defendant being held in any facility where he will be subject to abuse, injury, and terrorization." The evidence showed that after the assault on defendant he was treated in the prison hospital for some time and thereafter held in the maximum security area of Central Prison for his own protection. He was sent to Guilford County Jail in September, 1977. There was no evidence that defendant was subject to any official harassment. The evidence clearly shows that reasonable steps were taken to protect defendant's safety after his injury. Judge Seay so found. We note, moreover, that in finally imposing sentence Judge Wood recommended "that defendant be held in custody in a manner to protect him from danger to his person and life."

Defendant having shown no error in the denial of his motion to dismiss and for other relief, this assignment of error directed thereto is overruled.

By his third assignment of error defendant challenges the trial court's denial of his motion for a change of venue. This mo-

tion was apparently on the ground that prejudice against defendant in Guilford County was so great that he could not receive a fair trial. Motions for a change of venue on such grounds are governed by G.S. 15A-957, which states in pertinent part:

> "If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or
>
> (2) Order a special venire under the terms of G.S. 15A-958."

The burden of showing the existence of prejudice is on the defendant. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). There is no evidence of prejudice whatsoever in the record before us. It was therefore not error to deny defendant's motion for a change of venue.

[6, 7] By his fourth assignment of error defendant contends that the trial court erred in denying his first motion for mistrial. Defendant based this motion on two occurrences. First, during the jury selection process, the prosecutor introduced to the jury a certain Mrs. Ellison as the widow of Chief Lashley. Second, in the presence of the jury that tried defendant, the grand jury returned five unrelated first degree murder indictments and were thanked by the trial court for their "service as a necessary part of the process of enforcing the law and protecting society."

We see nothing in either of these occurrences necessitating a mistrial. As to the first, the record indicates that after Mrs. Ellison was introduced the defense attorney objected and the trial court sustained his objection. No further references to her appear to have been made. She was introduced as a potential witness for the purpose of identifying Chief Lashley and some of his personal effects. A stipulation by the defense attorney subsequently rendered her testimony unnecessary. The trial court offered to give the jury instructions or to allow defendant to question the members of the jury to see if they had been prejudiced. Defendant declined. The trial court further made it clear

that no emotional outbursts would be permitted in the courtroom. Under these circumstances it was not prejudicial to defendant to deny his motion for a mistrial on the ground stated. As to the second ground, the returning of verdicts by the grand jury, mere observation by the jury of other lawful courtroom processes will not be presumed to result in prejudice to defendant. *See State v. Hunt*, 297 N.C. 131, 254 S.E. 2d 19 (1979) (no assumption of bias from fact jury heard pleas taken and sentences imposed in other cases). Defendant's fourth assignment of error is without merit.

Defendant next assigns as error the introduction against him of well over one hundred unrelated items of evidence. We have considered each of the points argued by defendant and conclude that the trial court did not commit prejudicial error in the admission of this evidence. We discuss two of the matters raised here, one relating to the admissibility of certain expert testimony and the other relating to testimony concerning scientific tests.

Dr. John Dailey, a forensic pathologist, conducted the autopsy on Chief Lashley. He testified he recovered a .25 caliber bullet from the body; the bullet entered in the area of the right shoulder; it tracked downward and to the left, passing through the right lung and the aorta; and it came to rest in the area of the pancreas. It was Dr. Dailey's opinion that Chief Lashley died as a result of hemorrhage caused by the gunshot wound.

In the course of the direct examination of Dr. Dailey, the following exchange took place:

> "Q. . . . Dr. Dailey, based upon your education and your experience in the field of forensic pathology and based upon your examination on June 30, 1973, of the person and the wound or the wound of George Lashley, do you have an opinion satisfactory to yourself as to the position of George Lashley at the time the wound which you observed was inflicted?
>
> A. I have an opinion as to the position, yes.
>
> Q. What is that opinion?
>
> A. Its position would have had to be such—
>
> MR. CAHOON: We object to this.

COURT: Overruled.

EXCEPTION NO. 139

A. That it would be consistent with the track of the wound I have already described. His position would have had to be such that the bullet would have come into the right shoulder, passed from right to left, from top to bottom, and slightly from front to back, and this is the position that the body would have to be in. The positions that a body could assume in such a situation would be an individual bending forward such as this, or an individual seated such as this, being shot from above with the wound coming in and the bullet going down, or an individual standing up likewise coming in and going down, or an individual lying on his back with the gun held close to the ground and the bullet fired from right —the gun fired from right to left with the bullet passing in this particular trajectory."

[8, 9] Defendant argues that this opinion was inadmissible because it "invaded the province of the jury." As we tried to make clear in *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978), this is not the proper inquiry to make in determining the admissibility of expert opinion. The test is rather "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." *Id.* at 568-69, 247 S.E. 2d at 911. Applying this test here, Dr. Dailey's opinion was properly admitted. He was an experienced forensic pathologist, and he had conducted a personal examination of the body. He was able to tie the positions the body might have been in with the track the bullet took through the body. We have no doubt that as a result of his expertise and his opportunity for personal observation of the body he was in a better position than the jury to form an opinion on this question. Our holding of admissibility here is, moreover, consistent with a long line of decisions of this Court holding similar expert opinions admissible. *See State v. Powell*, 238 N.C. 527, 78 S.E. 2d 248 (1953) (deceased's hand in front of her face when she was shot); *State v. Stanley*, 227 N.C. 650, 44 S.E. 2d 196 (1947) (deceased lying down when wounds inflicted); *George v. R.R.*, 215 N.C. 773, 3 S.E. 2d 286 (1939) (deceased lying on railroad tracks when struck

by train); *State v. Fox*, 197 N.C. 478, 149 S.E. 735 (1929) (deceased lying down when shot).

[10] Mr. R. D. Cone, a forensic chemist with the North Carolina State Bureau of Investigation, also testified as an expert witness for the state. Mr. Cone testified as to two scientific tests he performed. In the first Mr. Cone analyzed certain swabbings shown by the state to have been taken from the hands of defendant. In making this analysis Mr. Cone would take a portion of a swabbing, combine it with a hydrochloric acid solution in a test tube and agitate it. He would then examine the solution using flameless atomic absorption spectrophotometry in an attempt to determine whether barium, antimony and lead were present. According to Mr. Cone, their presence would indicate the presence of gunshot residue. Mr. Cone found significant concentrations of these elements in a swabbing from the back of defendant's left hand. On the basis of these findings, it was his opinion that defendant "could have fired a gun with his left hand."

We have no doubt that Mr. Cone's conclusion based on the test as described was properly admitted. In *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death penalty vacated*, 428 U.S. 903 (1976) (a case coincidentally involving testimony by the same witness as here), this Court upheld the admission of both the results of this type of test and the conclusion arising from it. Justice Huskins, writing for the Court, stated, *id.* at 53-55, 203 S.E. 2d at 46-47:

> "SBI Chemist Cone testified that, using flameless atomic absorption spectrophotometry, he personally analyzed the gunshot residue wipings taken by Agent Sampson from defendant's hands to determine whether they contained barium, antimony and lead. This analysis showed 'significant concentrations' of all three elements in the wipings taken from the back of defendant's right hand and the palm of his left hand. Based on these test results, Mr. Cone testified that in his opinion 'the subject could have handled and fired a gun.'
>
> . . . .
>
> "Independent research on gunshot residue tests verifies the reliability of this type of test. In a series of tests per-

formed on persons involved in occupations where occupational contamination of the hands might cause interference with the test procedure, researchers have found that '[n]o false tests were obtained nor failure of tests to detect antimony, barium, and lead were encountered because of occupational contamination of the hands.' Harrison and Gilroy, Firearms Discharge Residues, 4 J. For. Sci. 184, 198 (1959). Although chemical reagents were used in the Harrison and Gilroy experiments to test for the presence of firearm discharge residue rather than flameless atomic absorption spectrophotometry, as in this case, the difference does not appear significant. Flameless atomic absorption spectrophotometry appears to be an improvement over the use of chemical reagents because chemical reagents detect only the presence of significant concentrations of the three test elements whereas spectrophotometry can also determine the weight of the elements deposited on the subject's hands.

"The crucial concern with tests of this type is that the test could indicate that a subject had fired a handgun when in fact he had not. It was for this reason that many courts rejected the dermal nitrate (paraffin) test. *See Brooke v. People*, 139 Colo. 388, 339 P. 2d 993 (1959); *Born v. State*, 397 P. 2d 924 (Okla. Crim. 1964), *cert. denied*, 379 U.S. 1000 (1965); *Clarke v. State*, 218 Tenn. 259, 402 S.W. 2d 863, *cert.* denied, 385 U.S. 942 (1966). This test proved unreliable because it could not distinguish between nitrates deposited on the hand from the firing of a handgun and nitrates deposited on the hands of persons who had come in contact with such common substances as explosives, fireworks, fertilizers, pharmaceuticals, leguminous plants (peas, beans, alfalfa), and burning tobacco products such as cigarettes. 5 Am. Jur. Proof of Facts, Firearms Identification 119-20 (1960). Apparently because of this fact, participating experts in the 1963 seminar on the scientific aspects of police work conducted by the International Criminal Police unanimously rejected the dermal nitrate test as being without value. Moenssens, Moses and Inbeau, Scientific Evidence in Criminal Cases § 4.12 (1973).

"According to the testimony of Mr. Cone, antimony, barium and lead will in 'rare circumstances' be found on the

hands of persons who have not fired a handgun. Even so, by reason of the location and the level of concentrations of the test elements on the subject's hands he is able to determine the probability, great or small as the case may be, whether the test substances came from the discharge residues of a handgun or from some other source. In our view, the test employed by Mr. Cone in this case avoids the pitfalls inherent in the dermal nitrate test and demonstrably possesses the degree of reliability required to render it competent. We hold that evidence of the results of the test was properly admitted."

The same test with the same safeguards was employed here. Its results were admissible.

[11] Mr. Cone went on, however, to testify about a second test and its results. This test was performed on State's Exhibit 11, a pair of trousers defendant was wearing on the day of the killing. Mr. Cone gave the following description of the test:

"I used a sheet of eight by ten photographic film which had been impregnated with 0.5 percent sulfanilic acid and 0.5 percent alpha naphthalamine. The clothing is placed over this photographic paper after the material has dried with the side on which you are examining for residue against the photographic film. This is then covered with a piece of cheesecloth which has been soaked in a solution of twenty-five percent acetic acid. A sheet of clean paper is then placed on this. This material together is placed in a heat press and heated for approximately two to three minutes and the results observed on the photographic film. The presence of nitrite particles will be indicated by a reddish-orange spot on the photographic film.

"As a result of this procedure, I found one particular area on State's Exhibit 11 between the belt loops along the waistband on the right side just slightly above and to the front of the right rear pocket."

After an extensive voir dire, the trial court ruled that Mr. Cone could give his opinion of the significance of the results of this test. He then testified as follows:

"Q. . . . Agent Cone, based upon your training and your experience in the field of forensic chemistry, and based upon your examination and test upon State's Exhibit No. 11, do you have an opinion satisfactory to yourself as to the significance of the concentration that you found on State's Exhibit No. 11?

MR. CAHOON: Objection.

COURT: Overruled.

EXCEPTION NO. 179

A. Yes, sir, I do.

Q. And what is that opinion?

EXCEPTION NO. 180

A. It is my opinion that the area between the belt loops which were circled with the black letter referred to the presence of nitrite particles originating from burned gunpowder or some other compound containing nitrite particles.

Compounds containing nitrite particles are those which have undergone some sort of reaction to reduce nitrate to nitrite. One possibility might be something like cigarette residue, that is ashes or smoke."

In essence, then, the testimony of Mr. Cone was that (1) he performed certain tests, (2) the tests showed the presence of nitrites, and (3) nitrites are produced by, among other substances, burned gunpowder.

"Scientific tests of this nature are competent only when shown to be reliable." *State v. Crowder, supra*, 285 N.C. at 53, 203 S.E. 2d at 46. There is no question raised that the test performed by Mr. Cone is reliable insofar as it shows the presence of nitrite particles. As for showing that the nitrite particles resulted from the discharge of a firearm, however, this test itself, like the paraffin test referred to in *Crowder*, is inconclusive.

Here, however, Mr. Cone did not attempt to conclude as a result of this test that defendant had discharged a firearm. Rather, he merely stated (1) there were nitrite particles on defendant's clothing and (2) these particles originated "from burned

gunpowder or *some other compound containing nitrite particles.*" (Emphasis added.) His testimony was thus limited to a reliable conclusion arising from the test he performed, *i.e.*, that there were nitrite particles on defendant's clothing, coupled with a scientific fact within his knowledge as an expert forensic chemist.

Given that the test was reliable for the purpose for which it was used, the question remains whether the results testified to were relevant. *See State v. Gray*, 292 N.C. 270, 282-84, 233 S.E. 2d 905, 913-15 (1977). As Mr. Cone testified, nitrites can result from the reduction of compounds other than gunpowder. The nitrite particles on defendant's clothing could, for example, have come from cigarette smoke. Where, however, as here, there is other evidence tending to show that the subject of the test discharged a firearm, the presence of nitrite particles is relevant insofar as it is consistent with that evidence. While they may not have independent evidentiary significance, the results of the test performed here are to some extent corroborative of other evidence tending to show defendant discharged a firearm. The results were thus properly admitted. Their weight was for the jury.

[12] Under his sixth assignment of error defendant groups some ten unrelated exceptions to rulings by the trial court limiting the scope of his cross-examination of prosecution witnesses. We have examined each of defendant's contentions and conclude that the trial court did not err in its rulings. We need discuss only one of them here.

On cross-examination, Robin Diane Phillips stated, "I was going with [Darrell] Stone. We were more or less living at Kelly's [defendant's] mother's house." The following exchange then took place:

> "Q. You didn't testify to that in 1973, did you, that you were staying at Kelly's house, did you?
>
> A. I believe I did.
>
> Q. You never mentioned his mother or his mother's house in 1973, did you?
>
> MR. GREESON: Objection. She has answered the question.
>
> MR. CAHOON: I am going to give her another chance.

COURT: Objection sustained.

EXCEPTION NO. 108

Q. If you did so, would you be kind enough to look at your testimony in the transcript there in front of you, beginning at page 60, and find it in there where you ever mentioned Kelly's mother or Kelly's mother's house?"

After some considerable discussion of the matter, the court ruled that it would not allow the witness to be cross-examined in this manner, *i.e.*, by reading silently through the transcript of the former trial in an effort to find a particular statement. Defendant argues this was error.

In so arguing, defendant relies on *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). Defendant in *Alston* was charged with kidnapping, armed robbery and felonious assault. He testified that his gun, which had been connected with the alleged crimes, was in his unlocked trailer at the time the crimes were committed. On direct examination, he stated that he had testified to this effect at a former trial. On cross-examination the district attorney was permitted to ask defendant to point out the testimony in the transcript of the former trial.

This Court found no error in the cross-examination of defendant in this manner, stating, 294 N.C. at 587-88, 243 S.E. 2d at 361-62:

> "In this jurisdiction, the scope of cross-examination covers a wide range. It is permissible to impeach or impair the credibility of a witness. The materiality and extent of cross-examination are matters which are largely within the discretion of the trial judge. *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971); *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959).
>
> Here it is obvious that defendant was being cross-examined for the purpose of impeaching him, and we find no abuse of discretion in the ruling of the trial judge. Further, defendant had already testified that he knew that the transcript of the previous trial did not contain any statement about the location of the gun. Thus, his objection to this question was of no avail since evidence of like import had

already been admitted without objection. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973)."

When properly read *Alston* is not a blanket endorsement of this tactic of impeachment. The case merely holds that under its particular factual circumstances there was no abuse of discretion in allowing such impeachment. Moreover, the witness in *Alston* demonstrated considerable familiarity with the transcript, having stated unequivocally that the statement in question was not in it.

Here the witness merely said she "believed" she had made a similar statement in an earlier trial. The matter under inquiry was of only marginal relevancy. The trial judge took into consideration the potential delay involved while the witness searched for her statement and concluded that he would not permit this form of impeachment. Defendant was otherwise given wide latitude in his cross-examination of this witness. Taking all these factors into account, we find no abuse of discretion on the part of the trial judge.

[13] Defendant by his seventh assignment of error challenges the denial of his motion for a mistrial on the basis of certain testimony by Norman Edward Anderson, which was admitted over defendant's objection. Anderson was a police officer for the City of Gibsonville. He testified that he went to the lift station where the killing occurred in response to a radio message he received about 6:25 or 6:30 a.m. on 30 June 1973. On arrival, he observed that Chief Lashley had been shot and asked what happened. Darrell Stone replied that "Kelly had shot the Chief." It is to this last statement that defendant objects.

It is clear from the context of the testimony that this statement was offered for one or both of two purposes: (1) to corroborate the testimony of Darrell Stone, or (2) to prove the truth of the matter asserted. If not admissible for one of these purposes, it should have been excluded.

This statement did not corroborate Darrell Stone's testimony. He never testified that Sparks killed Chief Lashley. Stone admitted on cross-examination that he did not see a gun in Sparks' hand at the time of the killing and that he did not see Sparks shoot Chief Lashley. The substance of his testimony was that Sparks was in the doorway opposite Chief Lashley; a shot

was fired; Lashley was hit; and Sparks ran into the woods. While a conclusion might be drawn from this evidence that Sparks killed Chief Lashley, this conclusion was for the jury. *See State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). Stone's out-of-court conclusion was therefore not admissible to corroborate his in-court testimony.

Anderson's repetition of what Stone said is clearly hearsay. It is thus not admissible unless it falls within one of the exceptions to the hearsay rule. The state contends that it does in that it was a "spontaneous utterance." We cannot agree.

"Declarations are competent as part of the res gestae if the declaration (1) is of such spontaneous character as to preclude the likelihood of reflection and fabrication, (2) is made contemporaneously with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom, and (3) has some relevancy to the fact sought to be proved." *State v. Cox*, 289 N.C. 414, 420, 222 S.E. 2d 246, 251 (1976). The statement offered here meets neither the first nor the second of these requirements. According to the testimony of both Stone and Vance Thomas Evans it was several minutes before Anderson arrived. This case is thus indistinguishable from *Gray v. Insurance Co.*, 254 N.C. 286, 118 S.E. 2d 909 (1961). Plaintiff in *Gray* brought suit as a beneficiary under an accidental death insurance policy. Her decedent was shot while attempting to break into a store. A policeman arrived on the scene a few minutes after the shooting and asked decedent what happened. He replied, "We tried to break in and I got shot." The Court held that this statement was not admissible as a spontaneous utterance. The same result must follow here.

Given that the statement was inadmissible, there still remains the question whether its admission into evidence was prejudicial. G.S. 15A-1443(a) provides: "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."

In this respect the present case is much like *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). In *Watson* a witness for the prosecution was permitted to repeat to the jury his statement to police officers that defendant and two others had "ripped off Johnson's Service Station." Two police officers corroborated this testimony. The witness had not observed the robbery. He merely concluded on the basis of a number of other facts he knew that defendant had participated in it. This Court held that his statement was inadmissible but concluded nevertheless that considering "the extensive evidence against defendant, we are convinced that the result would have been the same had the trial court properly excluded the opinion statement by the witness and the accompanying corroborative testimony." *Id.* at 166, 240 S.E. 2d at 445.

So it is here. The state presented evidence that: (1) the .25 caliber pistol with which Chief Lashley was shot was under the seat on the driver's side of the car; (2) defendant was crouched in the doorway on the driver's side; (3) just before the fatal shot was fired defendant was looking over his shoulder at Chief Lashley; (4) immediately after the shot, defendant ran toward the woods; (5) as he ran, he threw down the pistol; and (6) a scientific test showed he had fired a gun. In light of the strength of this evidence we conclude there is not a reasonable possibility that a different result would have been reached had the hearsay testimony as to Stone's conclusion been excluded.

[14] By his eighth and ninth assignments of error defendant claims that the trial court erred (1) in allowing the court reporter to read from the transcript of defendant's 1973 trial in this same case, and (2) denying his motion for mistrial on the ground that the jurors were permitted to examine the transcript of the 1973 trial. With regard to the first point, the court reporter read only those portions of the transcript containing testimony by persons who testified at the present trial. Testimony at a former trial is admissible for corroborative purposes. 1 Stansbury's North Carolina Evidence § 145 (Brandis rev. 1973). It was so used here. Defendant's assignment of error is without merit.

[15] In respect to his motion for a mistrial, defendant argues that the jurors might have seen his conviction and death sentence in the earlier case and he might thereby have been prejudiced.

Without replying to the merits of his argument we note simply that there is no indication in the record that the jury was allowed to examine the transcript. When the exhibits were being passed to the jury the court said: "I don't see any point in passing the transcript around. They have heard it read and they wouldn't have time to read it again anyway. I don't think we need to pass the transcript around." There is nothing in the record to show any contrary action. This assignment of error is simply not supported by the record.

[16] Under his eleventh assignment of error, defendant argues that the trial court erred in imposing a life sentence against him upon his conviction for first degree murder. According to defendant, on 30 June 1973, the date of the crime charged, the only penalty for first degree murder was death. This penalty was invalidated. Therefore, defendant argues, the maximum penalty he can receive consistent with the *ex post facto* clauses of the North Carolina and United States Constitutions is imprisonment for ten years under G.S. 14-2. This argument was raised and rejected in a carefully reasoned opinion by Chief Justice Sharp in *State v. Davis, supra*, 290 N.C. 511, 227 S.E. 2d 97. This assignment of error is overruled.

[17] By his twelfth assignment of error, defendant contends that the trial court erred in refusing to set bail while the case was on appeal. Under G.S. 15A-536, it is within the discretion of the trial court to grant or deny bail while a case is pending on appeal following conviction of defendant in superior court. *See* Official Commentary, G.S. 15A-536. No abuse of discretion was shown here.

We have examined the remainder of defendant's exceptions and assignments of error and conclude they do not merit discussion. In the trial there was

No error.

Justices COPELAND, BRITT and BROCK did not participate in the consideration or decision of this case.

LAURA Y. CLINE v. CALVIN C. CLINE

No. 74

(Filed 12 June 1979)

1. **Trusts § 19 — wife's action to establish resulting or constructive trust — sufficiency of evidence**

Evidence was sufficient to establish either a constructive or a resulting trust in plaintiff's favor in the land described in the complaint where it tended to show that defendant breached the confidential relationship of husband and wife when he took from his mother title to a farm in his name alone after representing to his wife that the land would be theirs jointly after the mortgage thereon was paid; plaintiff moved onto the farm with defendant and their children and there cared for defendant's mother; and plaintiff by her contributions and labor paid at least one-half of the mortgage.

2. **Trusts § 13.1 — resulting trust — promise made before deed delivered — subsequent payment**

A resulting trust arises where the person claiming it proves a payment on the purchase price made to the grantee or grantor after the delivery of the deed but pursuant to a *promise made to the grantee* before the deed was delivered, since there is no difference in principle between paying money toward a purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised.

3. **Trusts § 20 — constructive trust — jury instructions adequate**

Though the trial court's instruction with respect to the establishment of a constructive trust was not a model of clarity and organization, it did sufficiently inform the jury that for plaintiff to prevail on her claim of a constructive trust she must satisfy the jury by clear, strong and convincing evidence that: (1) there was an agreement, either express or implied, between the parties that title to the land in question was to have been placed in their names jointly and that they were to pay off the mortgage thereon jointly; (2) thereafter, defendant breached the confidential or fiduciary relation the law presumes to exist between a husband and wife by having the deed made to himself alone without plaintiff's knowledge; and, (3) in ignorance of defendant's breach of trust, plaintiff contributed at least one-half of the funds used to pay off the mortgage which encumbered the land at the time of the purchase.

4. **Trusts § 15 — equitable owner in possession of land — action to establish trust — statute of limitations**

Where the evidence disclosed that defendant's mother deeded the land in question to him on 15 January 1951, that plaintiff wife remained in possession of the land continuously, and that plaintiff did not learn that defendant had taken title in his name alone until the latter part of July 1975 when the parties separated, there was no merit to defendant's contention that plaintiff's action was barred by the statute of limitations, since, so long as an equitable owner retains possession, nothing else appearing, the statute of limitations does not

run against him but begins to run only from the time the trustee disavows the trust and knowledge of his disavowal is brought home to the *cestui que trust.*

Justices BRITT and BROCK took no part in the consideration or decision of this case.

ON plaintiff's petition under G.S. 7A-31(a) for discretionary review of the decision of the Court of Appeals vacating the judgment entered on 9 August 1976 by *Osborne, J.*, in the District Court of YADKIN. The opinion by *Vaughn, J., Hedrick* and *Clark, JJ.*, concurring, is reported in 34 N.C. App. 495 (1977). The appeal was docketed and argued as Case No. 47 at the Spring Term 1978.

On 12 September 1975 the plaintiff, Laura Y. Cline, instituted this action against her husband, Calvin C. Cline, the defendant, for the purpose of obtaining (1) a divorce from bed and board, alimony, and alimony *pendente lite*, and (2) an equitable lien in the amount of $25,000 on a specifically described 48-acre tract of land in Booneville Township, Yadkin County, North Carolina. In his answer defendant denied the material allegations in the complaint and asserted a counterclaim for divorce from bed and board, alimony, and alimony *pendente lite*. In addition, he prayed for the possession of the land described in the complaint.

On 9 August 1976 the Court permitted plaintiff to amend her complaint to allege a third claim, *i.e.*, that she is entitled to have established in her favor a resulting trust or, in the alternative, a constructive trust in one-half of the 48 acres previously described. In his reply, defendant denied every allegation in plaintiff's third claim and specifically pled the three and ten-year statutes of limitations in bar of her right to subject the land to an equitable lien or trust in her favor.

When the case came on for trial on 10 August 1976, the trial judge severed the parties' respective claims for divorce and alimony from plaintiff's claim of an equitable lien, a resulting trust or a constructive trust in the 48 acres and elected to try the latter. Plaintiff's evidence tended to show the facts detailed below.

Plaintiff and defendant were married in 1944. Defendant's parents, Charlie and Eva Cline, bought the land in suit (which then contained about 70 acres) in February 1950. They financed the purchase with a $3,500 loan, secured by a deed of trust to the

Veterans Administration. Mr. Charlie Cline made one payment on the note and died in December 1950. Thereafter, at a family meeting held to determine what arrangements could be made to save the land and to care for their mother, it was determined that none of defendant's brothers and sisters were willing to move on the land or to pay for it.

Plaintiff testified that after the family caucus defendant said to her, "We'll have to live up there and farm the land and finish paying for the place, then it will be ours." Plaintiff agreed to these conditions. Early in January 1951 she and defendant moved on the farm with Mrs. Eva Cline, who lived there until her death during the spring of 1976. Plaintiff said, "She lived with us. We kept her up. I done the buying of the groceries. I kept her up and the kids too."

In 1951 the farm contained approximately 60 acres and the unpaid balance due on the deed of trust was $3,000, payable in annual installments of about $300. Plaintiff and defendant raised tobacco every year and made the annual payments to the Veterans Administration from the proceeds of the tobacco sales. Prior to May 1964, when defendant received serious injuries in an automobile accident, plaintiff and defendant "worked equally." A "number of times" over the years defendant said to plaintiff, "When the property is paid for it will be 'ours'."

Plaintiff testified, "I hung tobacco, I strung tobacco, I sacked tobacco, I oiled tobacco, I hoed tobacco . . . I took it off the sticks." During the two or three years they leased their tobacco allotment she continued to work in tobacco by "hiring out to people in the summer to make enough money to get on our feet." Neighbors and others corroborated plaintiff's testimony as to her labors on and off the farm. She was described as "always having been a hard-working woman both at home and away from home." Since 1950, except for about five months preceding the birth of her third and last child in April 1952, the six or seven months following defendant's automobile accident in 1964, and the time she necessarily spent working in tobacco, plaintiff worked away from the farm at "public work" for wages of from $80 to $120 a week.

On 16 May 1959 plaintiff and defendant paid off the deed of trust to the Veterans Administration. However, in April 1959

plaintiff, defendant, and Mrs. Eva Cline had executed a note and deed of trust on the property to secure a loan of $3,500 from the Federal Land Bank. This money was paid back "out of tobacco" at the rate of $175 annually and was paid off on 22 December 1974. Plaintiff testified that the Veterans Administration loan was never really paid off until the 22nd of December 1974. In addition to this loan, between 4 August 1959 and 7 December 1965, plaintiff, defendant, and Mrs. Cline executed notes and deeds of trust to the Production Credit Corporation to secure loans in the amount of $300, $2,470, and $3,000. The proceeds from these loans were used to buy a tractor, to erect a tobacco barn and packing house, and to complete the dwelling in which plaintiff and defendant were living at the time of the separation. This dwelling was begun in 1953 or 1954 and completed in 1959. The money to repay the loans from the Federal Land Bank and the Production Credit Association came mostly out of tobacco and from plaintiff's earnings. To pay for the roof and storm doors on the new house plaintiff sold 10 shares of R. J. Reynolds stock which she had acquired during the five years she worked for that company. The original cost of the house was approximately $11,000 and plaintiff testified that she was "responsible" for half of that amount. At the time of the trial plaintiff's evidence tended to show that the fair market value of the land (then 48 acres), with its improvements, was $70,000 to $82,600.

On several occasions prior to 1975 plaintiff, along with her husband and his mother, had signed deeds to purchasers of a small portion (or lot) of the land.

On or about 1 June 1975, defendant separated himself from plaintiff and left the marital home. Thereafter, in the latter part of July, plaintiff first learned that on 15 January 1951 Mrs. Eva Cline had conveyed the land in suit, subject to her life estate, to defendant and that plaintiff was not named as a grantee in the deed. This deed had been recorded on 27 January 1951.

Defendant's testimony tended to show the facts to be as follows:

In 1951, after his father's death, he told plaintiff he "had to go up there and look after [his] mother because she couldn't take care of the place," which his father had farmed. He also told her he had to "take over" because he, along with his parents, had

signed the deed of trust which encumbered the farm. (On cross-examination, defendant conceded that plaintiff's Exhibit No. 1, a certified copy of the purchase-money deed of trust which his parents had executed to the Veterans Administration, did not show his signature. Notwithstanding, he said he was sure that he had signed *a* deed of trust.) When he asked plaintiff to move "up there" with him she agreed to go, and they and their three sons moved to the farm. Before they moved she told him twice that "she didn't want no part of it [the land] and wouldn't help pay for it"; and after they moved "she kept saying she wasn't going to help pay for it."

Defendant testified that he never, at any time, told plaintiff that the farm would some day be theirs or that any part of it would be hers. On the contrary, he had told her specifically that at his mother's death the property would belong to *him*. Plaintiff had full knowledge of the deed in suit from the time it was executed; that on 15 January 1951 he told his wife he and his mother were "going over to town to translate our deed." Plaintiff did not accompany them, but upon their return, they "set down with her and explained to her how the deed was. . . . She said she did not care about the deed. She did not want no part of it. She wasn't going to help pay for it." The consideration recited in the deed was one dollar and the grantee's assumption of "the debt to the Veterans Administration." After the deed was recorded it was kept in defendant's top bureau drawer, "free for everybody to see it." The drawer was never locked. Over the years, he thought the deed "had been discussed three or maybe four times."

Defendant asserted that although plaintiff had "worked at public work ever since 1951 and up until this day," her money all went for "automobiles, clothes, and getting her hair fixed up" at the beauty parlor; that she "never brought in any money that she earned at her employment for the purpose of making any payments on the house or the land either one." Proceeds from the sale of timber on the land ($2,800) and the money he recovered in 1957 in a personal injury action ($4,800) went into the house. Further, defendant said he could not recall plaintiff contributing any amount to the family budget since 1961; that she "never paid a cent" on any deed of trust on the land; that "she hardly did any

work on the farm"; and that he couldn't get her "to pull a bloom" out of the plant bed.

According to defendant's testimony, in 1964 he had another serious automobile accident which left him 90% totally and permanently disabled. Since then he has been receiving social security benefits. In consequence of this accident the crops have been "hired done," and plaintiff has "spent mighty little time doing farm labor." Out of the proceeds of the tobacco and other crops defendant paid the labor and all other farm expenses, gave his mother a portion of the profits from the farm, and defrayed all the family living expenses. From time to time he, his wife, and mother borrowed money, all of which was paid back with the proceeds of the sale of tobacco. All the money from the tobacco was put back into the farm.

As a witness for defendant, his sister, Ruby Block, testified that in 1957 or 1958 she heard plaintiff tell defendant that the reason she would not help him with the farm was because her mother-in-law had "signed it over to him and her name was not on the deed and she didn't have any part in it."

Dean Cline, the parties' 26-year-old son, testified that when he was 12 or 13 years old he learned that the deed to the farm was in his father's name but his grandmother had a life estate in the land. His mother, he said, worked most of the time at "public work," but she did help some with the farm. She had bought groceries, had bought him clothes, and had bought his children clothes. However, as far as he knew, it was always his father who went to the Production Credit and to the Federal Land Bank to make payments on the mortgage against the property. Representatives of these institutions and of the Iredell Insurance Agency, which carried the insurance on the crop and farm building, testified that it was always defendant who came in and paid the installments due on the loans and the insurance premiums. They did not know, however, "where the money came from."

Robert Cline, the parties' 31-year-old son, testified that over the years his mother worked at both "public work" and on the farm; that he never knew of her refusing to work in the tobacco; that his "mother was a hard working woman; when she worked she worked." She "pitched in and helped with everything." She bought groceries and his father bought groceries. Robert Cline

recalled hearing his father say he had a deed to the place, but he "did not know until recently, a few years back, that his mother's name was not on the deed." He had heard his parents arguing about the deed, but he had never seen it.

The jury's verdict was that plaintiff was entitled to have both a resulting and a constructive trust imposed upon the land in her favor and that her claim for relief was not barred by the ten-year statute of limitations.

Upon defendant's appeal, the Court of Appeals held the evidence sufficient to support the verdict as to a resulting trust but ordered a new trial because, it said, "The jury was never instructed that it must find that plaintiff advanced the consideration [her promises] before legal title was placed in defendant." In its opinion the Court of Appeals suggested that upon retrial of the case the judge would be "well advised not to attempt to instruct on the theory of a constructive trust." We allowed plaintiff's petition for discretionary review.

Finger, Park & Parker by Raymond A. Parker II and M. Neil Finger for plaintiff.

Franklin Smith and Henry B. Shore for defendant.

SHARP, Chief Justice.

[1] We consider first defendant-appellee's contention, brought to this Court in his brief under App. R. 16(a), that plaintiff's evidence was insufficient to establish either a resulting or a constructive trust, and that the trial court erred therefore in denying his motion for a directed verdict at the close of all the evidence. *See Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972).

The evidence in this case would permit the jury to find the following facts:

(1) After the death of defendant's father, defendant's mother was unable to farm their land and to make the annual payments on the mortgage. She told defendant, whose family consisted of his wife, the plaintiff, and their three young sons, that if he would move on the land with her and make the mortgage payments she would convey the property to him, subject to her life estate.

(2) Defendant discussed the situation with his wife and told her that if they would move on his mother's place with her, farm the land, and pay the mortgage, the property would then be theirs. He asked her to move "up there" with him. She agreed to the proposition defendant had stated to her, and the move was made.

(3) In less than 15 days after the move was accomplished and before the first payment was made on the mortgage, defendant caused his mother to convey the land, subject to her life estate, to him alone. The consideration for this conveyance was defendant's promise to move on the land and to pay the mortgage which encumbered it. Plaintiff had no knowledge of this conveyance at the time it was made and first learned of it in the latter part of July 1975.

(4) In performance of the agreement plaintiff made with defendant preceding their move to his mother's farm, and in reliance upon defendant's representations to her that when they had satisfied the mortgage on the land it would belong to them jointly, plaintiff by her labor assisted defendant in caring for his mother and in cultivating and harvesting tobacco, their annual cash crop. By her labor on the farm and her contributions in money, which she earned in "public work" off the farm, plaintiff paid one-half of the original mortgage indebtedness on the farm and also of subsequent encumbrances securing loans for the purchase of farm machinery and making improvements on the land. In addition, from her wages plaintiff made cash contributions to the support of the family.

Once proven, the foregoing facts are sufficient to establish either a constructive or a resulting trust in plaintiff's favor in the land described in the complaint. *See Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954); *Davis v. Davis*, 228 N.C. 48, 44 S.E. 2d 478 (1947).

Whenever one obtains legal title to property in violation of a duty he owes to another who is equitably entitled to the land or an interest in it, a constructive trust immediately comes into being. Such a trust ordinarily arises from actual or presumptive fraud and usually involves an abuse of a confidential relationship. Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property ac-

quired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. *See Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Davis v. Davis, supra*; 13 Strong's North Carolina Index 3d *Trusts* § 14 (1978); V Scott, Law of Trusts § 461-462.4 (3d Ed. 1967).

The parties to this action are husband and wife. The law recognizes that "[t]he relationship between husband and wife is the most confidential of all relationships, and transactions between them to be valid, must be fair and reasonable." *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E. 2d 562, 567 (1968); *Fulp v. Fulp, supra*. Taking plaintiff's evidence as true—as we must when considering a motion for a directed verdict, *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979)—defendant clearly breached this confidential relationship when he took title to the farm in his name alone after representing to his wife that the land would be theirs jointly after the mortgage was paid. A constructive trust arose, therefore, in her favor at the time defendant wrongfully took title solely in his name. Thereafter, in accordance with plaintiff's understanding with defendant that they were both obligated to pay off the mortgage which encumbered the property at the time defendant agreed to move on his mother's farm, plaintiff's contributions in labor and money paid at least one-half of the mortgage. Thus the equities remained with her and she is entitled to enforce the constructive trust which arose in her favor. Otherwise, defendant would be unjustly enriched at her expense.

The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes. *See Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Rhodes v. Baxter*, 242 N.C. 206, 87 S.E. 2d 265 (1955); *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321 (1954); V Scott, Law of Trusts §§ 440-440.1 (3d Ed. 1967); Bogert, Trusts and Trustees § 455 (2d

Ed. 1977) (hereinafter cited as Bogert). *See generally* 13 Strong N.C. Index 3d *Trusts* §§ 13-13.5 (1978).

If A and C pay for a parcel of land, but only C takes title, the theory of the law is that at the time title passed A and C intended that both would have an interest in the land. "A resulting trust is a creature of equity, and arises by implication or operation of law to carry out the presumed intention of the parties, that he, who furnishes the consideration for the purchase of land, intends the purchase for his own benefit." *Waddell v. Carson*, 245 N.C. 669, 674, 97 S.E. 2d 222, 226 (1957). This rule does not apply where A and C agree to buy a tract of land but A *pays* the purchase price and takes title in his name. In this situation, while it is possible—depending upon the circumstances—that he may have other remedies, no resulting trust arises in C's favor when consideration passes from him to A thereafter. *Bryant v. Kelly*, 279 N.C. 123, 181 S.E. 2d 438 (1971); *Rhodes v. Baxter*, 242 N.C. 206, 87 S.E. 2d 265 (1955).

[2] However, as Bogert points out, § 456 at 669-673, in a large number of cases the person claiming a resulting trust proves a payment on the purchase price made to the grantee or grantor after the delivery of the deed but pursuant to a *promise made to the grantee* before the deed was delivered. Although it seems that this Court has not considered the application of the resulting trust doctrine to this specific situation other jurisdictions have. *See* Bogert, § 456, n. 25, where the authorities are collected. In discussing the "large group of cases [in which] the person claiming a resulting trust proves payment after the delivery of the deed, pursuant to a promise made *to the grantee* . . . before delivery of the deed," Bogert offered the following example and comments:

"A is bargaining for land to be bought from B, and A seeks the aid of C in financing the sale. It is agreed between A and C that A shall pay part of the price at the time of the delivery of the deed from B to A, and that A shall give a note and mortgage to B for the remainder of the purchase price; and C agrees with A that C will make payments to A in the future which A agrees to use to help him in meeting his obligations to B. Here C, the third party, does not promise the grantor, B, anything. The consideration received by the grantor for his deed consists of cash paid by the grantee, A, and a note and mortgage executed by the grantee,

A, alone. C's promise to the grantee, A, is not to pay the purchase price, because technically one can pay the purchase price only to the seller of the land. C's agreement with A is to make a payment to A which will enable A to pay the purchase price." Bogert § 456 at 673.

"If the promise of C has been performed by the making of the agreed payment to A, the grantee, after delivery of the deed to A, the authorities hold that C obtains a resulting trust arising at the date of C's payment, but relates back in effect to the time of the taking of title by the grantee, A." Bogert justifies this result in either of two ways: "(1) by a finding that C's promise to A and his performance of it are equivalent in practical effect to a payment of part of the price of the land at the time of the delivery of the deed; or (2) by an argument that even if C's conduct is something totally distinct from paying part of the purchase price to the grantor, there is ground for an inference or presumption of an agreement between the prospective grantee and C that C should have an equitable interest in the land corresponding to the amount of his payment to the grantee." *Id.* at 674. Certainly the logic of such an inference is as cogent in this situation as it is in that of the classic purchase-money resulting trust. There is no difference in principle between paying money toward the purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised. *See Id.* at 672, 673.

It was the foregoing theory of a resulting trust which the trial judge attempted to explain to the jury in his charge upon the first issue. We agree with the Court of Appeals, which approved the theory, that the charge was an insufficient and somewhat confusing explanation of the applicable law, and that from it the jury might well have concluded plaintiff's right to have a resulting trust established in her favor depended solely on the contributions which she made subsequent to the delivery of the deed to defendant without determining whether a promise was made to defendant before he obtained title. For this reason the jury's answer to the first issue must be vacated. Notwithstanding, we affirm the judgment of the trial court upon the jury's answer to the second issue, which established plaintiff's right "to have a constructive trust imposed upon the land de-

scribed in the complaint so as to create a joint ownership in said property by the plaintiff and defendant."

[3] Concededly the charge on the second issue is not a model of clarity and organization. However, when it is read as a whole we think the judge made it clear that for plaintiff to prevail on the second issue she must satisfy the jury by clear, strong, and convincing evidence that there was an agreement, either express or implied, between the parties; that the title to the land was to have been placed in their names jointly and that they were to pay off the mortgage jointly; that thereafter defendant breached the confidential or fiduciary relation the law presumes to exist between a husband and wife by having the deed made to himself alone without her knowledge; that, in ignorance of his breach of trust, she contributed at least one-half of the funds used to pay off the mortgage which encumbered the land at the time of the purchase. The judge specifically informed the jury that any funds plaintiff might have invested in improvements on the property did not bear upon the issue of constructive trust, which arose only in connection with the actual purchase of the land itself.

In this Court defendant's contentions with reference to the charge on the second issue are that "the trial judge engaged in the academics of constructive trusts and the contentions of the parties" and that "there is insufficient evidence to support the judge's charge on this issue." He reargues the sufficiency of the evidence to withstand his motion for a directed verdict and questions the credibility and weight of plaintiff's evidence.

In the final analysis, despite the somewhat complicated questions of trust law involved, this case resolved itself into simple issues of fact: (1) Did plaintiff and defendant agree, before they moved to the farm and before he procured title in himself (as plaintiff testified), that *they* would pay off the mortgage and title would then be taken in their names jointly; or, did defendant tell plaintiff (as he testified) that when his mother died the property would belong to *him*? (2) If the agreement was made as plaintiff testified, did she—pursuant to their agreement and in ignorance of the fact that he had taken title in himself—contribute to defendant for the purpose of paying off the mortgage at least half the amount due; or did she "never bring in any money" for that purpose, as defendant testified? The jury, who heard the evidence

and observed the demeanor of the witnesses, resolved all issues in favor of plaintiff. On the second issue submitted to the jury we find no prejudicial error in the court's instructions on constructive trusts.

[4] Finally, we find no merit in defendant's contention that plaintiff's action is barred by the statute of limitations. "A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year statute of limitations. G.S. 1-56. . . . Moreover it is established by authoritative decisions of this Court that the statute of limitations does not run against a *cestui que trust* in possession." *Bowen v. Darden*, 241 N.C. 11, 17, 84 S.E. 2d 289, 294 (1954). So long as an equitable owner retains possession, nothing else appearing, the statute of limitations does not run against him. The statute begins to run only from the time the trustee disavows the trust and knowledge of his disavowal is brought home to the *cestui que trust*, who will then be barred at the end of the statutory period. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 317-18, 101 S.E. 2d 8, 13-14 (1957).

The record discloses that defendant's mother deeded the land in suit to him on 15 January 1951, and that plaintiff has remained in possession continuously. Further, plaintiff testified that she did not learn defendant had taken title in his name alone until the latter part of July 1975 when the parties separated. Defendant, of course, contends that she knew this from the date of the deed. Thus, the issue of the bar of the ten-year statute of limitations was properly submitted to the jury, which answered it in favor of plaintiff.

For the reasons stated, the decision of the Court of Appeals awarding defendant a new trial is reversed. The cause will be returned to that court with instructions that it be remanded to the District Court of Yadkin County with directions that the judgment in this case, filed 23 May 1976, be reinstated.

Reversed.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. RODERICK THOMAS JOYNER

No. 72

(Filed 12 June 1979)

1. Rape § 5— first degree rape—use of deadly weapon—sufficiency of evidence

The State's evidence was sufficient to show that a rape victim's resistance was overcome and her submission procured by the use of a deadly weapon so as to support submission of an issue of defendant's guilt of first degree rape where it tended to show that defendant raped the victim twice, and that shortly before the second rape the victim and her daughter were threatened with a .22 caliber pistol and told that they both would be killed "if [the victim] didn't do everything they wanted [her] to do."

2. Robbery § 4.3— armed robbery—continuing threat of use of firearm

The State's evidence was sufficient for the jury to find that a ring was taken from the victim by a "threatened use" of a firearm within the meaning of the armed robbery statute where it tended to show that, on several occasions prior to the taking of the ring, a pistol had been pointed at the victim to force her to commit certain acts, and it had been made clear to her that the pistol would be used against her if she failed to comply, since this continuing threat extended to every subsequent act by her.

3. Criminal Law §§ 9, 113.7— acting in concert—act constituting part of crime not necessary

It is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

4. Criminal Law § 9.3— conviction under principle of acting in concert

Defendant could properly be convicted of the crime against nature, assault inflicting serious injury, and armed robbery under the principle of concerted action, even if there was no evidence that defendant did any act necessary to constitute such crimes, where the evidence tended to show that defendant and four other men were riding around together before the crimes took place; two of them first entered the victim's home together, followed closely by the other three; once inside they did nothing other than to assault the victim, terrorize her, sexually abuse her and steal from her; afterwards they all left together; and four of them, including defendant, were shortly thereafter found still together, with the fruits of one of their crimes and the instrumentality of another amongst them.

5. Criminal Law § 113.7— charge on acting in concert

The trial court's instruction on acting in concert that "if two or more persons agree to act together with a common purpose to commit a crime and do

commit that crime, each of them is held responsible for the acts of the other done in the commission of that particular crime" was not unfavorable to defendant.

6. **Criminal Law § 114.2— statement of defendant's contentions—no expression of opinion**

In a prosecution for first degree rape, armed robbery, felonious entry, crime against nature and assault inflicting serious injury in which the trial judge instructed that, with regard to the sexual assaults, defendant contended that when he entered the victim's house everyone seemed to be laughing and enjoying themselves, and if the jury found that he did participate in any of these acts, he thought it was with the victim's consent and that to him it seemed that "everybody was just trying to have a little fun," defendant failed to carry his burden of showing that such contentions were so lacking in evidentiary support and contrary to what defendant in fact contended that in giving them the trial court ridiculed or reduced to absurdity his defense and thereby expressed an opinion adverse to defendant in violation of G.S. 1-180 (now G.S. 15A-1232).

7. **Criminal Law §§ 89.4, 169.6— refusal to permit witness to read from transcript —prejudice not shown**

Defendant failed to show that he was prejudiced by the trial court's refusal to permit defendant to have the prosecutrix read from the transcript of a prior trial in order to refresh her recollection as to what she said at that trial where the record does not reflect whether, in fact, the prosecutrix made an inconsistent statement at the prior trial or whether reading the transcript would have refreshed her recollection so that she could have testified about it.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Small* at the 12 September 1977 Session of PITT Superior Court defendant was tried and convicted on indictments proper in form of first degree rape, armed robbery, felonious entry, crime against nature, and assault inflicting serious injury. The first degree rape and armed robbery convictions were consolidated for judgment, and defendant sentenced to life imprisonment. The felonious breaking and entering and crime against nature convictions were likewise consolidated for judgment, and defendant sentenced to 10 years imprisonment to begin at the expiration of the life sentence. He was sentenced to two years imprisonment on the assault conviction.

Defendant appeals to this Court from the judgments entered in the rape and robbery cases pursuant to G.S. 7A-27(a). We allowed his motion for initial review by this Court in the other matters pursuant to G.S. 7A-31(a). Other cases arising out of the same

facts as this one but involving different defendants are *State v. Sylvester Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978); *State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978); and *State v. Barnes*, 297 N.C. 442, 255 S.E. 2d 386 (1979).

This case was docketed and argued as No. 24 at the Spring Term 1978.

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

Jeffrey L. Miller, Attorney for defendant appellant.

EXUM, Justice.

Defendant's assignments of error challenge the following actions of the trial court: (1) denial of defendant's motion to dismiss, because of insufficiency of the evidence, the charges of first degree rape, armed robbery, crime against nature, and assault inflicting serious injury; (2) instructing the jury on the principle of "acting in concert"; (3) stating the contentions of defendant; and (4) curtailing defendant's cross-examination of one of the state's witnesses. We find no merit in any of defendant's assignments of error and conclude that he has had a fair trial free from prejudicial error.

The state's evidence here is substantially as it was in the *Sylvester Joyner*, *Curmon*, and *Barnes* cases. It tended to show that around 7:15 p.m. on 11 January 1977 Mrs. Carolyn Lincoln was at home alone with her four year old daughter, Mara Carolyn Lincoln. Mrs. Lincoln lived on Route 8, two or three miles outside of Greenville. She answered a knock on her door and thought she recognized the voice of a neighbor. Upon opening the door she realized she did not know the man whom she described as a "young black man, tall and thin, wearing a jacket and cap." This man asked to use her telephone. She refused saying that she did not have a telephone and started to close the door. Two men then forced themselves into her home. One of them knocked her to the floor and lay down on top of her while the other searched through the house to see if anyone else was there. Upon learning that Mrs. Lincoln and her daughter were alone one of these men pulled her into the kitchen and held her while the other pulled off

her clothes. These men then sexually abused her and threatened her and her child with death if she said anything.

Three other men then entered the house, one of whom Mrs. Lincoln identified as the defendant, Roderick Joyner. Four of the men, including defendant, were in her kitchen "standing around and laughing" while one of the others had forcible sexual intercourse with her.

Generally these men terrorized Mrs. Lincoln and her daughter. They secured a loaded .22 caliber pistol owned by Mrs. Lincoln, put the pistol to her head, and threatened to kill her. During one episode of sexual abuse they brought her daughter into the kitchen, pointed the gun at her daughter's head, and threatened to kill her daughter if Mrs. Lincoln did not comply with all of their wishes. Defendant had forcible sexual intercourse with Mrs. Lincoln twice, once before she and her daughter were threatened with the pistol and once thereafter. Meanwhile one of the men in the presence of all the others forced a drink bottle into her rectum. Mrs. Lincoln was forced, during the course of the episode and in the presence of all the men, to perform fellatio on some of them but not on the defendant. At least one instance of forcible fellatio occurred while defendant was raping her.

After these savage instances of sexual abuse and with all five of her abusers "in the kitchen standing around my feet . . . they tried to pull my ring off." When they failed in this, she took the ring off and gave it to one of the men. Two of the men then started dragging her into her front bedroom. She began screaming and was hit over the back of the head. She said, "The other three men were in front of me while the two were trying to pull me out the door. . . . The next thing I can remember was crawling in the house off the front porch." Mrs. Lincoln was able to go to a neighbor's house where she called the sheriff whose deputies responded immediately to her aid.

Sheriff's deputies located the defendant and three of his companions, Roy Lee Barnes, Sylvester Joyner, and Alton Ray Curmon together at a residence in Greenville in the early morning hours on 12 January 1977. The other assailant, Roy Chester Ebron, had been earlier arrested. Defendant and the three others with him were then arrested. At the place of this arrest a .22 caliber revolver identified as that owned by Mrs. Lincoln was

found in a field jacket lying on the floor close to where defendant was lying. Several similar jackets were taken from this location. Mrs. Lincoln's diamond ring fell from the pocket of one of them and was likewise seized by the arresting officers.

After defendant's arrest he was fully advised of his rights to remain silent and to have a lawyer. After duly waiving these rights, defendant made a voluntary statement to the arresting officers. In this statement defendant admitted having entered the home of Mrs. Lincoln on the night in question with four others after which he and several of the others "had a sexual relationship with her."

Defendant was 16 years old.

Mrs. Lincoln was examined by her physician, Dr. Howard Satterfield, at 11:03 p.m. on 11 January at Pitt County Memorial Hospital. He found her "very upset, crying, sobbing and had blood all over her. She was extremely torn up." He found large bruises on both sides of her neck, a severe abrasion on her left knee, and tenderness in her lower back. Her labia were swollen two to three times their normal size and she suffered multiple cuts, some of them quite deep, in and around her rectum, which had been expanded to three or four times its normal size.

I

[1] Defendant first assigns as error the trial judge's denial of his motion that the first degree rape charge be dismissed on the ground that there is no evidence that the victim's resistance was "overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her"—an essential statutory element of first degree rape. G.S. 14-21(1)(b). The assignment is without merit. The state's evidence tends to show that defendant raped Mrs. Lincoln twice, once before her life and that of her child were threatened with a .22 caliber pistol and again thereafter. The trial judge correctly called the jury's attention to the state's contention that it was this second sexual intercourse in which the deadly weapon had figured. Shortly before this second rape by defendant Mrs. Lincoln and her daughter had been threatened with the weapon and told that they both would be killed "if I didn't do everything they wanted me to do." This evidence is amply sufficient for the jury to find that her

resistance at least on the second occasion was overcome and her submission procured by the use of a deadly weapon within the meaning of the statute. *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). In the last cited case this Court said, 290 N.C. at 444, 226 S.E. 2d at 494-95:

> "[A] deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21 (a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. In other words, the deadly weapon is used, not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by his threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use."

[2] Defendant's argument that the armed robbery charge should have been dismissed because of insufficiency of the evidence is likewise without merit. The basis for this charge was the theft of Mrs. Lincoln's diamond ring. Defendant argues there is no evidence that one "who, having in possession or with the use or threatened use of any firearms or other dangerous weapon . . . whereby the life of a person is endangered or threatened," G.S. 14-87, took the ring. This same argument was raised and correctly answered against one of defendant's accomplices, Sylvester Joyner, in *State v. Joyner, supra*, 295 N.C. 55, 243 S.E. 2d 367 (1978). This Court there said, 295 N.C. at 64, 243 S.E. 2d at 373:

> "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."

These assignments of error are overruled.

II

By defendant's next several assignments of error he contends the trial court improperly applied the principle of concerted action. Defendant argues that in order to be convicted of a crime under this principle, a defendant must personally do at least one act necessary to constitute at least part of the crime. Under this view defendant contends the charges of crime against nature (forcible fellatio), assault inflicting serious injury (insertion of the drink bottle into Mrs. Lincoln's rectum), and armed robbery (of Mrs. Lincoln's ring) should have been dismissed since there is no evidence that defendant personally did any act constituting a part of any of these crimes. He further argues that even if there is some evidence to support these charges, Judge Small erred in defining the principle of concerted action. We disagree. We hold that Judge Small correctly applied the principle in ruling on defendant's motions to dismiss. In addition, his jury instructions on the principle were not unfavorable to defendant.

Defendant relies on *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975) for his view of the concerted action principle. In *Mitchell* the evidence showed that Gary Twing and Russell Wyler, soldiers at Fort Bragg, were standing at a bus stop on Hay Street in Fayetteville together with about 20 other people. Defendant Mitchell walked up to the group and asked Wyler to "Come here." Wyler walked over to defendant whereupon defendant, brandishing a razor, robbed Wyler of his wallet. Wyler's friend, Twing, then walked over and one Donald Tucker, standing near defendant, put a knife against Twing's throat and robbed Twing of his wallet. Defendant was convicted at trial of the armed robbery of both Wyler and Twing. The state relied on the

principle of concerted action to convict defendant of both offenses and the trial court instructed the jury on it.

The Court of Appeals concluded that the instructions were erroneous because the concerted action principle was not applicable on these facts to convict defendant of the robbery of Twing. The Court of Appeals said, *id.* at 486-87, 211 S.E. 2d at 647:

> "If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of 'acting in concert.' . . .
>
> "According to the evidence in these cases, the defendant did all of the acts necessary to constitute the crime of armed robbery of Russell Wyler, but none of the acts necessary to constitute the crime of the armed robbery of Gary Twing. Under these circumstances, the law of 'acting in concert' was not applicable to the charge of armed robbery of Gary Twing by the defendant . . . ."

If the result in *Mitchell* is correct and the principle of concerted action not available to convict defendant there of the robbery of Twing, the reason is not because defendant did none of the acts necessary to constitute the crime of armed robbery of Twing. The reason is because there was no evidence to show that the defendant and Tucker acted together in robbing Twing. The evidence, instead, showed that Tucker's robbery of Twing was an independent, individual act on his part in which the defendant was not involved.

The principle of concerted action need not be overlaid with technicalities. It is based on the common meaning of the phrase "concerted action" or "acting in concert." To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose. See definitions of "concert," Webster's Third New International Dictionary 470 (1971). These terms mean the same in the law of crimes as they do in ordinary parlance.

[3] Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was

acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

In *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968), two men, Dixon and Lovelace, were convicted of the felonious possession of implements of housebreaking. The tools were seen in the actual possession of Dixon only. Both men, however, were observed at the entrance to a restaurant at 1:45 a.m. on a Sunday morning. The front door to the restaurant showed evidence of tool marks around the lock. This Court held that even if only Dixon had actual possession of the tools at the time the men were apprehended, "if the men were acting together in the attempt to use them to force entry into the restaurant, both in law would be equally guilty of the unlawful possession." *Id.* at 498, 158 S.E. 2d at 625. Concluding that the evidence was sufficient to find that the two men "were acting together," the Court, on Lovelace's appeal, affirmed his conviction.

In *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971), *death penalty vacated*, 408 U.S. 939 (1972), this Court said:

> "The court instructed the jury that one of the theories upon which the State was proceeding was that the defendant and Frazier were acting in concert. He thereupon charged the jury correctly that the mere presence of a person at the scene of a crime at the time of its commission does not make him guilty of the offense, but that if two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbing, both would be equally guilty within the meaning of the law and if 'two persons join in a purpose to commit a crime, each of

> them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof.' "

[4, 5] In this case before us the evidence is plenary that all five of these men were acting together pursuant to a common plan to assault, terrorize, sexually abuse, and steal from Mrs. Lincoln. The evidence tended to show that they were all together riding around before the crimes took place. Two of them first entered Mrs. Lincoln's home together, followed shortly by the other three. Once inside they did nothing other than to assault Mrs. Lincoln, terrorize her, sexually abuse her, and steal from her. Afterwards they left together. Four of them were shortly found still together with the fruits of one of their crimes and the instrumentality of another amongst them. The jury could find from this evidence that all of these men are equally guilty of all crimes committed by any one pursuant to their common purpose under the principles approved in *Lovelace* and *Westbrook*. The instructions on acting in concert given by the trial judge seem to have been taken from our *Pattern Jury Instructions for Criminal Cases*. See N.C.P.I.—Crim. 202.10. He said:

> "There is a principle in law known as acting in concert. I will endeavor to explain that principle to you now. For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons agree to act together with a common purpose to commit a crime and do commit that crime, each of them is held responsible for the acts of the other done in the commission of that particular crime."

These instructions were not unfavorable to defendant.

We, therefore, overrule defendant's assignments of error relating to the application of the concerted action doctrine.

III

[6] Defendant next assigns as error the trial court's statement of his contentions. He argues in his brief:

"[T]he contentions as stated by the trial judge, taken as a whole, served to characterize his defense as contrived, baseless and ridiculous; were without support in the evidence; and constituted an impermissible and prejudicial expression of opinion before the jury in violation of GS 1-180."

His brief, however, never, except by references to various exceptions in the record, specifies which of the trial court's statements involving defendant's contentions fall into the challenged categories. We have, nonetheless, carefully examined the instructions on this point.

Generally as to each of the crimes charged the trial court instructed the jury that defendant contended he was not guilty, did not do any of the acts charged, and was not acting in concert with others who might have done them. With regard to the sexual assaults the trial court also told the jury that defendant contended that when he entered the house everyone seemed to be laughing and enjoying themselves and if it found that he did participate in any of these acts, he thought it was with the consent of Mrs. Lincoln and that to him it seemed that "everybody was just trying to have a little fun." We gather that it is the statements of defendant's contentions regarding the sexual assaults to which defendant directs his arguments.

His argument seems to be that these contentions were not supported by the evidence, were contrary to all the evidence and were not actually made by him. For these reasons, when the trial judge gave these contentions, he ridiculed and reduced to absurdity defendant's entire defense and thereby expressed an opinion adverse to defendant in violation of G.S. 1-180 (now G.S. 15A-1232).

Defendant relies on *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412 (1966), where defendant was convicted of assaulting Louis Lipinsky and stealing a suit coat valued at $45.00 from Louis & Sons, a clothing store operated by Lipinsky in Charlotte. Lipinsky, an eye-witness to the crimes, testified against defendant, who offered no evidence. In giving defendant's contentions the trial court said in part, "Lipinsky was just imagining things if he thought this man [defendant] was out there; that Lipinsky never lost a suit of clothes. He didn't have any suit of clothes out there

on a rack. He doesn't even sell suits of clothes." The state in *Douglas* conceded that this portion of the instructions "appears to be an overstatement of defendant's contention." This Court awarded Douglas a new trial saying, 268 N.C. at 271, 150 S.E. 2d at 416:

> "There is no suggestion in the entire record that Lipinsky does not run a clothing store. When the judge charged that defendant contended that Lipinsky, 'doesn't even sell suits of clothes,' the jurors, recognizing the absurdity of such a contention, likely understood that the judge considered the rest of defendant's contentions to be on a par with that one. *State v. Dooley*, 232 N.C. 311, 59 S.E. 2d 808.
>
> "A trial judge is not required to state to the jury the contentions of either the State or the defendant. In a case where the State's evidence seems to establish defendant's guilt conclusively, and the judge must strain credulity to state any contrary contention for defendant, his obvious solution is to state no contentions at all. A simple explanation of the effect of the plea of not guilty will fulfill the requirement."

In the instant case, there is some support in the evidence for the challenged contentions. The evidence is that defendant entered Mrs. Lincoln's home after two of his accomplices had already entered and begun the sexual abuse of Mrs. Lincoln, which continued as defendant entered. Defendant was the youngest of the five assailants. Mrs. Lincoln testified that the men were "laughing" at about the time defendant entered the kitchen and that after he entered four of the men "were still in the kitchen at the time standing around and laughing. The third man [defendant] had intercourse with me for about five minutes." In defendant's pre-trial statement he admitted having had "a sexual relationship" with Mrs. Lincoln but did not admit that it was by force and against her will.

It is conceivable that defendant did make the contentions at trial to which his counsel now objects. His jury argument is not contained in the record. His counsel on appeal was not his trial counsel. No objection was made to the now challenged contentions at trial. Furthermore at one point after giving some of these contentions, Judge Small told the jury:

"In connection with some of the contentions of parties, I would instruct you, members of the jury, that the arguments of counsel, they being officers of the court, is to be considered by you in weighing and considering the evidence; and the contentions argued to you by counsel in support of the respective sides in this trial that are legitimately warranted by the evidence are to be considered by you in arriving at your verdict, and the Court is only stating a few of the contentions of the party in order to endeavor to explain the law to you that arises on the evidence presented during the course of the trial and out of the charges for which the defendant is being tried."

Near the close of his instructions, Judge Small said:

"I want you to understand that I have no opinion about this case. I have no opinion as to what your verdict ought to be as to any one of the charges for which the defendant is being tried. If I had such an opinion, I am prohibited by law from expressing it. Consequently, I have not expressed any opinion to you. None of the rulings I have made during the course of this trial and nothing else that I have done has been for the purpose of expressing any opinion to you about this case or what your verdict should be."

Considering the entire record and the entire charge contextually, we conclude defendant has not carried the burden, which he has on appeal, of showing that the complained of contentions were so lacking in evidentiary support and contrary to what defendant in fact contended that in giving them Judge Small ridiculed or reduced to absurdity his defense. To the contrary it seems here that Judge Small was earnestly trying to give defendant the benefit of every conceivable defense which had some basis in the evidence, however slim that basis might have been.

This case is more like *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death penalty vacated*, 429 U.S. 809 (1976), in which this Court found the judge's statement of defendant's contentions to be "logically consistent with defendant's own testimony" and not to constitute an expression of opinion. The Court also said, *id.* at 174-75, 221 S.E. 2d at 342-43:

"Usually the contentions of the parties are apparent from the evidence presented at trial. When the contentions

are not so apparent or counsel's contentions differ from the evidence he produced at trial, this Court does not require the trial judge to be clairvoyant. For this reason, we have consistently held that any misstatements of counsel's contentions must be brought to the trial judge's attention before the jury retires for deliberation so that he has an opportunity for correction."

This assignment of error is overruled.

IV

[7] Finally, defendant contends that the trial court improperly precluded him from cross-examining Mrs. Lincoln for the purpose of impeaching her testimony. Defendant attempted to question the witness about her testimony at an earlier trial involving Alton Ray Curmon. She was not able to recall it. The following appears in the record:

"I don't remember which case it was that involved Alton Ray Curmon, and do not remember much about it because it was a long time ago. I was testifying, I remember occupying the same chair in the same courtroom when I testified. I am sure that I testified. I don't recall testifying in the Curmon case that the third man was the man who did not have intercourse with me. But I just don't recall if I testified to that or not. I don't remember what I testified in that case. I can see the paper writing handed to me and recognize it as a transcript of *State of North Carolina vs Alton Ray Curmon.*

"Q. I will ask you to turn to Page 75 of the trial transcript and from the question, 'What happened then?'

MR. HAIGWOOD: Objection.

THE COURT: Sustained.

(DEFENDANT'S EXCEPTION NO. 1)

"Q. All right. On Page 55 of the transcript I will ask you to read what appears on that line where my finger is pointing.

MR. HAIGWOOD: Objection.

COURT: Sustained.

(DEFENDANT'S EXCEPTION NO. 2)"

Apparently defendant was seeking to have the witness read from the transcript of the prior trial in order to refresh her recollection as to what she said at that trial. While this is proper procedure, we cannot tell from this record whether defendant was prejudiced by failure of the trial court to permit it. The record does not reflect whether, in fact, the witness made a prior inconsistent statement or, for that matter, whether reading the transcript would have refreshed her recollection so that she could have testified about it.

This Court has consistently held that unless testimony improperly excluded is placed in the record, "it is impossible for us to know whether the ruling was prejudicial to the defendant or not." *State v. Poolos*, 241 N.C. 382, 383, 85 S.E. 2d 342, 343 (1955); *accord, State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971), *death sentence vacated*, 408 U.S. 940 (1972); *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978).

No prejudicial error has then been shown by these rulings. This assignment of error is overruled.

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

SANDRA BASS WOODS v. RICHARD LEE SMITH AND WILDA NORRIS STALLINGS

No. 103

(Filed 12 June 1979)

1. Evidence § 34.1; Rules of Civil Procedure § 20 — joinder of defendants — alternative claims of negligence — negligence of one defendant imputed to plaintiff — admission of allegations in complaint — no judicial admission

The allegation of negligence against one defendant in the complaint of a plaintiff who joins two defendants asserting claims of negligence against them in the alternative, when admitted by the second defendant in his answer, is not a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to the plaintiff.

2. **Evidence § 34.1; Trial § 22.1— repudiation of allegations in deposition—summary judgment proper**

Should a party in her deposition repudiate the allegations of her complaint in an unequivocal manner, the court should grant a motion for summary judgment in defendant's favor.

3. **Evidence § 34.1— party's adverse statements—evidential admissions—no judicial admissions—exceptions**

A party's adverse statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than as judicial admissions, the former being words or conduct admissible in evidence against the party making them but subject to rebuttal or denial, and the latter being formal concessions which are binding in every sense. Two exceptions to this rule are: (1) when a party gives unequivocal adverse testimony, his statements should be treated as binding judicial admissions rather than as evidential admissions; and (2) when a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of his complaint, summary judgment or a directed verdict would in most instances be properly granted against him.

4. **Evidence § 34.1; Trial § 22.1— plaintiff's adverse statements in deposition—uncertainty—sufficiency of evidence of defendant's negligence**

In a personal injury action where plaintiff's deposition testimony was substantially adverse to her allegations of negligence against one defendant, the trial court nevertheless erred in granting summary judgment for defendant, since plaintiff's deposition testimony was equivocal, uncertain and inconsistent, and since there was before the court, at the time of the hearing on defendant's motion, sufficient evidence for a jury to find that defendant was negligent, particularly in light of plaintiff's obvious uncertainty about what actually happened at the time of the accident.

APPEAL by plaintiff from *Godwin, Judge* and *Smith (David I.), Judge*. Judgments entered 3 August 1978 and 12 September 1978 in Superior Court, WAKE County.

Plaintiff filed this action against the two defendants, properly joined under N.C. R. Civ. P. 20(a), on 14 February 1978. In her complaint she alleged that on 22 September 1977 she was riding as a passenger in her automobile, which was being operated at the time by defendant-Smith. She further alleged that the automobile in which she was riding collided with an automobile being operated at the time by defendant-Stallings. Plaintiff seeks compensation for physical injury and for damage done to her automobile.

The accident giving rise to plaintiff's claim occurred at approximately 11:00 p.m. on a rural paved road. The two automo-

biles were proceeding in opposite directions. Plaintiff's complaint alleges that as the two automobiles approached each other, defendant-Stallings' automobile crossed the center line and struck the automobile in which she was riding. This allegation is the basis of plaintiff's claim for negligence against defendant-Stallings. In a separate count of her complaint, plaintiff states a claim for negligence against defendant-Smith, the driver of her car, alleging that he failed to exercise proper caution, which, had he done so, would have enabled him to avoid the collision. After stating her claims against both defendants, plaintiff alleges that, "[s]olely by the reason of the negligence of *either or both* of the Defendants . . . the said automobiles collided with each other . . . and thereby caused Plaintiff bodily injuries and property damage. . . ."

Defendant-Smith answered, denying all allegations of negligence on his part and admitting all allegations of negligence on the part of defendant-Stallings. Defendant-Stallings answered, denying all allegations of her negligence and admitting the allegations with respect to defendant-Smith's negligence. She also filed a cross claim against defendant-Smith.

Defendant-Stallings made a motion for judgment on the pleadings or summary judgment on the ground that defendant-Smith's negligence is, as a matter of law, imputed to plaintiff, a passenger in and the owner of the automobile which defendant-Smith was operating at the time of the accident. Defendant-Stallings contended that her admission in her answer of the allegations in plaintiff's complaint of defendant-Smith's negligence established those allegations as a conclusive judicial admission by plaintiff of defendant-Smith's negligence. Smith's negligence imputed to plaintiff would bar her claim against defendant-Stallings. Accepting this contention, the Court granted summary judgment in favor of defendant-Stallings on 3 August 1978.

Defendant-Smith subsequently made a motion for summary judgment on the claim against him. At the hearing on his motion the court had before it the depositions of the plaintiff, defendant-Smith, defendant-Stallings, defendant-Stallings' daughter, and the highway patrolman who investigated the accident. Defendant-Smith contended that he was entitled to summary judgment on the ground that in her deposition plaintiff unequivocally

repudiated the allegations in her complaint with respect to his negligence, and under this Court's holding in *Cogdill v. Scates*, 290 N.C. 31, 224 S.E. 2d 604 (1976) she may not rely on other evidence to establish his negligence when her own testimony establishes the absence of such. The court accepted this contention and granted defendant-Smith's motion for summary judgment on 12 September 1978.

We granted plaintiff's petition for writ of certiorari on 5 February 1979 to review the entry of summary judgment in favor of defendant-Stallings after the same was denied by the Court of Appeals. On the same date we entered an order certifying for review, prior to determination by the Court of Appeals, plaintiff's timely appeal on the entry of summary judgment in favor of defendant-Smith.

William A. Smith, Jr. for plaintiff-appellant.

Broughton, Wilkins, Ross & Crampton, by Robert B. Broughton and William S. Aldridge for defendant-appellee Stallings.

Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey and Robert W. Kaylor for defendant-appellee Smith.

BROCK, Justice.

I

DEFENDANT-STALLINGS' MOTION FOR SUMMARY JUDGMENT

[1] The issue posed by the grant of summary judgment in favor of defendant-Stallings is whether the allegation of negligence against one defendant in the complaint of a plaintiff who joins two defendants asserting claims of negligence against them *in the alternative*, when admitted by the second defendant in his answer, is a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to the plaintiff? Our framing of the issue assumes that the negligence of the driver Smith in this instance would, as a matter of law, be imputed to the plaintiff-owner of the car. Smith's negligence, so imputed to plaintiff, would bar her claim against Stallings under the doctrine of contributory negligence. Because we answer the issue in the

negative it is not necessary that we decide whether his negligence, if indeed such existed, is imputed to the plaintiff.

With the minor exception of the absence of certain provisions relating to admiralty jurisdiction of the federal courts, N.C. R. Civ. P. 20 is a close counterpart of Fed. R. Civ. P. 20. N.C. R. Civ. P. 20 provides in part that "[a]ll persons may be joined in one action as defendants if there is asserted against them jointly, severally, *or in the alternative*, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." (Emphasis added.) Joinder of two or more defendants by a plaintiff asserting claims against them in the alternative when the plaintiff is in doubt as to the persons from whom he is entitled to redress was formerly permissible under G.S. § 1-69, which was enacted in 1931 and repealed when the new rules of procedure became effective on 1 January 1970. *Conger v. Insurance Co.*, 260 N.C. 112, 131 S.E. 2d 889 (1963).

The purposes of the joinder provisions of Rule 20 are manifold. Focusing on the application of Rule 20 to this case, however, it is clear that one significant purpose of the Rule is to provide for joinder of defendants in the alternative. The need for such joinder most often arises when "the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint." *7 Wright & Miller, Federal Practice and Procedure: Civil*, § 1654, p. 278. *Aetna Ins. Co. v. Carroll's Transfer, Inc.*, 14 N.C. App. 481, 188 S.E. 2d 612 (1972) citing *1 McIntosh, N.C. Practice & Procedure*, § 661.

Plaintiff-Woods' situation presents a classic example of the need for joinder of defendants in the alternative. She was injured as a result of a sudden an unanticipated collision between the car driven by Smith in which she was riding as a passenger and the car driven by defendant-Stallings. Because of the split-second nature of the accident, she is uncertain whether her injuries were caused by the negligence of Stallings or the negligence of Smith or the negligence of both. But it is clear from the allegations that the negligence of one of the two or both was the proximate cause of her injuries. The alternative joinder provisions of Rule 20 were

drafted for the express purpose of allowing a plaintiff who is faced with such uncertainty as to the cause of her injuries to present her alternative theories to a jury, which must then decide from the evidence whether liability exists and if so which of the two or more defendants joined is liable to the plaintiff. Provided there is evidence produced at trial to support all aspects of the complaint, a jury in this case could find that defendant-Stallings' negligence was the sole proximate cause of plaintiff's injuries. Alternatively a jury could find that defendant-Smith's negligence was the sole proximate cause of plaintiff's injuries. The jury might also find that both defendants were negligent. Such a finding might bar plaintiff's claim against defendant-Stallings, but it would at least entitle her to judgment against defendant-Smith.

Defendant-Stallings' contention that plaintiff's allegations of negligence are binding judicial admissions that entitle Stallings to summary judgment is simply not tenable. "A party is bound by his pleadings and, unless withdrawn, amended, or, otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader." *Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964); *Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E. 2d 176 (1952); *2 Stansbury's N.C. Evidence*, § 177, p. 37 (Brandis Rev. 1973). It is clear, however, that application of this correct statement of the general rule to situations in which a plaintiff alleges claims *in the alternative* against two or more defendants could well defeat the salutary purposes of Rule 20's joinder provisions. Such misapplication of the rule is amply demonstrated by this case.

Inconsistent, alternative, and hypothetical forms of statements of claims, "are directed primarily to giving notice and lack the essential character of an admission. To allow them to operate as admissions would render their use ineffective and frustrate their underlying purpose. Hence the decisions with seeming unanimity deny them status as judicial admission, and generally disallow them as evidential admissions." *McCormick on Evidence*, § 265, p. 634 (2d ed. 1972). In *McCormick v. Kopmann*, 23 Ill. App. 2d 189, 203, 161 N.E. 2d 720, 729 (1959), the Illinois Appellate Court in considering the issue presented here correctly observed:

> "Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest

> so as to be admissible in evidence against the pleader. The pleader states the facts in the alternative because he is uncertain as to the true facts. Therefore, he is not 'admitting' anything other than his uncertainty. An essential objective of alternative pleading is to relieve the pleader of the necessity and therefore the risk of making a binding choice, which is no more than to say that he is relieved of making an admission."

Accord Van Sickell v. Margolis, 109 N.J. Super. 14, 262 A. 2d 209 (1969); *Jenkins v. Simmons*, 472 S.W. 2d 417 (1971); *Johnson v. Flex-o-Lite Mfr. Corp.*, 314 S.W. 2d 75 (1958); 4 *Wigmore on Evidence*, § 1064, p. 70 (Chadbourn Rev. 1972); 29 Am. Jur. 2d, Pleading, § 692.

Although we have not directly confronted this exact issue before, many of our decisions indicate that a plaintiff, who pleads claims in the alternative against two or more defendants when she is uncertain as to the true facts but believes she is entitled to recover from at least one of the defendants, is entitled to present evidence at trial to support both claims, and if she does, to submit both claims to the jury for a decision. *E.g., Conger v. Travellers Ins. Co.*, 260 N.C. 112, 131 S.E. 2d 889 (1963).

We agree with those jurisdictions which have expressly held that pleadings, when made in the alternative against two or more defendants do not possess the essential character of a judicial admission and may not, therefore, be used as such. For that reason, the grant of summary judgment in favor of defendant-Stallings is reversed.

II

DEFENDANT-SMITH'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's appeal from the grant of summary judgment in favor of defendant-Smith raises again the question to what extent and under what circumstances a party is bound by his own adverse testimony. We last faced this issue in *Cogdill v. Scates*, 290 N.C. 31, 224 S.E. 2d 604 (1976). Observing there that this is "'one of the most troublesome questions in the law of evidence. . . .'" we held that "[i]f at the close of the evidence a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown

no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed." *Id.* at 44, 224 S.E. 2d at 611. Defendant-Smith contends that plaintiff-Woods in her deposition unequivocally repudiated the allegations in her complaint with respect to his negligence. He would have us, on that basis, apply the holding in *Cogdill* and uphold the grant of summary judgment in his favor. Plaintiff-Woods contends firstly, that the holding in *Cogdill* should not apply at all to testimony given in a deposition, and secondly, that even if it does her deposition does not unequivocally repudiate the allegations of her complaint, and she should not be bound thereby.

In *Cogdill* we noted that "courts have taken three overlapping approaches to the question." After considering the three approaches as exposited in *McCormick, Handbook of the Law of Evidence*, § 266 (2d ed. 1972), we concluded that the facts in *Cogdill* did not require us to adopt any of them. Mrs. Cogdill testified to concrete facts, not matters of opinion, estimate, appearance, inference, or uncertain memory; her testimony was deliberate, unequivocal and repeated; her statements were diametrically opposed to the essential allegations of her complaint and destroyed the theory on which she brought her action; her attorney did not seek to elicit any remedial testimony from her; and she manifested an intent to be bound by repeating her testimony even after being warned of the consequences of perjury. It was on those unique factual circumstances that our holding in *Cogdill* was based.

Paragraph five of plaintiff's amended complaint reads as follows:

> "The Defendant, Richard Lee Smith, was negligent and careless so far as Plaintiff in this action is concerned, in neglecting and failing to carry Plaintiff in a reasonably safe manner as a passenger in said automobile then owned by the Plaintiff in the following respects:
>
> a. That he failed to keep a proper lookout for oncoming traffic and failed to keep his vehicle under proper control.
>
> b. That he failed to turn the Plaintiff's automobile to avoid colliding with an automobile that crossed over in its lane of travel.

c. That he failed to reduce his speed to avoid colliding with a special hazard in his lane of travel, to wit, the Defendant Stallings' automobile.

d. That he drove his vehicle on the highway at a speed greater than reasonable and prudent under the conditions then existing in violation of North Carolina General Statute 20-141(a).

e. That he drove his vehicle on a public highway and failed to decrease his speed to avoid an accident in violation of North Carolina General Statute 20-141(m)."

Prior to the hearing on Smith's motion for summary judgment, plaintiff was deposed and gave her account of the accident. Portions of plaintiff's deposition testimony, much of which was given in response to questions based on an accident report she had filed over the telephone from the hospital to which she was admitted after the accident, are set out below:

"The way I saw it, Richard was then on his side of the road when he got hit. I didn't see Richard also pull it to the side of the road just before impact to try to avoid the accident; but I could understand, or the way I could see it, it was just that we were going down the road and it was just one of those things, just, I just saw a flash of light beside the driver's side over there and it was, then it was an accident. It happened so quickly I didn't have a long time to sit and watch it happening. The accident happened very suddenly . . . . I felt she hit us instead of her.

* * *

Richard was driving in a right hand lane of travel. I don't think he had any trouble controlling his car. I didn't see him doing anything about driving his car that I felt I needed to tell him to drive better. To my knowledge he appeared to be looking out where he was driving and he had control of the car. I'd say that he was driving between 40 and 50 miles per hour.

* * *

I can't say, for Richard, whether he had time to react. I guess I feel the other lady was at fault . . . . I wasn't driv-

ing so, therefore, I won't [sic] paying that much attention to the center line and all of that. We had been driving, to my thinking, he had been driving all right before the accident. So the way I see it he was still driving all right. I didn't say that I saw her come across the road; no, I didn't say that. I saw the other car coming but I didn't see the other car coming across to hit us. No, I didn't say that. I feel like Richard Lee was in his lane.

* * *

I didn't actually observe the swerving of the other car. I think I knew the location of my car on the highway. I think it was in the right lane . . . . I said the accident happened very quickly. I did not have time to react because it happened so quickly . . . . I don't think he [Richard Lee Smith] had time to turn the car and get out of the way and keep from being hit.

* * *

The only thing I am really sure about is that I just saw a flash of light. To me, Richard had been driving all right, and I had no reason to doubt that he wasn't driving right at that particular time of impact. I reckon that's the way you state it. I just felt like it was the other lady's fault."

[4] Reading plaintiff's deposition as a whole, it is manifestly clear that her testimony is distinguishable from the unequivocal repudiation of the allegations of the complaint that were present in *Cogdill*. Plaintiff-Woods' deposition testimony indicates her continuing *uncertainty* about the events that led up to the accident. Her conclusion that "[t]he only thing I am really sure about is that I just saw a flash of light" is reflected throughout the testimony in her deposition about the particulars of the accident.

Moreover, at the time of the hearing on Smith's motion for summary judgment, the court had before it the depositions of defendant-Stallings, of defendant-Stallings' daughter (who was riding as a passenger in her car), and of the state trooper who investigated the accident. Defendant-Stallings stated that the accident occurred when the car Smith was driving crossed over without warning into her lane of travel. And her daughter stated

that the car driven by Smith was approaching at a very high rate of speed just prior to the accident. She also stated that the accident was caused by Smith's act of crossing the center line. These depositions offer plenary evidence to support plaintiff's allegations of negligence against defendant Smith. Provided plaintiff is not barred from going to trial by her own testimony, this evidence could form the basis for a jury finding that Smith was negligent and is liable to plaintiff.

[2] Plaintiff's contention that statements in a deposition relied on to support a motion for summary judgment should be treated differently from testimony at trial is not tenable.[1] Should a party in her deposition repudiate the allegations of her complaint in an unequivocal manner as the plaintiff in *Cogdill* did in her testimony at trial, the court should grant a motion for summary judgment in the defendant's favor, since a directed verdict in defendant's favor would be called for at trial on the basis of the party's testimony.

Such is not the case in this appeal, however. The plaintiff's statements in her deposition are equivocal, uncertain, and inconsistent, and our narrow holding in *Cogdill* does not apply. We are, therefore, required to adopt one of the three approaches that other courts have taken to this issue. All three approaches were considered and fully discussed in Cogdill, *supra.*

[3] The first approach considered in *Cogdill* appears to be the preferable rule, and we accordingly adopt it and apply it to this case. That approach treats a party's adverse testimony "like the testimony of any other witness called by the party, that is, the party is free (as far as any rule of law is concerned) to elicit contradictory testimony from the witness himself or to call other witnesses to contradict him." *McCormick, supra,* § 266, p. 637. Under this approach a party's statements, given in a deposition or at trial of the case, are to be treated as evidential admissions

1. N.C. R. Civ. P. 30(c) requires that the person before whom the deposition is taken shall put the deponent on oath. Rule 30(e) requires that the transcript of the deposition be submitted to the deponent for examination. The deponent can then have the person before whom the deposition was taken enter any changes in form or substance upon the deposition along with a statement of the reasons for making them. Rule 30(c) also provides that examination and cross-examination of a deponent may proceed as permitted at the trial under the provisions of Rule 43(b). Rule 32(a)(3) also provides that "[t]he deposition of a party . . . may be used by an adverse party *for any purpose*, whether or not the deponent testifies at the trial or hearing." (Emphasis added.) And Rule 32(b) provides that "[s]ubject to the provisions of Rules 28(b) and subdivision (d)(3) of [Rule 32], objection may be made at the trial or hearing to receiving in evidence any deposition or any part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

rather than as judicial admissions. In *2 Stansbury's North Carolina Evidence*, § 166, pp. 1-4 (Brandis Rev. 1973), the distinction between the two types of admissions is set forth:

> "The first of these to be noted is the *judicial* or *solemn* admission, which is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute . . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense.
>
> * * *
>
> The other type of admission . . . is the *evidential* or *extrajudicial* admission. This consists of words or other conduct of a party, or of someone for whose conduct the party is in some manner deemed responsible, which is admissible in evidence against such party, but which may be rebutted, denied, or explained away and is in no sense conclusive."

For a discussion of this distinction as applied to the question raised in this appeal *see* 55 N.C. L. Rev. 1155 (1977).

Thus, when a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Two exceptions to this general rule should be noted, however. First, when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*, his statements should be treated as binding judicial admissions rather than as evidential admissions. Second, when a party gives adverse testimony, *and there is insufficient evidence to the contrary presented to support the allegations of his complaint*, summary judgment or a directed verdict would in most instances be properly granted against him. *See Thompson v. Purcell Constr. Co.*, 160 N.C. 390, 76 S.E. 266 (1912); *Fulghum v. Atlantic Coast Line R.R. Co.*, 158 N.C. 555, 74 S.E. 584 (1912); *Wright v. Southern R.R. Co.*, 155 N.C. 325, 71 S.E. 306 (1911); *McCormick, supra*, § 266, p. 637.

[4] Neither of these exceptions is applicable in this instance. Plaintiff's deposition testimony was indeed substantially adverse

to her allegations of negligence against defendant-Smith. As noted *supra*, however, her adverse testimony is clearly distinguishable in degree from that present in *Cogdill*. Furthermore, there was before the court at the time of the hearing on Smith's motion, sufficient evidence for a jury to find that Smith was negligent, particularly in light of plaintiff's obvious uncertainty about what actually happened at the time of the accident.

Provided there is sufficient evidence presented at trial to support a jury verdict finding defendant-Smith liable, plaintiff is entitled to submit her claim against him to a jury. The grant of summary judgment in favor of defendant-Smith is, therefore, reversed.

Reversed as to both defendants.

Remanded to the Superior Court for trial.

MAXINE V. MOORE, AS EXECUTRIX OF THE ESTATE OF ALLAN PRATT MOORE, AND MAXINE V. MOORE, INDIVIDUALLY v. UNION FIDELITY LIFE INSURANCE COMPANY

No. 76

(Filed 12 June 1979)

1. Insurance § 67— action on policy covering death by "accidental bodily injury" —showing of unexplained, violent death by external means—presumption of accident

When the plaintiff in an action to recover death benefits under a policy insuring against loss of life due to "accidental bodily injury" makes a showing of unexplained, violent death by external means which is not wholly inconsistent with accident, the presumption arises that the means were accidental and the following rules apply: (1) the effect of this presumption is to place on defendant the burden of going forward with evidence; (2) if there is no evidence tending to show that death was non-accidental, the jury should be peremptorily instructed that if it finds an unexplained, violent death by external means, it should find that the death was accidental; (3) if evidence of non-accidental death is presented, then the presumption *per se* no longer applies, and the question of accidental death is one for the jury, but it is still permissible for the jury to infer from the circumstances that the death was accidental, and it is proper for the judge to so instruct; and (4) in no event does the presumption operate to relieve the plaintiff of the burden of persuasion on the issue of accidental death.

2. Insurance § 67.2— action on accident policy—sufficiency of showing of unexplained, violent death by external means

In an action to recover death benefits under a policy insuring plaintiff's husband against loss of life due to "accidental bodily injury," plaintiff's evidence was sufficient to show an unexplained, violent death by external means not wholly inconsistent with accident, and plaintiff was entitled to the presumption that the means were accidental, where it tended to show that plaintiff's husband was found dead with a gunshot wound to his head and a pistol by his side; the gunshot wound was just over the right eye, and it was surrounded by powder burns; and there were no signs of a struggle or that anyone else had been around, since this evidence, while sufficient to support a verdict of suicide, was not wholly inconsistent with an accidental discharge of the pistol.

3. Insurance § 67.2— action on accident policy—permissible inference of suicide or accident—no directed verdict against plaintiff

In an action to recover death benefits under a policy which insured plaintiff's husband against loss of life due to "accidental bodily injury" and which excluded coverage for death by suicide, the trial court erred in directing a verdict against plaintiff where plaintiff's evidence did not establish conclusively that her husband died by suicide but would also permit an inference of accident from her showing of an unexplained, violent death by external means.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

Justice COPELAND dissenting.

DEFENDANT appeals pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, opinion by *Judge Robert Martin* with Chief Judge, now Justice, *Brock* concurring and *Judge Clark* dissenting, reversing a directed verdict in its favor granted by *Judge Clifford* at the 13 September 1976 Session of FORSYTH District Court. The decision below was reported at 35 N.C. App. 69, 239 S.E. 2d 859. The case was docketed and argued as No. 52 at the Spring Term 1978.

Moore & Keith, by Thomas J. Keith, Attorneys for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr., and Gray Wilson, Attorneys for defendant appellant.

EXUM, Justice.

This is an action for death benefits under a policy issued by defendant insuring plaintiff's husband against loss of life due to

"accidental bodily injury." The trial court granted defendant's motion for a directed verdict at the close of all the evidence. The Court of Appeals held that it was error to direct a verdict against plaintiff and ordered a new trial. On the second issue raised on appeal, the Court of Appeals upheld the trial court's ruling that the principal sum payable under the policy was $5000. We affirm in both respects.

Plaintiff's evidence showed that her deceased husband, Allan Pratt Moore, was a retired truck driver. He and his wife together had a sufficient income, and he had no particular financial worries. He had been hospitalized in mental institutions at least three times, the last time as an outpatient for a period of approximately a month and a half beginning in June, 1973. Mrs. Moore testified that her husband would on occasion get into a "manic" state, characterized by his being "keyed up," engaging in excessive buying and selling and never resting. He did not, however, appear "depressive or moody or gloomy." Mr. Moore was on medication —Lithium and coumadin—after his last hospitalization.

Mr. Moore left home on the morning of Friday, 14 September 1973, to go to Hillsville, Virginia, to arrange for an auction sale. His death apparently occurred that night. His body was found the next morning. He was lying in front of his car just off an unpaved road or path on a farm he owned near Hillsville. The cause of his death was a gunshot wound to the forehead, just over his right eye. There were powder burns surrounding the wound. Mr. Moore's clothing was not disturbed. There were no signs of a struggle or that anyone else had been around. At or near his right foot was a .32 caliber pistol. He was proficient with firearms and usually carried a gun, although Mrs. Moore did not recognize the gun found by his side.

Defendant's evidence agreed in most essential respects with plaintiff's, but it showed in addition that the keys to Mr. Moore's car were still in the ignition and that found on his person, among other things, were his watch, his ring, his wallet and $92.24 in cash. Edwin E. Bolt, testifying for defendant, stated that he recognized the pistol found at the scene as belonging to Mr. Moore. Dr. Joseph H. Early estimated the time of death as 10:00 p.m. on 14 September 1973. He also stated that in his opinion the "weapon was within two inches of the skull" when it was fired.

At the time of his death, Mr. Moore was insured against death "resulting directly and independently of all other causes from accidental bodily injury" under a policy issued by defendant. Excepted from coverage under this policy is death caused "by suicide or any attempt thereat (sane or insane)." Plaintiff filed a claim to collect $10,000 in accordance with what she alleges are the terms of the policy. After defendant refused payment, she brought this action both in her capacity as executrix of her husband's estate and as beneficiary under the policy. Defendant contends that Mr. Moore died as a result of suicide and that it is consequently not liable under the policy. In any event, defendant denies liability for a sum in excess of $5000.

At the close of plaintiff's evidence at trial, the court ruled that the principal sum payable under the policy was $5000. At the same time, the court reserved ruling on defendant's motion for directed verdict. Defendant presented evidence and then renewed its motion, which was granted.

Plaintiff here had the burden of showing that her husband died as a result of accidental bodily injury within the meaning of the policy issued by defendant. *Barnes v. Insurance Co.*, 271 N.C. 217, 155 S.E. 2d 492 (1967). The evidence available here on that issue, as in many other cases of this nature, was essentially circumstantial.[1] Plaintiff was able to offer testimony as to the disposition and mental condition of her husband, his financial situation, and the fact that he was found dead with a gunshot wound to his head and a pistol by his side.

Cases of this nature, *i.e.*, in which the deceased is found dead with no clear indication of the manner of his death, have long troubled the courts. Both the problem and the generally accepted solution were stated by Justice, later Chief Justice, Barnhill in *Warren v. Insurance Co.*, 217 N.C. 705, 706, 9 S.E. 2d 479, 480 (1940):

> "In actions such as this upon the provision of a policy of insurance against death by accident or accidental means, where unexplained death by violence is shown, nothing else

1. For a sampling of other cases involving similar circumstances and the proof available to a plaintiff seeking to make out a prima facie case of accidental death, *see Barnes v. Insurance Co., supra* (deceased found run over by train); *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (deceased found shot); *Life and Casualty Ins. Co. v. Daniel*, 209 Va. 332, 163 S.E. 2d 577 (1968) (deceased found drowned).

> appearing, without the existence of some presumption, the cause of death might be left in the field of speculation. Was the death caused by accidental means, or was it a case of suicide, or was it an intentional and unlawful killing? Under these circumstances the law presumes the lawful rather than the unlawful. Thus the rule arises that where an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means."

In other words, when a beneficiary under an accidental death insurance policy "offers evidence tending to establish that the insured met his death by unexplained external violence, which is not wholly inconsistent with accident, the presumption arises that the means were accidental." *Barnes v. Insurance Co., supra*, 271 N.C. at 219, 155 S.E. 2d at 494.

The effect of this presumption has not been entirely clear, due in no small part to difficulties inherent in the use of the word "presumption" itself. As Justice Britt recently summarized the problem in *Henderson Co. v. Osteen*, 297 N.C. 113, 117, 254 S.E. 2d 160, 163 (1979): "Presumption is a term which is often loosely used. It encompasses the modern concept of an inference where the basic fact . . . is said to be prima facie evidence of the fact to be inferred. . . . It also encompasses the modern concept of a true presumption where the presumed fact must be found to exist unless sufficient evidence of the nonexistence of the basic fact is produced or unless the presumed fact is itself disproven." This difference between prima facie evidence (or a prima facie case as it is often called) and a true presumption is further explained in 2 Stansbury's North Carolina Evidence § 218, 172-73 (Brandis rev. 1973) (hereinafter Stansbury):

> "[A] 'prima facie case' or 'prima facie' evidence means evidence sufficient to go to the jury in support of a fact to be proved. There is nothing compulsory about it; the jury may disbelieve the evidence presented, or believe the evidence but decline to draw the inferences necessary to a finding of the ultimate fact, or believe the evidence and draw the necessary inferences. In the case of a presumption, however, although the jury may still disbelieve the evidence and thus fail to find the existence of the basic fact, it should be told that if it finds the basic fact it must also find the presumed

fact, unless evidence of its nonexistence is produced sufficient to rebut the presumption.

[A] prima facie case and a presumption differ sharply in their effect upon the burden of producing evidence. A prima facie case discharges the burden of the proponent, but does not shift the burden to his adversary. *A presumption, however, not only discharges the proponent's burden but also throws upon the other party the burden of producing evidence that the presumed fact does not exist.* If no such evidence is produced, or if the evidence proffered is insufficient for that purpose, the party against whom the presumption operates will be subject to an adverse ruling by the judge, directing the jury to find in favor of the presumed fact if the basic fact is found to have been established." (Emphasis added.)

To the extent our case law has discussed the effect of the presumption that an unexplained, violent death is accidental, it supports the conclusion that it is a "true" presumption.[2] *Warren v. Insurance Company* was a suit under a double indemnity clause of a life insurance policy, which provided for payment of $2500 above the face amount of the policy when the insured's death resulted from bodily injury caused by "external, violent and accidental means."[3] No benefits were to be recovered under this provision if death resulted from bodily injuries "inflicted intentionally by another person." The evidence in the case showed that deceased was shot by one Willie Tate, who then attempted to assault deceased's female companion. The issue of contention between the parties was whether Tate had intentionally shot deceased or had shot him accidentally in the course of an assault on his companion.

In discussing the effect of the presumption of accidental death on the allocation of the burdens of persuasion and of going forward with the evidence, Justice, later Chief Justice, Devin said, 215 N.C. at 404, 2 S.E. 2d at 18:

2. In our most recent case in which this presumption applied, *Barnes v. Insurance Co., supra*, the Court merely noted that plaintiff had "*at least* made out a prima facie case of accident." 271 N.C. at 220, 155 S.E. 2d at 495. (Emphasis added.)

3. The *Warren* case came to this Court four times. The opinions in the case may be found at 219 N.C. 368, 13 S.E. 2d 609 (1941); 217 N.C. 705, 9 S.E. 2d 479 (1940); 215 N.C. 402, 2 S.E. 2d 17 (1939); and 212 N.C. 354, 193 S.E. 293 (1937).

> "There is a distinction, with respect to the burden of proof, between the rule applicable to actions upon ordinary life insurance policies containing exceptions, where proof of policy and death of insured imposes upon the insurer the burden of sustaining the pleaded exception, and the rule applicable where the insurance is against death by accident or accidental means. In the latter case well considered authorities in this and other jurisdictions support the view that where unexplained death by violence is shown, the defendant who seeks to avoid liability on the ground that the death resulted from bodily injuries inflicted intentionally by another person, *has the burden of going forward with evidence*—that is that evidence of death by external violence is sufficient to take the case to the jury—but that the burden of the issue of death by accidental means still remains upon the plaintiff." (Emphasis added.)[4]

In a subsequent opinion in the *Warren* case, Justice, later Chief Justice Barnhill, agreed with the language used earlier and added, 217 N.C. at 706, 9 S.E. 2d at 480:

> "[W]here an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means. When, however, there is evidence tending to explain the cause of death, it becomes a question of fact for the determination of the jury."

When read together, the quoted language from the *Warren* cases makes these points: (1) when plaintiff makes a showing of a violent, unexplained death the burden of going forward with evidence shifts to defendant; (2) if there is no evidence forthcoming to rebut the presumed fact, *i.e.*, that death was accidental, there is no jury question as to it; (3) if, however, evidence is introduced tending to rebut the presumed fact, a jury question is presented; and (4) the burden of persuasion on the issue of accidental death never shifts from plaintiff. This is a classic description of the operation of a "true" presumption. *See* 2 Stansbury, *supra*, § 218, at 173.

4. Although the language Justice Devin used is susceptible to both interpretations, we read it to impose the burden of going forward with the evidence *as a result of the effect of the presumption*, not because the insurer must prove an exclusion from coverage if it seeks to avoid liability on that ground. If insurer follows the latter course, it has the burden of persuasion on the issue, not merely the burden of going forward with evidence. *See Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438 (1959).

There are, moreover, sound reasons of public policy for presuming accident in doubtful cases and treating this presumption as a true presumption. The presumption has its basis in the common experience of every day life. Men and women generally (although not as constantly as we might wish) conform their conduct to the requirements of law. When the question involved is, as may often be the case, whether death was by accident or suicide, there is in favor of presuming accident "the love of life and the instinct of self-preservation, the fear of death, the fact that self-destruction is contrary to the general conduct of mankind, the immorality of taking one's own life and the presumption of innocence of crime." *Life and Casualty Ins. Co. v. Daniel, supra*, 209 Va. at 335, 163 S.E. 2d at 580. Added to this common sense basis for the presumption is the fact that it serves "a social policy which inclines in case of doubt toward the fruition rather than the frustration of plans for family protection through insurance." McCormick on Evidence § 343 at 811 (2d ed. 1972). And, as Justice Barnhill noted in *Warren v. Insurance Co., supra*, 217 N.C. 705, 9 S.E. 2d 479, perhaps the most important reason for the presumption is to avoid the indulgence of speculation in cases of unexplained, violent death.

[1] In summary, when a plaintiff makes a showing of unexplained, violent death by external means, "which is not wholly inconsistent with accident, the presumption arises that the means were accidental." *Barnes v. Insurance Co., supra*, 271 N.C. at 219, 155 S.E. 2d at 494. The effect of this presumption is to place the burden of going forward with evidence on defendant. If there is no evidence tending to show that death was non-accidental then the jury should be peremptorily instructed that if it finds an unexplained, violent death by external means, it should also find that the death was accidental. If evidence of non-accidental death is presented, then the presumption *per se* no longer applies, and the question of accidental death is one for the jury. It is, however, still permissible for the jury to infer from the circumstances that the death was accidental, and it is proper for the judge to so instruct. *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F. 2d 724, 730-31 (4th Cir. 1935). Finally, in no event does the presumption operate to relieve the plaintiff of the burden of persuasion on the issue of accidental death.

[2] In applying these rules here, the first question we must answer is whether plaintiff's evidence showed an unexplained, violent death by external means not wholly inconsistent with accident. Although this is a close question, we think that it did. Plaintiff's husband was found dead with a gunshot wound to his head and a pistol by his side. The wound was just over the right eye, and it was surrounded by powder burns. There were no signs of a struggle or that anyone else had been around. While this evidence would certainly have supported a verdict of suicide, it is not wholly inconsistent with an accidental discharge of the pistol.[5] Plaintiff was therefore entitled to the benefit of the presumption.

Defendant cites *Slaughter v. Insurance Co., supra*, 250 N.C. 265, 108 S.E. 2d 438, in support of its contention that plaintiff is not entitled to the presumption. *Slaughter* was a suit on a policy insuring against death "resulting directly and independently of all other causes from bodily injury sustained by the insured solely through external, violent and accidental means." *Id.* at 266, 108 S.E. 2d at 439. Excluded from coverage was death caused by the intentional act of the insured or any other person.

Decedent in *Slaughter*, a taxicab driver in Selma, had been seen leaving town to take a passenger to Smithfield. Several hours later, he was found dead in a garbage dump about three miles from Smithfield. He had been shot in the back and above the left ear with a pistol. His money and a pistol he habitually carried were gone. His taxicab was found in Dunn, some 22 miles away. Upon consideration of all this evidence, this Court concluded, *id.* at 269, 108 S.E. 2d at 441:

> "In this case the plaintiff's own evidence showed an intentional killing. That showing established lack of coverage. It showed also a bar under the exclusion clause. Either was fatal to plaintiff's cause, requiring nonsuit."

While the decision in *Slaughter* was proper on the second ground stated, it was incorrect to say that plaintiff's evidence showed a lack of coverage. As was said in *Fallins v. Insurance Co.*, 247 N.C. 72, 75, 100 S.E. 2d 214, 217 (1957), "Injuries caused

5. *See Dick v. New York Life Ins. Co., supra*, 359 U.S. 437. Decedent in *Dick* was found dead. He had received two wounds from a shotgun, one to his left side and one to his head. The shotgun was lying nearby, with a screwdriver beside it. The United States Supreme Court, applying North Dakota law, held that plaintiff was entitled to the benefit of the presumption of accidental death.

to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured." Plaintiff's evidence in *Slaughter* thus did establish coverage; the reason she was nonsuited was that it also established an exclusion. "[T]he primary basis on which recovery was denied in *Slaughter* was the fact that plaintiff's evidence affirmatively established that the insured's death resulted from bodily injuries inflicted intentionally by another person and therefore by express policy provision was excluded from coverage." *Mills v. Insurance Co.*, 261 N.C. 546, 551, 135 S.E. 2d 586, 589 (1964).

[3] Correctly understood, then, *Slaughter* would require a directed verdict against plaintiff here only if her evidence affirmatively established suicide. Whether plaintiff's evidence here made out the affirmative defense of suicide depends on whether, taking this evidence in the light most favorable to her, "no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976) (discussing whether plaintiff's evidence established affirmative defense of contributory negligence). It is possible to draw reasonable inferences from plaintiff's evidence that her husband died by suicide. These inferences are, however, by no means conclusive. Other reasonable inferences, *e.g.*, accidental discharge of the weapon, may likewise be drawn. The effect of plaintiff's producing evidence from which inferences of suicide could be drawn was only to relieve defendant of the burden of going forward with such evidence in order to avoid a peremptory instruction in favor of plaintiff. It did not require that a verdict be directed against her.[6] *Cf. State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979) (in second degree murder case when state presents some evidence that would tend to show absence of malice, defendant has no burden to come forward with evidence in order to avoid mandatory presumption).

Defendant also relies on a number of cases from other jurisdictions in which a verdict was directed against plaintiff on

6. Whether plaintiff is entitled to the presumption or, at least, a permissible inference of accident, as well as whether plaintiff has made out an affirmative defense as a matter of law must necessarily be determined at the close of plaintiff's evidence. If at this point plaintiff is at least entitled to the inference and has not made out an affirmative defense, the case must go to the jury under proper instructions notwithstanding the strength of defendant's evidence either against the inference or in support of the defense. Whether defendant insurer would ever because of the strength of its evidence be entitled to a peremptory instruction is a question we need not answer here and leave open for future determination.

facts similar to but not precisely like those here. *Hinds v. John Hancock Mutual Life Ins. Co.*, 155 Me. 349, 155 A. 2d 721 (1959); *Aetna Life Ins. Co. v. Alsobrook*, 175 Ark. 523, 299 S.W. 743 (1927); *Mitchell v. New England Mutual Life Ins. Co.*, 123 F. 2d 246 (4th Cir. 1941); *Gorham v. Mutual Benefit Health and Accident Ass'n.*, 114 F. 2d 97 (4th Cir. 1940); *Despiau v. United States Casualty Co.*, 89 F. 2d 43 (1st Cir. 1937); *Travelers' Ins. Co. v. Wilkes*, 76 F. 2d 701 (5th Cir. 1935). We have carefully examined all these cases. We conclude, as to them, either (1) the facts are sufficiently different from those here to call for a different result, or (2) applying the principles upon which we rely here, we would have reached a different result.

There was here a question for the jury—the weighing of the reasonableness of drawing the inference of accident from a showing of an unexplained, violent death by external means against the inferences of suicide arising from the evidence. It was, therefore, error to direct a verdict against plaintiff.

We have examined the insurance policy in light of plaintiff's contention that it provided $10,000 coverage. While the policy could have been more carefully drawn, we do not see how plaintiff's decedent could reasonably have understood that the principal sum payable in the event of accidental death in the manner described herein was other than $5000.

The decision of the Court of Appeals is

Affirmed.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

Justice COPELAND dissenting.

No one can dispute that the law regarding presumptions is riddled with confusion. As the majority opinion correctly points out, often a logical inference is loosely termed a "presumption of fact," yet that concept and a "true" presumption, or a "presumption of law," are different in theory and in practical application. This Court has noted that "a presumption of fact used in the sense of an inference is a deduction from the evidence, having its origin in the well recognized relation between certain facts in

evidence and the ultimate question to be proven." *In re Will of Wall*, 223 N.C. 591, 595, 27 S.E. 2d 728, 730 (1943). Such an inference is "to be considered merely as an evidential fact or a circumstance, rather than as a presumption which would impose a burden [of producing evidence] on the defendant." *Id.* at 595, 275 S.E. 2d at 731. It is clear that we are dealing in this case with a "true" presumption [hereinafter referred to merely as a presumption].

The majority view of presumptions, and the one to which North Carolina subscribes, is the "bursting bubble" theory, which means that "[i]n practical terms, . . . although a presumption is available to permit the party relying upon it to survive a motion for directed verdict *at the close of his case*, it has no other value in the trial." McCormick on Evidence § 345 (2d ed. 1972). (Emphasis added.) Once the presumption has been sufficiently rebutted, it completely disappears from the case. *See generally In re Will of Wall, supra.* Therefore, when the defendant in this case introduced evidence tending to show that the insured's death was not an accident, the trial court was required to rule on its renewed motion for a directed verdict at the close of all the evidence as if the presumption had never existed. "The opponent of the presumption may still not be entitled to a directed verdict, but if his motion is denied, the ruling will have nothing to do with the existence of a presumption." McCormick on Evidence, *supra* at § 345.

The majority opinion apparently gave the plaintiff in this case the benefit of a true presumption, requiring the defendant to come forward with evidence rebutting death by accident, *and* the benefit of a prima facie case, entitling her to get to the jury regardless of the evidence showing death by suicide. This is not the law. In North Carolina a case goes to the jury "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence *reasonably* tends to establish." *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 683, 58 S.E. 2d 757, 760 (1950). (Emphasis added.) *See also Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1976). Thus, in this situation, a trial court must make a case by case determination to see whether the evidence would support a verdict for the plaintiff. The plaintiff does not get to the jury as a matter of right, and the defendant's evidence that does not con-

flict with that of the plaintiff is to be considered by the court. *See, e.g., Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967).

Of course there will be cases dealing with this issue in which the facts and circumstances indicate a reasonable possibility that the death of the insured *was* an accident. In this situation, as in any other case, the plaintiff would be entitled to have the jury decide the cause of death. In *Gorham v. Mutual Benefit Health & Accident Association of Omaha*, 114 F. 2d 97 (4th Cir. 1940), *cert. denied*, 312 U.S. 688, 85 L.Ed. 1125, 61 S.Ct. 615 (1941), Judge John J. Parker said the following:

> "A suicide case should be tried like any other case, and metaphysical reasoning about presumptions and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases. If the evidence is conflicting, or if different inferences can reasonably be drawn from it, the case is for the jury. If, however, the evidence is so clear as to leave no room to doubt what the fact is, the question is one of law, and it is the right and the duty of the judge to direct a verdict." *Id.* at 100. *See also* Annot., 85 A.L.R. 2d 722 (1962) for other cases dealing with this subject.

The evidence in this case permits only one reasonable, yet unfortunate, conclusion—the cause of the insured's death was suicide. The uncontradicted facts are as follows:

1. The insured had a long history of periods of mental disturbance, which "illness" resulted in him going into "manic" states, for which he had been treated three times in the past. The last treatment occurred a few months before his death on 14 September 1973.

2. When the insured left home to go to Virginia on 14 September 1973, the day of his death, he made a point of telling his wife and daughter that he loved them.

3. The insured was found dead in the early morning of 15 September 1973 in front of his car on a road near his farm in Virginia. A .32 caliber revolver belonging to the insured was found on the ground next to the deceased, which had five unfired shells and one spent shell in the cylinder.

4. There were "heavy" powder burns around the wound, and Dr. Early testified that in his opinion the gun was within two inches of the skull when fired.

5. The insured owned several guns, he usually carried a gun, and his widow testified that he "was proficient with firearms."

6. When he was found, the keys to the insured's car were in the ignition, and his wallet containing $91.00 was in a pocket of his pants.

7. There was no sign of a struggle or that anyone else had been there.

8. Dr. Early estimated the time of death to be 10:00 p.m. on 14 September 1973.

Under these facts, the trial court correctly granted defendant's motion for a directed verdict at the close of all the evidence. For this reason, I respectfully dissent and vote to reverse the decision of the Court of Appeals and to reinstate the judgment of the trial court.

STATE OF NORTH CAROLINA v. GREGORY FAIRCLOTH

No. 25

(Filed 12 June 1979)

1. Criminal Law § 99.4— court's remark to witness—no expression of opinion

The trial court did not express an opinion by telling a witness, who had improperly testified that a window screen of the victim's house had been pried out with some object, that the witness could not draw any conclusions but could say that he saw tool marks, since the court's instruction was not an expression of opinion on any question of fact to be decided by the jury or an expression of opinion as to whether a fact had been proved but instead simply limited the witness's testimony to a statement of what he saw, leaving the jury to draw its own conclusion.

2. Burglary and Unlawful Breakings § 7— first degree burglary—lesser included offenses—instruction not required

In a prosecution for first degree burglary, the trial court did not err in failing to charge on the lesser included offense of non-felonious breaking and entering where the State's evidence tended to show that defendant committed a breaking by removing a bathroom screen and entering the occupied dwelling

of the victim in the nighttime; the evidence concerning the assault he then committed upon her tended to show that his purpose was to commit rape; defendant's evidence tended to show that he went to the victim's home by invitation and she helped him climb through the bathroom window; and there was therefore no evidence whatsoever tending to show a non-burglarious breaking or entering.

3. **Burglary and Unlawful Breakings § 6.2— first degree burglary—felonious intent—jury instructions**

In a prosecution for first degree burglary where the indictment alleged that defendant entered the dwelling of the victim during the night with the felonious intent to rape her, the trial court's instruction which recapitulated the evidence for the State and for defendant on the issue of intent to rape and which stated each of the elements of first degree burglary, including defendant's intent at the time he entered the victim's home, was adequate.

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

Justice EXUM dissenting.

DEFENDANT appeals from judgment of *Cowper, J.*, 23 October 1978 Session, WAYNE Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with first degree burglary, *i.e.*, feloniously breaking and entering the occupied dwelling house of Barbara Smith during the night of 31 July 1978 with the felonious intent to rape her.

Evidence for the State tends to show that Barbara Smith, age twenty-four, was living at Dudley in a little house near the Goldwater Motel. On 31 July 1978 she had been to a nightclub in Greenville, North Carolina, with friends. She returned to her home and went to bed about 3 a.m. At approximately 5-5:15 a.m., she awoke suddenly and saw defendant Gregory Faircloth standing at the foot of her bed. She began screaming; defendant pulled the sheets off and jumped on top of her. She bit his tongue when he attempted to kiss her and continued to scream and fight. He then struck her on the side of her face, lost his balance and fell off the bed. At that point she pulled a pistol from beneath her pillow and shot at defendant twice while he was inside her bedroom. He ran out the back door and across a field toward the highway. She fired two more shots at him, once through the screen of her bedroom window and again through a nearby window.

Barbara Smith then called her friend Migdalia Rosario who lived a short distance away, and she came to Miss Smith's home. The sheriff was called and officers arrived within minutes. It was discovered that the bathroom window screen had been removed. There were pry marks on the screen and window. Miss Smith was taken to the hospital for treatment of her bruised face. While there, she saw defendant who had come to the emergency room for treatment of a gunshot wound in his thigh. She pointed him out to the police and he was arrested. He had a skinned knuckle, a cut on his tongue and had been shot in the thigh. After Officer Goodman had advised defendant of his constitutional rights and defendant had signed a written waiver of them, Officer Goodman asked him what happened. Defendant replied that he did not know Miss Smith and explained that he had been shot at Blackburn's Store by someone in a passing car, and when he fell after being shot he had bitten his tongue and skinned his knuckle.

The testimony of Barbara Smith was corroborated in almost every detail by Migdalia Rosario and Officer Goodman.

Defendant Gregory Faircloth, age twenty-one, testified in his own behalf. He stated that on the evening of 31 July 1978 he stopped at the "truck stop" to buy gas and recognized Barbara Smith who was already there buying gas when he pulled up. They knew each other and conversed. She said "she hadn't seen me in a good while . . . that I had been telling her that I would come by and asked me when I was coming by. I told her that I might stop by that night. . . . I stopped by the same night and I was on my way home and I went around to the front door and knocked and nobody answered. I went around to the side of the house and the bathroom window was opened. I called her through the window and she came into the bathroom and asked if it was me. I said that it was me and she said come on in and she unlocked the screen and handed it to me. She said to throw it outside and she helped me in through the window." Defendant further stated that they sat on her bed and talked and she asked him to loan her some money but he replied that he had none. She insisted on seeing his wallet, and they got into an argument and started tussling. Defendant said he then told her, "I'll kiss you; that's all I am going to do." When he attempted to do so she bit his tongue. He then pushed her and she fell, and he started from the room and she began shooting. He ran out the back door and toward his car

which was parked down the highway "because she insisted on it" and didn't want him to park behind her house. Defendant denied that he attempted to rape Barbara Smith and said he had no such intentions but went to her house because he was invited.

In rebuttal, Barbara Smith testified that she used Texaco gasoline which she bought with a Texaco credit card; that the "truck stop" sells Union 76 gasoline and she did not stop there on the night in question, had never bought gas there, never had a conversation with defendant there, never invited him to her home, and did not let him in through the window. She denied that she told defendant to park his car anywhere.

The jury convicted defendant of burglary in the first degree as charged, and he was sentenced to life imprisonment. Errors assigned on this appeal are noted in the opinion.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

Michael A. Ellis; R. Gene Braswell and Herbert B. Hulse, attorneys for defendant appellant.

HUSKINS, Justice.

[1] On direct examination Officer Goodman was requested to describe the bathroom screen and did so as follows:

> "The screen was one whole screen that covered the entire window; the bottom section of the window and the top section. The screen was secured in the window by two latches on each side. These two latches had been pulled out away from the window and in the bottom left-hand corner approximately 6 inches from the corner of that screen there was an indentation marking on the window and on the screen where some object had been pried under and the screen forced out."

Upon objection by defendant, the court said:

> "I'll ask the jury not to consider it. You can't draw any conclusions. You can say that you saw tool marks."

Officer Goodman was then asked: "Did you see any tool marks?" He answered: "Yes, I did." Defendant objects and

excepts to the suggestion of the court as to the proper form of questioning and argues that the court's remarks amounted to expression of an opinion. This is defendant's first assignment of error.

Former G.S. 1-180 has been repealed and the General Assembly has enacted in lieu thereof G.S. 15A-1222 and G.S. 15A-1232 reading respectively as follows:

> "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.
>
> * * * *
>
> 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."

Although the language in former G.S. 1-180 referred only to the charge, it was always construed as including the expression of any opinion, or intimation by the judge, at any time during the trial which was calculated to prejudice either of the parties. *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977); *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173 (1954). Now, G.S. 15A-1222 and -1232 expressly so provide. Thus any intimation or expression of opinion by the trial judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

Applying these legal principles to the challenged comment by the court, we hold that no prejudice has been shown. It was perfectly competent for the witness to say that the two latches securing the screen had been pulled away from the window and that there was an indentation marking on the window and on the screen. The only objectionable part of the statement was the conclusion Officer Goodman drew from what he had observed, *i.e.*,

that "some object had been pried under and the screen forced out." Upon objection and motion to strike, the trial court instructed the jury not to consider the answer and informed the witness, "You can't draw any conclusions. You can say that you saw tool marks." Such an instruction to the witness was not a comment upon the credibility of the witness. It was not an expression of opinion on any question of fact to be decided by the jury nor was it an expression of opinion as to whether a fact had been proved. Rather, the statement simply limited the officer's testimony to a statement of what he saw, leaving the jury to draw its own conclusions. This was entirely proper. Defendant cites and relies upon *State v. Oakley*, 210 N.C. 206, 186 S.E. 244 (1936). That case is factually distinguishable, the inadvertent question by the court there clearly constituting an expression of opinion in violation of former G.S. 1-180. There is no merit in defendant's first assignment, and it is therefore overruled.

[2] Defendant argues that there is evidence to support a finding by the jury (1) that he went to the home of Barbara Smith without any intention to commit any felony therein but in response to her invitation and (2) that entry could have been made from the outside by means other than a burglarious breaking. Defendant therefore contends the trial court erred by failing to charge on the lesser included offense of non-felonious breaking and entering. This constitutes his second assignment of error.

Where it is permissible under the bill of indictment to convict an accused of a lesser degree of the crime charged, *and there is evidence to support a milder verdict*, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Moreover, 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 defendant guilty of a higher degree of the same crime." *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). Conversely, if all the evidence tends to show that the crime charged in the bill of indictment was committed, and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on the unsupported lesser degree and correctly

refuses to submit lesser degrees of the crime charged as permissible verdicts. *State v. Alston*, 293 N.C. 553, 238 S.E. 2d 505 (1977); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); 4 N.C. Index 3d, Criminal Law, § 115.

When one person breaks and enters the occupied dwelling of another in the nighttime with the requisite intent to commit the felony designated in the bill of indictment, the crime of burglary is complete even though, after entering the house, the offender abandons his intent through fear or because he is resisted. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976).

Applying these principles to the record before us, we find no evidence of a non-felonious breaking or entering. The evidence for the State tends to show that defendant committed a breaking by removing the bathroom screen and entering the occupied dwelling of Barbara Smith in the nighttime. The evidence concerning the assault he then committed upon her tends to show that his purpose was to commit rape. On the other hand, defendant's evidence tends to show that he went to Barbara Smith's home by invitation and she helped him climb through the bathroom window. There is no evidence whatever tending to show a non-burglarious breaking or entering. Under these circumstances, the judge was not required to submit that lesser included offense. *State v. Watson*, 283 N.C. 383, 196 S.E. 2d 212 (1973); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). The evidence supports only two possibilities: (1) that the defendant broke and entered Barbara Smith's home with the intention of raping her, or (2) that he entered the house by invitation, with her consent and assistance, and assaulted her only after she bit his tongue. In that posture the evidence supports only first degree burglary or not guilty. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976). For these reasons, defendant's second assignment of error is overruled.

[3] Defendant contends the trial court erred in the charge to the jury by failing to explain and apply the law to the different factual aspects of the evidence with respect to the intent to commit rape. Defendant argues that his evidence showed a complete absence of such intent while the State's evidence showed the contrary. Thus, defendant says, it was the duty of the trial judge to array the evidence on each side and apply the law thereto so as

to aid the jury in determining whether the requisite intent existed. This constitutes defendant's third assignment of error.

Intent to commit a felony is an essential element of burglary. *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943). To support a verdict of guilty of burglary in the first degree, the evidence must show and the jury must find that the intent charged in the bill of indictment was in the mind of the intruder at the time he forced entrance into the house. *State v. Thorp*, 274 N.C. 457, 164 S.E. 2d 171 (1968). Intent is a mental attitude which must ordinarily be proved by circumstances from which it may be inferred. It is seldom provable by direct evidence. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965); *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963). "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. . . . However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary." (Citations omitted.) *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). Moreover, when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged. *State v. Friddle*, supra; *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937).

Perusal of the charge in this case reveals that the trial judge recapitulated the evidence for the State and for the defendant. In so doing, the court called the jury's attention to the defendant's testimony that he had seen Barbara Smith several times during the Spring, and had seen her on the morning in question at 3:30 a.m. at the truck stop when she invited him to come to her house; that he went there and knocked but no one answered the door; that he then went to the bathroom window and called her; that she came to the bathroom, unlocked the screen, and helped him enter the house through the window; that when an argument developed about money he told her he was going to kiss her "and that was all," but when he attempted to do so she bit him, became angry, got her pistol and shot at him as he left the house. The

trial judge then told the jury: "That is my recollection of the evidence. If you disagree with that, you use your recollection and disregard mine. It is your duty to remember and consider all the evidence whether I call it to your attention or not." The judge then charged on each of the elements of first degree burglary, including defendant's intent at the time he entered Barbara Smith's home. With respect to such intent the judge charged, *inter alia*, that the State must prove beyond a reasonable doubt:

> "That at the time of the breaking and entering the defendant intended to commit the crime of rape upon the body of Barbara Smith and rape is the attempt to have sexual intercourse with a person without consent and against the will of the person and with force sufficient to overcome resistance upon her. . . ."

In the final mandate the judge charged as follows:

> "So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about 5 a.m. on July 31, 1978 the defendant Gregory Faircloth did break and enter through the bathroom window the home of Barbara V. Smith's dwelling house, without her consent in the nighttime, intending at the time to have forcible sexual intercourse with her that is to rape her forcibly and without her consent and against her will and with such force sufficient to overcome any resistance which she might offer . . . it would be your duty to return a verdict of guilty as charged. If you do not so find or if you have a reasonable doubt as to one or more of these things you would not return a verdict of guilty of burglary in the first degree as charged."

The charge, while not a model of perfection, adequately presented the law with respect to every essential element of the crime of first degree burglary, including the element of intent. Furthermore, the court correctly applied the law to the different factual aspects of the evidence. The jury could not have been misled and could not have acted under a misapprehension of the law. Nothing more is required. Defendant's third assignment of error is overruled.

Our review of the record impels the conclusion that defendant has had a fair trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

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

Justice EXUM dissenting.

I respectfully dissent from that portion of the majority opinion which holds that defendant was not entitled to have the jury consider the lesser included offense of non-felonious breaking and entering. Generally the majority correctly states the legal principles governing this question. I disagree, however, with the majority's application of these principles to the facts. As the majority correctly notes, an essential element of burglary is an intent at the time of entry to commit a felony inside the dwelling. Certainly the state's evidence is such that a jury could find that the defendant's entry here was with intent to commit rape, as charged in the indictment. Defendant's evidence tends to show, however, that there was no such intent on his part and, furthermore, that his entry was with consent of the occupant. His evidence, if fully believed, would render him not guilty of any offense. A jury is, of course, not required to accept all of his testimony. It may believe any part or none of it.

His testimony, though, does constitute positive evidence conflicting with that of the state as to the essential element of felonious intent. I find this case indistinguishable in principle from *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979). There this Court said, *id.* at 271, 254 S.E. 2d at 533:

> "It is well settled that 'a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts.' *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E. 2d 406, 413 (1977). On the other hand, the trial court need not submit lesser degrees of a crime to the jury '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*, 281 N.C. 1, 13-14, 187 S.E. 2d 706, 714 (1972). (Emphasis added.)"

In *Drumgold* the state's evidence tended to show that defendant raped Mrs. Epps overcoming her resistance with the use of a deadly weapon. Defendant's evidence tended to show that he had consensual sex with Mrs. Epps and did not have in his possession a deadly weapon, *i.e.*, that he was not guilty of any offense. We held defendant was not only entitled to have the jury consider whether he was guilty of first degree rape or not guilty, but that the lesser included offense of second degree rape should likewise have been submitted because defendant's testimony conflicted with that of the state on an essential element of first degree rape, *i.e.*, the use of a deadly weapon.

So it is here. Defendant testified in effect that he had no intent to rape Barbara Smith when he entered her dwelling. He also testified that he did not have sexual intercourse with her once inside; instead, he merely tried to kiss her and told her "that's all I am going to do." This is positive evidence of a lack of the requisite felonious intent at the time of entry, which, if believed by the jury, would render defendant guilty at most of non-felonious breaking and entering even if the jury further believed that he entered the dwelling unlawfully, *i.e.*, without Barbara Smith's consent.

Under the majority's view a defendant testifying in his own behalf would apparently have to admit that he entered the dwelling wrongfully but did so with no intent to commit rape in order to raise a factual issue regarding his intent at the time of entry. If, however, he denies both the wrongful entry and the felonious intent, he is not entitled to have the jury consider, independently of the question of wrongful entry, the question of his intent upon entering. This is not the law. *Where there is conflicting evidence* as to all elements of a criminal offense, the jury need not accept all or none of either the state's or the defendant's evidence. It may believe only part of the evidence on either or both sides. That defendant's evidence, if fully believed, would be a complete defense should not bar him from the benefit of a partial defense which would arise if his evidence is only partially believed.

This case is unlike *State v. Allen*, decided this day, 297 N.C. 429, 255 S.E. 2d 362, where the defendant denied he was the victim's assailant and introduced evidence tending to show alibi and mistaken identity. A defendant is not entitled to rely on the

possibility that the jury may believe only a part of the *state's* evidence as a ground for submission of a lesser included offense. In such a case there is no positive, contradictory evidence of a lesser offense and the jury need decide only whether defendant was indeed the perpetrator. *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864, *cert. denied*, 389 U.S. 866 (1967).

Here, however, the question is not whether defendant was the perpetrator. The question is what crime, if any, he committed. There is positive evidence to support either burglary in the first degree, non-felonious breaking and entry, or not guilty.

STATE OF NORTH CAROLINA v. HERMAN K. SIMPSON

No. 48

(Filed 12 June 1979)

1. **Criminal Law § 75.8— Miranda warnings before questioning—further warnings not necessary prior to resumption of questioning**

Miranda warnings given to defendant at 9:30 a.m. and 10:10 a.m. prior to an interview of defendant which lasted until 2:45 p.m. were still effective when officers, after reviewing with defendant typewritten notes of the interview, told defendant at 5:15 p.m. that they did not believe what he had told them and again began interviewing him, and a confession made by defendant during the second interview was not inadmissible because defendant was not again given the *Miranda* warnings, where defendant knew that the purpose of all questioning of him was to obtain information about a certain murder, and all conversations were held in the same interview room with the same officers.

2. **Criminal Law § 34— admission of another crime in confession—incompetency on question of guilt**

In this prosecution for first degree murder, first degree burglary and armed robbery, the trial court committed prejudicial error in the admission of a portion of defendant's confession in which he admitted that he committed sodomy with a dog in a vacant house in the general area in which the crimes charged were committed, since evidence of an independent, unrelated crime is inadmissible to prove defendant's guilt of the crimes charged even when that evidence is contained in defendant's confession to the crimes charged.

3. **Homicide § 15.4— deceased lying down when blow struck—expert opinion testimony**

A pathologist's opinion testimony that the body of deceased was lying down at the time one of the blows to the head was struck was sufficiently based on facts observed by the witness and facts in evidence before the jury

as to the force of the blows, the location and angle of the blows, the location of blood in the area, and the position of the body.

4. **Burglary and Unlawful Breakings § 3.1; Indictment and Warrant § 17.3—burglary indictment—wrong house number—no fatal variance**

There was no fatal variance between indictment and proof in a first degree burglary case because the indictment alleged the number of the victim's residence was 130 and the evidence showed that the number of the residence was 126.

APPEAL by defendant from *Brewer, Judge.* Judgments entered 15 September 1978 in Superior Court, CUMBERLAND County.

Defendant was tried upon indictments, proper in form, charging him with: (1) the first degree murder of Willie A. Kinlaw on 21 March 1976; (2) the first degree burglary of the residence of Willie A. Kinlaw on 21 March 1976; and (3) the armed robbery of Willie A. Kinlaw on 21 March 1976. The jury returned verdicts of (1) guilty of first degree murder, (2) guilty of first degree burglary, and (3) guilty of felonious larceny. The trial judge ruled that the first degree burglary merged with the first degree murder for judgment and imposed one life sentence. Upon the felonious larceny conviction defendant was sentenced to a prison term of ten years to commence at the expiration of the life sentence. Upon defendant's petition we certified the felonious larceny conviction for review by this Court prior to determination in the Court of Appeals.

At trial the State's evidence tended to show the following: On 20 March 1976 Willie A. Kinlaw, age approximately 76, lived alone at 126 Wade Street, Fayetteville, North Carolina. For safety his step-son had caused to be installed steel bars on all of the windows and doors except the front door opening onto the porch facing Wade Street. At about 7:30 p.m. on 20 March 1976 defendant was seen walking down Wade Street in front of the Kinlaw house. At about 8:30 to 9:00 a.m. in the morning of 21 March 1976 defendant was seen walking along Wade Street across the street from a house two houses down from Willie Kinlaw's house. He said he was going home to McDuffie Street. He was carrying a brown bag at the time. He was in the process of walking away from Wade Street.

On 21 March 1976, a Sunday morning, at approximately 10:00 a.m., Willie A. Kinlaw's sister drove to his home to carry him to church. She observed the glass broken in the front door. After ringing the doorbell and receiving no answer she went to Mr. Lee's house next door and Mr. Lee returned with her to investigate. After finding the back door ajar Mr. Lee went into the house and discovered Willie Kinlaw's body in the living room. The cause of death was determined to be penetrating wounds on either side of the head inflicted by a hard object with an "L" or a "V" shaped surface to it. An inventory of Willie Kinlaw's house disclosed that his bedroom had been ransacked and a clock-radio and an old owl head pistol were missing.

Willie Kinlaw's step-daughter took care of his bills for him. About two weeks after Willie Kinlaw's death his step-daughter received his telephone bill which reflected a long distance call at 8:02 a.m., 21 March 1976, from Kinlaw's residence to Philadelphia, Pa. The call lasted for 38 minutes. Realizing that Willie Kinlaw had no relatives or acquaintances in Philadelphia, she relayed this information to the Fayetteville police. Upon investigation by Philadelphia law enforcement officers it was determined that defendant's girl friend lived at the address of the telephone number in Philadelphia which was called from the Kinlaw residence, and that defendant had called that number around 8:00 a.m. on either 20 March 1976 or 21 March 1976. The recipient of the call did not know from where defendant called.

Defendant left Philadelphia for Fayetteville around 15 March 1976 and remained in Fayetteville until about 6 April 1976 at which time he returned to Philadelphia. While in Fayetteville defendant stayed with several other people at 626 McDuffie Street. During the morning of 21 March 1976 defendant went to 626 McDuffie Street with a brown paper bag containing a clock-radio identified as the one taken from Willie Kinlaw's house. While at 626 McDuffie Street defendant tried to sell to one of the other occupants of that address an old owl head pistol. Also while at 626 McDuffie Street defendant had in his overcoat pocket an axe head with a handle broken off to about 12 inches in length.

On 9 April 1976 when the Philadelphia law enforcement officers went to the residence to which the long distance call was made on 21 March 1976 from Willie Kinlaw's house defendant was

present at the Philadelphia address. Defendant stated that while in Fayetteville he heard on television about the Kinlaw murder. On 12 April 1976 the Philadelphia law enforcement officers obtained two statements from defendant. The first was exculpatory but the second was a confession of breaking into Willie Kinlaw's house at about 3:20 a.m. on 21 March 1976, of killing Willie Kinlaw, of calling his girl friend in Philadelphia on Willie Kinlaw's telephone, and of taking a clock-radio, an old owl head pistol, and about $20.00 from Willie Kinlaw's house.

Defendant offered no evidence on trial.

Additional evidence for the State will be discussed in connection with the assignments of error addressed in the opinion that follows.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Fred J. Williams and Malcolm (Tye) Hunter, for the defendant.

BROCK, Justice.

Defendant brings forward seven assignments of error which he presents in four main arguments. They are: (1) that the court erred in failing to suppress the evidence of defendant's inculpatory statement given to the Philadelphia law enforcement officers; (2) that the trial court erred in admission of evidence of a dead dog and the report of the autopsy performed on the dog; (3) that the trial court erred in admitting evidence of the position of the body of the deceased when one of the blows was struck to the head; and (4) that the trial court erred in its refusal to dismiss the charges of first degree burglary and of armed robbery. We will discuss them in the order presented.

Defendant timely filed a motion to suppress the evidence of defendant's inculpatory statement made to the Philadelphia, Pa. police officers. A suppression hearing was held before Judge Godwin in Cumberland County on 19 and 20 June 1978. After a full hearing Judge Godwin found facts and denied the motion. The evidence adduced at the suppression hearing is summarized as follows: At the request of Fayetteville, N.C. officers, two Philadelphia, Pa. officers on 9 April 1976 went to the residence

listed for the telephone number in Philadelphia which had been called from the telephone of the deceased, Willie Kinlaw, in Fayetteville during the morning of 21 March 1976. Upon arrival at that address, 210 West Abbottsford Avenue, the Philadelphia officers talked with Millie Smith, mother of defendant's girl friend, with Mary Melton, defendant's girl friend, and with the defendant himself. At that time defendant was not a suspect in the eyes of the Philadelphia officers, and only a brief conversation was held.

On 12 April 1976 Detective Rosenstein of the Philadelphia police went to 210 West Abbottsford Avenue. After talking with Millie Smith and Mary Melton he determined that defendant was staying at a hotel about a block away. Detective Rosenstein went to the hotel, talked briefly with defendant and asked him to accompany the officer to the Police Administration Building. Detective Rosenstein told defendant that he was investigating a murder which had occurred in Fayetteville, N.C. and would like to talk with defendant to ascertain whether defendant had information concerning the murder. Defendant agreed to talk with the officer and to go to the Police Administration Building. Defendant, as well as Millie Smith and Mary Melton, were transported to the Police Administration Building, arriving there at about 9:15 a.m. on 12 April 1976.

Defendant was taken to an interview room and was left alone until 9:30 a.m. Beginning at 9:30 a.m. defendant was fully advised of his *Miranda* rights. Defendant stated that he understood his rights, that he did not want a lawyer present, and that he would answer questions. At 9:50 a.m. Detective Cook and Detective Parker of the Fayetteville, N.C. police entered the interview room and again advised defendant of his *Miranda* rights. Defendant acknowledged that he understood his rights by initialing each paragraph. He also signed a waiver of right to counsel. This second advising of rights concluded at about 10:10 a.m. at which time defendant was offered something to eat and drink. He refused.

Detective Rosenstein, with Detectives Cook and Parker present, began his interview with defendant at 10:11 a.m., 12 April 1976. The interview continued until 2:45 p.m. except for a short break to permit defendant to use the bathroom and get a drink of

water. At 1:25 p.m. defendant was offered a meal but he refused. At 2:45 p.m. the notes of the interview were sent out to be typed and defendant was taken to the cafeteria for a meal. At 3:35 p.m. Detective Rosenstein began going over the typed statement with defendant. Review of the nine-page, typewritten statement was completed and defendant initialed each page of it at about 5:15 p.m.

The officers told defendant that they did not believe what he had told them and they continued to question defendant until 8:30 p.m. when Detective Dupe of the Fayetteville police entered the room briefly and showed to defendant a North Carolina warrant charging him with murder. Thereafter defendant stated to Detective Rosenstein, "I'll tell you what you want to know. I killed him, but I want to talk to Millie [Smith] first." Millie Smith was brought to the interview room and talked with defendant for about ten minutes, and then the interview resumed. From 9:30 p.m. to 10:45 p.m. defendant made a detailed confession. This second statement was then typed and read to defendant who stated, "To the best of my knowledge it's true and correct." However, defendant refused to sign the second statement.

[1] The foregoing summary of the facts and the findings of fact by Judge Godwin are not disputed by defendant. His argument is that the reading to defendant of his *Miranda* rights and his waiver of rights from 9:30 a.m. to 10:10 a.m. in the morning were not effective for the interrogation which started at 5:15 p.m. and the confession which began at 9:30 p.m. Defendant argues that the interview from 9:30 a.m. until 5:15 p.m. was not custodial and therefore he was not entitled to be advised of his *Miranda* rights; that since he was not legally entitled to be advised of his *Miranda* rights from 9:30 a.m. to 10:10 a.m. he could not legally waive them. He asserts that when the finger of suspicion began to point to him at 5:15 p.m. and the interrogation became custodial, the officers were required at that time to advise him of his *Miranda* rights.

This argument may say something for the ingenuity of counsel but it is far from persuasive. The defendant was accorded every courtesy and every request. He was not intimidated in any way. He clearly understood that the purpose of the interview beginning at 9:30 a.m. was to obtain information concerning the

murder of Willie A. Kinlaw in Fayetteville on 21 March 1976. All conversations were held in the same interview room with the same officers. There was no threat, coercion, hope, or promise of reward. All of the evidence discloses a confession freely, understandingly, and voluntarily given. It is inconceivable to think the defendant's clear understanding and waiver of rights at 9:30 a.m. to 10:10 a.m. had become so diluted and stale by the passage of time that at 5:15 p.m. of the same day he was deprived of any rights. If, as defendant claims, he was not legally entitled at 9:30 a.m. to be advised of his *Miranda* rights, then he was accorded more than that to which he was entitled and is in no position to complain. This argument and assignment of error are without merit and are overruled.

[2] During the course of giving the inculpatory statement beginning at about 9:30 p.m. Detective Rosenstein questioned defendant intently to verify the things defendant was saying. To account for the instrument with which Willie A. Kinlaw was killed defendant stated that he used a "wood and metal thing" which he later threw in the Cape Fear River. To account for the stolen radio he stated that he gave it to his girl friend at 626 McDuffie Street in Fayetteville. To account for the stolen pistol he confessed to the murder of a patient in a rest home in Fayetteville where he fired the pistol at someone who saw him. (The evidence of this murder was not offered in the trial of the present case.) Also during this period defendant stated to Detective Rosenstein: "If you don't believe me about what I'm saying you can have somebody go to a vacant house on _____ Street that leads off McDuffie Street and you will find a dead dog there that I f----- [had sexual intercourse with]."

In asserting the reliability of defendant's inculpatory statement the district attorney, at trial, offered evidence of the glass in the front door of the Kinlaw residence being broken as described by defendant, of the bar being removed from the back door as described by defendant, of the stolen radio being at 626 McDuffie Street as described by defendant, of the stolen pistol being seen at 626 McDuffie Street in defendant's possession, and of finding the dead dog in the vacant house as described by defendant. It is to allowing the evidence concerning the dead dog to which defendant timely objected at trial and assigns as error on this appeal.

When defendant confessed to the crimes charged against him in the indictments in this case, he also confessed to another murder involving a patient in a rest home in Fayetteville as well as to sodomy with a dog on some unknown street leading off McDuffie Street where his girl friend lived. The State did not offer that portion of his confession which related to the other murder for the reason, apparently, that generally speaking proof that a defendant has committed an independent, unrelated crime is not admissible to prove defendant's guilt of the crime for which he is being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Evidence of an independent, unrelated crime is inadmissible under this rule even when that evidence consists of defendant's confession to the unrelated crime made as a part of his confession to the crime for which he is being charged. *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949). Portions of a confession which are irrelevant to the issue of defendant's guilt of the crime and which would tend to prejudice defendant at trial should not be admitted over defendant's objections and, on proper motion, should be stricken. *State v. Lynch*, 279 N.C. 1, 18, 181 S.E. 2d 561, 572 (1971).

In *State v. Fowler, supra*, defendant was on trial for murder. The State offered against him his confession made to the sheriff. Over defendant's objection the State also offered evidence that during this confession defendant stated he was serving a life sentence in South Carolina for murder and had escaped three years before the killing for which he was being tried. This Court held that the admission of that portion of defendant's confession relating to his imprisonment in South Carolina for murder was prejudicial error necessitating a new trial. The Court granted relief on the general rule that:

> "evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. The reason for the rule is to preserve to the accused, unencumbered by suggestion of other crimes, the common-law presumption of innocence which attaches upon his plea of 'not guilty,' and to protect him from the disadvantage of extraneous and surprise charges; also to confine the investigation to the offense charged." 230 N.C. at 473, 53 S.E. 2d at 855. (Citations omitted.)

Concluding that it was error to admit this portion of the defendant's confession, the Court noted also, *id.* at 476, 53 S.E. 2d at 857, "The prejudicial effect of the challenged testimony, if incompetent and erroneously admitted, is not debated or questioned."

Those portions of defendant's confession here relating to another murder he had committed and to his having committed sodomy with a dog were irrelevant to the issue of defendant's guilt of the crimes for which he was being tried. The State properly refrained from offering that portion of his confession relating to the other murder. The trial judge, however, improperly permitted the State to offer that portion of defendant's confession relating to the sodomy. There is nothing in the record connecting the sodomy with the crimes for which defendant was being tried. This sodomy, like the other murder, was an independent and unrelated criminal offense, evidence of which should have been excluded under well-established principles of law discussed above.

The instant case illustrates the practical wisdom of the rules which, when properly applied, render evidence of independent, unrelated crimes generally admissible. After the State introduced evidence that defendant had confessed to sodomy with a dog it spent a large part of the trial proving that defendant did, indeed, commit sodomy with a dog. No less than 12 pages of the record, including the testimony of four witnesses, one of whom was a forensic pathologist, are devoted to proving: (1) a dead dog was found at the location described by defendant; (2) the dog was delivered to the office of the Chief Medical Examiner in Chapel Hill, North Carolina, where an autopsy was performed by a forensic pathologist; and (3) the autopsy revealed, among other things, that the "dog's vagina was longer and wider than it should have been for the stage of the estrous cycle that the animal was in." The pathologist testified at great length as to the possible cause of death of the dog, and whether trauma to the vagina of the animal had occurred before or after death.

That defendant might have committed sodomy with a dog was totally irrelevant to the question of his guilt of the murder, burglary, and robbery involving Willie A. Kinlaw, the crimes for which he was on trial. He was faced, however, at trial not only with defending these crimes but defending a charge, not contained in the bill of indictment, that he had committed sodomy

with a dog. We are satisfied this erroneous and prejudicial tactic on the part of the State deprived defendant of a fair trial on the charges contained in the indictments. For this prejudicial error defendant must be awarded a new trial.

[3] By his next assignment of error defendant contends that the State's expert witness, Dr. Lutman, the pathologist who examined the body of Willie A. Kinlaw, did not have sufficient facts upon which to base his opinion that the body of deceased was lying down at the time one of the blows to the head was struck. We do not agree.

Dr. Lutman testified that his examination of the deceased revealed "V" or "L" shaped wounds on either side of the head just behind each ear, penetrating into the bone, and on the right side, completely through the skull. In his opinion a large amount of force was required to have inflicted such wounds, and they were "straight-entering" wounds on each side. The injury in the skin was directly over the injury of the bone. The blows were perpendicular to the bone. Dr. Lutman then stated that he had an opinion as to the position of the body at the time one or more of these blows to the head was inflicted. This opinion was based upon the force of the blows, the location and angle of the blows, the location of blood in the area, and the position of the body.

State v. Bock, 288 N.C. 145, 217 S.E. 2d 513 (1975) and *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967) relied upon by defendant are clearly distinguishable. In both *Bock* and *Todd* the opinion testimony was ruled inadmissible because it was based on facts not within the personal knowledge of the witness and not in evidence before the jury. In the present case, Dr. Lutman testified only from facts observed by him in his examination and from facts in evidence before the jury. Admittedly the district attorney's question is somewhat disjointed but the essential elements are present. This assignment of error is overruled.

By his next assignment of error defendant contends that the trial court should have allowed his motion to dismiss the charge of armed robbery. Defendant presents no reason, argument or authority to support this assignment of error. It is therefore deemed abandoned. App. R. 28(b)(3). Nevertheless defendant was convicted only of felonious larceny and the evidence is clearly ample to support that verdict.

[4] By his final assignment of error defendant contends that the trial court should have allowed his motion to dismiss the first degree burglary charge. Defendant argues that there was a fatal variance between the indictment and the evidence because the indictment alleged that the residence of Willie A. Kinlaw was number 130 and the evidence established that the residence was number 126.

The indictment in this case charges:

> "that on or about the 21st day of March 1976, in Cumberland County, Herman K. Simpson unlawfully and wilfully did feloniously during the nighttime between the hours of 12:00 midnight and 4:00 a.m. break and enter a building occupied by Willie Alexander Kinlaw, used as a dwelling house and located at 130 Wayde Street, Fayetteville, North Carolina. This dwelling house at the time of the breaking and entering was actually occupied by Willie Alexander Kinlaw. The defendant broke and entered with the intent to commit a felony therein . . . ."

There was no controversy as to the location of the residence of Willie A. Kinlaw. The description of the house in this case was adequate to bring the indictment within the language of the statute. The house was also identified with sufficient particularity to enable the defendant to prepare his defense and to plead his conviction or acquittal as a bar to further prosecution for the same offense. This inconsequential error in the street address appearing in the indictment does not render the indictment fatally defective. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972).

Because of the error in admitting evidence of the defendant's commission of the unrelated crime of sodomy defendant is awarded a

New trial.

STATE OF NORTH CAROLINA v. JAMES GIBBS, AKA JIMMY DEAN

No. 100

(Filed 12 June 1979)

1. **Criminal Law § 66.16— pretrial photographic identifications—in-court identifications of independent origin**

Evidence was sufficient to support the trial court's conclusion that a photographic identification procedure followed by law enforcement officers was "fair, proper, legal and without suggestion on the part of anyone," and, in any event, "it was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"; furthermore, the fact that one victim had only a brief time to observe her assailant went to the credibility of her identification testimony, not its admissibility.

2. **Criminal Law § 89.2— corroborative evidence—admissibility**

There was no merit to defendant's contention that the trial court erred in admitting evidence to corroborate evidence that had been disallowed or stricken where the evidence complained of, testimony by a police officer concerning one victim's identification statements, did in fact corroborate the victim's testimony which was not objected to at trial.

3. **Criminal Law §§ 158, 169.2— failure of record on appeal to show error—curative instruction of trial court**

Where defendant's sister who testified on his behalf was cross-examined as to whether she had shot her husband on an earlier occasion, defendant was not entitled to introduce into evidence the court record showing that the charge against his sister was dismissed on the ground that the prosecutor, at the time he questioned the sister, was holding the court record in his hand and asking questions based thereon, since there was nothing in the record on appeal to show what document, if any, the prosecutor was holding at the time he was cross-examining the witness; furthermore, any harm resulting from the cross-examination of the sister concerning the shooting was cured when the trial court ordered the testimony stricken and instructed the jury not to consider it.

4. **Criminal Law § 102.5— district attorney—questions about suppressed evidence—no improper conduct**

Defendant was not entitled to a mistrial based on allegedly improper conduct of the district attorney in questioning defendant about stolen items found in his home where defendant's pretrial motion to suppress the evidence was granted; defendant himself offered evidence concerning the stolen items; the trial court then ruled that the district attorney could cross-examine defendant about the property; and defendant did not object to the court's ruling.

5. **Burglary and Unlawful Breakings § 5.8; Assault and Battery § 14.4; Robbery § 4.3— first degree burglary—assault with firearm—armed robbery—sufficiency of evidence**

In a prosecution for first degree burglary, armed robbery and assault with a deadly weapon, evidence was sufficient to be submitted to the jury where it

tended to show that during the evening a window pane in the victims' house was shattered and one victim was shot in the shoulder; defendant, who was standing outside the window, extended his hand, in which he held a pistol, into the victims' den; and defendant then took one victim's wallet and money which the victim placed on a table just inside the window.

APPEAL by defendant from *Allsbrook, J.*, 10 April 1978 Session of WAYNE Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment charging him with (1) first-degree burglary of the dwelling house of Mr. and Mrs. A. G. Pelt, (2) armed robbery of Mr. Pelt and (3) assaulting Mrs. Pelt with a deadly weapon with intent to kill inflicting serious injury. Evidence presented by the state tended to show:

On the evening of 12 November 1977 Mr. and Mrs. Pelt were in their home in Goldsboro. Mr. Pelt was a pharmacist and had practiced his profession for more than 40 years. From about 6:00 to 6:30 they ate their evening meal after which they retired to their den. On the west end of the den was a standard size window with several panes in the lower panel. Mrs. Pelt was sitting in a swivel chair doing needlework and watching television. Mr. Pelt was lying on a couch watching television, the television set being located a short distance from the side of the window. It was dark outside but the den was brightly lighted.

At around 6:45 p.m. the Pelts heard a comparatively loud noise come from the direction of their garage which was in their backyard; thinking the noise was made by their neighbor working on his car, they thought no more about it. Very shortly thereafter one of the lower panes in their den window was shattered and Mrs. Pelt was shot in her right shoulder. The Pelts then saw a young black male standing at the window with his hand holding a small pistol extended into the den. Although they did not know defendant at the time, they identified him at trial as the intruder.

Following the shooting Mr. Pelt asked defendant what he wanted and he replied that he wanted money. Mr. Pelt then told defendant that he had $20 in his wallet and defendant ordered him to put his wallet on the table just inside the window. Because of the gun being pointed at him, Mr. Pelt did as he was ordered. Defendant reached inside the room, took the wallet and left.

Police and a rescue unit were called and Mrs. Pelt was taken to the hospital where she was treated for gunshot injuries for some two weeks. It was determined that the bullet was lodged between her spine and her lungs but it was not removed from her body.

Following the shooting Mrs. Pelt's automobile, which was parked in the garage back of the house, was found to have a shattered window. The car had been placed in the garage around 4:30 or 5:00 p.m. and the glass was not broken at that time. Several days after Mrs. Pelt returned home from the hospital, her son's dog found the shell of a .22 bullet in a chair near the den window.

On 12 December 1977 Goldsboro police stopped one Al Thomas and removed a Colt .22 caliber pistol from his person. Thomas testified that he purchased the gun for $20 from defendant some three weeks prior to said date. The gun was introduced as an exhibit and expert testimony was presented showing that the .22 caliber shell found in the Pelt home was fired by the pistol which Thomas purchased from defendant.

Defendant testified as a witness for himself. He also presented his sister who corroborated his testimony that he was not in the vicinity of the Pelt residence on the evening in question. He testified that he was 17 years of age at the time of the alleged offenses and previous thereto he had been convicted of motor vehicle violations, trespassing and two counts of assault. On cross-examination he admitted to participating with Thomas in the breaking and entering of the M. R. Barfield residence at which time a pistol, bullets and other property were stolen.

Other evidence necessary to an understanding of the questions raised on appeal will be alluded to in the opinion.

The jury found defendant guilty of burglary and armed robbery as charged and guilty of assault with a deadly weapon resulting in serious injury. The court entered judgments imposing life sentences in the burglary and robbery cases, said sentences to run concurrently; and a sentence of 10 years in the assault case, this sentence to begin at expiration of the other sentences. Defendant appealed and we allowed a motion to bypass the Court of Appeals in the assault case.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Patricia B. Hodulik, for the State.

David B. Brantley for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court erred in failing to suppress evidence of a pretrial photographic identification of him by Mrs. Pelt and in permitting her to identify him at trial. This assignment has no merit.

Before a jury was empaneled, the court conducted a *voir dire* hearing at which Mr. and Mrs. Pelt testified. Following the hearing the court made findings of fact and concluded that the photographic identification procedure followed by the law enforcement officers was "fair, proper, legal and without suggestion on the part of anyone", and, in any event "it was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The court concluded that the photographic identifications of defendant by Mr. and Mrs. Pelt and their subsequent identifications of him during the *voir dire* did not violate due process or any of defendant's constitutional rights; therefore, the evidence was admissible.

The trial court properly conducted a *voir dire* hearing in the absence of the jury to determine the validity of the identification testimony of Mr. and Mrs. Pelt. 4 Strong's N.C. Index 3d, Criminal Law § 66.18. The findings of fact made by the court are supported by competent evidence presented at the hearing, therefore, they are conclusive on this court. *Ibid.* § 66.20. The findings of fact fully support the conclusion of law that none of defendant's constitutional rights were violated in the identification procedures and that the evidence was admissible.

Defendant's argument is directed primarily at the probative value of Mrs. Pelt's testimony due to her limited opportunity to observe the intruder at the time of the offenses. While the length of time Mrs. Pelt observed her assailant was brief, she was very convincing in her testimony that she formed a definite mental image of him, due particularly to his "glaring" eyes and unusual teeth. We hold that her testimony was admissible, its credibility being a question for the jury.

[2] By his assignment of error number 4B, defendant contends that the trial court erred in admitting evidence to corroborate evidence that had been disallowed or stricken. There is no merit in this assignment.

Among other authorities defendant cites 1 Stansbury's N.C. Evidence (Brandis Rev.) § 52. While we recognize the rule espoused by defendant, namely, that if testimony is never offered, or when offered is excluded, evidence offered to corroborate it is inadmissible, we hold that the rule was not violated in the instance complained of.

This contention relates to identification testimony by Mr. Pelt who initially described defendant as a light-skinned black male. On or about the date defendant was arrested—some three or four weeks after the offenses were committed—the police conducted an experiment at the Pelt home to show that a face at the den window in the nighttime, as seen from the lighted den, would appear lighter than the face actually was. In carrying out the experiment, lighting in the den was arranged as it was on the night of the crimes and Mr. Pelt viewed the faces of two black police officers, Isler and Sharpe, just outside the window.

With respect to the experiment, Mr. Pelt was asked if he made any statement about the skin tone of the two black police officers. Without objection he answered: "The only statement I remember making was that if there was any difference the light in the room might have given it a little lighter tone." He was then asked about his statement as to Officer Isler in particular and when the witness said, "I believe I told him—" defendant objected and the objection was sustained.

Detective Stocks of the Goldsboro Police Department was asked if at the time of the experiment Mr. Pelt made any statement concerning the appearance of the two black officers when observed outside the window. Defendant objected and the court gave the usual instruction limiting the purpose of the answer to corroboration of the testimony of Mr. Pelt if in fact it did corroborate. Det. Stocks testified: "Mr. Pelt stated that Sharpe and Isler both looked several shades lighter than they were through the window than they did inside the den. They appeared to be lighter."

Clearly, the testimony of Det. Stocks that Mr. Pelt stated that "they appeared to be lighter" corroborated Mr. Pelt's testimony that "the light in the room might have given it a little lighter tone". "Slight variances in corroborating testimony do not render such testimony inadmissible". *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960). As to the testimony of Det. Stocks that Mr. Pelt said, "that Sharpe and Isler both looked several shades lighter than they were through the window than they did inside the den", we think any discrepancy in this statement and what Mr. Pelt testified to was taken care of by the court's limiting instruction. Furthermore, defendant did not move to strike Det. Stocks' answer or any part thereof.

We further point out that Mr. and Mrs. Pelt testified to other physical features of defendant that were more distinctive than his "color tone". These included his "wide open eyes", his narrow teeth, and a decayed or disfigured tooth in the front of his mouth. Assuming, *arguendo*, there is merit in defendant's contention regarding the challenged testimony, we perceive no significant prejudice in view of the other identification testimony and the evidence relating to the pistol.

[3] Defendant assigns as error the failure of the trial court to allow his witness, LaRue Jones, to explain certain conduct inquired about on cross-examination and to admit into evidence a document related thereto. We find no merit in this assignment.

On cross-examination the witness admitted that she had been tried and convicted twice for shoplifting. Without objection she was then asked if she shot her husband on 10 September 1973 and she replied that she did not. On redirect-examination defense counsel asked the witness: "Mrs. Jones, I will ask you about this warrant they've been talking about a few minutes ago—if that was dismissed?" The court sustained the state's objection to the question.

After Mrs. Jones testified, defendant gave his testimony. Following that, defendant offered two birth certificates as evidence. The court then instructed the jury to disregard all testimony relating to the shooting of LaRue Jones' husband on 10 September 1973. Defendant then offered as evidence: "Defense Exhibit No. 3" but the court sustained the state's objection to the evidence.

Defendant argues that he was entitled to introduce into evidence the court record showing that the charge against his sister for shooting her husband was dismissed; that when the prosecutor was questioning the witness about the shooting he was holding the court record in his hand and asking questions based on the record. This argument is not supported by the record on appeal. There is nothing in the record before us to show what document, if any, the prosecutor was holding at the time he was cross-examining the witness and there is nothing to show what "Defense Exhibit No. 3" was. It is well settled that it is the duty of the appellant to see that the record on appeal is properly made up. 4 Strong's N.C. Index, Criminal Law § 154. "The record imports verity and the court is bound on appeal by the record as certified and can judicially know only what appears of record." *Ibid.* § 158.

As to the merits of the contention, we think any harm accruing to defendant by questioning his sister about shooting her husband was cured when the trial court ordered the testimony stricken and instructed the jury not to consider it. "Where the trial court sustains an objection or withdraws incompetent testimony and instructs the jury not to consider it, any prejudice is ordinarily cured. . . ." *Ibid.* § 169.2.

By his eighth assignment of error, defendant contends that the trial judge expressed opinions on the evidence in three parts of his charge to the jury, in violation of G.S. 15A-1222 (formerly G.S. 1-180). We note that defendant failed to comply with Rule 10(b)(2) of the Rules of Appellate Procedure, 287 N.C. 671, 699, which requires that "[a]n exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference." In fact, the only semblance of an exception to the charge set forth in the record is under the grouping of exceptions and assignments of error wherein "EXCEPTION NO. 19" states "that Judge Allsbrook erred in his charge to the jury".

Although questions relating to the jury charge are not properly presented, due to the gravity of the charges against defendant, we have carefully reviewed the court's instructions to the jury, with particular reference to the portions complained of in defendant's brief, and conclude that the instructions are free from prejudicial error.

[4] We find no merit in defendant's assignment of error contending that the trial judge abused his discretion in denying defendant's motions for a mistrial and for a new trial based on improper conduct of the district attorney.

In connection with this contention defendant complains of several acts by the prosecutor. The first of these relates to the prosecutor's questioning defendant about property stolen by him from the M. R. Barfield residence. Prior to trial defendant moved to suppress evidence relating to the property taken from the Barfield home and found in defendant's home on the ground that defendant's home was illegally searched. The motion was allowed due to defects in the search warrant. However, at trial defense counsel questioned defendant about some of the Barfield property and brought out that state's witness Al Thomas had aided in the Barfield burglary and received the Colt .22 pistol mentioned above as part of his share of the loot.

Before cross-examining defendant, the district attorney inquired of the trial judge in the absence of the jury the extent to which he could question defendant about items taken from the Barfield residence. The district attorney stated that while there had been a pretrial order suppressing evidence by the state regarding the property found in defendant's home, he felt defendant had waived protection provided by the order by giving testimony concerning the property. The court asked defense counsel his position as to questions related to the property taken from the Barfield home. Counsel's answer was, "to be frank, I think it ought to go in."

Thereupon the court ruled that since defendant had testified on direct examination about breaking and entering the Barfield home and stealing property therefrom, the district attorney would be allowed to cross-examine him about those crimes and property found in defendant's home that came from the Barfield home. Defendant did not object to this ruling.

The district attorney then asked defendant about various items allegedly taken from the Barfield home and found in defendant's home. Every item defendant was questioned about was included on an inventory prepared by the police officer in connection with execution of the search warrant. Following the questions about those items, the district attorney then asked de-

fendant what else he took out of the Barfield residence. The court sustained defendant's objection to the question. Defense counsel then moved for a mistrial "for the misbehavior of the district attorney relating to the agreement that we had concerning the items that would be asked about". The court denied the motion.

Defendant's contention that the district attorney acted improperly has no foundation whatsoever. The only agreement we can glean from the record is that the prosecutor would confine his questions to items set forth on the inventory. The specific items the prosecutor asked about were on the inventory. There were several other items on the list and we see nothing improper in the prosecutor asking the witness what else he removed from the Barfield residence.

We have reviewed the other two incidents that defendant contends constituted improper conduct on the part of the district attorney and conclude that there was no impropriety in them.

[5] Defendant assigns as error the failure of the trial court to grant his motions to nonsuit all charges. This assignment has no merit. The only question with any semblance of logic that might be raised with respect to the sufficiency of the evidence on all elements of all charges would be the quesiton of "entry" in the burglary count. The evidence showed that the extent of defendant's entry into the house was the extension of his hand or hands through the space where the window was broken.

In 13 Am. Jur. 2d, Burglary § 10, p. 327, we find:

> "Literally, entry is the act of going into the place after a breach has been effected, but the word has a broad significance in the law of burglary, for it is not confined to the intrusion of the whole body, but may consist of the insertion of any part for the purpose of committing a felony. Thus, an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony. . . ."

See also: State v. Chappell, 185 S.C. 111, 193 S.E. 924 (1937), and *State v. Whitaker,* 275 S.W. 2d 316 (Mo. 1955).

We approve the quoted statement from American Jurisprudence. We hold that the evidence was sufficient to survive all motions for nonsuit and to support the verdicts returned.

We have considered the other assignments of error argued in defendant's brief but conclude that they too are without merit. We hold that defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES ALFONZO POWELL

No. 50

(Filed 12 June 1979)

1. **Burglary and Unlawful Breakings § 7— first degree burglary—question of whether dwelling occupied—necessity for submitting second degree burglary**

The trial court in a first degree burglary case erred in failing to submit to the jury the lesser included offense of second degree burglary where the evidence tended to show that the occupants returned to the dwelling at 9:30 p.m. and went to bed in separate bedrooms at 10:00 p.m. without looking in the third bedroom; entry to the dwelling was gained by breaking a window in the unoccupied bedroom but neither occupant was awakened by the sound of shattering glass; there was a hammer, a screwdriver and a small steak knife in the third bedroom, and the overhead light fixture and light bulbs were found on the bed; and an intruder was in the dwelling and committed certain acts between 1:00 a.m. and 3:00 a.m., since the jury could have found that the intruder entered the house when it was unoccupied, was there when the occupants came home later that night, and waited in the third bedroom until the occupants were asleep before he acted.

2. **Searches and Seizures § 14— consent for limited search for identification—discovery of stolen wallet**

The trial court properly refused to suppress a stolen wallet found by officers in defendant's room where defendant falsely told officers that he was Tommy Davis and that the James Alfonzo Powell the police were looking for was his cousin, who was at a different address; defendant specifically invited the officers to conduct a limited search of his room for identification; an officer saw the billfold in a partially opened dresser drawer, stated, "I have got his wallet," opened it up and discovered it was one stolen during a burglary; and the examination by the officers was reasonably restricted to the purpose of seeking identification.

3. **Searches and Seizures § 13— consent to search—Miranda warnings not necessary**

The *Miranda* warnings need not be given by officers before obtaining consent to a search.

4. **Criminal Law § 75.9— volunteered statements—Miranda warnings not necessary**

Defendant's statements in which he gave officers a false name and falsely told them the person they were looking for was his cousin who lived at a different address were volunteered and were admissible although no *Miranda* warnings had been given.

5. **Criminal Law § 92.4— consolidation of charges from two incidents**

The trial court did not err in consolidating for trial charges against defendant of first degree burglary, first degree rape, two cases of felonious assault, secret assault, felonious breaking and entering, two cases of felonious larceny, felonious larceny of a firearm, and receiving stolen property where all charges arose from two break-ins of the same dwelling house some four days apart by a black man in faded green or khaki pants, and the two incidents were close enough in time, place and circumstance that defendant was not prejudiced by having to defend charges arising from them in one action.

APPEAL by defendant from the judgment of *Martin (John) J.*, entered in the 18 September 1978 Criminal Session of DURHAM County Superior Court.

The defendant was charged, in indictments proper in form, with first degree burglary, first degree rape, two cases of assault with a deadly weapon with intent to kill inflicting serious injury, secret assault, felonious breaking and entering, two cases of felonious larceny, felonious larceny of a firearm, receiving stolen property and felonious possession of a firearm by a convicted felon. All the cases except felonious possession of a firearm by a convicted felon were consolidated for trial.

At trial the evidence for the State tended to show the following:

At about 9:30 p.m. on 28 April 1978 Reverend Paul Baynard and his wife returned home from a trip to Asheville. They went to bed in separate rooms at about 10:00 p.m., and Reverend Baynard read until approximately 1:00 a.m.

In the early morning hours of 29 April 1978 Reverend Baynard was awakened by a sting on his head, which he discovered was bleeding profusely. He walked in a daze into his

wife's room. She was gone, and there was a puddle of blood on the floor by her bed. A metal pipe was lying nearby. Reverend Baynard wandered outside looking for his wife, and he saw someone go into his house through a window. He reentered his home and saw a black male in the hallway. Reverend Baynard then went next door, and the police were called. When he and his neighbor returned to the Baynard residence shortly thereafter, at about 3:00 a.m., his wife was back in the house and the police had arrived. Reverend Baynard noticed that his billfold was missing after the incident.

Mrs. Baynard testified that she was awakened in the early morning of 29 April 1978 by the sound of a man in her bedroom doorway "with kind of a huffing noise." The black man beat her on the head and tied a rag around her face and mouth. He then dragged her outside and raped her, telling her he would kill her if she resisted.

Reverend Baynard had to have thirty stitches as a result of the blow to his head, Mrs. Baynard had twenty-three stitches in her head. Neither of them could identify the man who attacked them.

At approximately 10:30 a.m. on 3 May 1978 Reverend W. C. Webb went to the Baynard home. He rang the doorbell and then heard glass rattling. Immediately thereafter Reverend Webb saw a black man walking through a vacant lot next door, and he noticed a storm window shattered on the Baynard driveway. The police were called. Clothes from the dressers and closets were strewn all over the bedroom floors, and there was a suitcase on the dining room table containing packages of frozen meat. Reverend Baynard testified that his .22 caliber rifle and a coin box he had made were taken.

Investigations were made after the break-ins on 29 April 1978 and 3 May 1978. Numerous fingerprints were lifted. A fingerprint expert testified that in his opinion several of the prints matched those of the defendant.

At about 7:00 a.m. on 8 May 1978 Mrs. Carrie Ellerbe went to a Durham police station and reported a disturbance at her house on 304 North Guthrie Street involving a gun. Four policemen went to that address and were informed that the person who

owned the gun was upstairs in one of the bedrooms. When the officers entered the room the defendant rented from Mrs. Ellerbe, the defendant was in bed. The police subsequently arrested him and found Reverend Baynard's wallet and coin box in the room. The gun that was taken from the Baynard house on 3 May 1978 was found downstairs in Mrs. Ellerbe's house.

The defendant presented no evidence.

The jury found the defendant guilty of first degree burglary, second degree rape, two assaults inflicting serious injury, two felonious larcenies and felonious breaking and entering. They found the defendant not guilty of secret assault and felonious larceny of a firearm. The defendant was sentenced to life imprisonment on the first degree burglary conviction and imprisonment for forty years on the second degree rape conviction, to run consecutively with the life sentence. All the remaining convictions were consolidated for judgment, for which the defendant was sentenced to imprisonment for ten years, to run concurrently with the forty-year sentence imposed for second degree rape. The defendant appealed by right to this Court on his conviction for first degree burglary, and we granted his motion to bypass the Court of Appeals on all the remaining cases on 16 February 1979.

Other facts relevant to the decision will be included in the opinion below.

O. Hampton Whittington, Jr. for the defendant.

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

COPELAND, Justice.

For the reasons stated below, we must grant the defendant a new trial on his burglary conviction, and we find no error in the remaining convictions.

[1] In his first assignment of error, the defendant contends the trial court erred in not submitting to the jury the lesser included offense of second degree burglary as an alternative to a verdict of first degree burglary. We agree; therefore, the defendant must be granted a new trial on his conviction of first degree burglary.

In *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967), Mr. and Mrs. Patton had been entertaining guests at their home all evening. At about 11:00 p.m. they both left and drove the guests home. The Pattons got back home about half an hour later and went directly to bed in separate bedrooms, but neither of them looked into the third bedroom before retiring. Mrs. Patton read until about 12:30 a.m. She was later awakened by the defendant, who raped her.

In *Tippett* the trial court submitted the charges of first and second degree burglary to the jury, and the defendant was found guilty of second degree burglary. Noting that "the house was unoccupied for approximately half an hour immediately before Mr. and Mrs. Patton returned to it and retired for the night without going into the third bedroom of the house," this Court found no error in instructing on second degree burglary even though "where all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree." *Id.* at 595, 155 S.E. 2d at 274.

In *State v. Allen*, 279 N.C. 115, 181 S.E. 2d 453 (1971), Mr. Johnson was visiting his eighty-seven year old mother at her home. He testified that his mother went to bed, and right after that, at about 10:00 p.m., he left. The defendant's statement to police officers indicated that he entered one room of Mrs. Johnson's home around midnight, saw no one and took a television set. Mrs. Johnson did not testify, Justice Lake, speaking for this Court, stated:

> "While this evidence would permit the jury to draw an inference that Mrs. Johnson was in the house at the time the defendant broke and entered, it does not, even if true, compel a finding to that effect. Consequently, the question of whether the house was actually occupied at the time of the breaking and entering was for the jury, and had there been no announcement by the solicitor [that he was proceeding against the defendant only on a charge of second degree burglary], it would have been necessary for the court to submit to the jury, as possible verdicts, both burglary in the first degree and burglary in the second degree, depending

upon whether they found, upon this evidence beyond a reasonable doubt, that the house was or was not occupied at the time of the breaking and entering." *Id.* at 119, 181 S.E. 2d at 456.

In the case before us, there is no positive evidence as to when the intruder first entered the Baynard home on 28 or 29 April 1978. There is no evidence that Reverend or Mrs. Baynard checked the third bedroom before retiring. The record does indicate, however, that entry to the house was gained by breaking a window in the unoccupied bedroom, but neither Reverend nor Mrs. Baynard was awakened by the sound of shattering glass. A policeman who investigated the case testified that there was a hammer, a screwdriver and a small steak knife in the third bedroom, and the overhead light fixture and light bulbs were found on the bed. Thus, the jury could have found that the intruder entered the house when it was unoccupied, got caught there when the Baynards came home later that night and waited in the third bedroom until Reverend Baynard went to sleep before he acted. Under these facts, the trial court was required to submit second degree burglary to the jury as a possible verdict. Its failure to do so entitles the defendant to a new trial on his conviction for first degree burglary.

[2] Defendant also argues the trial court erred in not granting his motion to suppress from evidence the items seized from his room by the policemen. We do not agree.

On 8 May 1978 four Durham policemen went to defendant's room to investigate a reported disturbance involving a gun. Officer Taylor knocked on defendant's bedroom door that was ajar, and the defendant said, "Yes." Officer Taylor identified himself as a policeman, said he would like to talk with him and then entered the room. The defendant, who was lying in bed, identified himself as Tommy Davis and stated that he had moved there three weeks ago from 416 East Geer Street.

Two other police officers in the room recognized the defendant as being James Alfonzo Powell because of a flyer they had received the previous day specifying that Powell was to be picked up for a felony charge in Fayetteville. One of the addresses given for Powell was 414 East Geer Street. These two officers then

walked over to the bed and asked the defendant to stand up. As he did, they handcuffed him and told him he was under arrest.

At this point the defendant volunteered that the officers were looking for James Alfonzo Powell who was his cousin and who defendant claimed was "at 414 East Geer Street right now. If you go over there you can get him." One of the officers asked if he had any identification to show that he was not James Alfonzo Powell because "even though I [the officer] knew in my mind it was James Alfonzo Powell, I felt that I was obligated under duty of my office to at least give him some benefit of a doubt." After the defendant claimed he had no identification, the policemen asked him if they could look for identification. The defendant replied that he had nothing to hide, and the officers could look if they wished. Officer Johnson said, "Now, are you sure," and the defendant said, "Please look, and get over there because he will be gone before you can get there."

One officer stepped over to the dresser, noticed a wallet in a partially open drawer and said, "I have got his wallet." He then opened it up and discovered it was Reverend Baynard's wallet. At the same time another officer unfolded a piece of paper that was lying on a table and saw it was a birth certificate with the name of James Alfonzo Powell on it. At this point the officers ceased their search. A search warrant was obtained, and a subsequent examination of defendant's room resulted in the seizure of some clothing and the coin box that was taken from the Baynard residence on 3 May 1978.

After a pretrial hearing on defendant's motion to suppress the evidence, the court made findings of fact and conclusions of law. In denying the motion, the court found, *inter alia*, that "the defendant specifically invited and directed the officers to look about the room for identification and in doing so the defendant freely and voluntarily and unequivocally gave his consent to a limited search of the room for identification." We agree.

It is beyond dispute that a search pursuant to the rightful owner's consent is constitutionally permissible without a search warrant as long as the consent is given freely and voluntarily, without coercion, duress or fraud. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). *See also State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Virgil*, 276

N.C. 217, 172 S.E. 2d 28 (1970). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte, supra* at 227, 36 L.Ed. 2d at 862-63, 93 S.Ct. at 2047-48.

The defendant claims that his consent was not given voluntarily because he was in custody at the time, had not been given his *Miranda* warnings and had not been told that he had the right not to consent to the search. Although all these factors are to be considered in determining the voluntariness of the consent, they are not, taken either alone or together, conclusive. *See generally Schneckloth v. Bustamonte, id.*

In this case the defendant "specifically invited" the policemen to search his room, obviously to supply credibility to his story that he was Tommy Davis and that the James Alfonzo Powell the police were looking for was his cousin, who was at a different address. There is absolutely no evidence that the officers used any duress or coercion to induce defendant's consent to a limited search for identification. Furthermore, the examination by the officers was reasonably restricted to that purpose. The only evidence of fraud was that which the defendant was attempting to perpetrate on the officers. Under these facts, the trial court correctly denied defendant's motion to suppress. This assignment of error is overruled.

[3, 4] The defendant next claims the trial court erred in allowing into evidence certain statements he made to the policemen in his room on 8 May 1978 after he had been arrested when he had not been given his *Miranda* warnings.

Before introducing Reverend Baynard's wallet and coin box into evidence, Officer Taylor and Officer Hanan testified as to what occurred in defendant's room on the morning of 8 May 1978. The only statements made by the defendant after he was arrested that were testified to were his answers to the officers' request to search the room for identification and his volunteered assertions that he was not James Alfonzo Powell and that the policemen were looking for his cousin, who was at 414 East Geer Street. The defendant had identified himself as Tommy Davis when the officers first entered the room and before he was arrested.

The officers did not give the defendant his *Miranda* warnings while in the room because "we did not intend to interrogate him." "However, the warnings required by *Miranda v. Arizona*, 334 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises." *State v. Vestal, supra* at 579, 180 S.E. 2d at 767. Furthermore, the evidence clearly shows that the defendant's comments as to his cousin being James Alfonzo Powell were volunteered by him as soon as he was arrested. They were not in response to any interrogation; therefore, they were admissible despite the fact that no *Miranda* warnings had been previously given. *See, e.g., State v. Jackson*, 280 N.C. 563, 187 S.E. 2d 27 (1972). Thus, the argument that the policeman failed to give *Miranda* warnings is without merit.

[5] Defendant contends the trial court erred in refusing to grant his motion to sever some of the charges against him. We do not agree.

The State made a motion to consolidate all the charges against the defendant, and the defendant moved to sever the charges stemming from the 29 April 1978 occurrence from the charges resulting from the 3 May 1978 incident. After a pretrial hearing on the matter, the court found:

> "1. That the defendant is charged on several bills of indictment with various charges each of which is stated as a separate count as required by N.C.G.S. 15A-924;
>
> 2. That the evidence as offered by the State tends to show a series of offenses connected together as parts of a common scheme;
>
> 3. That the several offenses were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others; and
>
> 4. That the joinder for the purpose of trial of the offenses . . . will not prejudice a fair determination of the defendant's guilt or innocence of each offense."

The court did, however, grant the defendant's motion to sever the charge of felonious possession of a firearm by a convicted felon

because "joinder for trial of [that charge] with the remaining cases may prejudice a fair determination of the defendant's guilt or innocence of each offense."

G.S. 15A-926(a) states that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Thus, there must be some sort of "transactional connection" between cases consolidated for trial. *See State v. Greene*, 294 N.C. 418, 241 S.E. 2d 552 (1978).

In this case there are two incidents some four days apart involving a break-in of the same dwelling house by a black man in faded green or khaki pants. In both instances the man seemed to be working alone and on foot, and he apparently entered the house by breaking a bedroom window. Both times the intruder stole items from the house. A motion for joinder of offenses is addressed to the sound discretion of the trial judge. *Id.* There has been no showing the court abused its discretion in this case.

Furthermore, the defendant has not pointed to how he was prejudiced from the joinder.

> "[I]n determining whether an accused has been prejudiced by joinder '. . . The question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant.'" *State v. Greene, supra* at 423, 241 S.E. 2d at 665 (quoting *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). (Emphasis in original.)

Clearly, these two events were close enough in time, place and circumstances that the defendant was not prejudiced by having to defend the charges arising from them in one action. This assignment of error is overruled.

Defendant argues the trial court erred in denying his motion to dismiss the charges against him at the close of the State's evidence.

In his brief to this Court "defendant concedes that there was probably enough evidence to go to the jury on all the charges except receiving stolen property, which the court dismissed." Defendant also admits the court correctly charged the jury on the doctrine of recent possession of stolen property. There is no doubt that the trial court correctly denied defendant's motion to dismiss. This argument is without merit.

As to the first degree burglary conviction, defendant is granted a NEW TRIAL. As to the remaining convictions, we find NO ERROR.

STATE OF NORTH CAROLINA v. DANIEL KAY ALLEN

No. 42

(Filed 12 June 1979)

1. **Burglary and Unlawful Breakings § 7— first degree burglary—intent to commit rape—failure to submit nonfelonious breaking or entering**

In a prosecution for first degree burglary in which the indictment alleged an intent to commit the felony of rape, the trial court was not required to submit nonfelonious breaking or entering as a permissible verdict where the State's evidence tended to show that the victim's assailant grabbed her around the mouth from behind and said, "I'm going to f--- you right now"; she screamed and fought with her attacker for about five minutes during which he threatened to kill her, got her down on the floor, got down beside her, and tried to remove her clothing; in the struggle she received a battered lip and a knot on her neck; and she continued to scream and her assailant apparently became frightened and ran out the door; and where defendant's evidence tended to show alibi and a case of mistaken identity.

2. **Rape § 18.4— assault with intent to rape—failure to submit assault on a female**

In this prosecution for assault with intent to commit rape, the trial court did not err in failing to submit the lesser included offense of assault on a female as a permissible verdict where all of the evidence concerning the assault tended to show that the purpose of the victim's assailant was to commit rape in that he declared his intent to have intercourse with her when he initially grabbed her, he threatened to kill her if she continued to scream, and he struggled with her in an attempt to remove her clothing.

DEFENDANT appeals from judgments of *Clark, J.*, 23 October 1978 Criminal Session, BRUNSWICK Superior Court.

Defendant was charged in separate bills of indictment with first degree burglary and assault with intent to commit rape. The two charges grew out of an incident at the trailer home of Regina Wells on 30 April 1978.

The State's evidence tends to show that Regina Wells, age twenty, lived alone in Azalea Trailer Park located one and one-half miles from the Clover Leaf Trailer Park in Leland, North Carolina, where defendant, twenty-four years of age, lived with his wife and child. On 30 April 1978 Miss Wells was working the 4 p.m. to midnight shift at Carolina Power and Light Company in Southport. She left her place of work at midnight and arrived home about 12:30 a.m. On 30 April 1978 defendant was employed at the Hercules plant near Wilmington. He also worked the 4 p.m. to midnight shift. It takes about twenty-five minutes to drive from his place of work to his home in Clover Leaf Trailer Park.

Upon arrival at her home in Azalea Trailer Park, Miss Wells removed her dress, put on a bathrobe, and talked with the babysitter for about thirty minutes. The babysitter then left and Miss Wells went to the back of her trailer to wash some clothes. All doors to her trailer were closed but not locked. There were three lights burning in the kitchen and one in the living room. When she returned to the kitchen-living room area—"just one big room with a bar separating it"—someone grabbed her from behind and said, "I'm going to f--- you right now." At that time she was clad in her underwear and a bathrobe with the belt tied in a knot at the waist. Miss Wells screamed, and he said he would kill her if she screamed. She continued to scream and struggled with her assailant for about five minutes. They fought and tussled. Her attacker got her down on the floor and got down beside her but did not succeed in removing her clothing. She received a "busted" lip and a knot on her neck during the struggle. She continued to scream and her assailant apparently became scared, got up and ran out the door. She had never seen the man before this incident, but asserted "I saw him good" during the five-minute struggle.

On 4 September 1978 Miss Wells saw defendant Daniel Kay Allen at Parker's, a local grocery store, and immediately recognized him as the man who assaulted her in her home on the night of 30 April 1978. She testified: "I was in the checkout line in front

of the door and he walked in the door while I was paying the lady for my merchandise. I first saw him when the door opened. It is right there at it and you can see everybody coming in and out. When I saw him I knew it was him and he knew it was me also. I had already paid. I walked outside and got in my car. And about that time he was leaving and I got his license plate number. When he came into Parker's I saw him look at me and he just turned his head and walked on. He walked around the magazine rack and then out. I didn't see him buy anything. After I got the license number I called the sheriff's department and I later gave the license number to Marty Folding."

Defendant was duly apprehended and taken to the sheriff's office. Miss Wells was called to the sheriff's office to view the defendant. She looked at him briefly but said nothing. Defendant said, "Please, lady, please, I'm a religious man." Miss Wells was facing him at that time and recognized his voice as the same voice she heard in her trailer the night she was assaulted.

When Miss Wells reported the incident to the sheriff's department on the night of the occurrence, she described the suspect as a white male, approximately 6 feet tall, weighing about 155 pounds, clean shaven, brown short hair, and a real pale complexion. She said he was dressed in blue jeans and a light colored short-sleeved shirt.

Defendant offered evidence and testified in his own behalf. He said he was twenty-four years of age, 6 feet 1 inch tall, weighed 155 pounds, and on the date in question lived at Clover Leaf Mobile Home Park in Leland. He testified that his wife and little girl lived with him; that on the night of 29 April 1978 he got off work at midnight and went home; that he did not go to Azalea Trailer Park in the early morning hours of April 30; that he had never seen Miss Wells prior to the time he saw her at the sheriff's office; that he had never met her formally or informally; that he had no friends who lived in Azalea Trailer Park and did not know anyone who lived there; that he did not own any blue jeans or any short-sleeved shirts; that he had never worn short-sleeved shirts because his arms are too small—"it's just something personal to me."

Defendant further testified that on 4 September 1978 he went to Parker's Grocery Store to pick up two items for his wife,

a can of Lemon Pledge and a can of Wizard Air Spray; that he bought and paid for those items at the checkout counter; that he had no recollection of seeing Miss Wells in Parker's Store on that afternoon.

On cross-examination defendant admitted that he initially denied going to Parker's Store when questioned by Officer Folding but explained that "[t]hey were accusing me of three different counts. I did not deny to them that I went to Parker's. I denied the fact of breaking into Parker's. That is what I was denying. I did not tell Mr. Folding that I hadn't left the house all day. I did go to Parker's." He further stated that Azalea Trailer Park where Miss Wells lived was about a mile and a half from Clover Leaf Trailer Park where he lived. At the time he talked with Officer Folding he said he could not associate the name "Azalea" with that particular trailer park—"I had a brother who lived there three years ago but I didn't know the name of the trailer park."

Defendant's wife testified that she had no independent recollection of the night of April 29 but did not recall that her husband arrived home late at any time during the Spring of 1978. She further stated that her husband did not have in his wardrobe any short-sleeved shirts whatsoever and did not have any blue jeans.

Defendant offered various character witnesses who testified that his general reputation in the community was good.

In rebuttal, Officer Folding testified that when he arrested defendant on 4 September 1978 and questioned him, defendant first said he had been home all day and wasn't at Parker's—"he told me that maybe twice." When informed that a lady had seen him at Parker's about four o'clock, "then he told me that he went down there and that he went to Mack's Auto Parts to buy a toggle switch and that he went into Parker's, I believe, to get two items." Defendant stated four times to Officer Folding that upon leaving Parker's Store he went straight home. Officer Folding then told him the woman said he pulled out of the parking lot at Parker's and turned right into Belvedere Estates. Defendant then replied that he had forgotten that he went by his Uncle Ben's house to see about borrowing a guitar. Officer Folding then asked defendant if he knew where Azalea Plaza Trailer Park was and

defendant replied, "No." Officer Folding further testified: "I described that you would go to S & W Grocery and go down Fayetteville Road toward North Brunswick and it would be the first trailer park on the right. He said 'No, sir.' I asked him four or five—five more times if he was sure he didn't know where the trailer park was. And he stated 'no,' he did not. I told him that his story would be checked out about not knowing where the trailer park was. He stated at that time, 'Oh, I guess you ought to know that my brother lived there about three years ago.' I asked him if he had visited his brother in that trailer park, and he said 'Yes.' I asked him how many times. And he said he couldn't tell me the number of times he had been to the trailer, but he had been to see his brother numerous times at the trailer park."

Defendant was convicted as charged and sentenced to life imprisonment for the burglary and ten years for the assault with intent to commit rape, to run concurrently. He appeals, assigning errors discussed in the opinion.

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

Ray H. Walton and William F. Fairley, attorneys for defendant appellant.

HUSKINS, Justice.

[1] Defendant assigns as error the failure of the trial court to submit nonfelonious breaking or entering as a permissible verdict, thereby limiting the jury in its deliberations to either a verdict of guilty of first degree burglary or not guilty.

In the burglary case the bill of indictment charges that defendant broke and entered the occupied dwelling house of Regina Wells in the nighttime with intent to commit a felony therein, to wit: "with the unlawful, wilful and felonious intent to ravish and carnally know Regina Wells by force and against her will. . . ." Upon that charge the State is required to prove the intent to commit the felony designated in the indictment. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923).

Defendant does not contend the evidence of such intent was insufficient to carry the case to the jury. Rather, he contends the

evidence of intent to rape "was such that the jury should have been allowed to decide the presence or lack thereof and to have been given the option of convicting the appellant on a lesser offense which did not require the presence of such intent." Defendant therefore argues that the lesser included offense of nonfelonious breaking or entering should have been submitted.

Where it is permissible under the bill of indictment to convict the accused of a lesser degree of the crime charged, *and there is evidence to support a milder verdict*, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Unless there is evidence of guilt of the lesser degree, however, the court should not submit it. *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931). If all the evidence tends to show that the crime charged in the bill of indictment was committed, and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on the unsupported lesser degree and correctly refuses to submit lesser degrees of the crime charged as permissible verdicts. *State v. Alston*, 293 N.C. 553, 238 S.E. 2d 505 (1977); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); 4 N.C. Index 3d, Criminal Law, § 115.

The crime of burglary is complete when one person breaks and enters the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the felony designated in the bill of indictment, even though, after entering the house, the accused abandons his intent through fear or because he is resisted. *State v. Wells, supra*; *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

The record in this case is barren of any evidence of nonfelonious breaking or entering. The evidence for the State tends to show that the victim's assailant grabbed her around the mouth from behind and said: "I'm going to f--- you right now." She screamed and fought and tussled with her attacker for about five minutes during which he threatened to kill her, got her down on the floor, got down beside her, and tried to remove her clothing. In the struggle she received a battered lip and a knot on her neck. She continued to scream and her assailant apparently became frightened and ran out the door. Defendant's evidence

tends to show alibi and a case of mistaken identity. Thus, the State's evidence strongly suggests the intent to rape which was later abandoned through fear because Miss Wells continued to scream and resist, while defendant's evidence tends to prove he was elsewhere and the crimes charged, if committed at all, were committed by someone else. There is no evidence of a nonfelonious breaking or entering. On the evidence of record defendant was guilty of the crimes charged in the bills of indictment or he was not guilty of any offense. *State v. Alston*, supra. Defendant's first assignment of error is overruled.

[2] In the case charging assault with intent to commit rape, defendant contends the court erred in failing to submit, as a permissible verdict, the lesser included offense of assault on a female.

This assignment involves the same legal principles discussed with respect to the first assignment of error. It suffices to say that all of the evidence concerning the assault committed upon Miss Wells tends to show that the purpose of her assailant was to commit rape. His declaration when he initially grabbed her so indicates. His threat to kill her if she continued to scream so indicates. His struggle to disrobe her so indicates. "There is no evidence whatever tending to show that she was assaulted for any other purpose, or for no purpose. Under these circumstances, it was not error to instruct the jury that they might return either a verdict of guilty of assault with intent to commit rape or a verdict of not guilty." *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Lesser included offenses must be submitted when, and only when, there is evidence to support them. *State v. Watson*, 283 N.C. 383, 196 S.E. 2d 212 (1973).

State v. Banks, 295 N.C. 399, 245 S.E. 2d 743 (1978), cited and relied on by defendant, is clearly distinguishable. There, some of the evidence tended to show that it was not defendant's intent to rape the victim but rather to gratify his passion in other ways. Hence, there was evidence sufficient to support a conviction of assault with intent to commit rape or a conviction of assault upon a female, depending upon defendant's intent at the time of the assault. This created a jury question.

For the reasons stated defendant's second assignment of error is overruled.

A careful review of the entire record reveals a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

BOARD OF TRANSPORTATION v. ELLA MAE INGRAM JONES

No. 110

(Filed 12 June 1979)

1. **Eminent Domain §§ 6.3, 13.5 — determining value — damages to remainder — real estate appraiser's opinion — jury instruction on before and after value**

G.S. 136-112 speaks only to the exclusive measure of damages to be employed by the commissioners, jury or judge in a condemnation proceeding and in no way attempts to restrict expert real estate appraisers to any particular method of determining the fair market value of property either before or after condemnation; therefore, it was not error for the trial court to permit defendant's witness to testify that he derived defendant's damages by application of the "value of the part taken plus damages to the remainder" formula, since the court instructed the jury only on the before and after value method to compute defendant's damages and did not repeat in its charge any of the individual damages that were testified to.

2. **Eminent Domain §§ 6.8, 13.5 — general benefits — failure to instruct — no error**

In a condemnation proceeding to secure property for the building of a highway, the trial court did not err in failing to instruct the jury on general benefits even though it did charge on special benefits.

3. **Eminent Domain § 13.5 — general and special benefits — failure to request further jury instructions**

Plaintiff in a condemnation proceeding could not complain that the trial court failed adequately to define general and special benefits where plaintiff failed to request further instruction.

Justice BROCK did not participate in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals, 38 N.C. App. 337, 248 S.E. 2d 108 (1978) (*Brock, C.J.* (now Justice), concurred in by *Clark* and *Martin (Harry), JJ*), which reversed the judgment of *Herring, J.*, entered in the 25 July 1977 Session of WAKE County Superior Court.

This is a condemnation proceeding instituted by plaintiff, the North Carolina Board of Transportation, against certain property belonging to defendant, Ella Mae Ingram Jones. The taking was for the purpose of constructing a segment of the Raleigh Beltline from U.S. Highway 64 to Poole Road, just east of the city of Raleigh in Wake County.

Before the appropriation the defendant owned land consisting of 166.43 acres, 9.86 acres of which were south of Poole Road with the remainder lying north of Poole Road. Plaintiff condemned 29.48 acres in fee and .37 acre as easements. The condemned portion ran approximately through the center of defendant's land. After the taking, defendant's retained land was divided into three separate parts: 61.26 acres on the west side of the projected Beltline, 70.93 acres on the east side of the projected Beltline north of Poole Road and 4.39 acres on the east side of the projected Beltline south of Poole Road.

The parties stipulated before trial that the only issue to be decided was the amount of compensation to be paid defendant because of the appropriation of a portion of her property. Both the defendant and the plaintiff offered value witnesses who gave figures ranging from $500,000 to $98,105 as the difference between the fair market value of defendant's property before the taking and the fair market value of defendant's remaining property after the taking. The jury awarded the defendant $250,000, and the plaintiff appealed. The Court of Appeals reversed, granting plaintiff a new trial, and this Court granted defendant's petition for discretionary review.

Attorney General Rufus L. Edmisten by Assistant Attorney General Robert W. Newsom III for the plaintiff.

Johnson, Gamble and Shearon by Richard O. Gamble for the defendant.

COPELAND, Justice.

For the reasons stated below, we reverse the decision of the Court of Appeals.

[1] The Court of Appeals first held that plaintiff was entitled to a new trial because of the trial court's failure to strike the

testimony of one of defendant's expert witnesses. We do not agree.

Mr. W. R. Rand was a witness for the defendant at trial. After being found by the court to be an expert in the field of real estate appraisal, he testified that his estimate of the fair market value of defendant's entire property, including improvements thereon, prior to the taking was $755,737. The witness then testified that in his opinion the fair market value of defendant's remaining property after the taking was $444,847.

As Mr. Rand began explaining the bases for his estimates, it became apparent that he arrived at his valuation of the property after the appropriation by assessing and totalling all the damages he felt were caused by the condemnation, which in this case he estimated to be $310,890, and then subtracting that amount from his original appraisal of the value of the entire property before the taking. The plaintiff moved to strike the expert's testimony on the ground that his method of valuation was in conflict with G.S. 136-112(1). Its motion was denied.

G.S. 136-112 states in pertinent part:

> "The following shall be the measure of damages to be followed *by the commissioners, jury or judge* who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." (Emphasis added.)

It is important to note that the statute speaks only to the exclusive measure of damages to be employed by the "commissioners, jury or judge." It in no way attempts to restrict *expert real estate appraisers* to any particular method of determining the fair market value of property either before or after condemnation. *See generally State Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value).

> "Three *alternative* formulas are recognized for measuring just compensation in partial-taking cases: (i) The *value of the part taken* rule; (ii) *Value of the part taken plus damages to the remainder* rule; and, (iii) The *before and after value* rule. . . . The distinction between the second and third formulas is narrow, but the important point here is that they are alternatives. Therefore, it would be inappropriate to instruct the jury as to both formulas. . . . This does not mean that evidence of the value of the lands taken plus damages to the remainder is not admissible. In fact, it is appropriately considered by appraisers as two of the many guides for determining 'before and after values.' For example, all the appraisers in this case followed that procedure." *Young v. Arkansas State Highway Commission*, 242 Ark. 812, 814-15, 415 S.W. 2d 575, 577 (1967). (Emphasis in original.)

Therefore, if there is a jury trial on the issue of compensation in a partial taking case, such as in this one, the trial court is required to instruct the jury *only* on the before and after value rule set fort in G.S. 136-112(1). If he were to *instruct* on that method and *also* on the value of the part taken plus damages to the remainder theory, the jury may be misled into believing that "after they had determined the 'before and after' value they could also take the diminution in the value of the remainder into consideration." *Mississippi State Highway Commission v. Hall*, 252 Miss. 863, 874, 174 So. 2d 488, 492 (1965). *See also Wheeler v. State Highway Commission*, 212 Miss. 606, 55 So. 2d 225 (1951). This erroneous process would result in double compensation for some damages. This Court has noted that evidence regarding the adverse effects of the condemnation on the remaining property is admissible, but such effects "are not separate items of damages, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property." *Gallimore v. State Highway and Public Works Commission*, 241 N.C. 350, 355, 85 S.E. 2d 392, 396 (1955).

Mr. Rand in this case guaged his appraisals of defendant's property in terms of the fair market value of the property before and after the taking. He then explained how he arrived at his estimates, which he was entitled to do. The fact that he used a particular method, value of the part taken plus damages to the remainder, to arrive at his estimate of the fair market value of the

property after the taking did not render his testimony incompetent. The trial court instructed the jury only on the before and after value method to compute defendant's damages. The court did not repeat in its charge any of the individual damages that were testified to, thus making it very unlikely the defendant was overcompensated by the jury's award. *See Mississippi State Highway Commission v. Hall, supra.* Plaintiff's motion to strike Mr. Rand's testimony was correctly denied.

[2] The Court of Appeals also held that the trial court erred in not instructing the jury on general benefits, even though it did charge on special benefits.

"[S]pecial benefits are those which arise from the peculiar relation of the land in question to the public improvement. . . . [G]eneral benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." *Templeton v. State Highway Commission*, 254 N.C. 337, 341, 118 S.E. 2d 918, 922 (1961). (Citation omitted.) Plaintiff claims the following testimony by one of its witnesses constituted evidence of general benefits:

> "I determined that the land lying east of the Beltline had been enhanced due to the easy access to other areas of Wake County, and it's my opinion that this would escalate the development of that property and decrease the time necessary to develop it. I placed a value of $3,750.00 per acre on the tract of land lying east of the Beltline after the taking, which is an increase of $500 per acre.
>
> I included everything east of the road in that category. The land valued at $3,750.00 an acre afterwards includes the 4.39 acres lying to the south side of Poole."

From an examination of the above testimony, it is clear that the witness was referring only to the *defendant's* land. His reference to "everything east of the road" meant that he felt *both* of defendant's tracts lying east of the projected Beltline were included in his estimate of enhanced property value due to the construction of the highway.

It is true that the type of benefit to which the witness was testifying—easy access to other areas of Wake County—would

normally be enjoyed by other landowners in the area. Yet this does not appear to be necessarily so. For example, other property may have no reasonable access to the proposed highway. The only evidence in the record that even refers to other property in the area came from Mr. Rand, defendant's witness, who stated that "[t]here wasn't anything within 15-20 miles of that piece that was comparable to it, not with that road coming to it."

The burden of proving general and special benefits was on the plaintiff in this action, and we have stated that the trial court should not charge on such if their existence is merely speculative or uncertain. *Kirkman v. State Highway Commission*, 257 N.C. 428, 126 S.E. 2d 107 (1962). The trial court did not err in this case by not instructing the jury on general benefits.

[3] The plaintiff contends the trial court erred in its instructions to the jury on benefits in that it failed to adequately define that concept or to distinguish between general and special benefits. This Court has said that "[t]he failure to define more fully the meaning of general or special benefits or to distinguish between them, in the absence of timely request, may not be held for error." *Simmons v. North Carolina State Highway & Public Works Commission*, 238 N.C. 532, 535, 78 S.E. 2d 308, 311 (1953). Plaintiff made no such request; this assignment of error is without merit.

For the reasons stated above, the trial court is affirmed and the decision of the Court of Appeals is

Reversed.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROY LEE BARNES

No. 69

(Filed 12 June 1979)

1. **Criminal Law § 113.7— instruction on acting in concert—sufficiency of evidence**

The evidence was sufficient to support an instruction that defendant was acting in concert with others in the acts constituting rape, robbery and assault where there was no evidence that defendant personally committed such crimes but the evidence was plenary that they were committed and that the perpetrators were defendant's companions, and there was substantial evidence from which the jury could find that defendant was a willing and active participant in the pattern of sexual abuse, assault, robbery and terrorization inflicted upon the victim after he and his companions entered her home.

2. **Criminal Law §§ 114.3, 168.1— failure to include not guilty as possible verdict in one portion of charge—no prejudice to defendant**

Defendant was not prejudiced when the court instructed that the jury could return one of three possible verdicts of "guilty of an assault inflicting serious injury or guilty of an assault on a female" but inadvertently failed to say that the third possible verdict was not guilty where the court shortly thereafter told the jury that unless it found defendant guilty of assault inflicting serious injury or assault on a female beyond a reasonable doubt, its duty was to find defendant not guilty.

3. **Criminal Law §§ 114.2, 118.2— statement of defendant's contentions—supporting evidence**

It was not error for the trial court to state defendant's contentions in a manner logically consistent with defendant's own testimony even if defendant's testimony did strain credulity.

4. **Criminal Law § 114.3, 168.1; Rape § 6— instructions on first degree rape—subsequent withdrawal of first degree rape as permissible verdict**

In a rape prosecution in which defendant was tried under the theory of acting in concert, defendant was not prejudiced when the court instructed on the elements of first degree rape and then, realizing that there had been no proof that any person who had intercourse with the prosecutrix was over 16 years of age, stated that the evidence did not prove first degree rape and the jury could not return such a verdict.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Small* at the 8 August 1977 Criminal Session of PITT Superior Court and on bills of indictment proper in form, defendant was tried and convicted of second degree rape, armed

robbery, assault inflicting serious injury, felonious entry and crime against nature. The rape and robbery charges were consolidated for judgment and defendant was sentenced to life imprisonment therefor. Defendant was sentenced to imprisonment for two years on the assault charge. On the felonious entry and crime against nature charges, which were also consolidated for judgment, defendant was sentenced to imprisonment for ten years, to commence at the expiration of the other sentences. Defendant appeals the rape and robbery convictions pursuant to G.S. 7A-27(a). We allowed initial review of the assault, felonious entry and crime against nature convictions pursuant to G.S. 7A-31(a). This case was docketed and argued as No. 7 at the Spring Term 1978.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the state.

Garry T. Pegram, Attorney for defendant appellant.

EXUM, Justice.

The charges upon which defendant was convicted arose from the same incident as the cases of *State v. Sylvester Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978); *State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978); and *State v. Roderick Thomas Joyner*, 295 N.C. 349, 255 S.E. 2d 390 (1979). Although we have given careful attention to each of defendant's assignments of error, we do not discuss here those which raise questions already answered in the other cases. In assignments of error unique to this case, defendant argues the trial court committed prejudicial error by: (1) emphasizing the theory of "acting in concert" in its charge; (2) expressing an opinion as to defendant's guilt; (3) wrongly stating defendant's contentions; and (4) beginning an instruction on first degree rape and then correcting itself when it realized the evidence would not support it. We find no merit in any of these arguments.

The details of the crimes against Mrs. Carolyn Lincoln in which defendant allegedly participated have been set out fully in the other cases involving this incident. There is no need to repeat them here. We set forth only the evidence that relates specifically to defendant.

The state's evidence showed that two men initially forced their way into Mrs. Lincoln's house on 11 January 1977. Defendant and two others came in shortly afterward. All five sexually assaulted Mrs. Lincoln. At one point defendant got on top of her, rubbed his penis against her, kissed her, and fondled her breasts. While defendant was on top of her, another of the men forced her to perform fellatio on him. Later, while another of the men was having sexual intercourse with her, defendant placed his penis in her mouth. When Mrs. Lincoln was assaulted by having a soft drink bottle placed in her rectum, defendant "had moved back with the other ones that were holding my legs." Later, as she was dragged toward the door defendant followed within a few feet laughing.

Defendant was arrested in the early morning hours of 12 January 1977 in the company of some of other defendants in these cases. Lying on the floor near him was a green Army field jacket containing a pistol stolen from Mrs. Lincoln.

Other evidence offered against defendant included bloodstained clothing he was wearing at the time of his arrest and a confession he gave police officers. The confession was as follows:

> "On January 11, 1977, I was with some more boys and we ran into a ditch on a dirt road. Two of the boys went to a house to get help. Me and the other two boys started to leave and we went to the house where the other two dudes were at. When we got there I saw a little baby sitting on the bed. We went into the kitchen. One of the boys was f------ her. Blood was in the floor at the time. He got finished and I got down to f--- her, and the blood made me sick and I could not get a hard up. I got up and started going through the house. I saw the baby sitting on the bed. I told the baby nobody was going to hurt her. The baby said was we fixing to leave and I told the baby I was. I went into the bed and got a red pocketbook and took one nickel and one penny. I then went out the front door, and all the rest came out behind me."

Defendant testified in his own behalf. He stated that on 11 January 1977 he was in the company of Alton Ray Curmon, Sylvester Joyner, Roderick Joyner and Roy Ebron. Their car ran off the road and they could not get it out of the ditch. Curmon and Sylvester Joyner went up to a house to get help. Defendant

and two others waited by the road. They became cold, and they went up to the house as well. When he entered he saw a woman lying naked in the kitchen. He got down on the floor "fixing to do something to her" but "didn't have no taste for it," so he got up and went into another room. He took six cents from a pocketbook he saw in there, and then he and the other defendants left. He neither had sexual relations with Mrs. Lincoln nor saw anyone else do so.

[1] Defendant argues that the trial court erred by improperly emphasizing "acting in concert" throughout his instructions to the jury. The trial judge, after giving an initial instruction on "acting in concert" referred to it a number of times in his instructions to the jury on the rape, robbery and assault charges. There was no evidence that defendant personally committed these crimes. There was, however, plenary evidence that they were committed and that the perpetrators were defendant's companions. *See State v. Roderick Thomas Joyner, supra,* 295 N.C. 349, 255 S.E. 2d 390; *State v. Curmon, supra,* 295 N.C. 453, 245 S.E. 2d 503; *State v. Sylvester Joyner, supra,* 295 N.C. 55, 245 S.E. 2d 367. There was also substantial evidence, recited above, from which the jury could find that defendant was a willing and active participant in the pattern of sexual abuse, assault, robbery and terrorization inflicted upon Mrs. Lincoln after he and his companions entered her house. This evidence was sufficient to support an instruction that defendant was acting in concert with the others in the acts constituting rape, robbery and assault. *See State v. Roderick Thomas Joyner, supra.* "The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and *declare and explain the law arising on the evidence.*" *State v. Cousin,* 292 N.C. 461, 464, 233 S.E. 2d 554, 556 (1977) (Emphasis added.). This is precisely what the trial judge here was doing in his instructions on "acting in concert." Defendant's argument is without merit.

[2] Defendant next contends the trial judge improperly expressed an opinion as to defendant's guilt in his instructions to the jury on the assault charge by stating:

> "To this charge you may return one of two possible—one of three possible verdicts: guilty of an assault inflicting serious injury, or guilty of an assault on a female."

The trial judge obviously meant to, but did not, say that the third possible verdict was not guilty. Defendant argues that this lapse constituted prejudicial error. We do not agree. Shortly after giving the instruction quoted above, the trial judge told the jury that unless it found defendant guilty of assault inflicting serious injury or assault on a female beyond a reasonable doubt, its duty was to find defendant not guilty. In the face of this clear explanation of the law, his earlier omission could not have been prejudicial to defendant. *See State v. Sanders*, 280 N.C. 81, 185 S.E. 2d 158 (1971) (minor misstatement which could not have misled the jury held nonprejudicial). This assignment of error is overruled.

[3] Defendant also assigns as error certain statements by the trial judge regarding the evidence and defendant's contentions. Defendant cites in support of his argument the proposition that when "the judge must strain credulity to state any contrary contention for defendant, his obvious solution is to state no contentions at all." *State v. Douglas*, 268 N.C. 267, 271, 150 S.E. 2d 412, 416 (1966). We have examined each of the statements about which defendant complains. In each the trial judge's language tracks almost precisely evidence in the record, including defendant's own testimony. If credulity was strained here, it was by the testimony of defendant, not by the trial judge's statement of his contentions. It is not error for the trial judge to state the defendant's contentions in a manner logically consistent with the defendant's own testimony. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death penalty vacated*, 429 U.S. 809 (1976). This assignment of error is overruled.

[4] Defendant's next assignment of error concerns the trial judge's instructions on rape. Defendant was charged with first degree rape. The trial judge began his instructions on rape with an explanation of the elements of this offense. He then realized that there had been no proof that any of defendant's companions were over 16 years of age, a necessary element of first degree rape. *See* G.S. 14-21(1). At that point, he stated:

> "And the Court, realizing at this time that there is no evidence showing that the person having intercourse—if one did—with the witness, Carolyn Lincoln, was more than 16 years of age and that the defendant at that time was more than—I mean, that the defendant was acting in concert with

that person, the Court instructs you that you may not return a verdict of guilty of first degree rape, and the Court corrects its instructions on that part."

Defendant contends the instructions on first degree rape coupled with the trial judge's subsequent statements that the evidence did not prove it and the jury could not return such a verdict constituted prejudicial error. We do not agree. This Court has uniformly held that an inadvertent mistake by the trial judge, which he subsequently corrects in his instructions to the jury, is harmless error. *See, e.g., State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963); *State v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238 (1945); *State v. Rogers*, 216 N.C. 731, 6 S.E. 2d 499 (1940); *State v. Baldwin*, 178 N.C. 693, 100 S.E. 345 (1919). This rule applies here, and this assignment of error is therefore overruled. In the trial there was

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. WINFREY LEE HUNT

No. 108

(Filed 12 June 1979)

1. **Robbery § 3— thing of value taken—witness not present at crime scene—testimony admissible**

In a prosecution for murder and armed robbery of a grocery store owner, the trial court did not err in allowing the widow of the victim, who was not present at the crime scene, to testify concerning the amount of money on hand at the start of the day's business where there was testimony by three others tending to show that something of value, money, was taken from the store.

2. **Criminal Law § 169.3— evidence offered by defendant—objection to similar evidence not sustained**

Defendant could not complain of the admission of testimony concerning a polygraph test where defendant himself first asked questions about the test.

3. Criminal Law §§ 43, 61.2— photograph of shoe sole print—admissibility as substantive evidence

A photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence.

APPEAL by defendant from *Lee, Judge.* Judgments entered 20 October 1978 in Superior Court, DURHAM County.

Defendant was tried upon separate indictments charging him with (1) the murder of David Daniel Riddle, Jr. on 7 January 1978; and (2) the armed robbery of David Daniel Riddle, Jr., trading as Riddle's Cash Grocery, on 7 January 1978. On the murder charge the State elected to prosecute for second degree murder only.

The charges against this defendant were consolidated for trial with three charges against his brother, Jesse James Hunt for (1) accessory after the fact to murder; (2) accessory after the fact to armed robbery; and (3) receiving stolen goods. The disposition of the charges against Jesse James Hunt do not appear from the record before us. It is only the appeal of Winfrey Lee Hunt that is brought before us by this record.

At trial a co-defendant and co-participant in the armed robbery, Charles Green, who had already entered pleas of guilty to (1) armed robbery and (2) accessory after the fact to murder, testified for the State.

Defendant was convicted of second degree murder for which he was sentenced to life imprisonment. He was also convicted of armed robbery for which he was sentenced to a term of fifteen to twenty-five years imprisonment to begin at the expiration of the life sentence. On 2 March 1979 we allowed defendant's motion for review of the armed robbery conviction prior to determination by the Court of Appeals.

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

During Friday evening, 6 January 1978, defendant asked Charles Green to help him rob Riddle's grocery store, but Charles told defendant he "was not game for that." Again on Saturday morning, 7 January 1978, defendant asked Charles Green to help him rob Riddle's store, but Charles again turned him down. However, about 2:30 p.m. on 7 January 1978, Charles Green went with

defendant to rob Riddle's store. Charles Green stood outside the front door while defendant went into the store. Defendant was wearing Pro-Ked tennis shoes. Defendant jumped up on the counter and pointed a gun at Mr. Riddle, announcing that it was a holdup. Charles Green testified: "Mr. Riddle threw his hands up and started moving back by the meat counter. When he got back by the meat counter his hands dropped and Winfrey shot him. I thought he asked me to come in and get the money, but I was scared and he got it. He came to the door and we took off. I went down Gurley [Street] and he went up Primitive [Street]." Later defendant gave Charles Green $40.00 of the money taken from Riddle's store.

The defendant's evidence tended to show that he was in the company of several people at another place in Durham at the time of the robbery and was not present at Riddle's store.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen and Assistant Attorney General Nonnie F. Midgette, for the State.

William A. Graham III for defendant.

BROCK, Justice.

[1] By his first assignment of error defendant argues that the trial judge committed prejudicial error in allowing Mrs. Riddle, widow of the murder victim, to testify as to the amount of money on hand to start the day's business. Mrs. Riddle testified that the morning of 7 January 1978 was the first time in about eight years that she had not gone to the store with her husband. She testified: "We generally started the day's business with around $150.00 in ones, fives, and tens, never twenties." She further testified that after the robbery and shooting of her husband around $150.00 was missing from the store. Defendant argues that this testimony established an essential element of the State's case on robbery because it is the only testimony showing that anything of value was taken from the store. Defendant overlooks the testimony of Officer Blalock that when he arrived at the scene the drawer to the cash register was open and some pennies and change were on the floor. He overlooks the testimony of Officer Jennings who testified that he picked up the money at the store and that it was only coins, no bills. Defendant also overlooks the

testimony of Charles Green who testified that defendant pointed the gun at Mr. Riddle announcing that it was a holdup; that defendant got the money; and the defendant later counted out the money giving Charles Green $40.00 of it.

The kind or value of the property taken in a robbery is immaterial, so long as it is not the property of the accused. Furthermore, the offense proscribed by G.S. 14-87 is complete if there is an attempt to take property by use of firearms or other dangerous weapon. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974).

We find no prejudicial error in the admission of this testimony by Mrs. Riddle. This assignment of error is overruled.

[2] During defendant's cross-examination of the State's witness Charles Green defendant asked numerous questions about Charles Green having taken a polygraph test at the request of the police. The State did not inquire about the polygraph test until after defendant had done so. Defendant offered no objection to any of the testimony. However, he now assigns as error the admission of testimony about the polygraph test.

The only questions asked by the State were for the purpose of clarifying where and by whom the test was given. The results of the test were never offered in evidence by anyone.

Defendant may not deliberately bring out testimony and then complain of its admission. While testimony as to the results of a polygraph test is not admissible to show the guilt or innocence of an accused, such evidence admitted without objection may be considered by the jury. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). This assignment of error is overruled.

During the course of the investigation of this murder-robbery the officers made photographs of the shoeprint impressions on the glass countertop in Riddle's store. The photographs were then compared with photographs of the shoeprint impressions made from defendant's shoes, which were seized at his home incident to a consent search. The State's witness Curtis was found by the trial court, from competent evidence, to be an expert in forensic sciences and more particularly in the field of identification, analysis and comparison of footprints and footwear. The State's witness pointed out in detail the similar shoe sole defects found in the photographs of the shoeprint impressions taken from the

glass countertop in Riddle's store and the shoe sole defects found in the photographs of the laboratory test impressions made from defendant's shoes. He gave his opinion that the shoe sole prints on the glass countertop in Riddle's store were made by defendant's shoes. The trial court admitted the photographs as substantive evidence. Citing the long established rule to the effect that photographs are admissible in evidence only to illustrate the testimony of a witness and not as substantive evidence, *see e.g. State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970), defendant assigns error to this action by the trial court.

The photographs complained of by defendant were shown by extrinsic evidence to portray accurately the shoeprint impressions that they purported to show. We find no just cause to restrict their use to illustrative purposes only. Indeed, to do so, would completely eliminate the story that these accurate silent witnesses can tell, and would also eliminate the basis for the opinion and explanation of the expert witness.

[3] While we are not required by this case to repudiate entirely the "illustrative" doctrine with respect to all photographs, we hold that a photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence. *See State v. Foster*, 284 N.C. 259, 270-73, 200 S.E. 2d 782, 791-93 (1973) where a photograph of fingerprints was approved as substantive evidence. *See also, Stansbury's North Carolina Evidence*, § 34 (Brandis Rev. 1973); *McCormick on Evidence*, § 214 (2d ed. 1972); and 2 C. Scott, *Photographic Evidence*, § 1022 (2d ed. 1969), criticizing the North Carolina "illustrative" doctrine. For approval of allowing photographs as substantive evidence *see 3 Wigmore on Evidence*, § 790 (Chadbourn Rev. 1970).

Defendant's assignment of error to the admission of the photographs of the shoe sole print impressions as substantive evidence is overruled.

We have considered each of defendant's remaining assignments of error and finding them to be without merit they are overruled. In our opinion defendant had a fair trial, free from prejudicial error.

No error.

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

BOARD OF TRANSPORTATION v. REVIS

No. 85 PC.

Case below: 40 N.C. App. 182.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 June 1979.

COMMISSIONER OF INSURANCE v. RATE BUREAU

No. 104 PC.

Case below: 40 N.C. App. 85.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

FUNGAROLI v. FUNGAROLI

No. 29.

Case below: 40 N.C. App. 397.

Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

GARRISON v. MILLER

No. 98 PC.

Case below: 40 N.C. App. 393.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

HALE v. POWER CO.

No. 105 PC.

Case below: 40 N.C. App. 202.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

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

HARRINGTON v. COLLINS

No. 127 PC.

No. 57 (Fall Term)

Case below: 40 N.C. App. 530.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 June 1979.

HARRIS v. HARRIS

No. 86 PC.

Case below: 40 N.C. App. 26.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979 without prejudice to the right of plaintiff to institute further proceedings in garnishment to recover arrearages, if any, and current and future payments, if appropriate, in child support payments.

HASTY v. CARPENTER

No. 107 PC.

Case below: 40 N.C. App. 261.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

HEATH v. BOARD OF COMMISSIONERS

No. 103 PC.

Case below: 40 N.C. App. 233.

Petition by defendant and third-party plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

HEATH v. SWIFT WINGS, INC.

No. 108 PC.

Case below: 40 N.C. App. 158.

Petitions by plaintiff and defendant for discretionary review under G.S. 7A-31 denied 5 June 1979. Motion of plaintiff to dismiss defendant's appeal for lack of substantial constitutional question allowed 5 June 1979.

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

HOUSING AUTHORITY v. TRUESDALE

No. 120 PC.

Case below: 40 N.C. App. 425.

Petition by defendant for discretionary review under G.S. 7A-31 allowed and the cause is remanded to the Court of Appeals with directions to reinstate defendant's appeal to that Court 12 June 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 12 June 1979.

JACOBSON v. PENNEY CO.

No. 128 PC.

Case below: 40 N.C. App. 551.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

LEE v. TIRE CO.

No. 102 PC.

Case below: 40 N.C. App. 150.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

LUDWIG v. HART

No. 96 PC.

Case below: 40 N.C. App. 188.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 June 1979.

MANUFACTURING CO. v. LOGAN TONTZ CO.

No. 117 PC.

Case below: 40 N.C. App. 496.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

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

PARRIS v. DISPOSAL, INC.

No. 122 PC.

Case below: 40 N.C. App. 282.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

PORTER v. DEPT. OF INSURANCE

No. 121 PC.

Case below: 40 N.C. App. 376.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

RENT-A-CAR CO. v. LYNCH, SEC. OF REVENUE

No. 97 PC.

No. 55 (Fall Term)

Case below: 39 N.C. App. 709.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 June 1979.

SAWYER v. COX

No. 116 PC.

Case below: 40 N.C. App. 629.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

STATE v. EMORY

No. 124 PC.

Case below: 40 N.C. App. 381.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

STATE v. EVANS

No. 51.

Case below: 40 N.C. App. 730.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

STATE v. FUTRELL

No. 75 PC.

Case below: 39 N.C. App. 674.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

STATE v. GORE

No. 151 PC.

Case below: 39 N.C. App. 259.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 June 1979.

STATE v. MARTIN

No. 118 PC.

Case below: 40 N.C. App. 408.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979.

STATE v. RIDDLE

No. 79 PC.

Case below: 40 N.C. App. 280.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

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

STATE v. VEGA

No. 106 PC.

Case below: 40 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1979.

WHITE v. LACKEY

No. 110 PC.

Case below: 40 N.C. App. 353.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 June 1979.

WILLIAMS v. BISCUITVILLE, INC.

No. 101 PC.

Case below: 40 N.C. App. 405.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1979.

ESTHER B. BOOKER, WIDOW AND GUARDIAN AD LITEM FOR ELIZABETH A. BOOKER, DANIEL LOYD BOOKER, DAVID WAYNE BOOKER AND MARTHA JANE BOOKER, MINOR CHILDREN OF ROBERT S. BOOKER, DECEASED, EMPLOYEE v. DUKE MEDICAL CENTER, EMPLOYER AND GLENS FALLS INSURANCE COMPANY, CARRIER

No. 77

(Filed 12 July 1979)

1. **Master and Servant § 47.1— workmen's compensation—when claim originates**

A case or claim *originates*, in the ordinary understanding of the term, when the cause of action arises.

2. **Master and Servant § 91— workmen's compensation—dependents' claim separate from employee's claim**

Since plaintiff dependents' claim for compensation did not arise until the employee's death, his failure to file a claim for disability compensation within the statutory period did not bar his dependents' claim for death benefits.

3. **Master and Servant § 47.1— workmen's compensation—statutes in effect at time of death governing**

It is generally held that the right of a deceased employee's dependents to compensation is governed by the law in force at the time of death.

4. **Statutes § 8— retroactive effect—test**

A statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment; rather, the proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect.

5. **Master and Servant § 68— workmen's compensation—occupational disease—conditions**

For an occupational disease to be compensable under the amended version of G.S. 97-53(13), which applies only to cases originating on and after 1 July 1971, two conditions must be met: (1) it must be proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment; and (2) it cannot be an ordinary disease of life to which the general public is equally exposed outside of employment.

6. **Master and Servant § 68— workmen's compensation—occupational disease—"gradualness" not required**

If an employee contracts an infectious disease as a result of his employment and it falls within either the schedule of diseases set out in the statute or the general definition of "occupational disease" in G.S. 97-53(13), it should be treated as a compensable event regardless of the fact that it might also qualify as an "injury by accident" under G.S. 97-2(6), and G.S. 97-53(13) is to be interpreted independently of any prior definitions of "occupational disease" which required an element of "gradualness."

7. **Master and Servant § 68— occupational disease—disease characteristic of profession**

A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question, and it is not required that a particular illness be unique to the injured employee's profession before it can qualify as an "occupational disease."

8. **Master and Servant § 68— serum hepatitis—disease peculiar to occupation of lab technician**

In an action by deceased employee's dependents to recover death benefits, evidence was sufficient to support the Industrial Commission's determination that the employee's job as lab technician exposed him to a greater risk of contracting serum hepatitis than members of the public or employees in general, and this finding of fact supported the Commission's legal conclusion that serum hepatitis was a disease "characteristic of and peculiar to his occupation of lab technician."

9. **Master and Servant § 68— workmen's compensation—serum hepatitis as occupational disease**

In an action by deceased employee's dependents to recover death benefits, there was no merit to defendants' contention that serum hepatitis, which caused the employee's death, was an "ordinary disease of life" and was therefore noncompensable, since G.S. 97-53(13) does not preclude coverage for all ordinary diseases of life but instead only those to which the general public is equally exposed outside of the employment, and medical testimony was sufficient to support the Industrial Commission's conclusion that the public is exposed to the risk of contracting serum hepatitis to a far lesser extent than was deceased employee.

10. **Master and Servant § 68— workmen's compensation—occupational disease—causal connection between employment and disease**

In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence, and among the circumstances which may be considered are the extent of exposure to the disease or disease-causing agents during employment, the extent of exposure outside employment, and the absence of the disease prior to the work related exposure as shown by the employee's medical history.

11. **Master and Servant § 56— workmen's compensation—causal relation between employment and serum hepatitis**

In an action by dependents of an employee who died of serum hepatitis to recover death benefits, evidence was sufficient to support the Industrial Commission's conclusion that the employee's disease was caused by his employment when it tended to show that a person cannot contract serum hepatitis unless he comes into contact with the virus which must enter his bloodstream through an injection, blood transfusions, by nicks and scratches on the skin, or by handling fecal materials; only one contact is necessary to produce the disease, which has a maximum incubation period of six months; the employee

tested blood samples in his work and routinely spilled blood on his fingers; each day one or more of the blood samples showed a positive diagnosis of serum hepatitis; the employee's hobby was gardening and he often worked in the lab with unhealed nicks or scratches on his hands; for more than six months prior to diagnosis of his disease the employee had no injections of any type and no illnesses; and so far as the employee, his wife and his physicians could ascertain, the employee never came into contact with any person, blood or blood product infected with serum hepatitis outside the lab where the employee worked.

12. Evidence § 22.1—transcript of earlier proceeding—admissibility

In an action by the dependents of a deceased employee to recover death benefits, a transcript of the employee's testimony at an earlier hearing on the employee's claim for benefits was not inadmissible as hearsay, since the employee died prior to the hearing on the present claim; his testimony at the hearing on his own claim involved the same issue and subject matter as the hearing on the claim by his dependents; and the party against whom the transcript was offered at the second hearing was the same party against whom the employee offered his testimony at the prior hearing.

13. Master and Servant § 93.3— workmen's compensation—medical experts—hypothetical questions proper

In an action by the dependents of a deceased employee to recover death benefits, hypothetical questions which asked two medical witnesses to assume that the employee had no habits involving the use of alcohol or drugs administered by a syringe and to assume that the employee handled at least 100 blood samples a day in his work were either supported by the evidence or not prejudicial, and a hypothetical question which asked a doctor to base his opinion on the medical history he obtained from both the employee himself and from other doctors who had treated him was proper.

14. Master and Servant § 90— workmen's compensation—occupational disease—notice to employer—employer's waiver

In an action by the dependents of a deceased employee to recover death benefits, the employer waived its right to notice of the employee's disease where it failed to raise that issue at the hearing before the Industrial Commission; moreover, under the circumstances of this case it would be unrealistic to assume that the employer did not immediately receive notice of the diagnosis of the employee's disease.

15. Master and Servant § 91— workmen's compensation—occupational disease—time for filing claim

The claim of a deceased employee's dependents for death benefits was not barred by G.S. 97-38 providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs, and the employee in this case died fifteen months after he became totally disabled by serum hepatitis.

16. Master and Servant § 69— workmen's compensation—amount of recovery—amended statute properly applied

Since the claim of a deceased employee's dependents did not arise until his death on 3 January 1974, the Industrial Commission properly considered the 1973 amendments to G.S. 97-38 which took effect on 1 July 1973 in determining the amount of the award.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

ON plaintiffs' petition under G.S. 7A-31(a) to review the decision of the Court of Appeals reversing an award of the North Carolina Industrial Commission in plaintiffs' favor, 32 N.C. App. 185 (1977), docketed and argued as Case No. 9 at the Fall Term 1977.

This proceeding was begun before the Industrial Commission as a compensation claim for death benefits filed by the widow and four minor children, the sole dependents of Robert S. Booker (Booker), deceased employee of Duke University Medical Center.

Stipulations and plaintiffs' evidence show the following facts:

Booker began working for Duke Medical Center on 24 October 1966. From that date until the first part of July 1971 he worked as a laboratory technician in the Clinical Chemistry Laboratory, where he performed various chemical determinations on serum blood, blood serum, whole blood, and other body fluids. In the process he manually tested blood samples and, although he was a careful and experienced employee, he routinely spilled blood upon his fingers. Each day one or more of the blood samples he tested was infected with serum hepatitis. These samples bore no diagnostic label when they came in or went out, and the lab technicians never knew whether the patient's blood was diseased. The blood samples tested were divided about equally between Duke's in-patients and out-patients. The first of July 1971 Duke began to label all diagnosed hepatic patients' blood which came to the lab, but not all infected blood had been diagnosed.

On 3 July 1971 Booker, who had been totally asymptomatic up until 3 or 4 days prior to that date, developed symptoms which caused him to consult Dr. Joe B. Currin, a specialist in internal medicine. Dr. Currin ascertained that Booker was suffering from serum hepatitis and hospitalized him for ten days. Thereafter

Booker, who had worked continually with blood samples, ceased handling blood and worked in the lab as an "electronical engineer."

In July 1972 Dr. Michael E. McLeod of the Department of Medicine at Duke Hospital, Duke Medical Center, took Booker as a patient and treated him for serum hepatitis until Booker's death on 3 January 1974. During this interim Booker was "in and out" of the hospital on sick leave. About 1 October 1973 he became unable "to sustain his performance" at the lab, and on 15 October 1973 Dr. McLeod certified that Booker was no longer able to work. The autopsy, performed 3 January 1974 at Duke Medical Center, showed that Booker "died of a disease due to serum hepatitis."

Initially, Booker filed a claim with the Industrial Commission in his own behalf. A hearing was held before Commissioner William H. Stephenson on 18 October 1973. Thereafter, on 14 December 1973 an order was entered resetting the case on 1 March 1974 for the taking of additional evidence. Because of Booker's death on 3 January 1974 the case was removed from the hearing docket. On 16 December 1974 the plaintiffs filed their claims for death benefits, and Commissioner Stephenson conducted a hearing on 10 September 1975. At that time plaintiffs offered sufficient evidence to establish the facts summarized below.

Serum hepatitis is a virus disease of the liver which is transmitted when any amount of blood from one infected with the disease is introduced into the blood of another. It is usually transmitted by transfusions, injections, or contact with blood or blood products through some point of entry such as nicks, cuts, and scratches on the skin. It might also be transmitted by the handling of feces or orally, as for example, by the use of unsterilized instruments in a dentist's office. An accidental contact with an "almost microscopic" amount of contaminated blood can transmit serum hepatitis. Dr. McLeod testified, "Even with our assay of the hepatic antigen, which is the most sensitive assay, one can dilute the blood a million times and still transmit the illness serum hepatitis." It takes only one exposure to contaminated blood to originate the disease. Dr. Currin testified that "the incubation period of serum hepatitis is generally considered to be six weeks to six months."

Serum hepatitis is not a disease limited to persons who handle blood. Members of the general public are from time to time afflicted with this disease. Thus, it was not possible for Booker himself or the medical experts and chemist who testified for plaintiffs to state with absolute certainty the time or place at which Booker became infected.

Plaintiffs offered in evidence the transcript of Booker's testimony given on 18 October 1973 at the hearing upon his claim for disability benefits. Booker's testimony tended to show that he had never had hepatitis before working as a lab technician at Duke Medical Center and had never known any person who had had the disease; that he had never had any disabling diseases before contracting serum hepatitis; that he had never handled any fecal materials of any kind in his daily activities; that he had donated blood to the Duke Blood Bank about every six months and "these were the only injections" he ever had. It was stipulated that Booker donated blood to the Blood Bank at Duke Medical Center on 8 December 1970 and on 26 June 1971, and that the blood was taken by disposable needles which had not previously been used or exposed to any blood other than the donor's. Booker testified, "[A]lthough I do not know that I contracted hepatitis at Duke or away from Duke, I do know that I had no injections or any blood contact outside of my duties at work. As far as I am concerned, there is no other way that I could have contracted it."

Mrs. Booker's testimony at the hearing on 10 September 1975 corroborated that of her deceased husband. She further testified that he "did not make any use of alcoholic beverages"; that one of Booker's hobbies was gardening; that he liked to work in his garden; and that he had "the normal number of scratches, abrasions or whatever about his hands."

Mr. Robert F. Wilderman, the chemist in charge of the laboratory where Booker worked, testified that as far as he knew Booker was not exposed to hepatitis other than in his work at Duke; that in the performance of his work there he did know that Booker handled many samples of blood and that he came in contact with blood cells from hepatic patients.

In the opinion of Doctors Currin and McLeod there is a much greater likelihood that laboratory technicians in clinical labs at

major medical centers will contract serum hepatitis than that persons working in other places will do so, for "the public is generally not nearly so exposed to the hazard." Booker's situation, Dr. Currin said, was such "that in all likelihood he contracted it through his employment." Dr. McLeod's testimony was that the conditions under which Booker worked put him "at a much, much higher risk to contract the disease serum hepatitis than other employees in the hospital and people who are not employed in the hospital." Public health surveys, he said, supported this conclusion. Further, "all the evidence [Dr. McLeod] could gather did not indicate any other contacts" by Booker "with anybody with hepatitis, jaundice or liver disease."

On 21 October 1975 Commissioner Stephenson filed his opinion and award in which he made findings in accordance with plaintiffs' evidence. *Inter alia*, he found: "At sometime between December of 1970 and May 1971, Booker contracted an infection of an internal organ of the body due to exposure to hepatic blood in his employment, the said disease being serum hepatitis. This disease is characteristic of the occupation of a laboratory worker such as Booker. The general public is not as exposed to this disease as is a laboratory technician."

Upon these findings he concluded: "(1) . . . Booker contracted an infection of an internal organ of the body [serum hepatitis] due to exposure to materials and substances in his employment. G.S. 97-53(13) [as amended 1 July 1963. *See* 1963 N.C. Sess. Laws, ch. 965.] (2) Said occupational disease resulted in his death on January 3, 1974; (3) The rights and liabilities of the parties are governed by the statute as it existed in May of 1971. G.S. 97-52. (4) Defendants are obligated to pay plaintiff compensation at the rate of $50.00 per week for 350 weeks beginning January 1, 1974 by reason of Booker's death. G.S. 97-38."

From the award entered upon these findings and conclusions all parties appealed to the full Commission. On appeal, with two significant alterations, the full Commission adopted the findings and conclusions of the hearing commissioner as its own. First, it concluded that Booker's disease was a compensable occupational disease because it "was caused by conditions characteristic of and peculiar to his occupation of lab technician, and is one to which the general public is not equally exposed. G.S. 97-53(13) [as amend-

ed 1 July 1971. *See* N.C. Gen. Stat. § 97-53(13) (1972).]" Second, it reversed the hearing commissioner's ruling that "[t]he rights and liabilities of the parties are governed by the statute as it existed in May 1971," the latest possible date for Booker's contraction of hepatitis, and concluded that "[t]he rights and liabilities of the parties to this action are governed by the statute as it existed on 3 January 1974 [the date of Booker's death]." G.S. 97-38 (as amended 1 July 1973); G.S. 97-52; G.S. 97-53(13) (as amended 1 July 1971). Amendments to the Act, enacted in the interim between the dates of contraction and death, were thereby rendered applicable to plaintiffs' claims. Those changes made "the appropriate maximum benefits to be applied $80.00 per week and $32,500.00 overall."

Duke Medical Center and its carrier appealed the full Commission's decision to the Court of Appeals, which reversed the award. This Court allowed claimants' petition for discretionary review. Under App. R.16(a) defendant-appellees bring forward assignments of error to the Industrial Commission's award which were not considered by the Court of Appeals.

Dalton H. Loftin for plaintiffs.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon by Robert B. Glenn, Jr., and Josiah S. Murray III for defendants.

SHARP, Chief Justice.

For an injury or death to be compensable under our Workmen's Compensation Act it must be either the result of an "accident arising out of and in the course of the employment" or an "occupational disease." The Court of Appeals concluded that Booker's injury was not the result of an "accident" because no specific incident could be identified which led to his contracting the disease. *Booker v. Medical Center*, 32 N.C. App. 185, 231 S.E. 2d 187 (1977). None of the parties to this appeal assigned the conclusion as error. The question before us therefore is whether or not his death was the result of an "occupational disease." Because serum hepatitis is not expressly mentioned in the schedule of diseases contained in G.S. 97-53, it is a compensable injury only if it falls within the general definition set out in G.S. 97-53(13).

Booker was diagnosed as having serum hepatitis on 3 July 1971. He first exhibited symptoms of the disease three or four days prior to the diagnosis. The incubation period for the disease ranges from six weeks to six months. Prior to 1 July 1971 the definition of "occupational disease" set out in G.S. 97-53 included an "[i]nfection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavaties or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." 1963 N. C. Sess. Laws, ch. 965, formerly codified at N. C. Gen. Stat. § 97-53(13) (1965).

Effective 1 July 1971, and applying "only to cases originating on and after" that date, subsection (13) of G.S. 97-53 was amended to read as follows:

"Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

The Court of Appeals concluded that appellants' claim should be governed by the law in effect at the time Booker contracted the disease. It held that to do otherwise "would be to provide *ex post facto* coverage for diseases contracted under conditions existing before the statute providing coverage was enacted." 32 N.C. App. at 190, 231 S.E. 2d at 191. On the other hand, the full Industrial Commission applied the amended version of G.S. 97-53(13), the statute in effect when Booker died on 3 January 1974.

[1] The first question confronting us is which statute to apply. By its express terms the amended version of G.S. 97-53(13) applies "only to cases originating on and after July 1, 1971." 1971 N. C. Sess. Laws ch. 547 § 3. A case or claim *originates*, in the ordinary understanding of the term, when the cause of action arises.

[2] In *Wray v. Woolen Mills*, 205 N.C. 782, 172 S.E. 487 (1934), we held that the dependents' right to compensation is "an original right . . . enforceable only after [the employee's] death." Therefore, since the dependents' claim for compensation did not

arise until the employee's death, his failure to file a claim for disability compensation within the statutory period did not bar his dependents' claim for death benefits. 205 N.C. at 783-84, 172 S.E. at 488. A majority of states follow this rule. 2 A. Larson, Workmen's Compensation Law § 64.10 (1976).

[3] Among those jurisdictions which, like North Carolina, treat the dependents' right to compensation as separate and distinct from the rights of the injured employee, it is generally held that the right to compensation is governed by the law in force at the time of death. *Tucker v. Claimants in Death of Gonzales*, 37 Colo. App. 252, 546 P. 2d 1271 (1975); *Peterson v. Federal Mining & Smelting Co.*, 67 Idaho 111, 170 P. 2d 611 (1946); *Cline v. Mayor of Baltimore*, 13 Md. App. 337, 283 A. 2d 188 (1971); *aff'd* 266 Md. 42, 291 A. 2d 464 (1972); *Schwartz v. Talmo*, 295 Minn. 356, 205 N.W. 2d 318, *appeal dismissed* 414 U.S. 803 (1973); *Hirsch v. Hirsch Brothers, Inc.*, 97 N.H. 480, 92 A. 2d 402 (1952); *McAllister v. Board of Education*, 42 N.J. 256, 198 A. 2d 765 (1964); *Silver King Coalition Mines Co. v. Industrial Commission*, 2 Utah 2d 1, 268 P. 2d 689 (1954); *Sizemore v. State Workmen's Compensation Commissioner*, 219 S.E. 2d 912 (W.Va. 1975). *See also* 99 C.J.S. Workmen's Compensation § 21(c) (1958 & Cum. Supp. 1978). This rule has been applied even when the effect was to confer upon the dependents substantive rights which were unavailable to the employee during his lifetime. *See, e.g., Tucker v. Claimants in Death of Gonzales, supra.*

[4] Since the dependents' right to compensation under G.S. 97-38 does not arise until the employee's death, the date of his death logically governs which statute applies. Contrary to the intimation of the Court of Appeals this construction of G.S. 97-53(13) does not make the statute unconstitutional. A statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect. *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950); *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332 (1942); *Stanback v. Bank*, 197 N.C. 292, 148 S.E. 313 (1929). This is the test which has consistently been applied in construing amendments to our Workmen's Compensation Act. *See, e.g., Hartsell v. Thermoid Co.*, 249 N.C. 527,

107 S.E. 2d 115 (1959); *Oaks v. Mills Corp.*, 249 N.C. 285, 106 S.E. 2d 202 (1958); *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958).

[5] For an occupational disease to be compensable under the amended version of G.S. 97-53(13) two conditions must be met: (1) It must be "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment"; and (2) it cannot be an "ordinary disease of life to which the general public is equally exposed outside of the employment."

Before attempting to apply G.S. 97-53(13) to the facts of the instant case, it will be helpful to review briefly the circumstances which led to its enactment. Occupational disease coverage in the United States has always lagged far behind "accident" coverage. 1B A. Larson, Workmen's Compensation Law § 41.20 (1978). The first workers' compensation laws were constructed to afford relief only to those persons who suffered an unexpected, employment-related accident during the working day. Even well-known diseases of the workplace, such as lead and arsenic poisoning, were not covered by the early laws. Solomons, *Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems*, 41 Alb. L. Rev. 195, 197 (1977). When North Carolina passed its Workmen's Compensation Act in 1929 it borrowed the phrase "injury by accident" from the original British Act to describe the type of injury covered. Note, *Development of North Carolina Occupational Disease Coverage*, 7 Wake Forest L. Rev. 341, 342 (1971). No specific coverage was provided for occupational diseases. 1929 N. C. Pub. Laws, ch. 120. In 1935 the General Assembly amended the Act to provide coverage for specified occupational diseases. 7 Wake Forest L. Rev. at 344; 1935 N. C. Pub. Laws, ch. 123. In the thirty-five years following the enactment of G.S. 97-53 only two new occupational diseases (undulant fever and psittacosis) were added to the schedule of coverage. 7 Wake Forest L. Rev. at 352.

The great disadvantage of schedule-type coverage is its failure to keep pace with the development of new disabling exposures in the industrial process. Sears and Groves, *Worker Protection Under Occupational Disease Disability Statutes*, 31 Rocky Mtn. L. Rev. 462, 467 (1959). While the schedule method was wide-

ly used at first, the definite trend has been toward expansion into general coverage, either by abandoning the schedule altogether or by leaving the list intact while providing for coverage of all other occupational diseases. 1B A. Larson, Workmen's Compensation Law § 41.20 (1978). The clear intent of the General Assembly in enacting the current version of G.S. 97-53(13) was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases.[1]

The Court of Appeals held that an illness is compensable under G.S. 97-53, whether mentioned specifically in the statute or falling within the general definition in subsection (13), only if it also comes within "well understood definitions of the term 'occupational diseases.'" 32 N.C. App. at 192, 231 S.E. 2d at 192. The definitions to which the court referred are those found in *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951). In this case, decided long before adoption of the current version of G.S. 97-53(13), this Court made the following remarks:

"The Legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term 'occupational disease.' Indeed, it in effect, defined the term in G.S. 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment. The term has likewise been defined as a diseased condition arising gradually from the character of the employee's work. These are the accepted definitions of the term. *Cannella v. Gulf Refining Co. of La.*, 154 So. 406; *Barron v. Texas Employers' Ins. Assoc.*, 36 S.W. 2d 464. See also Words & Phrases, 'Occupational Diseases.'

"An injury by accident, as that term is ordinarily understood, 'is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time.'

1. As of 1978 forty-one states including North Carolina provided for general coverage of occupational diseases, *i.e.*, they covered all occupational diseases. Nine states covered specified diseases ranging from as few as twelve in Kansas to as many as forty-seven in Colorado. 1B A. Larson, Workmen's Compensation Law § 41.10 (1978). For a list of specific statutory provisions, see E. Blair, Reference Guide to Workmen's Compensation Law § 8 (1974). In many states language substantially similar to that used in G.S. 97-53(13) provides the sole definition of occupational disease. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-275 (1972); Neb. Rev. Stat. § 48-151(3) (1974). Other states have converted from a "scheduled" to a "comprehensive" system by amending their respective schedules to include a catch-all provision embracing any disease arising out of employment. *See, e.g.*, Nev. Rev. Stat. §§ 617.440, .450 (1973); N. Y. Work. Comp. § 3(2)(30) (McKinney Cum. Supp. 1978-79); Ohio Rev. Code Ann. § 4123.68(BB) (Page 1973); R. I. Gen. Laws § 28-34-2(33) (1968); Utah Code Ann. § 35-2-27(28) (1953).

71 C.J. 601 (see cases in note)." 234 N.C. at 130-31, 66 S.E. 2d at 696.

Similar definitions of the term "occupational disease" can be found in *Watkins v. Murrow*, 253 N.C. 652, 661, 118 S.E. 2d 5, 11-12 (1961) and *MacRae v. Unemployment Compensation Comm.*, 217 N.C. 769, 775, 9 S.E. 2d 595, 599 (1940).

Because serum hepatitis is not a disease which develops gradually through prolonged exposure to harmful conditions but instead is an illness caused by a single exposure to a virus, the Court of Appeals concluded that it was not compensable as an occupational disease. For the reasons which follow we disagree.

We begin by noting Professor Larson's admonition that "[d]efinitions of 'occupational disease' should always be checked against the purpose for which they were uttered." 1B A. Larsons, Workmen's Compensation Law § 41.31 (1978). Because the first workmen's compensation acts usually provided coverage for accidental injuries while denying or limiting it for victims of occupational disease, the tendency in early court decisions construing these acts was to expansively define the term "accident" while narrowly construing the term "occupational disease." As jurisdictions amended their laws to provide coverage for all occupationally related illnesses, these older definitions became less viable:

"The present problem of definition is: Under general definitions of occupational disease in statutes granting compensation for such disease, how much is affirmatively included? The important boundary becomes now, not that separating occupational disease from accident, since compensability lies on both sides of that boundary, but the boundary separating occupational disease from diseases that are neither accidental nor occupational, but common to mankind and not distinctively associated with the employment. For this purpose a new set of standards must be used. *It is of little value, and, indeed, may be quite misleading, to quote indiscriminately from old definitions whose only purpose was distinguishing accident.*" 1B A. Larson, Workmen's Compensation Law § 41.32 (1978) (Emphasis added.)

In all of the North Carolina cases cited earlier, the term "occupational disease" was defined solely for the purpose of distinguishing it from an "injury by accident." In *Watkins v. Mur-*

row, supra, for example, claimant was a truck driver who was permanently disabled by carbon monoxide poisoning when he parked his truck and went to sleep with the motor running. The carbon monoxide entered the cab from a faulty exhaust pipe. Noting that an occupational disease is one which "develops gradually over a long period of time," the Court agreed with the Industrial Commission that claimant had suffered an accidental injury. 253 N.C. at 661, 118 S.E. 2d at 11-12. In none of these cases was any attempt made to inclusively define the term "occupational disease." To use the definitions for that purpose is to carry them beyond their intended scope.

The Court of Appeals' construction, moreover, would work a judicial repeal of a portion of the statute. In holding that an illness is compensable only if it falls within prior judicial definitions of the term "occupational disease," the Court noted that even a disease listed by name in G.S. 97-53 would be noncompensable under that statute if it were the result of "a single event" as opposed to being the "cumulative effect of [a] series of events." 32 N.C. App. at 192-93, 231 S.E. 2d at 192-93. Of the occupational diseases listed by name in the statute, however, at least three—anthrax, psittacosis, and undulent fever—are infectious diseases which are contracted, like serum hepatitis, by a single exposure under optimum conditions to the virus or bacteria causing the disease. Stedman's Medical Dictionary (22nd ed. 1972); G.S. 97-53(1), (26), (27). The Court of Appeals' construction would in effect read these diseases out of the statute.

Finally, the Court of Appeals' interpretation must be rejected as inconsistent with the overriding legislative goal of providing comprehensive coverage for occupational diseases. Except for those diseases specifically named in the statute, it is our view that the legislature intended the present version of G.S. 97-53(13) to define the term "occupational disease." To the extent that this statute conflicts with prior judicial definitions of the term "occupational disease," the older definitions must give way.

As Professor Larson points out, the "element of gradualness, so heavily stressed in definitions contrived to distinguish accident, loses its importance when the sole question is the inclusiveness of an occupational disease statute. If the inherent conditions of employment produce outright infection, . . . it may

be treated as an occupational disease although the process is much more sudden than that described in the older definitions." 1B A. Larson, Workmen's Compensation Law § 41.40 (1978).

[6] If an employee contracts an infectious disease as a result of his employment and it falls within either the schedule of diseases set out in the statute or the general definition of "occupational disease" in G.S. 97-53(13), it should be treated as a compensable event regardless of the fact that it might also qualify as an "injury by accident" under G.S. 97-2(6).

Other jurisdictions faced with the same issue have reached a similar result. *See, e.g., Board of National Missions v. Alaska Industrial Board,* 116 F. Supp. 625 (D. Alas. 1953) (tuberculosis contracted by missionary ministering to persons with that disease deemed an "occupational disease"); *Mills v. Detroit Tuberculosis Sanitarium,* 323 Mich. 200, 35 N.W. 2d 239 (1948) (tuberculosis contracted by dishwasher at Sanitarium); *Otten v. State,* 229 Minn. 488, 40 N.W. 2d 81 (1949) (contraction of tuberculosis by nurse); *Herdick v. New York Zoological Society,* 45 App. Div. 2d 120, 356 N.Y.S. 2d 706 (1974) (zookeeper contracted tuberculosis from handling infected animals).

Having concluded that G.S. 97-53(13) is to be interpreted independently of any prior definitions of "occupational disease," we turn now to its construction. To be compensable under subsection (13) a disease must, *inter alia,* be "characteristic of and peculiar to a particular trade, occupation or employment."

[7] A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. *See Harman v. Republican Aviation Corp.,* 298 N.Y. 285, 82 N.E. 2d 785 (1948). Appellees argue, however, that serum hepatitis is not "peculiar to" the occupation of laboratory technicians since employees in other occupations and members of the general public may also contract the disease.

Statutes similar to G.S. 97-53 have been examined by the court of many states. Conn. Gen. Stat. § 5223, for example, defined an occupational disease as "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." (Current version

at Conn. Gen. Stat. Ann. 31-275 (West 1972).) In *Lelenko v. Wilson H. Lee Co.*, 128 Conn. 499, 503, 24 A. 2d 253, 255 (1942) that statute was construed as follows:

"The phrase, 'peculiar to the occupation,' is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations (see Oxford Dictionary; Funk & Wagnalls Dictionary). . . . To come within the definition, an occupational disease must be a disease which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. *Glodenis v. American Brass Co.*, 118 Conn. 29, 40, 170 A. 146, 150."

In *Ritter v. Hawkeye-Security Insurance Co.*, 178 Neb. 792, 795, 135 N.W. 2d 470, 472 (1965) the Nebraska Supreme Court examined a statute almost identical to our own. *See* Neb. Rev. Stat. § 48-151 (1974). In upholding a disability award to a dishwasher who developed contact dermatitis as a result of the use of cleansing chemicals in his work, the court made the following remark:

"The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally."

Similarly, in allowing an award to a nurse's aide who contracted tuberculosis from her patients, the Supreme Court of Maine in *Russell v. Camden Community Hospital*, 359 A. 2d 607, 611-12 (Me. 1976) said:

"The requirement that the disease be 'characteristic of or peculiar to' the occupation of the claimant precludes coverage of diseases contracted merely because the employee was on the job. For example, it is clear that the Law was not intended to extend to an employee in a shoe factory who contracts pneumonia simply by standing next to an infected co-worker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed. To

be within the purview of the Law, the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted."

Courts in other jurisdictions have likewise rejected the proposition that a particular illness cannot qualify as an "occupational disease" merely because it is not unique to the injured employee's profession. *Young v. City of Huntsville*, 342 So. 2d 918 (Ala. Civ. App. (1976)), *cert. denied*, 342 So. 2d 924 (Ala. 1977); *Aleutian Homes v. Fischer*, 418 P. 2d 769 (Alas. 1966); *State ex rel. Ohio Bell Telephone Co. v. Krise*, 42 Ohio St. 2d 247, 327 N.E. 2d 756 (1975); *Underwood v. National Motor Castings Division*, 329 Mich. 273, 45 N.W. 2d 286 (1951).

[8] In the light of these principles we turn now to an examination of the evidence presented to the Industrial Commission. The record indicates that from 1966 until 1971 Booker manually tested blood samples in the laboratory at Duke Medical Center. Some of the blood would routinely spill on his fingers. His supervisor testified that he came in contact with blood samples containing hepatitis associated antigen at least once a day. Dr. Michael McLeod, a medical expert specializing in internal medicine, stated that in his opinion the conditions "that Mr. Booker worked under put Mr. Booker at a much, much higher risk to contract the disease serum hepatitis than other employees in the hospital and people who are not employed in the hospital." Similarly, Dr. Joe Currin testified that "the public is generally not nearly as exposed to the hazard."

It is clear from this evidence that a distinctive relation exists between Mr. Booker's occupation and the disease serum hepatitis. The evidence amply supports the Commission's determination that Booker's job exposed him to a greater risk of contracting the disease than members of the public or employees in general. This finding of fact supports its legal conclusion that serum hepatitis is a disease "characteristic of and peculiar to his occupation of lab technician." We note that many other states have similarly recognized that hospital employees may face an increased risk of contracting communicable diseases. *See Note, Occupational Diseases and the Hospital Employee—A Survey*, 5 Mem. St. U.L. Rev. 368 (1975) and cases cited therein.

[9] Appellees also argue that serum hepatitis is an "ordinary disease of life" and is therefore noncompensable. They cite in particular Dr. Michael McLeod's statement on cross-examination that "[s]erum hepatitis is not a disease which is limited to persons who handle blood. Members of the general public from time to time are [also] afflicted with this disease." Clearly, serum hepatitis *is* an "ordinary disease of life" in the sense that members of the general public may contract the disease, as opposed to a disease like silicosis or asbestosis which is confined to certain trades and occupations. Our statute, however, does not preclude coverage for all ordinary diseases of life but instead only those "to which the general public is *equally exposed* outside of the employment." G.S. 97-53(13) (Emphasis added). The testimony of Dr. McLeod and Dr. Currin cited earlier supports the Commission's conclusion that the public is exposed to the risk of contracting serum hepatitis to a far lesser extent than was Mr. Booker.

As the Michigan Supreme Court observed when faced with a similar argument in *Mills v. Detroit Tuberculosis Sanitarium*, 323 Mich. 200, 209, 35 N.W. 2d 239, 242 (1948): "[T]he statute does not place all ordinary diseases in a non-compensable class, but, rather those 'to which the public is generally exposed outside of the employment.' The evidence in this case indicates that the plaintiff was exposed in his employment to the risk of contracting tuberculosis in a far greater degree and in a wholly different manner than is the public generally." The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation.

The final requirement in establishing a compensable claim under subsection (13) is proof of causation. It is this limitation which protects our Workmen's Compensation Act from being converted into a general health and insurance benefit act. *Bryan v. Church*, 267 N.C. 111, 115, 147 S.E. 2d 633, 635 (1966). In *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E. 2d 22, 25 (1951) we held that the addition of G.S. 97-53 to the Act "in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment. And nonetheless, since the adoption of the amendment, may an award for an occupational disease be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged."

[10] In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history. *See County of Cook v. Industrial Commission*, 54 Ill. 2d 79, 295 N.E. 2d 465 (1973); *Evans v. Indiana University Medical Center*, 121 Ind. App. 679, 100 N.E. 2d 828 (1951); *Peterson v. State*, 234 Minn. 81, 47 N.W. 2d 760 (1951); *Vanore v. Mary Immaculate Hospital*, 260 App. Div. 820, 22 N.Y.S. 2d 350 (1940), *aff'd*, 285 N.Y. 631, 33 N.E. 2d 556 (1941). *See also*, Note, *Occupational Diseases and the Hospital Employee—A Survey*, 5 Mem. St. U.L. Rev. 368 (1975).

[11] Evidence on each of the foregoing three points was presented at the hearing before the Commissioner and may be summarized as follows: Serum hepatitis is a liver disease transmitted most often through injections, blood transfusions, by nicks and scratches on the skin, or by handling fecal materials. A person cannot contract serum hepatitis unless he comes in direct contact with the virus, which must enter his blood stream in one of the manners set out above. Only one contact is necessary to produce the disease. The maximum incubation period is six months.

During the four years he worked at the laboratory, Booker handled and tested blood samples, some of which would routinely spill on his fingers. Each day one or more of these samples showed a positive diagnosis of serum hepatitis. Booker's hobby was gardening and from time to time he would nick or cut his fingers. It was not unusual for him to work in the laboratory with unhealed nicks or scratches on his hands.

For more than six months prior to diagnosis of his disease Booker had no injections of any type and no illnesses. The only time a needle was inserted in his body during this period was when he donated blood at the Duke Blood Bank. All such donations were obtained by disposable needles; that is, the needles were used once and then destroyed. So far as Booker and his wife knew and as far as his physicians could ascertain, at no time

or place outside of the Duke Medical Center lab where he worked had Booker ever come into contact with any person, blood or blood product infected with serum hepatitis.

The Commission's findings of fact based on the foregoing evidence sustantially exclude the possibility that Booker contracted the disease outside of his employment. It is also perfectly obvious that his occupation exposed him to a greatly increased risk of contracting serum hepatitis for each day he handled unmarked vials of blood infected with the disease. These findings are sufficient to sustain the Commission's conclusion that Booker's disease was caused by his employment.

Appellees argue, however, that several of the Commission's findings of fact are based on incompetent evidence. (Defendants' assignments of error 1-9, 13, 14, 26, and 28).

[12] At the hearing before the hearing commissioner on plaintiffs' claim, a transcript of Booker's testimony at the 18 October 1973 hearing on *his* claim was admitted into evidence and relied upon to support several findings of fact. Appellees objected to its admission on hearsay grounds, arguing that claimants had failed to qualify the transcript for the hearsay exception relating to testimony from former proceedings.

The rules governing the admission of testimony from a former judicial hearing may be summarized, in relevant part, as follows:

"(1) The witness must be unavailable. In both civil and criminal cases, death or insanity satisfies this requirement. . . .

"(2) The proceeding at which the currently unavailable witness testified must have been a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which his testimony is directed at the current trial.

"(3) . . . In civil cases, the parties at the prior and present trials must be the same, or privity must exist between them, or the evidence must be offered against the same party it was offered against at the prior trial, or the party against whom it was offered at the prior trial must have had, not merely the opportunity for cross-examination, but the same motive for cross-

examination as the party against whom it is offered at the current trial." 1 Stansbury's North Carolina Evidence § 145 (Brandis Rev. 1973).

Clearly, all of these requirements are met here. Booker died on 3 January 1974 prior to the hearing on the present claim. His testimony at the hearing on his own claim for compensation obviously involved the same issue and subject matter as the hearing on the claim by his dependents. And, finally, the party against whom the transcript was offered at the second hearing (*i.e.*, Duke Medical Center) was the same party against whom Booker offered his testimony at the prior hearing.

[13] At the hearing before the Commissioner on plaintiffs' claim Dr. Currin and Dr. McLeod were asked a series of hypothetical questions directed at obtaining their opinions as to whether the conditions of Booker's job could have caused him to contract serum hepatitis, whether the general public faced the same risk, and whether his death was in fact caused by the disease. Both doctors had treated Robert Booker during his illness and it was stipulated that both were medical experts specializing in internal medicine.

Appellees raise objections to both the form and answers to these questions. Their primary objection as to form is that the questions assumed facts not in evidence. In particular they point to the following: (1) both doctors were asked to assume for the purposes of the hypothetical that Booker had no habits involving the use of alcohol or drugs administered by a syringe and to assume that Booker personally handled at least 100 blood samples a day in his work; (2) Dr. Currin was asked to base his opinion on the medical history he obtained from both Booker and from other doctors who had treated him.

Booker's abstinence from alcohol and drugs administered by a syringe is supported by evidence in the record. Booker's wife testified that he did not use any alcoholic beverages. Booker himself testified that the only time a needle was injected in his body was when he gave blood at Duke. A hypothetical question based on this evidence was therefore proper.

Although there was no testimony as to the exact number of blood samples Booker handled there is plenary evidence that he

handled "many samples of blood" each day and that he "came in contact with blood frequently and continually during the entire four years" he worked as a lab technician. Booker's supervisor, chief chemist in the Duke Clinicial Lab, testified that some of the blood with which Booker came into contact each day was infected with hepatitis. In light of this evidence, the misstatement of the exact number of samples handled cannot be considered prejudicial.

Finally, we do not think the hearing commissioner erred in allowing Dr. Currin to base his opinion in part on a medical history he obtained from the other treating physician and from Booker himself. In *State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979) we set out the following rules governing opinion questions to physicians testifying as experts:

"(1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion."

Statements made by a patient to his physician for the purposes of treatment and medical information obtained from a fellow-physician who has treated the same patient are "inherently reliable" within the meaning of these rules. *State v. Wade*, 296 N.C. at 462-63, 251 S.E. 2d at 412; *State v. DeGregory*, 285 N.C. 122, 134, 203 S.E. 2d 794, 802 (1974).

Appellees also argue that even if the hypothetical questions were proper the answers given to them were not. Dr. McLeod, for example, when asked whether the conditions of Booker's job could have caused his illness, replied: "I have an opinion that those conditions would be conducive to the contraction of serum hepatitis." In response to the same question Dr. Currin answered: "I have an opinion that he had serum hepatitis and that the situation was such that in all likelihood he contracted it through his employment." Appellees contend that such answers deal in possibilities rather than probabilities and are therefore inadmissible. Similar

objections are made to other answers by the expert witnesses. In our opinion the hearing commissioner committed no error in allowing each of the expert witnesses to answer the causation questions with the degree of certainty the witness felt appropriate. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), *death sentence vacated*, 428 U.S. 905 (1976), *rev'd on other grounds*, 293 N.C. 262, 248 S.E. 2d 339 (1977); *Mann v. Transportation Co.*, 283 N.C. 734, 747-48, 198 S.E. 2d 558, 568 (1973). *See also* 1 Stansbury's North Carolina Evidence § 137 (Brandis Rev. 1973 and 1979 Supp.).

Appellees made additional assignments of error to the evidence which we have examined and find to be without merit. Thus, we conclude that competent evidence supports the Commission's findings of fact and that its findings support its conclusions of law. We therefore uphold the Commission's determination that Robert Booker's death was the result of an "occupational disease" as defined by G.S. 97-53(13).

Nothing else appearing, claimants are entitled to the award of compensation granted by the Commission. Appellees argue, however, that the claim should be denied for failure to meet various notice and claim requirements imposed by the Workmen's Compensation Act.

[2] They argue first that the claim of Booker's dependents should be barred by Booker's failure to file a claim within the statutory period specified in 97-58(c). That issue was answered adversely to appellees in *Wray v. Woolen Mills*, 205 N.C. 782, 172 S.E. 487 (1934). In that case we held that the dependents' claim for compensation was not barred by the employee's failure to file within the one-year period because the dependents were not parties to the proceeding brought by the employee.

[14] Appellees also contend that we should deny compensation for Booker's failure to comply with the notice requirements imposed by the Act. G.S. 97-58(b) provides that "[t]he report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has the same." Reading this language in conjunction with G.S. 97-22 we find that a claim for

compensation under the Act is barred if the employer is not notified within 30 days of the date the claimant is informed of the diagnosis "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

There is nothing in the record to indicate that Booker notified Duke Medical Center of his illness within 30 days of diagnosis nor was there a finding by the Commission that this omission was excusable and nonprejudicial. In the comment attached to the award, the hearing commissioner noted that "[n]o discussion was had at the hearing in this case as to whether or not defendants pled the statute of limitations and, if so, which statute." The issue of timely notice was raised for the first time when defendants appealed the full Commission's order to the Court of Appeals.

Courts in other jurisdictions have held that an employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. *See, e.g., Priedigkeit v. Industrial Commission*, 20 Ariz. App. 594, 514 P. 2d 1045 (1973); *Sanford v. University of Georgia Board of Regents*, 131 Ga. App. 858, 207 S.E. 2d 255 (1974); *Paull v. Preston Theatres Corp.*, 63 Idaho 594, 124 P. 2d 562 (1942); *Wood v. Oklahoma Osteopathic Hospital*, 512 P. 2d 135 (Okla. 1973); *Stewart v. Barr*, 471 P. 2d 462 (Okla. 1970); *United States Steel Corp. v. Workmen's Compensation Appeal Board*, 9 Pa. Commw. Ct. 281, 305 A. 2d 913 (1973). *See also* 3 A. Larson, Workmen's Compensation Law § 78.70 (1976). These decisions are in accord with the general rule that courts will not decide questions which were neither presented nor considered at the hearing on the merits. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972); *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. 3 A. Larson, Workmen's Compensation Law § 78.20 (1976). Had appellees squarely presented the issues of notice at the hearing before the Commission, it could have conducted an inquiry in accordance with G.S.

97-22 to determine whether or not Duke Medical Center was prejudiced by the lack of notice. To allow an employer to raise the issue for the first time on appeal deprives the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice. We hold, therefore, that appellees waived the issue of notice by failing to raise it at the hearing before the Industrial Commission.

Moreover, under the circumstances of this case it would be unrealistic to assume that Duke Medical Center did not immediately receive notice of the diagnosis on 3 July 1971 that Booker had hepatitis. He continued to work in the same laboratory until 1 October 1973 when he became totally disabled by the disease. Furthermore, after he "suffered hepatitis," his duties in the lab were changed so that he no longer handled blood.

[15] Appellees also argue that the claim of Booker's dependents is barred by failure to meet the requirements of G.S. 97-38. This statute provides compensation for the dependents of a deceased employee "[i]f death results approximately from the accident and within two years thereafter, or while total disability still continues . . . within six years after the accident." Because Booker's disease was the result of a single infection, appellees contend that the date of the "accident" should be construed as the date Booker contracted the disease.

At the time this statute was enacted occupational diseases were not compensable under the Act, and the statute therefore applied only to deaths caused by accident. 1929 N. C. Pub. Laws, ch. 120 § 38. With the passage of G.S. 97-52, the two-year and six-year limitations also became applicable to deaths resulting from occupational disease. 1935 N. C. Pub. Laws ch. 123. G.S. 97-52 provides in pertinent part that "[d]isablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident."

When death results from an accidental injury, the date of the "accident" may be fixed with relative certainty. It is the day upon which the fortuitous and unlooked for event which produces injury occurs. *Rhinehart v. Market,* 271 N.C. 586, 588, 157 S.E. 2d 1, 3 (1967); *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 428, 124

S.E. 2d 109, 110-11 (1962). Most occupational diseases, however, are not the result of a single incident but rather of prolonged exposure to hazardous conditions or a disease-causing agent. In such cases it is seldom possible to identify a specific isolated event to which the injury may be attributed. The judicial definitions of "accident" employed in "injury-by-accident" claims simply do not lend themselves to locating a date from which the time limitations of G.S. 97-38 will run where the "injury" causing death is an occupational disease.

The practical problem of fixing a date for the "accident" in cases involving gradual injury has been handled in most jurisdictions by treating the date of the accident as the date on which disablement occurs. 1B A. Larson, Workmen's Compensation Law § 39.50 (1978). *See also Carey v. Travelers' Insurance Co.*, 133 Ga. App. 657, 212 S.E. 2d 13 (1975); *Thomas v. Ford Motor Co.*, 123 Ga. App. 512, 181 S.E. 2d 874 (1971); *LaGattuta v. Baldwin Ehret-Hill, Inc.*, 36 App. Div. 2d 887, 320 N.Y.S. 2d 650 (1971); *North American Compress & Warehouse Co. v. Givens*, 445 P. 2d 270 (Okla. 1968); *St. Paul Insurance Co. v. Waller*, 524 S.W. 2d 478 (Tenn. 1975); *Brown Shoe Co. v. Reed*, 209 Tenn. 106, 350 S.W. 2d 65 (1961).

On the facts of the instant case claimants have established their right to compensation under G.S. 97-38. In cases of occupational disease other than asbestosis and silicosis G.S. 97-54 provides that "disablement" is equivalent to "disability" as defined in G.S. 97-2(9), that is, "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The parties stipulated that "Booker was paid his full salary at least through October 1, 1973 and lost no salary prior to that time by reason of an accident or alleged occupational disease." Booker's death on 3 January 1974 was well within two years of the earliest possible date of disablement (1 October 1973). Hence death occurred within two years of the "accident" within the meaning of G.S. 97-38.

We recognize that application of G.S. 97-38 may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time. Because of the arbitrary results such statutes sometimes engender, this type of restrictive provision has been harshly criticized. *See, e.g.*, 1B A. Larson, Workmen's Compensa-

tion Law § 41.80 (1978). We also note that similar restrictions have not been placed on an employee's claim for disablement resulting from occupational disease, except in cases involving asbestosis, silicosis, or lead poisoning. G.S. 97-58. The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature.

[16] Pursuant to G.S. 97-38 the full Commission awarded compensation at the rate of $80.00 per week for 350 weeks beginning 4 January 1974 to Esther Booker for the benefit of herself and her four minor children. Appellees' final contention is that the Commission erred in awarding compensation according to the statute in effect when Booker died on 3 January 1974 rather than the statute in effect at the time he contracted the disease.

Effective 1 July 1973, G.S. 97-38 was amended to increase the maximum weekly benefits from $56.00 to $80.00 and to increase the percentage of average weekly wages upon which the award is based from 60% to 66⅔%. Like the current version of G.S. 97-53(13), these amendments were made applicable to cases originating on and after their effective date. 1973 N. C. Sess. Laws, ch. 515, §§ 4, 9, ch. 759, §§ 4, 8. Because the claim of Booker's dependents did not arise until his death, we hold that the Commission properly considered the 1973 amendments to G.S. 97-38 in determining the amount of the award.

For the reasons stated, the decision of the Court of Appeals is reversed and the case is returned to the Court of Appeals with directions that it be remanded to the North Carolina Industrial Commission for the implementation of its award.

Reversed and remanded.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. FRANK EDMOND MILANO

No. 17

(Filed 12 July 1979)

1. **Constitutional Law § 48— effective assistance of counsel—failure to request voir dire on identification testimony—failure to request voir dire on searches—failure to object to testimony and manner of cross-examination**

Defendant was not denied the effective assistance of counsel in this rape case (1) by the failure of his attorneys to request a voir dire concerning in-court identifications of defendant by three witnesses where all of the witnesses had an ample opportunity to view the defendant, and the record shows no impermissible pretrial identification procedures; (2) by the failure of his attorneys to request a voir dire examination regarding searches of defendant's apartment and car and seizures of a gun and holster introduced into evidence where the record shows that both searches were made pursuant to search warrants, defendant's own direct testimony shows that he consented to a search of his apartment, and the searches were therefore reasonable; or (3) by the failure of his attorneys to object to certain testimony and the manner in which they cross-examined certain witnesses since trial counsel have wide latitude in making strategic and tactical decisions, and since defendant was not prejudiced by the admission of evidence which he now complains may have been excluded had his counsel objected in the light of the overwhelming evidence against him.

2. **Rape § 4.3— prior abortion by rape victim—length of pregnancy—exclusion of cross-examination**

The exclusion of cross-examination of a rape victim as to the length of her pregnancy when she had an abortion prior to the incident in question cannot be held prejudicial error where the verdict could not have been improperly influenced thereby and the answer the witness would have given is not in the record.

3. **Criminal Law §§ 50, 62, 66.3— inherent danger of show-up identification—admissibility of polygraph test—exclusion of opinion testimony**

The trial court properly excluded a question asked of a police officer concerning the "inherent danger" of a show-up identification and a question posed to a lie detector examiner relating to the admissibility of a polygraph test in court since the questions called for improper conclusions by the witnesses on questions of law.

4. **Bills of Discovery § 6— discovery order—examination of materials during trial**

Where defendant claimed during the trial that the State had not completely complied with a pretrial discovery order, the court did not abuse its discretion in ordering that defendant be permitted to examine and copy all reports, statements and photographs at the end of the court day and in giving defendant the right to recall any witnesses he desired. G.S. 15A-910.

5. **Criminal Law § 62— polygraph results—stipulation of admissibility**

The trial court in a rape case had the discretion to admit the results of a polygraph test administered to defendant where defendant, his attorney and the assistant district attorney entered into a stipulation that the results of the polygraph test would be admissible in evidence; the court found that the polygraph operator was qualified to administer the test and interpret its results and that the test was administered under proper conditions; and the court properly instructed the jury that the test results could not be considered as evidence of defendant's guilt or innocence but only as evidence relating to defendant's credibility.

6. **Criminal Law § 62— psychological stress evaluation test—inadmissibility**

The results of a psychological stress evaluation test that had been administered to defendant were not admissible in evidence where there had been no stipulation between the State and the defendant as to the test's admissibility.

7. **Criminal Law § 113.5— failure to instruct on eyewitness testimony—absence of request**

Although it perhaps would have been the better practice for the trial court to have instructed the jury on eyewitness testimony in this rape case, its failure to do so without a request by defendant did not constitute prejudicial error.

Justice EXUM dissenting.

APPEAL by defendant from the judgment of *Barbee, S.J.*, entered in the 18 September 1978 Session of MECKLENBURG County Superior Court.

The defendant was charged, in an indictment proper in form, with first degree rape.

At trial the evidence for the State tended to show the following:

On 17 May 1978 Mrs. Madelyn Monette and her husband were at their home on 4148 Walker Road in Charlotte. The Monettes lived in a duplex, and their door to the outside was on the side of the house facing a house belonging to Ms. Joannie Flippin. There was a gravel driveway between the two buildings. At about 11:00 a.m. Mr. Monette left the house to walk the dog. About five minutes later a brown car with a white top drove into the gravel driveway, and a man, later identified by Mrs. Monette as the defendant, walked up to the Monette's porch. The defendant asked Mrs. Monette if she knew where a Richardson family lived. When she replied no, the defendant asked whether he could

use her phone. Mrs. Monette said she did not have a phone but that her next door neighbor had one and would probably be glad to let him use it. Mrs. Monette then closed the door and went back into her house.

Ms. Joannie Flippin lived next door to the Monettes. About 11:00 a.m. on 17 May 1978 she saw a small brown car with a white top pull into the driveway between her house and the Monette's home. A man, later identified by Ms. Flippin as the defendant, got out of the car and went directly to the Monette's apartment. Shortly, thereafter, Ms. Flippin's doorbell rang, and the defendant was at her door. He stated that he was a friend of her neighbors, who had indicated he might use her phone. After Ms. Flippin let him in the house to use her telephone, she smelled alcohol on his breath and realized he had been drinking.

Although there was a phone next to the front door, the defendant walked past it and into the kitchen. He asked Ms. Flippin for a drink of water, which she gave him. He then dialed a number on the kitchen phone but hung up, saying the line was busy. The defendant proceeded to walk through the entire house uninvited. He dialed a number on the telephone two more times, but both times he declared that the line was busy. The defendant asked Ms. Flippin if she lived there alone. She replied that she lived there with her husband and two children and that her husband was due home right then. Ms. Flippin then insisted that the defendant leave because "I [Ms. Flippin] did not want this man in my house."

Ms. Flippin was suspicious of the defendant, so she watched him out of window on the side on her house, facing the Monette's building. She saw him leave her house and walk right into the Monette's apartment without pausing or knocking. Ms. Flippin then picked up a dental appointment card and wrote down a description of the car: "brown body, white top, small car, Monza." She could not see the license plate at that time.

Mrs. Monette testified that after the defendant had left to use the phone next door, she started vacuuming. Shortly thereafter, she looked up, and the defendant was standing right behind her in her home. The defendant told Mrs. Monette that he had a present for her, and he pulled "a very large handgun" out of his pants. He said, "Don't scream or I'll blow your brains out."

The defendant made Mrs. Monette lie down on the floor. He pulled her pants off, put the gun in her right ear and had sexual intercourse with her for about two or three minutes. Mrs. Monette testified that she did not know whether the defendant ejaculated, but "it wasn't obvious if he did." The defendant got up and walked her to the bathroom with the gun at her head. He told her to take a shower and wash out thoroughly, which she did, as he watched. While Mrs. Monette was in the shower, the defendant left, admonishing her "not to tell anybody or he [the defendant] would shoot me."

Mrs. Monette wrapped a towel around her as the defendant was leaving. Her husband was just returning with the dog, and she began screaming that she had been raped. Mr. Monette testified that "as I was approaching the side of the house I saw this person going down the sidewalk, and I was running with the dog and he turned and looked at me. I was about four feet from him. I saw his face."

Ms. Flippin heard the screams next door, went to her window and saw the defendant coming out of the Monette's house. She watched him get into the car. As he backed out of the driveway, she wrote down the license plate number, JHJ-847, on the card on which she had previously written the car's description. This card was admitted into evidence at trial.

The police were called and arrived at the Monette's house around five minutes later, about 11:25 a.m. Ms. Flippin gave Officer Jones the card on which she had written the car's description and license plate number. Officer Jones called the police dispatcher and found out that the address listed on the car registration was "Whitehall." The police subsequently learned, apparently from the defendant's mother who lives on Whitehall Drive, that the potential location of the car they were looking for was Eastcrest Apartments. A police car was sent to that vicinity, and shortly thereafter Officer Edwards found defendant's car parked at an apartment complex on Eastcrest Drive.

Officer Edwards looked into the defendant's car and saw a brown military-type holster lying on the back seat. He then knocked on the door of defendant's apartment. The defendant came to the door, identified himself as Frank Milano and said that he owned the brown Monza parked outside. The policeman asked

the defendant if he would go with him to Walker Road because his license plate number was given as a possible suspect car in relation to an incident that had occurred there. The defendant agreed to go, and his girlfriend, who is now his wife, went with them in an unmarked police car to the Monette's house, which was about three miles away.

The police car parked in the driveway between the Monette's apartment and Ms. Flippin's house. Ms. Flippin, Mr. Monette and Mrs. Monette came to the car separately, in that order, to look at the defendant. Ms. Flippin and Mr. Monette immediately identified the defendant as the man they had seen earlier that morning. Mrs. Monette stated that when she first went to the car to see the defendant, his head was turned away from her and he would not look at her. Mrs. Monette asked the police to have the defendant get out of the car and stand in front of her. She testified that once the defendant stood up facing her and voluntarily said something, "I [Mrs. Monette] knew it was him. There was no doubt in my mind that it was him." The defendant was then advised of his rights and arrested.

Mrs. Monette was shown an SBI manual containing pictures of various types of guns by Officer Maxwell. She picked out two pictures that resembled the gun her assailant had had. One was a "military type .45 automatic caliber pistol." When the police subsequently searched defendant's apartment, they found a ".45 military style automatic" which was introduced into evidence at trial. In defendant's car they found "a holster for a pistol; military style; large caliber; for automatics" and a car registration card issued to Frank Edward Milano at 3935 Whitehall Drive in Charlotte.

Dr. George W. Robertson examined Mrs. Monette at Charlotte Memorial Hospital on 17 May 1978. He found no "motile sperm" during the pelvic examination. The witness testified that "the absence of sperm does not absolutely mean that intercourse has not taken place. It could mean that intercourse did take place, but there was no ejaculation. . . . It's not terribly uncommon that sperm is not present." The doctor then related what Mrs. Monette had told him of the incident, which corroborated what Mrs. Monette had previously testified to.

The evidence for the defendant tended to show the following:

At about 11:00 a.m on 17 May 1978 Mrs. Rita Milano Irwin, the defendant's mother, went to the defendant's apartment. As she approached the building entrance, she realized that the defendant and his girlfriend, Lynn Feldman, would probably still be asleep because they both worked late at night. Mrs. Irwin then left her calling card on the windshield of defendant's car as a way of asking him to call her. Mrs. Irwin testified that her son was a nice, gentle person. He had been living with her on Whitehall Drive until approximately three weeks before 17 May 1978.

Mrs. Elizabeth Lynn Feldman Milano was the defendant's girlfriend on 17 May 1978. They got married on 6 July 1978 after the defendant was released from custody pending trial.

In May of 1978 Mrs. Milano was working as a bartender at the Spontanes Club. At about midnight on 17 May 1978 the defendant came to the Spontanes Club where she was working. He told her that he had had some trouble that night at the Hitching Post where he worked. A man named Max Simpson or Max Sampson had kneed the defendant in the groin. The defendant was in pain when Mrs. Milano saw him, but he would not let her take him to the emergency room.

When Mrs. Milano got off work about 2:15 a.m. on 17 May 1978, she and the defendant went to a party with some friends. They later left the party and drove to the house of one of the defendant's friends, and the defendant borrowed a gun. When Mrs. Milano asked him what it was for, the defendant told her that he was afraid the man he had had trouble with at work would come to the apartment. Mrs. Milano and the defendant returned home and went directly to bed, at about 6:30 or 7:00 a.m. on 17 May 1978. The defendant always slept on the inside of the bed; therefore, he could not get out of bed without Mrs. Milano knowing it.

Mrs. Milano woke up at about 11:00 a.m., and the defendant was still sleeping. Shortly after 11:30 a.m. the police came to the door asking for the defendant. Mrs. Milano told the officer that the defendant was asleep. She woke him up, and the two of them went with the policeman to Walker Road.

Mrs. Milano's account of what happened at the Monette's house was basically the same as was previously testified to, ex-

cept Mrs. Milano stated that Mr. and Mrs. Monette came out to the car together rather than separately. Mrs. Milano testified that "I am sure that [the defendant] was with me in the apartment at Eastcrest Drive at the time this alleged rape occurred."

Mrs. Milano stated that she had moved the gun to the top shelf of a closet from the counter where the defendant had previously placed it. "When the police officer first came to the apartment that morning [on 17 May 1978], I [Mrs. Milano] moved the gun at that time."

Linda Cunningham testified that the defendant's mother worked at her pet shop. She had known the defendant well for about five and a half years. She stated that the defendant's "reputation is that of pretty good character."

Dr. James Groce is a psychiatrist at Dorothea Dix Hospital. The defendant was sent to that institution for evaluation on 19 May 1978, and he was discharged on 25 May 1978. The defendant's IQ was 106, which is in the upper range of normal intelligence. He was in good physical health and "appeared to be a normal male capable of having sexual intercourse." Dr. Groce testified that the defendant was mentally normal, and "I [Dr. Groce] felt that he could proceed to trial and that he was likely to have known and understood his behavior at the time this alleged incident occurred."

Mr. Lewis Portas, a criminologist with the Charlotte Mecklenburg Crime Laboratory, had examined a sealed rape kit of Mrs. Monette, which included a swab taken from her vagina. Mr. Portas testified that "the examination of the swab from the rape kit gave some indication for the presence of semen; however, I was unable to find any sperm under the microscope."

Ms. Jane Sturman, a criminologist with the Charlotte Mecklenburg Crime Laboratory, examined blood and saliva samples from the defendant and from Mrs. Monette. Ms. Sturman was unable to determine whether the defendant had had any contact with Mrs. Monette because both of them had Type A blood and both of them had A antigen in their saliva.

Mr. John Edward Purvis testified that he had been a friend of the defendant since high school, and they had previously lived

together. In the early morning of 17 May 1978 the defendant came to his house and asked to borrow his gun. The defendant mentioned that he was scared for his girlfriend and that he would return the gun the next day. Mr. Purvis took all the bullets and gave the defendant the gun—"a military .45." The witness identified the gun the police seized from defendant's apartment as his gun that he had loaned the defendant on 17 May 1978.

The defendant testified on his own behalf. He went to work at the Hitching Post on the night of 16 May 1978. At about 11:00 p.m. a man who defendant believed was named Max Sampson came into the club. The man was drunk, and he started a fight with some of the customers. The defendant threatened to call the police, so the man ran out. About five minutes later he returned, and after some heated discussion he kneed the defendant in the groin. The man had threatened the defendant and told him he would find out where he lived. The defendant was scared for his girlfriend because he was leaving for Florida the next day and she would be at his apartment periodically.

Thereafter the defendant closed the club and went to the Spontanes Club where his girlfriend was working. He was upset and in pain. When his girlfriend got off work, they went to a party together. After leaving the party, the defendant stopped at John Purvis' house and borrowed his gun for protection. They then went home, and the defendant took the gun inside and left the holster in the back seat of his car. The defendant and his girlfriend went immediately to bed.

At about 11:45 a.m. the defendant was awakened by his girlfriend, and there was a policeman at the door. The officer asked him about his car. The defendant pointed it out and said it was in the same place he had parked it. The defendant did testify, however, that the window on the passenger side of the car was rolled down, but it had been closed when he had driven it home earlier that morning. The defendant stated that there was an extra ignition key to his car in a tray inside the automobile on the morning of 17 May 1978 when he and his girlfriend were in the apartment sleeping.

The defendant testified that he voluntarily submitted himself to a lie detector test, and that "I [the defendant] answered all the questions truthfully."

Mr. W. O. Holmberg of the Charlotte Police Department is an expert in the field of polygraph examination. He testified for the State during rebuttal evidence. He had administered a polygraph test to the defendant on 14 September 1978. Mr. Holmberg explained that after a test is finished, the subject is given a numerical rating evaluation. If the rating is plus six or above, truthfulness is indicated. A score of minus six or "above," for example minus seven or minus twelve, indicates deception, and a score between minus six and plus six is inconclusive.

Mr. Holmberg asked the defendant three relevant questions during the polygraph test:

> "(1) During the morning hours of May the 17th, did you have sex with a white female on Walker Road?
>
> "(2) On May the 17th, between the hours of eleven and twelve p.m., did you force a white female to have sex with you?
>
> "(3) On May the 17th, 1978, did you drive your 1977 Monza to Walker Road?"

The defendant's response to each of these questions was no. Mr. Holmberg testified that defendant's rating relative to the above questions was minus twenty-seven; indicating deception.

The judge submitted the charge of first degree rape to the jury, and they found the defendant guilty. He was sentenced to life imprisonment, and he appealed by right to this Court.

Shelley Blum for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Rudolph A. Ashton III for the State.

COPELAND, Justice.

For the reasons stated below, we find no error in defendant's trial.

[1] In his first assignment of error, the defendant claims he was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

In a case dealing with a guilty plea entered on counsel's advice, the United States Supreme Court has stated that the gauge of effective assistance of counsel is not "whether a court would retrospectively consider counsel's advice to be right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773, 90 S.Ct. 1441, 1449 (1970). Speaking of constitutionally ineffective representation claims, this Court has said:

> "The Courts rarely grant relief on the grounds here asserted, and have consistently required a stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation. We think such a standard is necessary, since every practicing attorney knows that a 'hindsight' combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial. To impose a less stringent rule would be to encourage convicted defendants to assert frivolous claims which could result in unwarranted trial of their counsels." *State v. Sneed*, 284 N.C. 606, 613, 201 S.E. 2d 867, 871-72 (1974).

This defendant was represented at trial by two privately retained attorneys, Mr. Joel L. Kirkley and Mr. William J. Eaker. He cites several ways in which he feels his trial counsel were inadequate.

The defendant first complains that his counsel did not request a *voir dire* concerning Mr. and Mrs. Monette's and Ms. Flippin's identification of him as the man they saw on 17 May 1978. All these witnesses had an ample opportunity to view the defendant. This Court has previously dealt with an ineffective representation claim based on an attorney's failure to request a *voir dire* concerning a witness' in-court identification, the law of which equally applies to this case:

> "The record indicates no impermissible pre-trial identification procedures. While the defendant's counsel did not request a voir dire examination of the prosecuting witness before she was permitted to identify the defendant in court as her assailant, the record indicates no basis for the belief

that such an examination would have tainted her in-court identification. . . . Under these circumstances, the failure of counsel to demand a voir dire examination of the prosecuting witness, prior to her in-court identification, cannot be deemed such evidence of ineffective assistance of counsel as to warrant the granting of a new trial." *State v. Mathis*, 293 N.C. 660, 670-71, 239 S.E. 2d 245, 252 (1977).

The defendant next argues that his attorney should have required a *voir dire* examination regarding the searches of defendant's apartment and car, which resulted in the seizures of the gun and the holster that were introduced into evidence at trial. The record shows, however, that these searches were both pursuant to search warrants. Furthermore, the defendant's own testimony on direct examination indicates that he consented to the search of his apartment. Under these facts, we must find that the searches were reasonable. Defense counsel are not required to make frivolous motions or objections to every search regardless of the underlying circumstances. *See Sallie v. North Carolina*, 587 F. 2d 636 (4th Cir. 1978).

The defendant asserts that his counsel were constitutionally ineffective because of the way they handled certain witnesses, either by failing to object to certain testimony or by their own "inept cross-examination."

These claims must fail as grounds for granting the defendant a new trial. Several federal courts have suggested that courts look to the ABA Standards Relating to the Defense Function as "a reliable guide for determining the responsibilities of defense counsel." *Marzullo v. Maryland*, 561 F. 2d 540, 547 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 56 L.Ed. 2d 394, 98 S.Ct. 1885 (1978). *See also United States v. DeCoster*, 487 F. 2d 1197 (D.C. Cir. 1973). Section 5.2(b) of the ABA Standards Relating to the Defense Function (App. Draft 1971) states that "[t]he decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are "not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *Sallie v. North Carolina*,

supra at 640. Moreover, even if some of the evidence of which defendant now complains may have been excluded had his counsel objected to it at trial, defendant has not shown any prejudice to him from its admission in light of the overwhelming evidence against him. *See generally Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970).

As this Court noted in *State v. Sneed, supra,* an ineffective representation claim is normally raised in post-conviction proceedings, where the defendant may be granted a hearing on the matter with the opportunity to introduce evidence. When the assertion is made before an appellate court on direct review of a criminal conviction, however, that court is necessarily bound by the record of the trial proceedings below. *See generally* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 NW U. L. Rev. 289 (1964). On the record before us, we cannot find that defendant was denied constitutionally effective representation at trial. This assignment of error is overruled.

The defendant claims the trial court erred in restricting the scope of his cross-examination of certain of the State's witnesses. We do not agree.

The defendant argues that the court erred in sustaining the State's objections to questions he asked Mrs. Monette concerning her employment history and an abortion she had had several years ago. It appears in the record that the witness later testified before the jury about her past jobs; therefore, the defendant cannot complain of the original exclusion of this evidence. *See, e.g., State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972), *cert. denied,* 409 U.S. 1046, 34 L.Ed. 2d 498, 93 S.Ct. 547 (1972).

[2] Mrs. Monette stated during cross-examination that "I had an abortion when I was seventeen years old in 1975." The defendant then asked her how many months pregnant she was when she had the abortion. The court sustained the State's objection to this question. The jury was sent out of the courtroom, and after hearing counsels' arguments on the matter, the court ruled that "the Court finds that the evidence in reference to the alleged abortion is irrelevant to this offense and the Court hereby orders that

such evidence is incompetent and inadmissible pursuant to G.S. 8-58.6."[1]

This Court has said that "[t]he limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. Chance*, 279 N.C. 643, 652, 185 S.E. 2d 227, 233 (1971), *death penalty vacated in* 408 U.S. 940, 33 L.Ed. 2d 764, 92 S.Ct. 2878 (1972). (Citations omitted.) Furthermore, the answer the witness would have given had she been permitted to reply to the question is not in the record; therefore, we cannot tell whether the court's ruling prejudiced the defendant in any way. *See, e.g., State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972). In light of these facts, we do not deem it necessary to rule on defendant's argument that G.S. 8-58.6 unconstitutionally limits a defendant's right to confront the witnesses against him.

[3] During trial the court also sustained the State's objections to a question asked of a policeman concerning "the inherent danger" of a show-up identification and a question posed to the lie detector examiner relating to the admissibility of a polygraph test in court. It was entirely proper for the trial judge to sustain these objections because they called for improper conclusions by the witnesses on questions of law. *See generally State v. Griffin*, 288 N.C. 437, 219 S.E. 2d 48 (1975), *death penalty vacated in* 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976).

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1. G.S. 8-58.6 states in pertinent part:

"Restrictions on evidence in rape cases.—(a) As used in this section, the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser-included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b)."

[4] Pursuant to defendant's motion for discovery, the court entered an order on 14 September 1978 relating to certain matters it deemed the State should disclose to the defendant. In the middle of trial, on 19 September 1978, the court held a hearing on defendant's claim that the State did not completely comply with that order. After the hearing the court ruled that "the Court is not specifically finding that the State has failed to comply with the order. . . , but out of an abundance of precaution, the Court is ordering that the defendant be permitted to inspect and examine [everything the defendant was then asking for]." The defendant was permitted to copy all reports and statements and view all photographs. At defendant's request, this was all done at the end of a court day rather than the next morning so he would have an opportunity to prepare for court. The able trial judge also gave the defendant the right to recall any witnesses he desired.

G.S. 15A-910 sets forth a variety of sanctions a court may employ when a party fails to comply with discovery. G.S. 15A-910(1) authorizes the court to "[o]rder the party to permit the discovery or inspection," which was done in this case. Chief Justice Sharp, speaking for this Court, has stated that "the choice of which [sanction under G.S. 15A-910] 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. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978). There has been no such abuse in this case. This assignment of error is overruled.

[5] On 14 September 1978 the defendant, his attorney and the assistant district attorney working on this case entered into the following stipulation:

> "[T]he defendant voluntarily, knowingly and understandingly entered into a stipulation whereby the defendant agreed that Mr. Holmberg was to administer a polygraph test to him and that if the results of such polygraph test were conclusive, either the State or the defendant could offer such evidence in the trial of the case."

The defendant now contends that the trial court erred in admitting the results of the test, regardless of his previous stipulation.

Before the results of the lie detector test were admitted into evidence, an extensive *voir dire* was conducted concerning the

qualifications of the examiner, Mr. Holmberg, the conditions under which the test was conducted and the results of it. The trial court ruled that the results be admitted into evidence, and it made extensive findings of fact and conclusions of law, none of which are disputed by defendant.

The defendant's argument on this issue must fail. It is clear that in North Carolina the results of a polygraph examination are not admissible in evidence absent a valid stipulation by the parties. *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). When a defendant voluntarily and knowingly enters into a valid stipulation concerning the admissibility of a lie detector test, however, the trial court has the *discretion* to admit the results into evidence, depending upon the examiner's qualifications and the conditions under which the test was administered. *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975). *See also State v. Williams*, 35 N.C. App. 216, 241 S.E. 2d 149 (1978), *cert. denied*, 294 N.C. 739, 244 S.E. 2d 156 (1978). In this case the trial court specifically found that Mr. Holmberg was "an expert in the conduction and interpretation of a polygraph test and its results" and that "the polygraph test was administered under proper conditions . . . and the results thereof are reliable." All the safeguards set forth in *State v. Steele, supra*, were followed. Thus, the trial court did not err in admitting into evidence the results of the lie detector test.

The defendant also claims the trial court's instructions concerning the results of the polygraph examination were erroneous. We do not agree.

The law is clear that even if the results of a polygraph examination are properly admitted at trial, that evidence cannot be used to show a defendant's guilt or innocence of the crime charged; it may only be used as evidence relating to a defendant's credibility. *State v. Steele, supra.* The trial court instructed the jury on this matter as follows:

> "There is evidence tending to show that the Defendant, Mr. Frank Milano, voluntarily submitted to a polygraph or lie detector test. You may not consider this test in determining whether he is guilty. You may consider the results of this test along with all other facts and circumstances in determin-

ing whether the defendant, Mr. Frank Milano, was telling the truth at the time the test was administered."

This instruction was entirely proper. *See State v. Steele, supra.*

[6] At trial the defendant attempted to get the results of a psychological stress evaluation that had been administered to him into evidence. A thorough *voir dire* was conducted on this matter, and the court ruled the evidence inadmissible. In addition to finding that there had been no stipulation between the State and the defendant as to the test's admissibility, the court found that "there is no sufficient legal basis in this state to make such psychological stress test competent evidence" and that "the reliability of such a psychological stress test has not been sufficiently established to make it competent evidence in this state."

We need not decide whether the psychological stress evaluation has attained "scientific acceptance as a reliable and accurate means of ascertaining truth or deception." *State v. Foye, supra* at 708, 120 S.E. 2d at 171. Assuming, *arguendo,* that the test has reached such a level, it certainly must meet at least the same requirements that have been applied to polygraph examinations in North Carolina, one of which is that there be a written stipulation by the parties as to its admissibility at trial. This assignment of error is without merit.

[7] After the court finished instructing the jury in this case, he asked both the State and the defendant "whether there are any suggested additional instructions, corrections or modifications." Both parties indicated that they wanted no additional instructions. The defendant now argues that the trial court erred in not instructing the jury on eyewitness testimony.

"The omission to which defendant points by this assignment of error does not concern a substantive feature of the case, and defense counsel did not call this omission to the attention of the trial judge even when he inquired of defense counsel if there were other requested instructions." *State v. Small,* 293 N.C. 646, 659-60, 239 S.E. 2d 429, 438 (1977). Furthermore, the court did fully instruct the jury on defendant's defense of alibi, including a charge that "if upon considering all the evidence in the case, including the evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence at or participation in the

crime charged, you must find [the defendant] not guilty." Although it perhaps would have been the better practice for the trial court to have included an instruction on eyewitness testimony in this case, its failure to do so without a request by defendant did not constitute prejudicial error. This assignment of error is overruled.

We have examined defendant's three remaining assignments of error, Nos. 7, 8, and 9, and find them without merit.

For the foregoing reasons, we find that defendant had a trial free from prejudicial error.

No error.

Justice EXUM dissenting.

To admit in evidence against defendant the results of a polygraph examination which he "failed" while at the same time excluding from evidence the fact that defendant "passed" a psychological stress evaluation was so fundamentally unfair in the context of this case as to deny defendant due process of law under the rationale of *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers* defendant was tried and convicted of the murder of one "Sonny" Liberty. The shooting of Liberty, a policeman, allegedly occurred in a barroom which Liberty had entered to execute an arrest warrant for one C. C. Jackson. Liberty was shot three times in the back. He then fired his riot gun into an alley from which the shots appeared to have come. One of these shots struck Chambers as he ran down the alley. Chambers was utlimately charged with and convicted of Liberty's murder. At trial Chambers' defense was not only that he did not shoot Liberty but that one Gable McDonald had actually done the shooting. Prior to Chambers' trial McDonald had confessed to the shooting. McDonald had subsequently repudiated this confession, however, saying he confessed at the importuning of one Reverend Stokes who had promised him that he would not go to jail and would share in the proceeds of a lawsuit Chambers would bring against the town where the shooting occurred.

At Chambers' trial he called McDonald as a witness and through him was able to get admitted into evidence McDonald's written, sworn, out-of-court confession. The state on cross-

examination elicited from McDonald the fact that he had repudiated his confession and his reasons for doing so. After the state's cross-examination Chambers renewed an earlier motion to examine McDonald as an adverse witness. This motion was denied on the basis of Mississippi's "voucher rule" which precluded a party from cross-examining his own witness unless the witness testified adversely to the party calling him. Since McDonald had not, under Mississippi's rule, testified adversely to Chambers, Chambers was denied the opportunity to cross-examine him. Chambers also sought to offer the testimony of three witnesses to whom McDonald had admitted shooting Liberty. This testimony was not allowed at trial. On the basis of Mississippi's voucher and hearsay rules, respectively, the Mississippi Supreme Court found no error in either of these rulings.

In the United States Supreme Court defendant contended "that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law." The United States Supreme Court, with only Justice Renquist dissenting on a procedural ground, agreed with this contention. While it was critical of the Mississippi rules of evidence it nevertheless recognized that they were the rules which had been traditionally applied by the Mississippi Supreme Court. Nevertheless the United States Supreme Court concluded that the application of these evidentiary rules under the circumstances denied Chambers "a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. It said further, *id.* at 302-03:

> "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. 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."

In the case before us defendant offered the testimony of Mr. Andy Nichols, an instructor in the Criminal Justice Department of Central Piedmont Community College in Charlotte, to the effect that on 16 August 1978 Nichols had examined defendant using a psychological stress evaluator (sometimes called an audio

stress evaluator). This test indicated that defendant was telling the truth when he denied being involved in a sexual encounter with Mrs. Monette. It was stipulated that Nichols was a qualified expert in such examinations. The testimony of Nichols together with other evidence offered by defendant on the question indicated that the psychological stress evaluator was a device for measuring stress in the human voice and that as a "lie detection" device it was as reliable, if not more reliable, than the polygraph. All evidence relating to this examination was ruled inadmissible by the trial judge.

After defendant rested, the state was permitted to offer in rebuttal the testimony of W. O. Holmberg, a police officer with the City of Charlotte. He testified that on 14 September 1978 he examined defendant using a polygraph and that in his opinion, based on the polygraph examination, defendant "indicated deception" when he denied a sexual encounter with Mrs. Monette.

It was brought out on a voir dire hearing that after defendant "passed" the psychological stress evaluator test administered by Nichols, he and the state stipulated that he would submit to a polygraph examination to be administered by Holmberg and, further, that the results of the polygraph examination would be admissible in evidence whether offered by the state or the defendant.

This Court has consistently held that polygraph examination results are inadmissible. *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). In *Foye* defendant was given a new trial because of the introduction of testimony that a "lie detector" test administered to him indicated that he was telling the truth when he confessed to the murder with which he was charged. The reasons given in *Foye* for excluding the results of polygraph tests were: (1) there is no "general scientific recognition of the efficacy of such tests"; (2) such evidence distracts the jury from the real questions before it; (3) "it would permit the defendant to have extra-judicial tests made without the necessity of submitting to similar tests by the prosecution"; and (4) "the lie detecting machine could not be cross-examined." 254 N.C. at 708, 120 S.E. 2d at 172. The decision and reasoning of *Foye* were reaffirmed in *Brunson* in which this

Court noted that "the weight of authority still supports that decision." 287 N.C. at 445, 215 S.E. 2d at 100.

The Court of Appeals in *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975), held that under certain circumstances, which included a stipulation of admissibility, polygraph examination results could be admitted. This Court, until the majority's decision today, has never so held. I agree with the majority that the conditions precedent to admissibility of polygraph results as set out in *Steele* were followed here. I also agree with the majority's acceptance of the *Steele* decision itself.

The trial court, relying essentially on the stipulation of admissibility voluntarily entered into by the defendant and his voluntary participation pursuant thereto in the polygraph examination, ruled that testimony regarding it was admissible. Because, however, of the absence of a similar stipulation regarding the psychological stress evaluator test the trial court ruled that its results were inadmissible.[1]

Defendant's counsel should have insisted that the admissibility stipulation, if made at all, include both tests. I concede that because the admissibility stipulation did not include the psychological stress evalutor examination the trial court, from the strict standpoint of our law of evidence, ruled correctly as to both tests. The effect, however, of these rulings was so fundamentally unfair in the context of other evidence in this case as to deny defendant due process of law. To insure that fairness in the proceeding which our constitutions demand the trial judge should have either (1) exercised his discretion to rule inadmissible evidence relating to the polygraph or (2) recognized that strict application of the rules of evidence would, under these circumstances, deny due process to defendant and admitted results of both tests.

I stress as did the United States Supreme Court in *Chambers* the factual context in which the evidentiary questions arose. Defendant here has consistently denied his guilt both prior to trial and as a witness at trial. He put up a strong, affirmative

1. The trial court's conclusions that "there is no sufficient basis in this state to make such psychological stress test competent evidence" and "the reliability of such . . . test has not been sufficiently established to make it competent evidence" are, as the majority notes, not determinative. The same conclusions would appertain, in this state, to the polygraph. All the evidence in this record is that the psychological stress evaluation is as reliable, if not more so, than the polygraph.

defense which included a corroborated alibi; evidence of his good character and lack of any prior criminal activity; a reasonable explanation of his possession of the firearm; testimony by Lynn Feldman Milano, then his girlfriend and now his wife, that she was physically present with him at the time the incident with Mrs. Monette allegedly occurred; and evidence of a painful injury to his groin the evening before the incident in question. All of this, if believed, renders defendant an extremely unlikely rapist.

On the other hand the state's evidence, while seemingly strong, raises, in my judgment, nagging doubts upon close examination. At the heart of the dispute in this case was whether defendant had, in fact, driven his automobile sometime after 11:00 a.m. on 17 May 1978 to the apartment complex of Mrs. Monette. Defendant claimed the car was last driven between 6:30 and 7:00 a.m. and told police it was in the same position when they found it as it was when he parked it in the early morning hours. Police located his car between 11:30 a.m. and 12:00 Noon. At that time had the car been recently driven its engine would have been warm. Yet the state offered no evidence that the engine was warm or that it had or had not been checked for warmth by the investigating police.

Further, Mrs. Monette identified her assailant to police as being stockily built, five feet eight inches tall with dark hair and brown eyes. She told Dr. Robertson that he was five feet ten inches tall and weighed 165 pounds. In fact defendant was five feet five inches tall, weighed 140 pounds and had hazel eyes. Moreover, Dr. Robertson found no evidence of trauma to Mrs. Monette's genitalia and no real evidence of recent sexual intercourse.

The strength of the state's case as opposed to defendant's was, of course, for the jury and not this Court to weigh and consider. I mention it to show only that the case is not "open and shut" on the question of whether a rape occurred; if anything, it is even closer on whether defendant was indeed the rapist. It comes down to a question of which side the jury believes. In this context, evidence of defendant's failure of a polygraph examination was devastating to his defense and, in effect, insured his conviction. Whether admission of this evidence coupled with exclusion of evidence that he had passed a psychological stress evaluation denied him that fundamental fairness which constitutional

due process demands is a question which this Court should address notwithstanding the trial court's technically correct application of our rules of evidence. Having addressed it, I am satisfied defendant, like Chambers, was denied due process and is entitled to a new trial.

CONOVER v. NEWTON

BIRCH A. ALLMAN, DESSIE B. ALLMAN, BEN E. ISENHOUR, ANNA WYATT ISENHOUR, WADE F. LINEBERGER AND EVELYN B. LINEBERGER v. THE CITY OF NEWTON

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF CONOVER, NORTH CAROLINA, 11 MAY 1978

No. 112

(Filed 12 July 1979)

1. **Rules of Civil Procedure § 56.1— conversion of motion for judgment on pleadings into motion for summary judgment—notice**

Assuming that the conversion of a Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion for summary judgment by the court's consideration of matters outside the pleadings brings into effect the ten day procedural notice requirement of Rule 56(c), defendant was not prejudiced by the lack of ten days notice of the hearing on plaintiffs' motion where the record shows that plaintiffs testified at the hearing and were extensively cross-examined, there was no factual controversy but the questions presented were clearly defined questions of law, and the law as it related to these questions was ably argued by counsel for both plaintiffs and defendant.

2. **Rules of Civil Procedure § 56.1— summary judgment while discovery procedures pending**

While ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures which might lead to the production of evidence relevant to the motion are still pending and the party seeking discovery has not been dilatory in doing so, the court's action in hearing plaintiffs' motions for summary judgment while discovery procedures initiated by defendant were still pending did not constitute prejudicial error where information sought by defendants' interrogatories to plaintiffs was brought out at the hearing by defendants' cross-examination of plaintiffs, and where seven of the nine individuals sought to be deposed by defendant testified at the hearing and were extensively questioned by counsel for defendant, and their testimony revealed that no factual questions were presented for decision.

3. Rules of Civil Procedure § 56— summary judgment on grounds not stated in motion

The granting of summary judgment on grounds other than those raised in the written motion for summary judgment would not have been improper, since Rule 56 does not require that any grounds be stated in the motion. Furthermore, where the issue raised by the motion for summary judgment was whether a petition for voluntary annexation was signed by all owners of realty within the described area, the granting of summary judgment on grounds that the withdrawals of signatures therefrom rendered the petition insufficient was within the issue raised by the motion.

4. Municipal Corporations § 2— voluntary annexation petition—withdrawal of signatures

Property owners who have signed a voluntary annexation petition have the right to withdraw from the petition at any time up until the governing municipal body has taken action upon the petition by annexing the area described in the petition.

5. Municipal Corporations § 2— voluntary annexation petition—withdrawal of signatures—invalidity of entire ordinance

When six owners of real property located within the area described in a voluntary annexation petition validly withdrew their signatures from the petition before the annexation ordinance was passed, the city governing body was without jurisdiction to take any further action on the petition as submitted, and the entire ordinance purporting to annex all of the area described in the petition was void.

6. Municipal Corporations § 2.1— involuntary annexation—error in description in resolution of intent to annex

The fact that the metes and bounds description in a resolution of intent to annex failed to close because one small piece of property was not included within it was not fatal to the validity of the annexation ordinance where the resolution of intent and the published notice of public hearing made full reference to a map which was available for public inspection of the area proposed to be annexed, and this map and a map published in the newspaper notice of the public hearing showed all of the property proposed to be annexed.

7. Municipal Corporations § 2.3— annexation ordinance—use of natural topographic features as boundaries—inclusion of property on both sides of streets

The evidence supported the trial court's determination that an annexation ordinance substantially met the requirements of G.S. 160A-36(d) that natural topographic features be used in fixing new municipal boundaries whenever practical and that developed land on both sides of a street used as a boundary be included within the municipality.

8. Municipal Corporations § 2.1— amendment of annexation report

An amendment of an annexation report after the public hearing but before passage of the annexation ordinance to reflect minor changes in the

financing of services for the current fiscal year in the area proposed to be annexed and to reflect a reduction in size of the area to be annexed was within the amendment authorization of G.S. 160A-37(e) and did not affect the validity of the annexation ordinance.

APPEAL by defendant City of Newton in Case No. 78CVS742, defendant City of Newton in Case No. 78CVS739, and by petitioners in Case No. 78CVS893 from orders of *Ervin, Judge*, entered 11 August 1978. Discretionary review of all three cases prior to determination by the Court of Appeals was allowed 6 March 1979.

These three cases arise out of an involuntary annexation proceeding intitiated by the City of Conover pursuant to G.S. §§ 160A-33 through 44 and out of a voluntary annexation proceeding instituted pursuant to G.S. § 160A-31 by certain property owners seeking to be annexed to the City of Newton. For purposes of brevity the cases will be referred to throughout this opinion as *Conover v. Newton, Allman v. Newton, and In Re: Annexation Ordinance of Conover.*

On 3 April 1978 the City Council of the City of Conover passed a resolution at a regular meeting giving notice of intent, as required by G.S. § 160A-37(a), to annex 792 acres of land contiguous to the existing city limits of Conover. The notice of intent set 3 May 1978 as the date for the required public hearing on the annexation proposal. It, therefore, contained a description of the boundaries of the area to be annexed. Notice of the hearing and a description of the area to be annexed, including a map, were published in a qualified newspaper as required by G.S. § 160A-37(b), and the annexation report required by G.S. § 160A-35 was made available for public inspection with proper notice of its availability given.

On 3 May 1978 a public hearing was held on the Conover Annexation proposal. On 11 May 1978, pursuant to G.S. § 160A-37(e), the Conover City Council amended the annexation report required by G.S. § 160A-35 and adopted an ordinance annexing the area described in the report as amended.

"Meanwhile, back at the ranch," on 19 April 1978 twenty-one owners of real property (some of whom owned property in the area proposed to be annexed involuntarily by Conover, and some

of whom did not) submitted a petition seeking voluntary annexation of their property by the adjoining City of Newton pursuant to G.S. § 160A-31. The sufficiency of the petition was certified by the city clerk of Newton on the same day. On 2 May 1978 a public hearing on the voluntary annexation petition was held. At this hearing, four individuals who had signed the petition, Ben E. Isenhour, Anna Wyatt Isenhour, Birch A. Allman, and Dessie B. Allman, submitted written requests that their names and property be removed from the petition. The hearing was then recessed until 3 May 1978.

When the hearing was reconvened on 3 May 1978, two other individuals who had signed the voluntary annexation petition, Wade F. Lineberger and Evelyn B. Lineberger, submitted written requests that their names and property be removed from it. The effect of these withdrawals, if valid, was to sever the major part of the area described in the voluntary petition into two tracts, one still contiguous to the City of Newton and one not. Giving no effect to these withdrawals, the City of Newton passed an ordinance on 3 May 1978 annexing all of the area described in the voluntary petition, including that property owned by the individuals who sought to withdraw. A portion of the area annexed by Newton was within the area sought to be, and subsequently, annexed by Conover on 11 May 1978, pursuant to its involuntary annexation proceeding.

On 17 May 1978 the City of Conover filed suit against the City of Newton seeking a declaratory judgment that the Newton annexation ordinance of 3 May 1978 was void. A temporary restraining order was issued against Newton. On the same date the six property owners who notified the City of Newton of the withdrawal of their names and property from the voluntary annexation petition filed suit against the City of Newton seeking a similar declaratory judgment.

On 8 June 1978 thirty-three owners of real property in the area annexed by Conover filed a petition for review of Conover's annexation ordinance, as provided for by G.S. § 160A-38(a). This review proceeding was calendared for a hearing on 31 July 1978.

On 25 July 1978 Conover filed a motion for partial summary judgment in *Conover v. Newton* and a motion to consolidate the three pending cases. On 27 July 1978 the plaintiffs in *Allman v.*

Newton filed notice of hearing on a motion for judgment on the pleadings, setting 31 July 1978 as the date for hearing.

On 31 July 1978 a hearing was held before Judge Ervin in the review proceeding brought by petitioners against the City of Conover. The court allowed Conover's motion to consolidate the three cases and proceeded to hear plaintiffs' motion for judgment on the pleadings in *Allman v. Newton* (converting it to a motion for summary judgment by considering matters outside the pleadings) and plaintiff's motion for partial summary judgment in *Conover v. Newton* as well as the evidence in the review proceeding.

Judgments in the three cases were filed 11 August 1978. In *Allman v. Newton* the court granted plaintiffs' converted motion for summary judgment ruling that the withdrawals of their signatures by the plaintiffs were valid and that the Newton annexation ordinance was rendered completely void thereby. In *Conover v. Newton* the court granted plaintiff's motion for partial summary judgment on the same grounds. The court entered judgment against the petitioners in *In Re: Annexation Ordinance of Conover*, ruling that Conover's involuntary annexation proceeding complied with all statutory requirements.

Sigmon & Sigmon by Jesse C. Sigmon, Jr. and Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for appellant-City of Newton.

Corne & Pitts by Larry W. Pitts for appellant-petitioners.

Williams, Pannell & Lovekin by Martin C. Pannell; Patton, Starnes & Thompson by Thomas H. Starnes; and Lake & Nelson by Broxie J. Nelson for appellee-City of Conover.

Isenhour & Long by David L. Isenhour for appellees-Allman, et al.

BROCK, Justice.

Appellant-Newton first raises a series of procedural assignments of error, which it is contended require this Court to reverse the superior court's orders in *Allman v. Newton* and *Conover v. Newton*. These assignments of error although made on independent grounds are closely related in nature and will be considered together.

First, appellant-Newton contends that the trial court committed prejudicial error by proceeding to hear the plaintiffs' converted motion for judgment on the pleadings in *Allman v. Newton* in that Newton was not given the requisite notice of such hearing. Second, appellant-Newton contends that the trial court committed prejudicial error by proceeding to hear the converted motion for judgment on the pleadings in *Allman v. Newton* and the motion for partial summary judgment in *Conover v. Newton* because there were discovery proceedings, initiated by Newton, pending in both cases at the time the court heard the motions. Third, appellant-Newton contends that the grant of summary judgment in *Conover v. Newton* should be reversed because it was entered on grounds other than those raised in Conover's written motion.

[1] A motion for judgment on the pleadings in *Allman v. Newton* was filed on 27 July 1978, setting 31 July 1978 as the date for a hearing on it. At the hearing on 31 July 1978 the motion was converted to a motion for summary judgment pursuant to N.C. R. Civ. P. 12(c) when the court proceeded to consider matters outside the pleadings, *i.e.*, the testimony of plaintiffs in the case. Rule 12(c) provides that when a motion for judgment on the pleadings is converted to a Rule 56 motion for summary judgment "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Assuming that the conversion of a Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion for summary judgment brings into effect the ten day procedural notice requirement of Rule 56(c), *see Long v. Coble*, 11 N.C. App. 624, 182 S.E. 2d 234, *cert. denied* 279 N.C. 395, 183 S.E. 2d 246 (1971) and 5 *Wright & Miller, Federal Practice and Procedure*, § 1371, p. 704 and § 1366, p. 683 n. 72 (citing cases interpreting the similar language in Fed. R. Civ. P. 12(b)(6)), we do not think the court's failure in this instance to allow such constitutes reversible error.

It is apparent from the record in these three cases that all of the evidence obtainable by way of the discovery procedures initiated by appellant-Newton was fully developed at the hearing on the motions. In *Allman v. Newton* the sole attempt at discovery intended to lead to the production of evidence for the purpose of opposing a motion for either judgment on the pleadings or a motion for summary judgment was a set of interrogatories directed to plaintiffs in the case. At the hearing on the converted motion

for judgment on the pleadings, all plaintiffs, with the exception of Anna Wyatt Isenhour, testified and were extensively cross-examined about their initial decision to sign the petition for voluntary annexation by Newton and their subsequent decision to withdraw. The record reveals, furthermore, that there was no factual controversy to be decided.[1]

The questions presented by the converted motion in *Allman v. Newton* were clearly defined questions of law. Did the plaintiffs have the right to withdraw their signatures, and, if so, what was the effect on the Newton annexation ordinance? The law as it related to these questions was ably argued by counsel for both plaintiffs and defendant. We do not think appellant-Newton was, therefore, prejudiced by the lack of ten days notice of the hearing on plaintiffs' motion. *See Oppenheimer v. Morton Hotel Corp.*, 324 F. 2d 766 (6th Cir. 1963); *LeFevre v. Reliable Paint Supply Co.*, 152 Misc. 594, 273 N.Y.S. 903 (1934); 10 *Wright & Miller, supra*, § 2719, p. 452.

[2] Appellant-Newton's second procedural contention is also without merit. Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so. *Bane v. Spencer*, 393 F. 2d 108 (1st Cir. 1968), *cert. denied* 400 U.S. 866, 91 S.Ct. 108, 27 L.Ed. 2d 105 (1970); *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E. 2d 881 (1978); 10 *Wright & Miller, supra*, § 2741, p. 731. But despite the fact that discovery procedures initiated by Newton were still pending at the time the court proceeded to hear the motions for summary judgment in *Allman v. Newton* and *Conover v. Newton*, we do not think that, in this instance, the court's action constitutes reversible error.

In *Allman v. Newton*, appellant-Newton had filed interrogatories to all plaintiffs. As noted *supra*, all plaintiffs, with the exception of one, testified at the hearing and were extensively cross-examined by counsel for appellant-Newton about their deci-

1. We note that this fact disposes as well of appellant-Newton's contention that it was entitled to a jury trial on the issue, raised in Newton's amended answer in *Allman v. Newton*, of whether or not the withdrawals of their signatures by the plaintiffs were fraudulently induced. The evidence presented at the hearing on the motion reveals that the plaintiffs' decisions to withdraw were based solely on their beliefs that they had been misled when they initially signed the petition. No evidence of fraudulent inducement to withdraw their signatures was presented.

sions to withdraw from the voluntary annexation petition. The interrogatories directed to these plaintiffs by appellant-Newton appear in the record and reveal that their sole purpose was to elicit information about the plaintiffs' decisions to withdraw. Appellant-Newton's counsel ably brought out this information by cross-examining plaintiffs at the hearing, and we do not think the fact that this information came out in this fashion, rather than by way of answers to the interrogatories filed, prejudiced appellant-Newton.

In *Conover v. Newton*, appellant-Newton filed on 28 July 1978 a notice of intent to take depositions of various elected and appointed officials of the City of Conover. None of these individuals had been deposed at the time the court proceeded to hear and rule on Conover's motion for partial summary judgment. For the same reasons set out above, we do not feel this error prejudiced appellant-Newton. Seven of the nine individuals sought to be deposed testified at the consolidated hearing and were extensively questioned by counsel for appellant-Newton. Their testimony clearly reveals that no factual questions were presented for decision. Furthermore, the court reserved ruling on the motion until 11 August 1978 in order that appellant-Newton might file further affidavits in opposition to the motion. No such affidavits were filed until 14 August 1978. This assignment of error, for the reasons stated, is overruled.

[3] Appellant-Newton's assignment of error to the grant of summary judgment in favor of Conover on grounds other than those raised in Conover's written motion for summary judgment is also overruled. We note first that Rule 56 does not require any grounds be stated in a motion for summary judgment. Furthermore, the issue raised by Conover's motion was whether the petition for voluntary annexation by Newton was signed by all owners of real property within the area described in it. The grant of summary judgment in favor of Conover on grounds that the withdrawals by the plaintiffs in *Allman v. Newton* rendered the petition insufficient was clearly within the issue raised by Conover's motion.

Having considered the procedural errors raised by appellant-Newton and finding them to be without merit, we now proceed to consider appellant-Newton's contention that there was error in

the court's ruling that Newton's entire annexation ordinance was void and the grant of summary judgment for plaintiffs in *Conover v. Newton* and *Allman v. Newton* on that basis. This assignment of error is two-pronged. Appellant-Newton first contends that the court erred in ruling that the property owners had the right to withdraw from the voluntary annexation petition. Second, appellant-Newton contends that even if such ruling was correct, the court erred in holding that the entire Newton annexation ordinance was void. Appellant's contention is that a correct application of the law requires that only that part of the annexation ordinance, which includes the area that became non-contiguous to the City of Newton as a result of the withdrawals (including that property owned by those who withdrew), should be void. We find both of these contentions to be without merit.

The superior court considered its ruling that the property owners had the right to withdraw to be dispositive of the motions in both *Allman v. Newton* and *Conover v. Newton.* With this consideration we agree. G.S. § 160A-31. Annexation by Petition.—(a) provides "[t]he governing board of any municipality may annex by ordinance any area contiguous to its boundaries upon presentation to the board of a petition signed by the owners *of all* the real property located within such area. The petition *shall* be signed by *each* owner of real property in the area. . . ." (Emphasis added.) Thus, the statutory provision pertinent to this appeal is the requirement that the petition be signed by *all* of the owners of real property located within the area described in the petition submitted to the governing board of a municipality.

It is uncontroverted that six owners of real property located within the area described in this petition, who had originally signed it, withdrew at the public hearing on it, which is required by G.S. § 160A-31(c). It is also uncontroverted that the City of Newton passed an ordinance on 3 May 1978 annexing all of the area described in the petition as originally submitted, including the property of those who sought to withdraw. Thus, the first question to be answered is did the property owners who withdrew from the petition have the right to do so at the time they withdrew?

G.S. § 160A-31(d) provides that at the required public hearing on a petition for voluntary annexation, "all persons owning prop-

erty in the area to be annexed who allege an *error* in the petition shall be given an opportunity to be heard. . . ." (Emphasis added.) Appellees contend this phrase provides statutory authorization for withdrawal from the petition at the time of the public hearing. Appellant-Newton insists that interpretation is incorrect and contends that the phrase operates as a limitation on what may be raised at the time of the hearing, precluding withdrawal from the petition. *Webster's Third New International Dictionary* defines error as "an act involving an unintentional deviation from truth or accuracy." While this definition does not encompass the situation presented here, the withdrawal of signatures originally affixed to the petition, nevertheless, appellant-Newton's contention that the phrase operates implicitly as a limitation on the right to withdraw is without merit. G.S. § 160A-31(d) also provides that the governing board to which a voluntary annexation petition is submitted shall determine, *after holding the required public hearing on the petition*, whether the statutory requirements relating to the sufficiency of it are met. This portion of the statute would appear to authorize, by implication, withdrawals up until the time at which the hearing is concluded. Such an implied statutory right of withdrawal is supported by the fact that it may only be at the public hearing on the proposed annexation that petitioners are made aware of the full ramifications of it. Because we find support for a more extensive right of withdrawal in our case law, however, we do not find it necessary to rely on such an implied statutory right.

Appellant-Newton has made a valiant effort to distinguish the case of *Idol v. Hanes*, 219 N.C. 723, 14 S.E. 2d 801 (1941) on its facts, but we believe the case provides controlling precedent and clearly establishes, absent legislative proscription, the right to withdraw from a petition of the nature involved here.

Idol involved the creation of a sanitary district by voluntary petition as authorized by 1927 N.C. Session Laws, Ch. 100. The signatures of fifty-one per cent of the resident freeholders in the proposed district were required before a board of county commissioners was authorized to act on the petition. The petition in *Idol* was initially signed by more than the requisite fifty-one per cent, but prior to the public hearing on creation of the district, a sufficiently large number of individuals sought to withdraw their

signatures such that the fifty-one per cent requirement would no longer be met if the withdrawals were valid.

The Commissioners proceeded to approve the petition notwithstanding the requested withdrawals. On appeal to this Court by the Commissioners from an injunction issued against them, this Court held that "the better rule is that the individual petitioner may as of right withdraw his name from the petition at any time before final action thereupon. . . ." *Id.* at 726, 14 S.E. 2d at 803. In reaching this decision, Seawell, J., observed:

> "It is supposed that second thoughts are apt to be sounder, and this conviction has led courts to consider the right of withdrawal favorably, both as a matter of justice to the individual, who is entitled to apply his best judgment to the matter in hand, and as sound policy in community and public affairs, where the establishment of governmental institutions should rest upon mature consideration rather than be mere unnecessary excrescences upon the body politic, raised by the whim and fancy of a few men." *Id.* at 725, 14 S.E. 2d at 802.

We think both considerations relied upon in *Idol*, justice to the individual and policies favoring the establishment of governmental institutions only upon mature consideration, are equally applicable to a voluntary annexation petition. The first consideration is applicable by the very nature of the annexation proceeding authorized by the statute, *i.e.*, *voluntary* annexation by the consent of *all* property owners in the area proposed to be annexed. Because the annexation of an area by a municipality involves substantially more extensive consequences and obligations, application of the second consideration is even more appropriate than it was in *Idol* in which only the establishment of a single-purpose district was involved.

We are not unmindful of the consequences of the fact that the statute involved in *Idol* required the signatures of only fifty-one per cent of the resident freeholders in the proposed sanitary district, whereas the statute providing for voluntary annexation requires the signatures of one hundred per cent of the owners of real property in the area proposed to be annexed. One or more unwilling property owners are in a position, thereby, to thwart

the aspirations of the majority in a given area who seek voluntary annexation. But, "the defeat of an aspiration is not the destruction of a right." *Idol, supra*, at 725, 14 S.E. 2d at 803. The percentage required is a matter for legislative judgment, and in this instance it is clear that the legislature intended voluntary annexation to be accomplished only upon unanimous consent. Absent statutory prohibition on the right to withdraw from a voluntary annexation petition after it has been submitted but final action has not yet been taken on it, we think the considerations articulated in *Idol* support the right of individual petitioners to reconsider their initial decision and withdraw from the petition at any time before final action thereupon. In a situation, such as is presented here, in which an area is faced with involuntary annexation proceedings by one municipality, it is not unlikely that an individual's initial decision to sign a petition for voluntary annexation by an adjacent municipality as an alternative will be influenced by misinformation and even high pressure tactics employed by those actively seeking to promote the alternative annexation.

The question of whether a petitioner had the right to withdraw from an annexation petition has been extensively considered by courts in other jurisdictions as well. "Although persons signing a petition have been permitted to withdraw their names, sometimes as a matter of right, within a limited time after signing, the right to withdraw their names has been denied, particularly after a hearing on the petition, or when the withdrawal would deprive the body with which the petition was filed of jurisdiction." *E. McQuillin, The Law of Municipal Corporations*, § 7.33, pp. 449-50 (3d ed. 1966). *See Annots.*, 126 A.L.R. 1031, 27 A.L.R. 2d 604. In *Town of Blooming Grove v. Madison*, 253 Wis. 215, 33 N.W. 2d 312 (1948), it was held that where no rights of others are established until final action is taken upon an annexation petition, a person signing the petition may withdraw at any time prior to such final action. *Accord. Crocher v. Abel*, 348 Ill. 269, 180 N.E. 852 (1932); *Crosthwait v. White*, 55 N.M. 71, 226 P. 2d 477 (1951); *Town of Brookfield v. Brookfield*, 274 Wis. 638, 80 N.W. 2d 800 (1957). Other jurisdictions have held that signatures may not be withdrawn once a sufficient petition has been filed with the governing board of a municipality. *E.g., City of Roanoke v. County of Roanoke*, 214 Va. 216, 198 S.E. 2d 780 (1973). Still others have taken a middle approach and held that petitioners

may not withdraw once the governing body has commenced affirmative action upon the petition, *e.g.*, by holding a required public hearing. *E.g.*, *State v. City of Phoenix*, 74 Ariz. 46, 243 P. 2d 766 (1952).

[4] We think, after considering the different approaches taken to this question, that, absent legislative directive, the first approach is the better one: petitioners may withdraw at any time up until the governing municipal body has taken action upon the petition by enacting an ordinance annexing the area described in the petition. This rule is "much more likely to get at the real and mature judgment of the voters, and it is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question." *County Ct. of DeKalb County v. Pogue*, 115 Ill. App. 391, 400, *affirmed* in *Kinsloe v. Pogue*, 213 Ill. 302, 72 N.E. 906 (1904).

[5] Having concluded that the withdrawals were valid, we now must consider what legal effect those withdrawals have on the Newton annexation ordinance adopted 3 May 1978. The superior court ruled that the entire ordinance was void, and with this ruling we agree.

"The judicial decisions are in accord in declaring that the essential provisions of the law touching the sufficiency of the petition in proceedings to change corporate boundaries must be followed, ... [A]n adequate petition is commonly regarded as an essential procedural requirement, without which no jurisdiction is conferred on the tribunal empowered to act. In other words, a petition sufficient according to the requirements of the statutes is jurisdictional." *McQuillin, supra*, at § 730, pp. 424-26. *See Idol v. Hanes, supra;* 62 C.J.S., Municipal Corporations, § 56, p. 158. The annexation ordinance adopted by Newton was founded upon a single voluntary petition. For purposes of clarity the description of the area to be annexed was divided into a Tract I and a Tract II both contiguous to Newton but not to each other. When the plaintiffs in *Allman v. Newton* withdrew from the petition, which we have held they were entitled to do, the petition was rendered statutorily insufficient in an essential respect. It no longer contained the signatures of all owners of real property in the area proposed to be annexed. G.S. § 160A-31(a). The City of Newton was, therefore, without jurisdiction to take any further action on the petition as submitted.

It nonetheless proceeded to enact an ordinance annexing all of the area described in the petition. Appellant-Newton, anticipating our holding with respect to the right of withdrawal, would now have this Court modify the petition in such a fashion as to make it conform to the requirements of the statute. This it would have us to do by excising from the petition the property owned by those who withdrew and the property beyond theirs, which was rendered noncontiguous to the City of Newton by their withdrawal. Appellant-Newton would, in effect, have this Court treat the petition as one for annexation of "*all or part*" of the area described in it.

The provisions of the voluntary annexation by petition statute, when read in conjunction with the provisions of the involuntary annexation statutes, preclude our undertaking Newton's proposed equitable modification of the petition. G.S. § 160A-37(e) (specifying procedures for involuntary annexation by cities of less than 5000) and G.S. § 160A-49(e) (specifying procedures for involuntary annexation by cities of 5000 or more) provide that within a specified time period after the public hearing on the annexation proposal, "the governing board shall have authority to adopt an ordinance extending the corporate limits of the municipality to include *all, or such part,* of the area described in the notice of public hearing. . . ." (Emphasis added.) G.S. § 160A-31(d) provides, however, that "[u]pon a finding that (a petition for voluntary annexation) meets the requirements of (G.S. § 160A-31) the governing board shall have the authority to pass an ordinance annexing *the territory described in the petition.*" (Emphasis added.) If the General Assembly had intended to authorize cities proceeding pursuant to a petition for voluntary annexation to annex merely a part of the area described in the petition, it would have so provided as it has explicitly done in G.S. §§ 160A-37(e) and 160A-49(e). The absence of such statutory authorization, in light of the explicit provisions for it in the involuntary annexation statutes, is cogent evidence that the General Assembly intended a petition for voluntary annexation to stand or fall as a unity. The three statutes are clearly *in para materia.* 2A *Sutherland Statutory Construction,* § 51.03, p. 298 (4th ed. 1973). Moreover, G.S. § 160A-31 was first enacted substantially as it appears today by 1959 N.C. Sessions Laws, Ch. 713. During the same session of the Legislature, G.S. §§ 160A-33

through 44 and G.S. §§ 160A-45 through 56, as other component parts of a general rewrite of the municipal annexation statutes, were enacted in substantially the same form as they appear today, including the provisions in G.S. § 160A-37(e) and G.S. § 160A-49(e) quoted above. Our holding in this respect obviates discussion of appellant-Newton's multifarious theories by which it contends that certain parts of its annexation ordinance are valid.

The grant of summary judgment in favor of plaintiffs in *Allman v. Newton* and the grant of summary judgment in favor of plaintiff in *Conover v. Newton* declaring the entire Newton annexation ordinance to be void are affirmed.

We now turn to consideration of the assignments of error by petitioner-appellants in *In Re: Annexation Ordinance of Conover* to the superior court's judgment concluding that Conover's involuntary annexation proceeding complied with all requirements of G.S. §§ 160A-33 through 44.

In an annexation proceeding under Article 4A, Part 2 of Chapter 160A of the General Statutes, Annexation by Cities of Less than 5,000, the record of the proceedings must show *prima facie* complete and substantial compliance with the applicable provisions of the statutes.

> "Where an appeal is taken from an annexation ordinance and a petition has been filed requesting review of the annexation proceedings, and the proceedings show *prima facie* that there has been substantial compliance with the requirements and provisions of the Act, the burden is upon petitioners to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in proceedings which materially prejudice the substantive rights of petitioners." *In Re Annexation Ordinance*, 255 N.C. 633, 642, 122 S.E. 2d 690, 697 (1961). *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961).

This burden is placed on petitioners because it is presumed as a general rule that:

> ". . . a public official in the performance of his official duties 'acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of pro-

moting the public good and protecting the public interest. [Citation omitted.] The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . .' " *In Re Annexation Ordinance*, 284 N.C. 442, 452, 202 S.E. 2d 143, 149 (1974).

The superior court's review, pursuant to G.S. § 160A-38, of an involuntary annexation proceeding is limited in scope to the following. (1) Did the municipality comply with the statutory procedures? (2) If not, will petitioners "suffer material injury" by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirements of G.S. § 160A-36 as applied to petitioners' property? G.S. §§ 160A-38(a) and (f). *In Re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971). Our limited role now is to review the record and the court's findings of fact and conclusions of law to determine whether or not such findings and conclusions with respect to the first two of these are supported by competent evidence.

Petitioners raise three questions on this appeal. They contend there was error in the superior court's conclusions of law: (1) that an error in the metes and bounds description of the area proposed to be annexed was not fatal to the validity of the annexation ordinance; (2) that the ordinance complied with G.S. § 160A-36(d), which requires that natural topographic features be used as boundaries whenever it is practical to do so; and (3) that the procedure by which an amendment to the ordinance was adopted complied with the statutory requirements relative thereto. For the reasons stated below, we find these assignments of error to be without merit.

[6] The metes and bounds description in the Resolution of Intent to annex adopted by Conover on 3 April 1978 failed to close because a relatively small piece of property owned by Mrs. F. A. Abernethy was not included within it. Mrs. Abernethy did not join in the petition for review. It is, therefore, difficult to see how

any petitioner meets the "material injury" requirement in relation to this error in the proceedings. Nevertheless, this error was amply cured by the fact that the metes and bounds description in the Resolution of Intent and the published notice of public hearing made full reference to a map, filed in the office of the Clerk of the City of Conover and available for public inspection as of 3 April 1978, of the area proposed to be annexed. This map and the map published in the newspaper notice of the public hearing show the property owned by Mrs. F. A. Abernethy as included within the area proposed to be annexed. We think, in this instance, that there was sufficient compliance with the requirements of G.S. § 160A-37 that the Resolution of Intent "describe the boundaries of the area under consideration. . . ." "[S]light irregularities will not invalidate annexation if there has been substantial compliance with all essential provisions of the law." *In Re Annexation Ordinance*, 278 N.C. 641, 648, 180 S.E. 2d 851, 856 (1971).

[7] The superior court made findings of fact that:

> "The boundary of the area described in the Annexation Ordinance consists of and follows valleys, streets, branches, creeks, ridge lines, major graded areas which have settled and become natural topographic features, drainage areas, identifiable woods lines with drainage areas and identifiable hedge rows with drainage areas, and railroads; that exclusive of the portion of the boundary that joins the existing Conover City limits, the boundary consists of approximately 9,950 feet of natural boundaries, approximately 12,075 feet of boundaries consisting of streets or following just off of streets, approximately 1,400 feet along a major railroad, approximately 1,775 feet along identifiable prominent tree lines or hedge rows with drainage areas, approximately 1,375 feet of major graded areas which have become natural topographic features, and approximately 2,500 feet associated with property lines only; that much of the boundary located with reference to streets and railroads has boundaries consisting of natural topographic features; that where Highway 64-70, State Road 1731, State Road 1732, State Road 1734, and the Southern Railroad is used as a boundary that the same consists of a natural topographic feature in that they constitute a continuing ridge line and that where these roads have been used as a boundary the Annexation Ordinance includes de-

veloped property located on both sides of the road; that the Conover governing board has, wherever practical, used natural topographic features as the new City limits boundary and where a street has been used as a boundary has included within the annexation area developed land on both sides of the street."

From these findings of fact the court concluded as a matter of law that Conover's annexation ordinance met the requirements of G.S. § 160A-36(d), which provides:

> "In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality developed land on both sides of the street."

The court's findings of fact and conclusions of law with respect to these requirements are amply supported by the evidence presented at the hearing. Conover presented Mr. Charles H. Davis, a consultant in urban planning, as a witness at the hearing. Mr. Davis had been hired by Conover, after passage of the annexation ordinance, to review it and the procedures employed. His testimony reveals that he examined the boundary of the area annexed and provides plenary evidence to support the court's findings and conclusions with respect to compliance with G.S. § 160A-36(d). At the request of petitioners, the court as well (sitting as a jury in this instance) had a view of portions of the boundary. Petitioners called only one witness on this issue, Conover City Engineer Mr. Clifford Smithson. Although Mr. Smithson's testimony on direct examination provides some support for petitioner's contentions, on cross-examination he revealed that he had made only a limited inspection of portions of the boundary and was totally unfamiliar with others. The requirements are only that topographic features be used *wherever practical*, and if a street is used as a boundary that developed property on both sides of it be included. The evidence presented amply supports the court's conclusions of substantial compliance with this part of the statute.

[8] G.S. § 160A-37(e) provides that after holding the required public hearing on an involuntary annexation proposal, the govern-

ing board of a municipality shall take into consideration facts presented at such hearing and "shall have authority to amend the report required by G.S. § 160A-35 to make changes in the plans for serving the area to be annexed so long as such changes meet the requirements of G.S. § 160A-35." There is no requirement that the amended report be available for public inspection for any particular amount of time before final action is taken on the annexation proposal, nor is there any requirement that a second public hearing be held on the report as amended. *Williams v. Town of Grifton*, 22 N.C. App. 611, 207 S.E. 2d 275 (1974).

After holding the required public hearing on 3 May 1978, the Conover City Council met on 11 May 1978 and adopted certain amendments to the report prior to passage of the annexation ordinance itself. These amendments were made primarily to reflect minor changes in the financing of services for the then current fiscal year through 30 June 1978 in the area proposed to be annexed and to reflect a reduction in size of the area to be annexed. Minor amendments of this type are well within the ambit of the statutory authorization for amendment in G.S. § 160A-37(e). This assignment of error is also overruled.

For the reasons stated above we affirm the superior court's conclusion of law that the Conover annexation ordinance of 11 May 1978 was valid.

We affirm the judgment of the trial court in each of the three actions.

Affirm.

NORTH CAROLINA NATIONAL BANK v. TED R. BURNETTE AND WIFE, IRMA M. BURNETTE

No. 28

(Filed 12 July 1979)

1. Uniform Commercial Code §§ 46, 47 — sale of collateral — notice — commercial reasonableness — burden of proof

A secured party seeking a deficiency judgment under G.S. 25-9-502 has the burden of establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition.

2. Uniform Commercial Code § 46— sale of collateral—notice given—commercial reasonableness presumed

If the secured party who seeks a deficiency judgment can establish that he gave notice of a public sale of collateral in a manner which substantially complies with the procedures of Part 6 of Article 9 of the Uniform Commercial Code, he is not required to establish further that the sale was commercially reasonable.

3. Uniform Commercial Code § 47— sale of collateral—notice requirements—substantial compliance

Substantial compliance is the prescribed standard in determining whether the notice procedures outlined in G.S. 25-9-603 have been followed, and the secured party is not required to insure that the notice of sale is actually received by the debtor.

4. Uniform Commercial Code § 47— sale of collateral —notice—actual address of debtor

An "actual address" of a debtor, as used in G.S. 25-9-603(2), is an address where a notice of sale could reasonably be expected to be received by the addressee in the ordinary course of the mails.

5. Uniform Commercial Code § 47— sale of collateral—sufficiency of notice

In an action to collect a deficiency after sale of collateral, plaintiff's evidence established as a matter of law that a notice of sale mailed by plaintiff was sent to an "actual address" of debtor in substantial compliance with G.S. 25-9-603 and that plaintiff was therefore entitled to the conclusive presumption of commercial reasonableness where the evidence tended to show that plaintiff had successfully sent certified mail to defendants at Route 1, Little Switzerland, less than three months earlier in connection with other demand letters; those letters had been promptly received and acknowledged by defendants; and having successfully used that address to communicate with defendants in the recent past, plaintiff could reasonably expect that a certified letter mailed to the same address would reach defendants in the ordinary course of the mails.

6. Uniform Commercial Code § 46; Constitutional Law § 23— presumption of commercial reasonableness of sale—no denial of due process—enactment of statute not State action

There was no merit to defendants' contention that the presumption of commercial reasonableness created by G.S. 25-9-601 denied them the opportunity to contest the reasonableness of a public sale of collateral by a secured party and thereby deprived them of their property without procedural due process, since the constitutional mandate of due process applies only to actions by the government which deprive individuals of their fundamental rights, and the enactment of G.S. 25-9-601 did not constitute "State action."

7. Rules of Civil Procedure § 50.2— directed verdict for party with burden of proof—evidence manifestly credible

There are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where the credibility of mov-

ant's evidence is manifest as a matter of law, and three situations where credibility is manifest are: (1) where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests; (2) where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents; and (3) where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions.

8. **Uniform Commercial Code § 46— sale of collateral—commercial reasonableness—evidence manifestly credible**

In an action to recover a deficiency after sale of collateral, plaintiff's evidence was manifestly credible and established as a matter of law that plaintiff mailed notice of sale to an "actual address" of the debtors in substantial compliance with G.S. 25-9-603, and judgment n.o.v. was therefore properly granted for plaintiff on the question of commercial reasonableness.

Justices COPELAND and BROCK did not participate in the consideration or decision of this case.

ON certiorari to review decision of the Court of Appeals, 38 N.C. App. 120, 247 S.E. 2d 648 (1979), reversing judgment of *Lewis, J.*, entered 17 December 1976 in MITCHELL Superior Court.

This is an action by plaintiff to collect a deficiency after sale of collateral securing a promissory note executed by defendants.

On 28 January 1974, defendants executed a promissory note to plaintiff evidencing an indebtedness of $190,000.00. To secure payment of the note, defendants executed a security agreement upon certain road grading and rock crushing equipment.

Defendants never made any payments on the indebtedness. On 29 July 1974 plaintiff wrote certified letters, return receipt requested, addressed to defendants at Route 1, Little Switzerland, North Carolina, demanding payment. These demand letters were received by defendants on 1 August 1974. The return receipt shows the delivery address was P. O. Box 121, Little Switzerland, North Carolina. When defendants thereafter failed to make any payments on the promissory note, plaintiff repossessed certain rock crushing and road grading equipment which constituted security for the indebtedness.

On 27 September 1974 plaintiff mailed by certified mail to defendant, and posted at the McDowell County Courthouse, a copy of a notice of sale of the rock crushing equipment which sale

was to take place on 18 October 1974. The rock crushing equipment was sold on that date, and there is no dispute concerning that sale.

On 24 October 1974 plaintiff mailed by certified mail to defendants, and posted at the Yancey County Courthouse, a notice of sale of the road grading equipment which was to take place on 31 October 1974. The road grading equipment was sold on 31 October 1974. A dispute has arisen as to whether this notice was mailed to an "actual address" of debtor in substantial compliance with G.S. 25-9-603.

After applying the proceeds of both sales to defendants' account, there remained a deficiency of $89,008.23. On 22 November 1974 plaintiff filed this suit for a deficiency judgment. Defendants answered in pertinent part that the two sales were not conducted in a commercially reasonable manner as required by G.S 25-9-504, and that plaintiff had disposed of property by sale which was not collateral for the loan of 28 January 1974. The case was tried before a jury.

At the close of all the evidence plaintiff moved for a directed verdict on the issue of commercial reasonableness of the sales of collateral. Plaintiff contended it had established as a matter of law substantial compliance with the notice procedures of G.S. 25-9-601, *et seq.*, and therefore was entitled to the conclusive presumption of commercial reasonableness created by G.S. 25-9-601. Trial court denied the motion and reversed its ruling concerning plaintiff's compliance with G.S. 25-9-601, *et seq.*, pending a jury determination as to the commercial reasonableness of the two sales.

The jury returned a verdict finding (1) that defendants were indebted to plaintiff by way of a deficiency in the amount of $89,008.23; (2) that plaintiff had not disposed of the collateral in a commercially reasonable manner and had thus damaged defendants in an amount equivalent to the deficiency, *i.e.*, $89,008.23; and (3) that plaintiff did not dispose of any of defendants' property in which it did not have a security interest.

Upon return of the verdict plaintiff moved for judgment notwithstanding verdict (JNOV) on the question of commercial reasonableness. Trial court allowed the motion, finding that plain-

tiff had established substantial compliance with G.S. 25-9-601, *et seq.*, and therefore its sales of the rock crushing and road grading equipment were conclusively deemed commercially reasonable in all aspects.

Defendants moved for, and trial court granted, JNOV for defendants on the question of whether plaintiff had sold the property of defendants which was not pledged as collateral for the loan of 28 January 1974. By stipulation of the parties the trial court determined that defendants were entitled to a set-off of $15,000 against the deficiency judgment for damages resulting from disposition of property not pledged as collateral.

Judgment notwithstanding verdict for plaintiff in the sum of $74,008.23 ($89,008.23 less the $15,000.00 set-off) was signed accordingly, and defendants excepted and appealed. Plaintiff filed a cross-appeal.

On plaintiff's cross-appeal the Court of Appeals reversed JNOV for defendants and remanded for reinstatement of jury's verdict that plaintiff had not disposed of property not pledged as security for the loan of 28 January 1974. Defendant's new brief before this Court presents no argument and cites no authority concerning the correctness of the disposition of plaintiff's cross-appeal. As a result, this aspect of the case is deemed abandoned and is no longer before us. Rule 28, Rules of Appellate Procedure.

On defendants' appeal the Court of Appeals reversed in part the JNOV for plaintiff, holding that plaintiff's sale of the *road grading equipment* was not entitled to the presumption of commercial reasonableness created by G.S. 25-9-601 since a question of fact existed as to whether plaintiff had sent notice to an "actual address" of defendants in substantial compliance with G.S. 25-9-603. The Court of Appeals remanded the case for a jury determination on the question of substantial compliance with G.S. 25-9-603. We allowed plaintiff's petition for writ of certiorari to the Court of Appeals to review that ruling.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton and Robert A. Wicker, and Watson and Dobbin, by Richard A. Dobbin, for plaintiff.

McLean, Leake, Talman & Stevenson, by Wesley F. Talman, Jr. and Joel B. Stevenson, for defendants.

HUSKINS, Justice.

The trial court entered judgment for plaintiff notwithstanding the verdict (JNOV) on the ground that plaintiff, as a matter of law, had substantially complied with the procedures provided by G.S. 25-9-601, *et seq.* (Cum. Supp. 1977), for the disposition of collateral by public sale and therefore the public sale of the grading equipment was conclusively deemed "to be commercially reasonable in all aspects." G.S. 25-9-601. The first question presented by this appeal is whether the Court of Appeals erred in reversing JNOV for plaintiff on the issue of commercial reasonableness of plaintiff's disposition by public sale of the road grading equipment pledged as collateral to secure the $190,000.00 note executed by defendants on 28 January 1974.

Resolution of this question requires us to consider the rights and duties of an Article 9 secured party with respect to disposition of repossessed collateral.

[1] The procedures outlined in G.S. 25-9-601, *et seq.*, for the disposition of collateral by public sale are unique to North Carolina and supplement the provisions of G.S. 25-9-504 (Cum. Supp. 1977). Section 9-504 gives the secured party a wide latitude with respect to disposition of repossessed collateral. *See* J. White and R. Summers, Uniform Commercial Code, § 26-9 (1972). "A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." G.S. 25-9-504(1). "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms. . . ." G.S. 9-504(3). However, the secured party has a duty to provide reasonable notice of any impending disposition and to insure that "every aspect of the disposition" is "commercially reasonable." G.S. 25-9-504(3). A secured party seeking a deficiency judgment under G.S. 25-9-502 (Cum. Supp. 1977) has the burden of establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition. *Accord, Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976), and cases cited therein; Annot., 59 A.L.R. 3d 369 (1974). Placing the burden of persuasion on the secured party tends to insure that the deficien-

cy sought has not been unnecessarily enhanced by abuses of the broad discretion accorded the secured party with respect to the disposition of collateral.

[2] The concept of commercial reasonableness has been notoriously difficult to define and has therefore been unevenly applied by courts and juries. *See generally,* J. White & R. Summers, supra, § 26-11; Comment, 15 Wake Forest L. Rev., 71, 72-79 (1979). To minimize the uncertain results fostered by the flexible standard of commercial reasonableness contained in section 9-504(3), the General Assembly of North Carolina enacted the "Public Sale Procedures" set out in Part 6 of Article 9. *Credit Co. v. Concrete Co.,* supra, 31 N.C. App. at 456; Comment, supra, 15 Wake Forest L. Rev. at 80. Part 6 establishes a conclusive presumption of commercial reasonableness when a secured party gives notice of a disposition of collateral by public sale in substantial compliance with its provisions:

> "Disposition of collateral by public proceedings as permitted by G.S. 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part *shall conclusively be deemed to be commercially reasonable in all aspects.*" (Emphasis added.) G.S. 25-9-601.

The notice requirements for the disposition of collateral by public sale are contained in G.S. 25-9-602, which specifies the contents of the notice of sale, and in G.S. 25-9-603, which prescribes the manner in which notice of sale is to be posted and mailed. Thus, if the secured party who seeks a deficiency judgment can establish that he gave notice of a public sale of collateral in a manner which substantially complies with the procedures of Part 6, he is not required to further establish that the sale was commercially reasonable.

The Court of Appeals reversed JNOV for plaintiff on the ground that plaintiff had failed to establish its compliance with the procedures for mailing of notice prescribed by G.S. 25-9-603 and therefore was not entitled to the conclusive presumption of

commercial reasonableness. We now examine the soundness of that holding.

G.S. 25-9-603 deals with the posting and mailing of notice of sale and provides in pertinent part as follows:

> "(1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.
>
> (2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement:
>
> (a) at the actual address of the debtors, if known to the secured party, or
>
> (b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address."

Specifically, the Court of Appeals reasoned that on the evidence presented by plaintiff a question of fact existed as to whether plaintiff had sent the notice of the public sale to an "actual address" of defendants. Thus, the precise question is whether plaintiff's evidence establishes as a matter of law that notice of sale was sent to an "actual address" of the debtors.

[3] We first note that G.S. 25-9-603 does not require the secured party to insure that the notice of sale is *actually* received by the debtor. Rather, the secured party is required to "*mail* by registered or certified mail a copy of the notice of sale to each debtor . . . (a) at the actual address of the debtors, if known to the secured party, or (b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address." G.S. 25-9-603(2) (Emphasis added.) We further note that G.S. 25-1-201(26) reads in pertinent part as follows: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to

know of it." Additionally, we note that *substantial compliance* is the prescribed standard in determining whether the procedures outlined in G.S. 25-9-603 have been followed. *See* G.S. 25-9-601. Substantial compliance means a compliance which substantially, essentially, in the main, or for the most part, satisfies the procedures. *See* Black's Law Dictionary, p. 1597, defining "substantially" (4th Ed. 1968); *cf. Douglas v. Rhodes*, 188 N.C. 580, 125 S.E. 261 (1924), defining "substantially" under former G.S. 45-25.

[4] Guided by the standard of substantial compliance mandated by G.S. 25-9-601 and by the definition of notice quoted from G.S. 25-1-201(26), we conclude that an "actual address" of a debtor is an address where a notice of sale could reasonably be expected to be received by the addressee in the ordinary course of the mails. Whether an address utilized by a creditor is an "actual address" of a debtor is a determination which must be made on the basis of circumstances known to, or which should have been known to, the creditor at the time the notice of sale was mailed.

[5] Plaintiff's evidence on this question tends to show that the address listed on the promissory note and security agreement executed by defendants on 28 January 1974 was Route 1, Box 271, Spruce Pine, North Carolina. Defendants, however, did not live in Spruce Pine. They actually lived in a home located in Chestnut Grove, which is approximately one and one-half miles from Little Switzerland. On 29 July 1974, letters demanding payment were sent to defendants by certified mail, return receipt requested, addressed to "Route 1, Little Switzerland, North Carolina." The return receipt indicates that these demand letters were delivered to defendants three days later on 1 August 1974. The receipt was purportedly signed by the male defendant and reflects that the delivery address was "P. O. Box 121, Little Switzerland, North Carolina." When defendants thereafter failed to make any payment on the promissory note, plaintiff mailed to defendants a notice of sale of the road grading equipment. The notice of sale was dated 24 October 1974 and was sent by certified mail, return receipt requested, to "Route 1, Little Switzerland, North Carolina." The male defendant testified that he had previously received mail at the post office in Little Switzerland, and that he received the demand letters addressed to Route 1, Little Switzerland.

The above evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary may be drawn. Accordingly, we conclude that the evidence establishes as a matter of law that the 24 October 1974 notice of sale was sent to an "actual address" of debtor in substantial compliance with G.S. 25-9-603. The documentary evidence from which plaintiff's witnesses testified establishes that plaintiff has successfully sent certified mail to the Route 1, Little Switzerland address less than three months earlier in connection with the 29 July 1974 demand letters, and those letters had been promptly received and acknowledged by defendants. Having successfully used the Route 1, Little Switzerland address to communicate with defendants in the recent past, plaintiff could reasonably expect that a certified letter mailed to the same address would reach defendants in the ordinary course.

Defendants do not contradict plaintiff's strong prima facie case nor do they challenge the authenticity or accuracy of the documentary evidence from which plaintiff's witnesses testified. Indeed, male defendant's testimony that he lived one and one-half miles from Little Switzerland *and had received mail there in the past, including the demand letters of 29 July 1974*, tends to confirm the authenticity and accuracy of plaintiff's evidence. The credibility of such evidence is thus manifest as a matter of law.

Having satisfied its burden of establishing substantial compliance as a matter of law with the notice procedures of G.S. 25-9-603, it follows that plaintiff's disposition of the road grading equipment by public sale triggers the conclusive presumption of commercial reasonableness created by G.S. 25-9-601. We hold, therefore, that plaintiff is entitled to JNOV on the question of the commercial reasonableness of plaintiff's disposition by public sale of the road grading equipment.

In concluding that a question of fact remained as to whether plaintiff had sent notice of sale to an "actual address" of debtor, the Court of Appeals relied heavily on the fact that the notice of sale mailed to the Little Switzerland address on 24 October 1974 was not *received* by defendants until 7 November 1974, a full week after the sale of the road grading equipment on 31 October 1974. The court's reliance on this circumstance is misplaced. As previously noted, section 9-603 does not require creditor to insure

that notice of sale is *actually received* by debtor; rather, it requires, in pertinent part, that notice be *mailed* to the actual address of debtor where notice could reasonably be expected to be received by the addressee in the ordinary course of the mails. Thus, the fact that the notice mailed on 24 October did not reach defendants until 7 November is not relevant in determining whether on the date it mailed the letter plaintiff was justified in its belief that Route 1, Little Switzerland was an actual address of debtor where the notice of sale could be expected to be received in the ordinary course of the mails.

The Court of Appeals also relied on the fact that, technically, Route 1, Little Switzerland was a non-existent address. This observation is of no consequence in light of plaintiff's showing that said address was sufficiently accurate to effect normal delivery and prompt acknowledgment of receipt by defendants.

We note parenthetically that on 24 October 1974, the date notice of sale was mailed, defendants were vacationing in Eagle, Colorado. The male defendant testified that prior to their departure defendants knew that the road grading equipment was being repossessed, that a sale of this collateral was imminent, and the place where the sale would be conducted. Before leaving on this trip, defendants did not ask for the sale to be postponed and left no forwarding address. They learned that the sale had taken place immediately upon their return from Colorado on 31 October 1974. Under these circumstances, notice of sale would not have been received by defendants at either the Spruce Pine or Little Switzerland address until defendants returned home.

[6] Defendants next contend that the presumption of commercial reasonableness created by G.S. 25-9-601 denies them the opportunity to contest the reasonableness of a public sale of collateral by a secured party and thereby deprives them of their property without procedural due process in violation of Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The mandate of procedural due process contained in our Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive individuals of their fundamental rights. *United States v. Cruikshank*, 92 U.S. 542, 554-55, 23 L.Ed. 588 (1876); *In re Trusteeship of Kenan*, 261 N.C. 1, 134

S.E. 2d 85 (1964). This constitutional shield does not protect citizens from the actions or activities of other private individuals. "The requirement of 'State action' can rarely be satisfied when the action is taken by one not a state official." *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972). The initial inquiry on this point, therefore, is whether the presumption of commercial reasonableness created by G.S. 25-9-601 constitutes "state action" in the constitutional sense.

Defendants do not deny that the actions under scrutiny are those of a private creditor and a private debtor acting under the terms of a private security agreement. Nor do defendants seriously contend that the public sale of the road grading equipment was carried out with the aid of government officials. Rather, defendants purport to find State action solely in the legislative decision to deem commercially reasonable a public sale of collateral in which the secured party substantially complies with the notice procedures outlined in G.S. 25-9-601, *et seq.* According to defendants, the mere enactment of such legislation significantly involves the State in the disposition of collateral by secured parties to the point where the actions of such parties must be considered those of the State.

This contention is unsound and contrary to the weight of authority. *See* Annot., 29 A.L.R. Fed. 418 § 5 (1976). To hold that essentially private conduct is converted into State action simply because it is authorized by statutory law would make virtually all legislative enactments "State action." This is so because "[i]t is difficult to imagine any statutory provision that does not, in some way, control human relationships." *Oller v. Bank of America, supra.* To say that all human behavior which conforms to statutory requirements is "State action" would far exceed not only what the framers of the State and Federal Constitutions ever intended but common sense as well. *Id.* Since we hold that the enactment of G.S. 25-9-601 does not constitute "State action," it becomes unnecessary to discuss whether defendants were deprived of their property without procedural due process.

The result we reach requires us to consider whether verdict may be directed for the party with the burden of proof and, similarly, whether the trial court may grant a JNOV for the party

with the burden of proof. For the reasons which follow, we conclude that it may, in appropriate circumstances, do so.

Rule 50, Rules of Civil Procedure, contemplates that *any* party may move for a directed verdict at the close of all the evidence. *See* Official Comment, G.S. 1A-1, Rule 50. When such motion is made by any party and denied, or for any reason not granted, and the jury returns a verdict for the non-movant, the movant may make a motion for judgment notwithstanding the verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). The motion for JNOV in effect requests "that judgment be entered in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury." *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The rule itself provides that the motion for JNOV, made under the outlined circumstances, "shall be granted if it appears that the motion for directed verdict could properly have been granted." Rule 50(b)(1), Rules of Civil Procedure. It follows, therefore, that "[t]he propriety of granting a motion for judgment notwithstanding verdict is determined by the same considerations as that of a motion for directed verdict. . . ." Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest L. Rev. 1, 41 (1969).

Turning now to the case before us, plaintiff has the burden of establishing substantial compliance with the notice procedures outlined in G.S. 25-9-601 *et seq.* Its motion for JNOV brings into focus the propriety of directing a verdict for the party with the burden of proof. We first note that such directed verdicts are rarely granted. *See, e.g., Service Auto Supply Co. of P.R. v. Harte & Co.*, 533 F. 2d 23 (1st Cir. 1976). This is so because, even though proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by proponent. *See* 2 McIntosh, N.C. Practice and Procedure, § 1488.20 at 25-26 (Phillips Supp. 1970). Nonetheless, this Court has recognized that there may be situations where credibility is manifest as a matter of law. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). In such situations it is proper to direct verdict for the party with the burden of proof if the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn. *See generally, Fireman's Fund Ins. Co. v.*

Videfreeze Corp., 540 F. 2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977); *Grey v. First Nat. Bank in Dallas*, 393 F. 2d 371 (5th Cir.), *cert. denied*, 393 U.S. 961 (1968); *United States v. Grannis*, 172 F. 2d 507 (4th Cir.), *cert. denied*, 337 U.S. 918 (1949); 9 Wright & Miller, Federal Practice and Procedure, § 2535 (1971); Comment, Directing Verdict for the Party with the Burden of Proof, 50 N.C. L. Rev. 843 (1972).

[7] It should be stressed that there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of movant's evidence is manifest as a matter of law.* The constitutional right to trial by jury, N.C. Const., Art. I, § 25, is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury. *See Kidd v. Early, supra; McQueen v. Bank*, 111 N.C. 509, 16 S.E. 270 (1892). Similarly, Rule 51(a), which prohibits the trial judge in his charge from expressing an opinion as to whether a fact is fully or sufficiently proven, becomes applicable only after a preliminary determination by the trial judge that issues of fact and credibility exist for the jury. 2 McIntosh, supra, § 1488.20 at 25 (Phillips Supp. 1970).

Whether credibility is established as a matter of law depends on the evidence in each case. Accordingly, it would be futile to attempt to state a general rule which would determine whether credibility is manifest in a particular case. Nonetheless, review of the modern cases indicates three recurrent situations where credibility is manifest:

(1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963); *Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165 (1956).

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. *Watkins Products, Inc. v. Keane*, 185 Neb. 424, 176 N.W. 2d 230 (1970); *Commerce Trust Co. v. Howard*, 429 S.W. 2d 702 (Mo. 1968); 2 McIntosh, supra, 1488.20 at 26 (Phillips Supp. 1970).

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to

specific areas of impeachment and contradictions." *Kidd v. Early, supra*, 289 N.C. at 370. *See also*, Comment, supra, 50 N.C. L. Rev. at 844-46 (1972).

In summary, while credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant. *See generally*, 9 Wright & Miller, Federal Practice and Procedure, § 2535 (1971); James, Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 Va. L. Rev. 218, 226-27 (1961). Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury. *Kidd v. Early, supra.*

Cutts v. Casey, 278 N.C. 390, 180 S.E. 2d 297 (1971), does not control decision here. That case involved a motion for a directed verdict upon conflicting evidence on a strenuously contested issue of fact. Thus, credibility was obviously not manifest as a matter of law and neither a directed verdict nor a motion for summary judgment would have been appropriate. Any language to the contrary in *Cutts* was not necessary to a decision of the case.

[8] The record in this case reveals that plaintiff's evidence is manifestly credible and establishes as a matter of law that plaintiff mailed notice of sale to an "actual address" of the debtors in substantial compliance with G.S. 25-9-603. Accordingly, JNOV for plaintiff on the question of commercial reasonableness was properly granted.

The jury having found that defendants are indebted to plaintiff, after lawful sale of the collateral and proper credit for the proceeds thereof, in the amount of $89,008.23, it follows that plaintiff is entitled to judgment on the verdict for said amount. Furthermore, the jury having determined that plaintiff had *not* disposed of any of defendants' property not pledged as collateral in the security agreement, and the trial court's JNOV for defendants on that question having been reversed by the Court of Appeals and the reversal not preserved for further review in this Court, defendants have no set-off in any amount as a credit against the deficiency.

For the reasons stated the cause is remanded to the Court of Appeals for further remand to the Superior Court of Mitchell

County for entry of judgment on the verdict in favor of plaintiff in the sum of $89,008.23 with costs.

Reversed and remanded.

Justices COPELAND and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. WALLACE HUNTER LOGNER, RAY WILEY CUMMINGS, AND TOMMY WAYNE WILLIAMS

No. 24

(Filed 12 July 1979)

1. **Criminal Law § 169.3— objection to testimony—subsequent admission of similar evidence without objection**

Defendant was not prejudiced by a witness's testimony that he gave defendant twenty-five per cent of the valium he bought where the witness had already testified without objection that he had given defendant part of the valium.

2. **Criminal Law § 34.2— testimony by coconspirator—obtaining of cocaine from defendant—other crime—evidence as harmless error**

In this prosecution for murder, kidnapping, conspiracy to commit armed robbery, and armed robbery, the admission of testimony by a coconspirator that he had on one occasion obtained cocaine from one defendant, if erroneous, could not have prejudiced defendants to the extent that it caused a result different from that which would have been reached had the testimony been excluded.

3. **Criminal Law §§ 87.4, 173— irrelevant testimony on redirect—opening door—harmless error**

In this prosecution for a robbery-murder in Wake County in which the State's witness, a coconspirator in the crimes charged, testified on cross-examination that he and another unnamed person had committed a robbery-murder in Johnston County about three weeks before the crimes in question, defendants were not prejudiced by the court's admission of irrelevant testimony on redirect that the other participant in the Johnston County robbery-murder was not one of certain named persons, that the other participant was not from Lee, Chatham or Johnston Counties, and that the other participant was armed with a .22 caliber rifle, since such testimony did not in any way implicate defendants in the Johnston County robbery-murder, the testimony was of no probative value for any purpose, and defendants opened the door for such irrelevant testimony by bringing out substantially the same testimony themselves.

4. Criminal Law § 89.2— telephone company records—admission for corroboration

In this prosecution for a robbery-murder, telephone company records showing that numerous telephone calls had been made between the residence of a coconspirator who testified for the State and the residence of one defendant during a short period of time prior to the robbery-murder were properly admitted for the purpose of corroborating testimony by the coconspirator.

5. Criminal Law § 112.1— instructions on reasonable doubt

The trial court's instructions on reasonable doubt were sufficient where the court charged that a reasonable doubt is a doubt based on reason or common sense arising out of some or all of the evidence presented or lack of evidence, and that proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces the jury of defendant's guilt.

6. Criminal Law § 117.4— credibility of State's witness—instructions—crimes committed—addiction to valium—grant of immunity

The trial court in its charge on credibility adequately summarized testimony by the State's witness that he had committed numerous crimes for which he had not been charged or convicted and that he was addicted to valium and sometimes obtained it by deception. Furthermore, the court sufficiently informed the jury that the witness was testifying pursuant to a grant of immunity from the State.

7. Criminal Law § 116.1— instruction on right of defendants not to testify

The trial court's instruction on the right of defendants not to testify was correct, adequate and in substantial conformity with defendants' request.

8. Criminal Law § 114.2— instructions—no expression of opinion that conspiracy proved

The trial court did not express an opinion that a conspiracy had been proved by his statement in the charge, "Now we are involved at this issue ladies and gentlemen of the jury, with a conspiracy," where the court was explaining to the jury the written issues that would be submitted to them.

9. Criminal Law § 114.2— instructions—no expression of opinion that State's witness present at robbery-murder

The trial court did not express an opinion that it had been proved that the State's witness Oldham was present at the robbery-murder in question by his statement in the charge, "and also Oldham of course was there," where the court was correctly requiring the jury to find that the witness Oldham was also present in order to convict defendants of first degree murder.

10. Criminal Law § 114.2— instructions—no expression of opinion that robbery proved

In this prosecution for a robbery-murder, the trial court did not express an opinion that the fact of a robbery had been proved by his statement that "the court may have erroneously in this charge referred to the date of this robbery 7 February" where the court was correcting his erroneous reference

to the date of the alleged robbery in his instructions on the elements of armed robbery.

11. Robbery § 5.2— armed robbery—property stolen—increased burden on State—no prejudice to defendants

Defendants were not prejudiced by the court's instruction requiring the jury to find that defendants took and carried away money and the victim's pistol in order to find them guilty of armed robbery when the indictment charged only the stealing of money, since the State was thus required to prove more than should have been required of it.

APPEALS by the three defendants from *Friday, Judge.* Judgments entered 23 July 1978 in Superior Court, WAKE County.

Defendants were tried upon separate bills of indictment, proper in form, charging each defendant with: (1) first degree murder; (2) kidnapping; (3) conspiracy to commit armed robbery; and (4) armed robbery. All charges against each defendant were consolidated for trial.

One David Oldham, a fourth participant in the robbery-murder-kidnapping, testified for the State under a grant of immunity.

Each defendant was convicted of first degree murder upon which a sentence of life imprisonment was imposed. Each was convicted of kidnapping and, upon a finding of mitigating circumstances, a prison sentence of twenty to twenty-five years was imposed. Each was convicted of conspiracy to commit armed robbery upon which a prison sentence of ten years was imposed. Each was convicted of armed robbery. In the case of each defendant the trial judge ruled that the armed robbery conviction merged with the first degree murder conviction. On 21 December 1978 we allowed defendants' motions to review the convictions of conspiracy to commit armed robbery and the convictions of kidnapping prior to determination by the Court of Appeals.

The State's evidence tended to show the following:

Robert Waylon Holland, the victim of the murder-robbery, lived in the New Hill community in western Wake County. Mr. Holland's business was located next to his residence. He operated a business of selling beer and snacks. Also, two pool tables were located on his business premises. He did business in cash and

because there were no banks nearby he cashed checks for customers. On the day in question, 7 March 1977, Mr. Holland carried a large sum of money to the store—in the thousands of dollars.

About three weeks before 7 March 1977 State's witness Oldham and defendant Cummings went to the New Hill community where they were to meet a person named Tink for the purpose of robbing Mr. Holland. Tink did not arrive and the robbery was not consummated. Later, State's witness Oldham and defendant Cummings again went to the New Hill community to find out if Mr. Holland lived behind the pool hall and to see what the place looked like inside.

Approximately ten days before 7 March 1977 State's witness Oldham met with defendant Cummings, with defendant Wallace (Skeeter) Logner, and with Sneezy Logner (Wallace Logner's brother) at Wallace (Skeeter) Logner's house in Durham. The four of them went to New Hill to observe Mr. Holland's actions. Defendant Cummings and defendant Wallace (Skeeter) Logner were let out of the car across the road from the pool room. State's witness Oldham and Sneezy Logner drove about one-half mile down the road to a pull-off. They waited in the car for a call on the C.B. radio. The call was to be made from a walkie-talkie C.B. radio that defendant Cummings had with him. After about thirty minutes they received the call and proceeded back to New Hill where they picked up defendant Cummings and defendant Wallace (Skeeter) Logner. Cummings related to them how Mr. Holland had closed the pool room and had walked to the house next door.

Approximately two days later (about eight days before 7 March 1977) the four of them (Oldham, Cummings, Wallace Skeeter Logner, and Sneezy Logner) again drove to New Hill. On that trip they found the pool room closed and they returned to Durham.

Approximately five days before 7 March 1977 the four of them (State's witness Oldham, Sneezy Logner, defendant Cummings, and defendant Wallace (Skeeter) Logner) again drove to New Hill in the late afternoon. On the way to New Hill they discussed how they could watch Mr. Holland to determine how and when he went from the store to his house and the best way

to rob him. Sneezy Logner let State's witness Oldham and defendants Cummings and Wallace Logner out of the car near the Holland residence. Sneezy drove the car back to the pull-off to await a radio call from the other three. Oldham, Cummings, and Skeeter Logner carried a crowbar, sledge hammer, chisel, and two large screwdrivers in the event they might need to open a safe. Each wore gloves and a ski mask and each was armed with a pistol. They walked down the railroad track to the back of the Holland residence but were frightened away when Mr. Holland unexpectedly walked around the house. Upon receiving the call on the radio Sneezy Logner drove back near New Hill where he picked up Oldham, Cummings, and Wallace Logner. On their drive back to Durham they decided that the best time to enter the Holland house was as the train passed through New Hill.

On 7 March 1977 Sneezy Logner was not available as a driver; therefore, defendant Williams was enlisted to drive. Williams was instructed how to operate the radio, where to let them off, and how to pick them up. Again, State's witness Oldham, defendant Cummings, and defendant Wallace (Skeeter) Logner walked down the railroad tracks to the rear of the Holland residence. They again carried the burglary tools, each was wearing gloves and ski masks, and each was armed. Oldham had a .38 cal. revolver, Cummings had 9 millimeter automatic pistol, and Wallace (Skeeter) Logner had a sawed-off double barrel shotgun.

As the train passed through New Hill, the three of them entered the back door of the Holland residence. They taped Mrs. Holland's hands, eyes, and mouth. They then waited for Mr. Holland to come from the store. As Mr. Holland entered the back door, Wallace (Skeeter) Logner shot him with the shotgun. They then took a pistol, a wallet and a cloth bag from Mr. Holland's pockets. They left by the back door and called defendant Williams on the radio, who then picked them up and drove back to Durham. Each of the four received a share of the money taken from Mr. Holland. State's witness Oldham received a share of approximately $275.00.

The defendants offered no evidence.

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

Arthur Vann for defendant Wallace (Skeeter) Logner.

William B. Crumpler for defendant Ray Wiley Cummings.

Howard F. Twiggs for defendant Tommy Wayne Williams.

BROCK, Justice.

During cross-examination by defendants of State's witness Oldham each defendant brought out that Oldham was addicted to valium. Defendant Cummings also brought out on cross-examination that Oldham had tried other drugs, including cocaine. Then on re-direct examination the State was permitted to bring out that Oldham gave defendant Cummings about twenty-five per cent of the valium he bought. Also on re-direct examination Oldham was permitted to testify that, after the first trip to New Hill to view the Holland's store and residence, he took cocaine which he obtained from Wallace (Skeeter) Logner.

[1] Defendant Cummings undertakes to assign error to the admission of testimony on re-direct examination of the State's witness Oldham concerning valium supplied by Oldham to Cummings. Defendants Logner and Williams do not object to the re-direct testimony concerning valium. Defendant Cummings waived objection to testimony about the valium by failure to enter timely objection or motion to strike. *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971); *Stansbury's N.C. Evidence*, § 27, p. 70 (Brandis Rev. 1973). The following transpired on re-direct examination of State's witness Oldham:

"REDIRECT EXAMINATION BY Mr. Hall [District Attorney]:

When Mr. Oldham engaged in criminal activity, he usually had more than one other person with him. Of the $100,000.00 of property he admitted to stealing, his share approximated $25,000.00. He did not take all the valium he got prescriptions for.

Q. Who else took any of it?

A. I gave Ray Cummings part of it. I gave Chester Estes part of it.

Q. What percentage of it would you say that you gave Ray Cummings?

MR. CRUMPLER: Objection.

COURT: OVERRULED.

CUMMINGS' EXCEPTION NO. 1.

A. I would say approximately twenty-five percent of what I bought."

Having failed to object to the first question about who else took any of the valium, and particularly having failed to move to strike the testimony that Oldham gave Cummings part of it, defendant Cummings' objection to the question as to the percentage given to Cummings came too late. We perceive no harm in the witness answering that he gave Cummings twenty-five per cent of the valium he bought after he had already testified without objection that he had given Cummings part of the valium. This assignment of error by defendant Cummings is overruled.

[2] Defendants Logner and Williams assign as error the admission of the testimony concerning cocaine on re-direct examination. Defendant Cummings does not object to the re-direct testimony concerning cocaine.

"When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each." *State v. Summerlin*, 232 N.C. 333, 337, 60 S.E. 2d 322, 325 (1950). "It is undoubtedly the general rule of law that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other." *Id.* However, if the evidence tends to prove any other relevant fact it will not be excluded merely because it also shows the accused to have committed an independent crime. 1 *Stansbury's, supra*, § 91, p. 288. If the evidence of other crimes bears some logical relevance to the crime charged it will be admitted. *See State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949).

The testimony concerning cocaine was restricted by the trial judge to events which took place after the planning of the robbery began. The trial judge ruled in effect that the evidence was relevant as a part of the on-going conspiracy. It may also have been relevant to establish the close relationship between State's witness Oldham and Wallace (Skeeter) Logner to support Oldham's identification of Logner as a participant in the crime for which he was being tried.

Defendant Williams argues that even though the evidence that State's witness Oldham obtained the cocaine from defendant Logner may have been admissible against defendants Logner and Cummings, it was nevertheless inadmissible against him because the evidence of the conspiracy did not implicate him until the day of the robbery when he was secured as a substitute driver.

It is immaterial when a defendant entered into or became a party to the conspiracy, or how prominent or inconspicuous a part he took in the execution of the unlawful purpose; he is responsible to the fullest extent for everything that is said and done in furtherance of the plot. *State v. Summerlin, supra.*

Conceding arguendo that it was error to admit the re-direct testimony that Oldham on one occasion had obtained cocaine from defendant Logner, we fail to perceive how the testimony reasonably could have prejudiced Logner and Williams in this trial for murder, kidnapping, conspiracy to commit armed robbery, and armed robbery to the extent that it caused a result different from that which would have been reached had the testimony been excluded. The primary controversy throughout this trial was the credibility of State's witness Oldham and defendants were afforded every opportunity to discredit him. It seems to us that the mere mention of cocaine one time was insignificant in a trial as protracted as this one. In our opinion the error in admitting the one brief statement that Oldham had obtained cocaine from defendant Logner could not have prejudiced defendants Logner and Williams so as to raise a "reasonable possibility that, had the error in question not been committed, a different result would have been reached. . . ." G.S. § 15A-1443. *See State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973).

This assignment of error by defendants Logner and Williams to the admission of the testimony concerning cocaine on re-direct examination is overruled.

[3] All defendants assign as error that the trial judge allowed "the prosecutor to conduct redirect examination of the witness Oldham with respect to a separate robbery-homicide that the witness admitted participating in with another unnamed person."

On cross-examination by defendants the State's witness Oldham testified that he was presently serving a twenty year sentence for safecracking; that he had broken into at least one hundred homes and businesses; that he was fifteen or sixteen years of age when he was first arrested; that between the ages of sixteen and thirty-three he had netted at least $100,000.00 from stealing and robbing; and that he participated with another person in the robbery and murder of Mr. and Mrs. A. B. Lee in Johnston County about three weeks before the robbery-murder involved in this case. The cross-examination of the State's witness Oldham concerning his past conduct was permissible and proper for the purpose of impeaching his credibility as a witness. However, defense counsel also launched into completely irrelevant cross-examination concerning the names of persons who had participated in criminal activity with Oldham. Oldham was permitted to testify on cross-examination, without objection from anyone, that Bobby Blackman and Jimmy Blackman had participated with him in criminal activity; that Bobby Blackman is presently serving a prison sentence for a homicide; that Richard Godwin had participated in four crimes with him; that Charles Estes has robbed as many as twenty-five places with him; that his brothers Anthony and Keith Oldham were involved with him in some robberies in Chatham County; and that he and Roscoe Grice discussed the robbery and murder of Mr. and Mrs. Lee in Johnston County, although Grice did not actually participate.

It appears from the record on appeal that Oldham had, in his conversations with an S.B.I. agent, implicated defendant Cummings in the murder-robbery of Mr. and Mrs. Lee in Johnston County. In response to defendant Cummings' motion to suppress such testimony by State's witness Oldham, the district attorney properly instructed Oldham not to mention Cummings' participation in the Johnston County murder-robbery. This instruction was followed by Oldham. Therefore defendants were safe in launching into the irrelevant cross-examination concerning others who had participated in crime with him. But that safety for Cummings did not render the irrelevant cross-examination proper. Such cross-

examination was apparently engaged in to lay the ground for the spurious argument to the jury by defendants that since those other persons had engaged in crimes with Oldham that the jury more reasonably should believe that it was one or more of those persons who had participated with Oldham in the Johnston County robbery-murder and also in the robbery-murder of Mr. Holland in Wake County instead of the three defendants.

On re-direct examination by the district attorney Oldham testified that he and one other person were present at the robbery-murder of Mr. and Mrs. Lee in Johnston County. The district attorney then asked a series of questions, and, over objection by defendants to each question, Oldham was permitted to testify that it was not Chester Estes, that it was not Anthony or Keith Oldham, that it was not Bobby Blackman, and that it was not Jimmy Blackman who was present with him at the time of the Johnston County robbery-murder. These questions and answers, like defendants' cross-examination, were irrelevant to the subject matter of the trial. However, defendants by their cross-examination clearly opened the door to the questions on re-direct examination and should not be heard to complain. G.S. § 15A-1443(c). In any event none of the questions or answers, of which defendants complain, in any way implicated defendants in the independent substantive offenses of the robbery and murder of Mr. and Mrs. Lee in Johnston County.

Following the above line of questioning the district attorney, with further irrelevant questions, brought out that the other person with Oldham in the Johnston County robbery-murder was not from Lee County. Then all defendants objected to Oldham being allowed to testify that the other person was not from Chatham County and was not from Johnston County. It seems that defendants in their cross-examination of Oldham and the district attorney in his re-direct examination lost sight of the fact that the crime in question was the robbery-murder of Mr. Holland in the New Hill section of Wake County. Defendants and the State undertook an investigation of the Johnston County robbery-murders.

Defendants argue from the false premise that allowing Oldham to testify that the other person with him in the Johnston County robbery-murders was not from Chatham County or from

Johnston County (they did not object to his testimony that the other person was not from Lee County) necessarily reflected that the other person must have been from Durham County (home county of the defendants) and therefore implicated one of them as being the other participant. This argument is specious. Under the testimony of which defendants now complain the other person in the Johnston County robbery-murders could have as easily come from any one of the other one hundred counties of the State or even beyond the borders of the State.

Following the above line of questioning the district attorney, still on re-direct examination of Oldham about the Johnston County robbery-murders, asked if the other person with Oldham was armed and with what. Over objection from all defendants, Oldham was allowed to answer that the other person was armed with a .22 cal. rifle. Conceding that the questions and answers were irrelevant to the charges being tried, it is inconceivable how defendants were harmed. Defendants had already brought out on their irrelevant cross-examination that the other person with Oldham shot Mr. Lee with a . 22 cal. rifle.

The admission of technically incompetent evidence is harmless unless it is made to appear that defendants were prejudiced thereby and that a different result likely would have ensued had the evidence been excluded. *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971). Our judgment must be based on our own reading of the record on appeal and on what seems to us to have been the probable impact of this irrelevant testimony on the minds of an average jury. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969). Viewing the record on appeal in its entirety this irrelevant testimony brought out by the State was of no probative value for any purpose and could not have prejudiced defendants. Also, as pointed out, defendants opened the door for this irrelevant testimony by bringing out substantially the same irrelevant testimony themselves. This assignment of error is without merit and is overruled.

[4] The defendants assign as error that the trial court permitted the State to offer in evidence telephone company records, which indicated that there had been numerous telephone calls between defendant Cummings and Oldham between 19 February 1977 and 7 March 1977 (the date of the robbery-murder of Mr. Holland in Wake County).

Oldham testified that he had known defendant Logner for two years prior to 7 March 1977; that he had known defendant Cummings three to four years prior to 7 March 1977; that he had known defendant Williams for two to three weeks prior to 7 March 1977; and that he knew where each of the three lived in Durham. Oldham further testified that he had talked to defendant Cummings on the telephone from his (Oldham's) residence in the Bear Creek Community of Chatham County on several occasions, including a call from Cummings on 7 March 1977 in which Cummings told him they needed to go back "down yonder," and told Oldham to bring this shotgun.

The telephone records were identified and duly authenticated by qualified officials of the General Telephone Company of the Southeast (serving Durham) and of United Telephone Company for the Carolinas (serving the Bear Creek Community of Chatham County). These records were for the telephone in the residence in which defendant Cummings lived in Durham and for the telephone in the residence in which Oldham lived in Chatham County. The records corroborated Oldham's testimony and were competent for this purpose. They were properly admitted. 1 *Stansbury's, supra*, § 155, p. 521. This assignment of error is without merit and is overruled.

Under defendants' assignments of error to the instructions given to the jury by the trial judge they made eight arguments:

[5] 1. Defendants argue that the court did not adequately define reasonable doubt. They rely upon *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). In *Hammonds* it was held that, absent a request, the trial judge is not required to define reasonable doubt. *Hammonds* also held that the law does not require any set formula in defining reasonable doubt. In *Hammonds* the opinion pointed out that there were many approved formulae. In the present case the trial judge defined reasonable doubt as follows:

> "[A] reasonable doubt is a doubt based on reason and on common sense, arising out of some or all of the evidence that has been presented; or lack or insufficiency of the evidence, as the case may be.
>
> Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt."

The foregoing definition comports with the approved examples pointed out in *Hammonds*, and it is an adequate and clear definition of reasonable doubt. This argument is without merit.

[6] 2. Defendants argue that the trial judge "did not adequately explain credibility" in his charge. The defendants filed thirteen numbered requests for jury instructions. They argue that they requested but the trial judge failed, in his summation of the evidence, to mention the numerous crimes Oldham admitted committing but for which he was not charged or convicted, and failed to mention Oldham's admission to valium addiction or that he sometimes obtained valium by deception. Our reading of the charge to the jury discloses that the judge adequately summarized the testimony of Oldham upon these points as follows: "that he had been convicted of breaking and entering, safecracking and indecent exposure and he has participated in other breakings and enterings since he was fifteen years old. He has participated in about 100 breaking and enterings and has entered about fifty safes. He has participated in a robbery, murder of Mr. and Mrs. Lee in Johnston County. . . ." Further as follows: "That he took valium and drank vodka and he secured valium by taking a pill bottle to the drugstore and he secured it from two drugstores. . . . That he was a valium addict for about two years before 1977; that he took up to eight pills daily and drank vodka. . . ." The trial judge is not required to give his instructions in the wording arranged by counsel. It is sufficient if he instructs in substantial conformity with the requested instruction. *State v. Kirby*, 3 N.C. App. 43, 163 S.E. 2d 911 (1968). The instructions upon this request by defendants was in substantial conformity with the request and was adequate. This argument is without merit.

Defendants further argue that the trial judge failed to inform the jury adequately of the grant of immunity to the State's witness Oldham. We disagree. The trial judge instructed as follows: "Ladies and gentlemen of the jury the Court earlier in this trial instructed you that David Oldham, Jr. was testifying under a grant of immunity in this trial. Again, the Court instructs you that if you find that this witness testified in whole or in part for these reasons or this reason, you should examine his testimony with great care and caution in deciding whether or not to believe it." Further in the charge the judge instructed: "He has

been granted immunity from the Holland crimes and others about which he testifies and he has been promised he would serve his time in the county jail for his testimony in this trial. . . ." This argument of defendants is without merit.

From a reading of defendants' argument it appears they object to the failure of the trial judge to argue their case to the jury for them. This the trial judge is not required to do nor may he properly do.

[7] 3. The defendants argue that "the trial court committed prejudicial error in charging the jury on the right of the defendants not to testify." The defendants requested an instruction on their rights not to testify. Again we point out that the trial judge is not required to give his instructions in the wording arranged by counsel. It is sufficient if the trial judge instructs in substantial conformance with the request. The instruction as given was correct, adequate and in substantial conformance with the request. *See State v. Scott*, 289 N.C. 712, 724, 224 S.E. 2d 185, 192 (1976). This argument of defendants is without merit.

4. Defendants argue that the trial judge expressed his opinion, in violation of G.S. 15A-1222 and 1232, that certain facts had been proved. Defendants point to three instances where they contend the trial judge expressed an opinion.

[8] First: Defendants contend that the trial judge expressed the opinion that a conspiracy had been proved. They extract from the charge these words: "Now we are involved at (sic) this issue ladies and gentlemen of the jury, with a conspiracy." Taken out of the context of what had been said immediately prior to the above extracted sentence and what was said immediately after the above extracted sentence the sentence might be suspect. However, the trial judge at this point was explaining to the jury the written issues that would be submitted to them. He then proceeded to define conspiracy and placed the burden upon the State to prove each element beyond a reasonable doubt. We cannot perceive how the jury could have understood the trial judge to be stating his opinion that a conspiracy had been established.

[9] Second: Defendants contend that the trial judge expressed an opinion that it had been proved that Oldham (State's witness) was present at the robbery-murder of Mr. Holland. They extract

the following words from the charge: "and also Oldham of course was there. . . ." The phrase extracted by defendants as an expression of opinion by the trial judge, when placed back in context, reads as follows:

> "So, ladies and gentlemen of the jury, in connection with the second issue, Court charges that if you find from the evidence and beyond a reasonable doubt, that the defendants Logner, Cummings and Williams, and also Oldham of course was there, were present on the premises of Mr. Holland's home on this day in question and they were at that time, as a result of a common purpose, to rob Mr. Holland with a firearm; that if one or more of them actually had a shotgun, pistols, a firearm; that they were aiding and abetting each other and that Mr. Holland was killed while the defendants were perpetrating armed robbery and that he died as a proximate result of the bullet wounds to his body received during the perpetration of an armed robbery; then you being so satisfied beyond a reasonable doubt would return a verdict of guilty of first degree murder as charged in the bills of indictment."

It seems obvious that the trial judge was correctly requiring the jury to find that Oldham was present also.

[10] Third: Defendants contend that the trial judge expressed an opinion that it had been proved that a robbery had been committed. The sentence about which defendants complain appears in the trial judge's explanation to the jury of the elements the State must prove beyond a reasonable doubt to justify convictions of kidnapping. When read in context, the instruction is: "[F]irst, that the defendants, while actually acting with a common purpose and aiding and abetting each other, unlawfully, that is without justification or excuse, restrained Mrs. Holland, that is restricted Mrs. Holland's freedom of movement, by taping her legs, arms and mouth and eyes on 7 March 1977, in her own home in Wake County—*members of the jury, the court may have erroneously in this charge referred to the date of this robbery 7 February.* If so, strike that from your minds and substitute 7 March 1977 in all places. Secondly, that Mrs. Holland did not consent to this restrainment or confinement. . . ." The portion italicized is the portion to which defendants except. Obviously the trial judge was only seeking to eliminate confusion for the jury for he had in fact

referred to "the 7th day of February 1977" in his instructions on the elements of armed robbery. We cannot conceive of the jury being led to think that the trial judge was of the opinion that the fact of a robbery had been proved.

In the three instances challenged by defendants we find no expression of an opinion by the trial judge.

5. Defendants argue that the trial judge did not accurately or properly explain conspiracy. We have carefully read the instruction about which defendants complain. Again, when placed back in context with the instructions immediately proceeding and immediately following the sentence extracted by defendants the instruction is a clear definition of a criminal conspiracy and adequately applies the law to the evidence in the case. This argument is without merit.

[11] 6. Defendants argue that the trial judge incorrectly instructed the jury that they could find the defendants guilty of armed robbery if the property stolen included deceased's pistol. They concede there was evidence that defendants took deceased's pistol but they argue that since the bill of indictment only charged the stealing of money it was improper to include the pistol in the instructions. The fallacy in defendants' argument is that in fact the error in mentioning the pistol, if error it be, was beneficial to defendants because it required the State to prove more than was required under the indictment. The trial judge instructed as follows: ". . . and that they took and carried away this money and a pistol from the person of Mr. Holland, without Mr. Holland's voluntary consent, by endangering or threatening his life, Mr. Holland's life, with the use or threatened use of the firearm, defendants knowing that they were not entitled to take this money and this pistol and intending at that time to deprive Mr. Holland of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm." As pointed out above, this coupling of the money and the pistol in the instructions required the State to prove more than should have been required of it. We find no prejudice to defendants.

7. Defendants argue that the trial court did not accurately or properly explain kidnapping.

8. Defendants argue that, as a whole, the trial court's instructions were confusing and too favorable to the State.

It would constitute a laborious and unjustified writing and would seriously expand this already somewhat unnecessarily, voluminous opinion to articulate and answer each of defendants' arguments under these two subheads. Suffice to say we have examined and considered each of defendants' arguments hereunder and find them to be tediously tenacious but without merit. The instructions to the jury fairly and adequately apprised it of its duties and fairly and adequately applied the law to the evidence in the case.

For the reasons heretofore stated we hold that defendants' assignment of error charging that the trial court failed to instruct the jury in accordance with defendants' requests for instructions, and defendant Cummings' assignment of error charging that the trial court should have granted his motion for mistrial and for a severance of his trial from the trials of Logner and Williams, are without merit.

In our opinion defendants received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. MAUDE MAY CLAY

No. 40

(Filed 12 July 1979)

1. Criminal law § 75.7— *statement made in defendant's home—no custodial interrogation*

Evidence was sufficient to support the trial court's conclusion that defendant's inculpatory statement made to officers was voluntary and did not stem from a custodial interrogation where such evidence tended to show that officers arrived at defendant's house at 1:00 a.m., gave defendant the *Miranda* warnings, and in response to their questions were told by defendant that another person had shot the victim; two officers then accompanied the victim to the hospital while other policemen remained at defendant's house; the two officers who had gone to the hospital returned to defendant's house at 3:10 and again asked her who shot the victim; defendant stated at this time that she had shot him; defendant was not placed under arrest until after she made the statement at 3:10 a.m.; defendant was not told not to leave her residence while officers went to the hospital; and defendant was never threatened or coerced into giving a statement or promised anything.

2. Assault and Battery § 8— self-defense—when deadly force is excessive

Where an assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law.

3. Assault and Battery § 15.6— self-defense—force permissible—improper instruction

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court's instructions with respect to excessive force and absence of an intent to kill that defendant could use such force as she thought necessary to protect herself from bodily injury or offensive physical contact were improper, but such error does not require a new trial because the instruction was more favorable than that to which defendant was entitled.

APPEAL by the State from the decision of the Court of Appeals, reported in 39 N.C. App. 150, 249 S.E. 2d 843 (1978), granting defendant a new trial based on *Judge John C. Martin's* denial of defendant's motion to suppress confession evidence at the 13 February 1978 Criminal Session of ALAMANCE Superior Court.

Defendant was charged in a bill of indictment, proper in form, with assault with a deadly weapon with intent to kill inflicting serious bodily injury.

The State presented evidence which tended to show that on the afternoon or early evening of 3 September 1977, Nathaniel Evans went to defendant's house to buy a drink of liquor and while there became engaged in a scuffle with defendant because of her refusal to sell him a bowl of cooked okra. Evans went home but returned to defendant's house around 11:00 p.m. and was invited into the house by Verla Turner. Evans testified that after he entered the house, Turner pulled a knife on him, and he started backing towards the door. Defendant then told Turner to get the shotgun so she could shoot Evans. When Turner returned with the gun, Evans turned and started out the door and was shot in the leg. He fell to the floor, and when he looked up, defendant was trying to take the gun from Turner to shoot him again. Evans further testified that he did not see who shot him.

Burlington police officers Barrow and Perry testified that they went to defendant's residence at approximately 1:05 a.m. in response to a call reporting a domestic problem. The officers did not realize until they arrived at the residence that there had been

a shooting. At that time, they gave defendant the *Miranda* warnings and in response to their questions were told by defendant that Turner had shot Evans. The two officers then accompanied Evans to the hospital while other policemen remained at defendant's house. Barrow and Perry returned to defendant's residence at about 3:10 a.m. and once again asked her who shot Evans. At this time, she stated that she had shot him. At trial, defendant moved to suppress this statement. The trial judge conducted a voir dire hearing as a result of which he concluded that defendant's statement was "the result of an on-the-scene investigation rather than custodial interrogation" and denied the motion to suppress.

Defendant presented evidence which tended to show that Evans had threatened to kill her and had pulled a knife on Turner earlier that evening. There was also evidence that Evans was drunk at the time of the shooting and that he had a reputation for being a violent and fighting man.

The trial judge submitted to the jury the possible verdicts of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and not guilty. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. From judgment imposing a sentence of four to five years, defendant appealed.

The Court of Appeals, in an opinion written by Judge Hedrick, Judge Morris concurring, granted defendant a new trial on the grounds that defendant's inculpatory statement was the result of custodial interrogation and should not have been admitted into evidence. Judge Harry Martin dissented on the grounds that the evidence presented on voir dire supported the trial judge's conclusion that defendant's inculpatory statement was voluntary and did not stem from a custodial interrogation. The State appealed.

Angela R. Bryant for defendant appellee.

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

BRANCH, Justice.

The State contends that the Court of Appeals incorrectly decided that the trial judge erred in admitting defendant's inculpatory statement into evidence.

Pursuant to defendant's motion to suppress this statement, the trial judge correctly conducted a voir dire hearing. After hearing testimony from Officer Barrow and defendant, the trial judge, *inter alia*, made the following findings of fact:

> That again at approximately 3:10 a.m. Officer Barrow and Officer Perry returned to the Clay residence, having been to the Alamance County Hospital to determine the status of the victim, and upon returning to the Clay residence had in their possession a tape recorder; that during the period of time in which they were absent from the Clay residence the defendant was not in custody or detained in any manner and felt that she could have left the house at any time; that the officers thereafter asked the defendant questions and interrogated the defendant and that she voluntarily answered the questions; that such interrogation was conducted in connection with an on-the-scene investigation of a crime and not as a result of any custodial interrogation and that at the time of the second interrogation and answers given by the defendant, the defendant had not been placed under arrest and had not been told that she could not leave the residence and was in no manner detained even though officers had remained present there at the residence during the entire period of absence of Officers Perry and Barrow and that prior to asking Mrs. Clay any questions at the time of the second interrogation Mrs. Clay was reminded of the rights which she had previously been given at approximately 1:10 a.m.

Based on these findings of fact, Judge Martin concluded that the inculpatory statement was the result of an on-the-scene investigation and was given "voluntarily, freely, and understandingly without duress, coercion, or inducement."

In deciding that the trial judge erred in allowing defendant's statement into evidence, the Court of Appeals stated:

In our opinion, in the present case the evidence adduced on *voir dire* and the findings of fact made by the trial judge do not support the conclusion that the defendant's inculpatory statements "were the result of an on-the-scene investigation rather than a custodial interrogation." In our opinion, the evidence in the present case demonstrates a "coercive environment" rendering the 3:10 a.m. statements of the defendant inadmissible in the absence of any evidence showing that she affirmatively waiver her right to counsel.

The *Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation. *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974); *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973). "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Neither *Miranda* warnings nor waiver of counsel is required when police activity is limited to a general on-the-scene investigation. *State v. Sykes, supra; State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968). The ultimate test of the admissiblity of a confession is whether the statement was in fact voluntarily and understandingly made. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). It is well settled that the trial judge's findings of fact after a voir dire hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when supported by competent evidence. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. White, supra.* Likewise, the finding of the trial court that the defendant was not in custody at the time he made the statement in question is conclusive if supported by record evidence elicited on a properly conducted voir dire. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977).

[1] With these rules in mind, we turn to the record to ascertain whether the trial judge's findings, in instant case, are supported by evidence elicited on voir dire.

Officer Barrow testified that before he talked to defendant he did not have a suspect in mind. The first statement was taken at about 1:10 a.m., and defendant was not under arrest or in

custody. She told the officers that Mr. Turner had shot Mr. Evans. Officers Barrow and Perry then went to the hospital and returned to defendant's residence at approximately 3:00 a.m. Before the officers went to the hospital, defendant was not under arrest and was not told not to leave her residence. She was not handcuffed and was not placed under arrest when Barrow and Perry returned from the hospital. Defendant gave the officers a statement at 3:10 a.m. indicating that she had shot Mr. Evans. She was never threatened or coerced into giving a statement or promised anything.

Defendant's voir dire testimony included the following statements which we find quite telling:

> I feel I could have left the house before I made the statement if I had wanted to go, and I don't think they would have tried to stop me. . . .
>
> I was not arrested at my house that night and I was not handcuffed or threatened in order to get me to answer questions. I knew at the time that I did not have to tell the police anything and that I could have stopped talking to them at any time I wanted to. I knew if I wanted a lawyer that I could have one there while they were talking to me. I did leave the house after talking to the police.
>
> . . . I was upset, really mad, and was afraid because that big man had come in here jumping on me and beating on me. I was nervous. But not because all the policemen were in the house. Because then I felt safe. . . .
>
> . . . I was arrested on this charge about 7:00 o'clock that morning.

It is obvious that the trial judge's findings are amply supported by the testimony presented on voir dire. Moreover, it appears that the evidence which lends the strongest support to his findings was elicited from the defendant. The Court of Appeals, in support of its decision, relies on conclusions not warranted by the evidence. Judge Harry Martin, in his dissenting opinion, has ably pointed out the lack of basis for these conclusions.

There was plenary evidence to support the trial judge's findings of fact, which in turn support his conclusions of law and rul-

ing. We, therefore, hold that the trial judge correctly denied defendant's motion to suppress her inculpatory statements.

Defendant argues that the trial judge erred in instructing the jury in that he failed to distinguish between the elements of self-defense when there is an intent to kill and the elements of self-defense where that intent is absent. Defendant's contention seems to be that if she did not act with intent to kill, her assault would be excused by the law of self-defense if it reasonably appeared to be necessary to protect herself from bodily injury or offensive physical contact. However, we think the inquiry relative to self-defense in such cases should focus not on the presence or absence of defendant's intent to kill but on the amount of force used by the defendant in repelling the attack and the nature of the attack with which the defendant was faced.

It is clear that where one has inflicted serious injury upon another with intent to kill, such assault would be justified as being in self-defense only if the defendant was in actual or apparent danger of death or great bodily harm at the hands of the other. *State v. Anderson*, 230 N.C. 54, 51 S.E. 2d 895 (1949). Our cases also provide that a defendant can use force in self-defense even though the threat he attempts to repel is less than death or great bodily harm. *State v. Fletcher*, 268 N.C. 140, 150 S.E. 2d 54 (1966); *State v. Anderson, supra.* However, some confusion arises with regard to the amount of force which may be used in self-defense to protect against bodily injury or offensive physical contact.

In *State v. Anderson, supra*, the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injuries. Defendant offered evidence tending to show self-defense, and the trial judge submitted to the jury the possible verdicts of guilty of felonious assault, the lesser included offense of nonfelonious assault with a deadly weapon, and not guilty. In its charge to the jury, the court, without qualification, instructed:

> One is permitted to fight in self-defense or kill in self-defense when it is necessary for him to do so in order to avoid death or great bodily harm.

Finding this instruction to be erroneous, this Court, speaking through Justice Ervin, stated:

> . . . In final result, it charged the jury that one is never privileged by law to employ force in self-protection unless he is threatened with death or great bodily harm.
>
> * * *
>
> The law does not compel any man to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm. If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm.

In *State v. Fletcher, supra*, defendant was also charged with assault with a deadly weapon with intent to kill inflicting serious injury. The trial judge instructed the jury that in order to have the benefit of the principle of self-defense, the defendant must show that he used a deadly weapon only to protect himself from death or great bodily harm. This Court held that the instruction was erroneous because it improperly placed on the defendant the burden of satisfying the jury that he acted in self-defense. Relying on *State v. Anderson, supra*, the Court found the instruction objectionable in another respect:

> Moreover, the court's instructions imply defendant could not lawfully use force in self-defense unless he was threatened *with death or great bodily harm.* We find no instruction with reference to the right of defendant to defend himself against a nonfelonious assault. Failure to instruct the jury with reference to defendant's right of self-defense in respect of repelling a nonfelonious assault is prejudicial error.

[2] Even though the weapons used in those cases were not deadly weapons per se, both *Anderson* and *Fletcher* may leave the impression that a defendant may assault another with a deadly weapon if it reasonably appears that such assault is necessary to protect the defendant from bodily injury or offensive physical contact. Notwithstanding the language in *Anderson* and *Fletcher*,

we hold that a defendant may employ deadly force in self-defense *only* if it reasonably appears to be necessary to protect against death or great bodily harm. We define deadly force as force likely to cause death or great bodily harm. *See, Commonwealth v. Klein,* 363 N.E. 2d 1313 (Mass. 1977). This follows from our definition of deadly weapon, to wit, an instrument which is likely to produce death or great bodily harm, under the circumstances of its use. *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). In so holding, we expressly reject defendant's contention, and any implication in our cases in support thereof, that a defendant would be justified by the principles of self-defense in employing deadly force to protect against bodily injury or offensive physical contact. Our decision says, in effect, that where the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law. Although we may hear protestations to the contrary, this decision will not compel anyone "to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm." In such cases, a person so accosted may use such force, short of deadly force, as reasonably appears to him to be necessary under the circumstances to prevent bodily injury or offensive physical contact. This decision precludes the use of deadly force to prevent bodily injury or offensive physical contact and in so doing recognizes the premium we place on human life. However, it does not preclude the use of deadly force where such force reasonably appears to be necessary to prevent death or great bodily harm. The reasonableness of defendant's apprehension of death or great bodily harm must be determined by the jury on the basis of all the facts and circumstances as they appeared to defendant at the time. *State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519 (1944). Among the circumstances to be considered by the jury are the size, age and strength of defendant's assailant in relation to that of defendant; the fierceness or persistence of the assault upon defendant; whether the assailant had or appeared to have a weapon in his possession; and the reputation of the assailant for danger and violence.

[3] In instant case, after instructing the jury on the elements of the offenses submitted, the trial judge instructed on self-defense, in part, as follows:

> Now, members of the jury, if the defendant acted in self defense, her actions are excused and she is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in self defense.
>
> Now if you find from the evidence beyond a reasonable doubt that the defendant assaulted Nate Evans with a deadly weapon with intent to kill inflicting serious injury or assaulted him with a deadly weapon inflicting serious injury or assaulted him with a deadly weapon, that offense, or assault, would be excused as being in self defense only if the circumstances at the time that she acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect herself from death or great bodily harm or to protect her home from attack and the circumstances did create such a belief in her mind.
>
> * * *
>
> However, the force used cannot have been excessive. This means that the defendant has the right to use only such force as reasonably appeared to her to be necessary under the circumstances to protect herself from *bodily injury or offensive physical contact.* In making the determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to that of Cleo Evans, the fierceness of the assault, if any, upon the defendant, whether or not Cleo Evans had a weapon in his possession, and the reputation, if any of Cleo Evans for danger and violence. [Emphasis added.]
>
> * * *
>
> Now, if you find from the evidence beyond a reasonable doubt that the defendant did assault Nate Evans, but do not find that she had an intent to kill, that assault would be ex-

cused as being in self defense if the circumstances at the time she acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect herself from *bodily injury or offensive physical contact* or to protect her home from attack and the circumstances did create such a belief in her mind even though she was not thereby put in actual danger of death or great bodily harm. [Emphasis added.]

* * *

If, members of the jury, however, although you are satisfied beyond a reasonable doubt that Maude May Clay committed an assault upon Cleo Nate Evans with a deadly weapon inflicting serious bodily injury with intent to kill or that she committed an assault upon him inflicting serious injury with a deadly weapon or that she committed an assault upon him with a deadly weapon, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that Maude May Clay did not act in self defense—that is, that Maude May Clay did not reasonably believe that the assault was necessary to protect herself from death or serious bodily injury or her home from attack or that she, Maude May Clay, used excessive force or was the aggressor. If you do not so find or have a reasonable doubt, then Maude May Clay would be justified by self defense and it would be your duty to return a verdict of not guilty.

We note that in instructing on self-defense, the trial judge adhered, virtually verbatim, to the pattern jury instruction applicable to the case. However, we believe that in light of our holding in this case, that instruction is defective in part. The references to "bodily injury or offensive physical contact" in the two paragraphs dealing with excessive force and absence of an intent to kill are not warranted in instant case because defendant employed a deadly weapon or deadly force. Such error does not require a new trial, however, because the instruction was more favorable than that to which defendant was entitled.

In cases involving assault with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused as being in self-defense only if the circumstances at the time the

defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm. If the weapon used is a deadly weapon per se, no reference should be made at any point in the charge to "bodily injury or offensive physical contact." If the weapon used is not a deadly weapon per se, the trial judge should instruct the jury that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from "bodily injury or offensive physical contact." In determining whether the weapon used was a deadly weapon, the jury should consider the nature of the weapon, the manner in which it was used, and the size and strength of the defendant as compared to the victim.

In summary, we hold that the trial judge correctly denied defendant's motion to suppress and that the instructions on self-defense were not prejudicial to defendant. The decision of the Court of Appeals granting defendant a new trial is

Reversed.

Chief Justice SHARP concurs in result.

STATE OF NORTH CAROLINA v. JACK HARVEY DAVIS

No. 66

(Filed 12 July 1979)

1. Criminal Law §§ 66.6, 67.1 — lineup — voice identification — no suggestive procedures

Identification procedures involving defendant were not rendered impermissibly suggestive because (1) all participants in a lineup were taller than the height given by the homicide victim's wife in her original description of the intruder to police, since defendant himself was not the shortest man in the lineup; (2) defendant was both the fifth man in a lineup and the fifth man to speak in a voice identification procedure, since the victim's widow did not see

the participants as they spoke and did not know in what order they were speaking; and (3) the identifying witness was told that there was a suspect in the lineup, since the record was not clear as to whether the witness was actually told this or merely assumed it, and a confirmation of the witness's assumption would not indicate to the witness which of the participants the suspect was.

2. **Criminal Law § 66.1— identification of defendant—opportunity for observation—testimony not inherently incredible**

Identification testimony by a witness who had an opportunity to see defendant within a few feet of her in broad daylight for approximately five seconds was not inherently incredible.

3. **Homicide § 20.1— photographs of victim—admissibility**

The trial court in a homicide prosecution did not err in admitting into evidence two photographs of the victim's body which accurately depicted the scene of the crime, since the photographs were properly authenticated, were used by witnesses to explain and illustrate their testimony, were not excessive in number, and were not so used as to unduly arouse the passions of the jury.

4. **Criminal Law § 55.1; Homicide § 20— cigarette butts in victim's home—admissibility**

The trial court in a homicide prosecution did not err in admitting into evidence several partially burned Winston cigarette butts found in the victim's home after the murder since the evidence tended to show that the victim and his wife did not smoke cigarettes; there had been no cigarette butt on the laundry room floor of the victim's home before defendant and his companion entered the home; the victim's wife saw defendant smoking during the day while she was held captive; saliva tests showed that the cigarettes were smoked by a Group O secretor; and blood tests on defendant showed that he was a Group O secretor.

5. **Criminal Law § 113.1— jury instructions—inconsistencies of State's evidence—instruction required**

Defendant could not complain of the trial court's failure in its statement of the contentions of the parties to detail fully the inconsistencies in the State's evidence brought out on cross-examination, since defendant failed to request that a more detailed statement of the contentions be made.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Baley* at the 3 April 1978 Criminal Session of ROWAN 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 pursuant to G.S. 7A-27(a). This case was docketed and argued as No. 64 at the Fall Term 1978.

Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Associate Attorney, for the State.

Russell J. Hollers, Attorney for defendant appellant.

EXUM, Justice.

Defendant's appeal presents four principal questions. They are whether: (1) the trial court properly admitted identification testimony by the deceased's wife; (2) certain photographs should have been excluded because of their inflammatory nature; (3) certain cigarette butts found in the victim's home were properly admitted; and (4) the trial court gave insufficient weight to defendant's contentions in its instructions to the jury. We find no prejudicial error on any of these points.

The state's evidence tended to show that two men broke into the home of Earl Reece White and Mary Alice White in Randolph County about 9:00 a.m. on 25 February 1977. Mrs. White was alone in the house at that time. One of the men grabbed Mrs. White and held her. She was subsequently tied up in the living room. The two men made masks for themselves from torn strips of sheets belonging to Mrs. White. They remained in and around the house from 9:00 a.m. to 5:30 p.m.

Around 2:00 p.m. W. C. Below, a farm employee of Mr. White's, and Sam Hill came to the house on an errand. They were seized by the two men, who were then armed with pistols, and tied up in the living room with Mrs. White. Because of the masks the men had on, Below and Hill were unable to identify them.

Mr. White arrived at his home around 5:00 p.m. The two men tied him up in the living room with the others and asked where his money was. They later took him upstairs. Shortly thereafter, four shots were heard. The two men came downstairs, disconnected the telephone, and told Mrs. White, Below and Hill not to leave for thirty minutes. After the men left, Below and Hill freed themselves and went upstairs, where they found Mr. White. He was lying in a pool of blood with his hands bound behind his back. They checked for a pulse and found none. Mr. White had been shot four times in the head.

Mrs. White told police that she would be able to identify the first man who came into her house, but not the second. She

testified at trial that she was able to observe this man for about five seconds as he first entered the door. She apparently later described him to law enforcement officers as being around five feet seven inches tall, weighing about 140 pounds, in his late twenties, with gray sideburns and a ruddy complexion, and wearing a dark jacket and a camouflage cap.

On 8 March 1977 Mrs. White was shown a group of 18 photographs and was not able to make an identification. On 23 June 1977 she was shown another group of 13 photographs. From this group she picked defendant and one Charles Thomas Ashley as "resembling" the first man who entered her home. There is testimony in the record that the photographs in this group were similar, and there is nothing to indicate any suggestion to Mrs. White as to whom she should pick out.

Mrs. White subsequently attended two lineups. Defendant was in the first, which was held on 8 August 1977. There were a total of seven men in this lineup. All wore camouflage caps. They ranged in height from five feet nine inches to six feet three inches. The youngest man in the lineup was 30 years old. Defendant is apparently about six feet one inch tall and, although his exact age is unclear from the record, at least 35 years old. There was testimony to the effect that all the men in the lineup were similar in description to defendant. Mrs. White stayed in the viewing room for two to five minutes. She then made a visual identification of defendant as the first man to enter her home. There is no evidence of any statement by law enforcement officers as to which man she should pick. Mrs. White did, however, say at one point in her testimony that she was told one of the two men whose photographs she had identified would be in the lineup. Her subsequent testimony undercuts this assertion somewhat, indicating this may have been an assumption on her part rather than something that was actually communicated to her. After making her visual identification, Mrs. White listened to each man in the lineup say, "You are a nice lady and I hate you have to be uncomfortable and I won't hurt you." She identified defendant's voice as that of the first man who entered her house. She neither saw the men in the lineup as they spoke nor knew the order in which they were speaking. Defendant was both the fifth man in the lineup and the fifth to speak.

Charles Thomas Ashley, the other man whose photograph Mrs. White identified as "resembling" the intruder, was in the second lineup she attended. She did not pick Ashley out at that lineup. She did, however, identify another man who apparently had been an inmate at the local jail at the time of the killing. It appears from the record that Mrs. White thought this lineup was for the purpose of identifying the second of the two men to enter her home on 25 February 1977.

At trial Mrs. White unequivocally identified defendant as one of the two intruders. She stated: "I base my identification of him in Court today on seeing his face on the morning of 25 February 1977. I have no doubt in my mind that Jack Harvey Davis was one of the men that came into my house."

Defendant did not object to testimony concerning the photographic identifications. He did object to (1) the admission of testimony as to Mrs. White's visual and voice identifications of defendant at the 8 August 1977 lineup, and (2) her in-court identification of defendant. Upon defendant's initial objection to this testimony the trial court held a voir dire. After hearing evidence from both the state and defendant, the court found facts and concluded that both Mrs. White's lineup and in-court identifications of defendant were admissible. Defendant assigns this ruling and the subsequent admission of this testimony as error.

Two questions are raised by defendant's objection to Mrs. White's in-court identification. The first is whether it was a result of identification procedures so suggestive as to deprive defendant of due process of law; the second, whether her identification was inherently incredible.

"The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E. 2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902 (1976). This Court follows a two-step process in evaluating such claims of a denial of due process. As we stated in *State v. Headen*, 295 N.C. 437, 439, 245 S.E. 2d 706, 708 (1978):

> "The first [question] concerns the legality of the pretrial identification procedures, *viz.*, whether an impermissibly sug-

gestive procedure was used in obtaining the out-of-court identification. If this question is answered negatively, our inquiry is at an end. If answered affirmatively, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." (Citations omitted.)

[1] Defendant points to three examples of what he claims was suggestive behavior on the part of law enforcement officials at the lineup. First, he argues that the lineup itself was suggestive because all the participants in it were taller than the height given by Mrs. White in her original description of the intruders to police. This argument is patently without merit. By the time the lineup was held, defendant was a prime suspect in the case, his photograph having been identified by Mrs. White. He is six feet one inch tall. In order for the lineup *not* to be suggestive at that point, it was necessary to have participants who resembled defendant in physical appearance. The fact that the shortest participant was an inch or two taller than Mrs. White's initial description can in no way be termed suggestive when defendant himself was not the shortest man in the lineup.

Defendant next contends that the voice identification procedures were suggestive because he was both the fifth man in the lineup and the fifth man to speak. The record is clear that Mrs. White neither saw the participants in the lineup as they spoke nor knew in what order they were speaking. While with benefit of hindsight it is possible to construct a theory that Mrs. White surmised that defendant was the man she identified visually because he spoke fifth, the relationship between this theory and any demonstrable facts is too tenuous to use as the basis for finding suggestiveness in the identification process.

Defendant further argues that the procedures used were unduly suggestive because Mrs. White was told there was a suspect in the lineup. As pointed out, the record is not clear as to whether she was actually told this or merely assumed it. Even assuming law enforcement officers made such a statement, we do not think it amounts to impermissible suggestiveness. It is natural for any witness called to view a lineup to assume that the police have a suspect in it. A mere confirmation of this assumption does nothing to indicate to the witness which of the par-

ticipants the suspect is. Standing alone, it does not taint the legality of the lineup. *State v. Davis*, 25 N.C. App. 256, 212 S.E. 2d 680 (1975).

Having found no impermissible suggestiveness in the lineup procedures, we need not discuss further defendant's claim that they resulted in a substantial likelihood of irreparable misidentification. *See State v. Headen, supra*, 295 N.C. 437, 245 S.E. 2d 706.

The question presented by defendant's objections to testimony concerning Mrs. White's visual and voice identifications of him at the 8 August 1977 lineup is whether the procedures employed at the lineup were so suggestive as to result in a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188 (1972); *see also State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973) (same standards apply in determining admissibility of voice and visual identifications). As we have shown, there was no suggestiveness in the procedures used that could have led to a misidentification. Testimony concerning Mrs. White's out-of-court identifications was properly admitted.

[2] Even so defendant would have us rule that Mrs. White's identification was inadmissible because it was inherently incredible. Defendant relies on *State v. Miller*, 270 N.C. 726, 731, 154 S.E. 2d 902, 905 (1967), in which this Court held that the probative force of identification testimony is for the jury in all cases except "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *Miller* involved a witness who did not know the person he identified and saw him only briefly, at night, and at a distance of 286 feet. Here the evidence showed that Mrs. White had the opportunity to see defendant within a few feet of her in broad daylight for approximately five seconds. While there were a number of factors tending to weaken the probative force of her testimony, it was not inherently incredible within the meaning of *Miller*. The question of her credibility was properly submitted to the jury. Defendant's assignments of error relating to Mrs. White's identification of him are overruled.

[3] Defendant also assigns as error the introduction into evidence of two photographs of the body of Earl Reece White.

These photographs were properly authenticated. They were used by several of the state's witnesses to explain and illustrate their testimony. The trial court instructed the jury that they were to consider the photographs only to the extent they illustrated or explained witnesses' testimony. Under these conditions the photographs were admissible. *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). Defendant argues, nevertheless, that the prejudicial impact of these photographs outweighed any probative value they might have had and they should have been excluded for that reason. This Court has recognized the principle that photographs should be excluded from evidence when they are highly inflammatory and of negligible probative value. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969). Such is not the case, however, with the two photographs here. They accurately depicted the scene of the crime, they were not excessive in number, and they were not so used as to unduly arouse the passions of the jury. This assignment of error is overruled.

[4] By two of his other assignments of error defendant challenges the admission into evidence of several partially burned Winston cigarette butts. One of the cigarette butts was found on the laundry room floor. The others were found in an ashtray in the living room. " '[A]ny object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials.' " *State v. Patterson*, 284 N.C. 190, 194, 200 S.E. 2d 16, 19 (1973), *quoting* 1 Stansbury's North Carolina Evidence § 118 (Brandis rev. 1973). Mrs. White testified: (1) she did not smoke Winston cigarettes; (2) her husband did not smoke; (3) there had been no cigarette butt on the laundry room floor before the two men entered her house; and (4) she saw defendant smoking cigarettes during the day while she was held captive. This testimony was sufficient to connect the cigarettes with defendant. They were relevant in that they corroborated Mrs. White's testimony that defendant was one of the intruders. Saliva tests showed that the cigarettes were smoked by a Group O secretor. Blood tests on defendant showed that he is a Group O secretor. This Court has previously held that the results of such blood grouping tests are admissible into evidence. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). These assignments of error are overruled.

[5] Defendant further assigns as error the trial court's failure in its statement of the contentions of the parties to detail fully the inconsistencies in the state's evidence brought out on cross-examination. The trial court stated the contentions of both parties in general terms. With regard to discrepancies in the state's evidence brought out on cross-examination, he told the jury: "The defendant's evidence tends to show that there are discrepancies in the testimony of the State's witnesses identifying him as one of the perpetrators in this crime which have been disclosed upon cross-examination, and you should have at least a reasonable doubt of his guilt." If defendant felt this statement was inadequate and that a more detailed statement of the inconsistencies was needed, he should have called the matter to the trial court's attention. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). He did not do so; thus, he cannot now complain. This assignment of error is overruled.

We have examined defendant's other assignments of error and find they do not merit discussion. In the trial there was

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ALTON RAY YELLORDAY AND RICKY NELSON

No. 81

(Filed 12 July 1979)

1. Robbery § 4.3— armed robbery—sufficiency of evidence

The State's evidence was sufficient to support a charge of armed robbery of the prosecutrix and the verdict of the lesser included offense of common law robbery where the prosecutrix testified that defendants smashed through her bedroom door with an ax, demanded money, and ransacked the room hunting for it; at that time she had a black pocketbook containing about two dollars behind her bed; when she tried to escape from the house one defendant grabbed her and carried her out of the house, threw her down on the ground, and brutally assaulted her; the next morning she found the pocketbook in the middle of the road in front of her house; and defendants took about two dollars of her money.

2. Criminal Law § 34.7— armed robbery—evidence defendants had earlier robbed victim—relevancy

Evidence that defendants had robbed the male victim of his social security check on 3 January was relevant to show that when defendants entered the victims' residence on 3 February their purpose was to rob the male victim of his monthly check where (1) both robberies occurred at the victims' residence; (2) the male victim was the sole victim in the first robbery and the principal victim in the second; (3) defendants acting together were the sole perpetrators of the two robberies; and (4) both offenses, occurring within a month of each other, were committed on the 3rd of the month, the day on which the male victim received his monthly social security check.

3. Criminal Law § 99.8— questions by trial court—no expression of opinion

The trial court's questions to the disabled, arthritic 61-year-old robbery victim were solely for the purpose of clarifying his confused and sometimes conflicting testimony and did not constitute an expression of opinion on the evidence.

4. Criminal Law § 89.5— minor variation in corroborating testimony

Variation between a robbery victim's testimony that money was taken from her pocketbook which she had behind her bed and a deputy sheriff's testimony that the victim told him money was taken from a dresser top was minor and merely raised an issue of credibility for the jury where the victim was consistent in her testimony that defendants took two dollars and a few cents from her.

5. Criminal Law §§ 73.2, 102.5— questions to unavailable witness not hearsay—improper questions by prosecutor—harmless error

In this armed robbery prosecution, testimony by officers that they asked an eyewitness who was not present at trial certain questions about the occurrence and identity of the robbers, that the eyewitness answered their questions, and that they had later unsuccessfully tried to locate the eyewitness to insure his presence at trial was not inadmissible as hearsay since the officers never repeated any response to their questions and the questions themselves are not evidence. However, the district attorney's questions to the officers were improper since he was trying to imply that had the eyewitness been present his answers would have paralleled and corroborated testimony by the victims, but such conduct by the district attorney did not constitute prejudicial error where it could not have affected the verdict.

Justices BRITT and BROCK did not participate in the consideration or decision of this opinion.

APPEALS by defendants from the judgments of *James, J.*, 25 April 1977 Criminal Session of the Superior Court of HALIFAX, docketed and argued as case No. 83 at the Spring Term 1978.

Defendant Yellorday (age 18) and defendant Nelson (age 17) were separately indicted and jointly tried for the first-degree

burglary of the dwelling of Ned and Emma Powell and the armed robbery of Emma. Each was convicted of first-degree burglary and common-law robbery, and appeals from the sentences imposed. The State's evidence, which consisted of the testimony of the victims and four law enforcement officers, tended to show:

Ned Powell, 61 years old, and Emma, his wife, 59 years old, live in a modest frame house in Lincoln Heights in the town of Roanoke Rapids. Disabled by arthritis, Ned's sole income is a social security check of $118.00, which he receives on the third day of each month.

After dark, around 7:30 p.m. on 3 February 1977, Ned, Emma, and their guest Sidney Freeman were seated in the Powell's bedroom near the wood heater when they heard a noise "like something hit the front door." An ax blade then split the bedroom door, breaking it open, and defendant entered the room. Defendant Nelson told Freeman that he was not the one they wanted and ordered him to lie motionless on the bed. He then demanded that Ned tell him "where the goddamn money was at." When Ned denied that he had any money Nelson grabbed him and removed from his pocket the $62.00 which remained from the proceeds of the social security check he had received that day. Nelson then hit Ned "beside his head and knocked him out." After that defendants "ranshacked the house," emptying bureau drawers and throwing clothes from the wardrobe on the floor. When Emma attempted to flee the house defendant Yellorday grabbed her and carried her outside. There he threw her on the ground and called to Nelson that "if he wanted some . . . he could come on and get it." When Nelson did not respond to the call Yellorday committed an act of sodomy upon Mrs. Powell.

While Yellorday had Emma outside, two men (identified in the record only as "the woodmen") arrived at the Powell residence in a pickup truck with a load of wood, and defendants fled. The woodmen were bringing the load of wood Ned had ordered to be delivered after he had received his social security check. When one of the men entered the house he found Ned in a dazed condition. While Ned was trying to tell him about the robbery Emma came in "crying and dirty," saying that she had been raped. The woodmen summoned the law enforcement officers and remained parked in front of the house until the sheriff and his deputies arrived.

In reporting to the officers what had happened, both Ned and Emma told them that night, and again on the following morning, that they knew the two defendants well; that defendants lived down the street from them in "The Heights" and passed the Powell home every day; that they recognized defendants as soon as they broke through the door despite the strip of stocking each had tied around his head to mask his eyes. Emma said that they had seen the defendants that same day as she and Ned went to the grocery store after the check had come. She also testified that she had known both defendants since they were babies and "their mammas and their daddys too"; that one was the son of Shirley Yellorday and the other was Mary Jane's boy, Ricky.

When defendants broke into the Powell's bedroom Emma's black pocketbook, which contained two or three dollars, was behind her bed. The next morning she found the pocketbook in the middle of the street in front of her house.

Ned testified, over defendants' objection, that the robbery on February 3rd was the second time defendants had robbed him; that on 3 January 1977 they had come on his porch and taken his social security money from him, but he didn't report the robbery because he was afraid they would hurt him and he "wasn't able to fight anybody."

The testimony of the four law enforcement officers, Sheriff W. D. Bailey and his deputies, Ray Garner, E. C. "Fab" Warren, and Charles E. Ward, was substantially the same. Deputy Garner was the first to arrive at the scene after the robbery. He found Emma coming out of the house with a pair of torn panty hose "hanging down around her knees." Because she was distraught and crying he placed her in his car, radioed for assistance, and tried to calm her before taking her to the hospital. The deputy said that when Emma was asked if she could identify the invaders she said she knew them but "couldn't call their names right at that time"; that they were two blacks who lived in Lincoln Heights—one was Mary Jane's boy Ricky and the other, Shirley Yellorday's son, and that it was the defendant Yellorday who had "raped" her.

When Sheriff Bailey and Deputy Warren responded to Deputy Garner's call they found the Powell's ax in the front yard and observed gaping holes in both the front door and the bed-

room door. For the purpose of corroborating Ned and Emma each deputy testified as to the statements the Powells made during the investigation of the charges against defendants.

Deputies E. C. Warren and Charles E. Ward stated that the next morning they conducted a further investigation at the Powell home and took additional statements from the Powells and Freeman. Both officers said they had been present at the defendants' preliminary hearing in the district court and had heard Ned and Emma identify defendants as the persons who broke into their bedroom, attacked and robbed them. In explanation of Freeman's failure to testify as a witness for the State, these officers said that, despite their diligent search, they had been unable to find Freeman since the preliminary hearing.

When the State rested its case, defendants announced they would offer no evidence and moved to dismiss the charges against them. The motions were denied, and the jury found each defendant guilty of first-degree burglary and common-law robbery. Each received a sentence of life imprisonment on the count of burglary and, on the charge of robbery, a consecutive sentence of eight to ten years.

Rufus L. Edmisten, Attorney General, and Charles J. Murray, Assistant Attorney General, for the State.

Dwight L. Cranford for Ricky Nelson, defendant.

H. P. McCoy, Jr., for Alton Ray Yellorday, defendant.

SHARP, Chief Justice.

[1] We consider first defendants' assignment of error No. 6, that the trial judge erred in denying their motions for judgments as of nonsuit at the close of the State's evidence. In a criminal case the rule is that, upon a motion to nonsuit, the court must consider the evidence "in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence." *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967). Under this rule, defendants concede that the State's evidence withstands their motion to dismiss the charge of burglary. They argue, however, that there was not suf-

ficient evidence to go to the jury on the charge that defendants robbed Emma Powell.

For some reason, unfathomable to us, the district attorney chose to charge defendants with feloniously taking two dollars from the person, dwelling and presence of Emma Powell by the use of a dangerous weapon, an ax, whereby her life was endangered without making a similar charge against defendants with reference to the taking of $62.00 from the person of Ned Powell. Notwithstanding, we hold that the testimony of Emma on direct examination, standing alone, is sufficient to support both the charge of armed robbery and the verdict of the lesser included offense of common-law robbery. "Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence of putting him in fear . . . . It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient. (Citations omitted.)" *State v. Moore*, 279 N.C. 455, 457, 183 S.E. 2d 546, 547 (1971). *Also see State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied* 409 U.S. 948 (1972).

Emma testified that defendants smashed through the bedroom door with an ax, demanded money, and ransacked the room hunting for it. At that time she had a black pocketbook containing about two dollars behind her bed. When she tried to escape from the house defendant Yellorday grabbed her and carried her out of the house, threw her down on the ground, and brutally assaulted her. The next morning she said she found the pocketbook in the middle of the road in front of the house. The clear implication is that one of the defendants took the pocketbook, rifled it and then discarded it. However, even if the pocketbook were empty, the circumstances of its taking constitutes robbery.

On cross-examination Emma said that neither of the defendants ever took any money from her. Construing this statement in the light of defendants' actions after they burst into the Powells' bedroom, we deduce that Emma was saying that defendants did not take money from her person as they had done from the person of Ned. In any event, this statement does not bear upon the motion for nonsuit. "Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit." *State v. McKinney*,

288 N.C. 113, 117, 215 S.E. 2d 578, 581 (1975). Defendants' assignment No. 6 is overruled.

[2] Defendants' first assignment challenges the admissibility of the testimony of Ned and Emma Powell that on 3 January 1977, the day Ned received his check from the Social Security Disability Program, defendants came upon the Powells' front porch and robbed Ned of the proceeds of that check, and that this crime was not reported to the police because of Ned's fear of reprisals by defendants. Defendants argue that this incident was "another distinct, independent, or separate offense" and this evidence was erroneously admitted to their prejudice. This contention is without merit.

In a criminal prosecution "[e]vidence 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." *State v. Stegmann*, 286 N.C. 638, 652, 213 S.E. 2d 262, 272, *death sentence vacated*, 428 U.S. 902 (1975); *State v. McClain*, 282 N.C. 357, 361, 193 S.E. 2d 108, 111 (1972); 1 Stansbury's N.C. Evidence, § 91 (Brandis Rev. 1973). Thus, evidence revealing the commission of an independent offense is admissible "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one . . . tends to prove the crime charged and to connect the accused with its commission"; or, when such evidence discloses acts or declarations tending to prove that the accused possessed a specific intent or mental state which is an essential element of the crime charged. *State v. Hunter*, 290 N.C. 556, 573-75, 227 S.E. 2d 535, 545, *cert. denied*, 429 U.S. 1093 (1976).

The Powells' testimony regarding the January robbery was properly admitted under the foregoing principles. When the January robbery and the February robberies are considered together their interrelation is clear: (1) Both robberies occurred at the Powell residence; (2) Ned Powell was the sole victim in the first robbery, the principal victim in the second; (3) defendants acting together were the sole perpetrators of the two robberies; and (4) both offenses, occurring within a month of each other,

were committed on the 3rd of the month, the day on which Ned generally received his monthly social security check. Manifestly, the challenged testimony is relevant to show that when defendants entered the Powell residence on 3 February 1977 their purpose was to rob Ned of the proceeds of his monthly check. Assignment No. 1 is not sustained.

[3] Defendants next contend that the trial court, "by its prolonged interrogation of the witness, Ned Powell," expressed an opinion in violation of G.S. 1-180. A trial judge's questions, propounded to a witness to clarify his confusing or contradictory testimony, do not constitute an expression of opinion unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt, or as to a factual controversy to be resolved by the jury. *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973); 4 Strong's N.C. Index 3d, Criminal Law, §§ 99.8, 99.9 (1976). From the record in this case it is crystal clear that the questions which Judge James asked Ned were solely for the purpose of clarifying his confused and sometimes conflicting testimony. The jurors, who heard the disabled, arthritic 61-year-old man "get it straight," only to be confused again by the next set of questions, were bound to have understood (and sympathized with) the trial judge's efforts to "see if [he could] clear this up." We are satisfied beyond peradventure that no one could reasonably infer from the exchanges between the judge and Ned Powell that the judge was expressing an opinion as to what facts had been proven. This assignment, therefore, is overruled.

[4] Defendants' third assignment is that the trial judge erred in overruling their motion to strike certain portions of the testimony of Deputy Sheriff E. C. Warren which was admitted solely for the purpose of corroborating Emma Powell. Warren testified that when he spoke with Emma shortly after 7:30 p.m. on 3 February 1977 she was very excited, crying, and she had dirt on her back and on her clothing; that she told him, inter alia, she had been robbed and molested by "a boy named Ricky" and "by Shirley's boy," that they "took two dollars and a few cents from her," and that the money "was on the dresser."

Defendants argue that the foregoing statements were erroneously admitted because they did not corroborate Emma's

testimony. On direct examination Emma stated that she had "two or three dollars" in a black pocketbook behind her bed when defendants broke into the bedroom and that the next morning she found the pocketbook in the middle of the road in front of the house. On cross-examination she said that Ricky Nelson never put his hands on her, that Yellorday was the one who abused her sexually, and that neither took any money from her but they did take it from her husband.

The rule of law applicable to Assignment No. 3 has been stated as follows: "If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this 'new' evidence under a claim of corroboration . . . . However, if the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Brooks*, 260 N.C. 186, 189, 132 S.E. 2d 354, 356-57 (1963). *See State v. Carter*, 293 N.C. 532, 238 S.E. 2d 493 (1977). Furthermore, when portions of the prior statements are competent as corroborating evidence and other parts are not, it is the responsibility of the party objecting to specify the objectionable parts and move to strike it alone. The court is under no duty to separate the good from the bad. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); 4 Strong's N.C. Index 3d *Criminal Law*, § 89.4 (1976).

The record in this case will not support defendants' contention that the statements to which Deputy Warren testified were "new" evidence introduced under a claim of corroboration. In her testimony on both direct and cross-examination Emma repeatedly identified defendants as the individuals who broke into her home on 3 February 1977. Whether her "two or three dollars" were taken from the dresser or carried away in her black pocketbook, Emma was consistent in her testimony that "the two boys took two dollars and a few cents from her . . . ." This variation between Deputy Warren's statement and Emma's testimony is minor and merely raised an issue of credibility for the jury.

As to Emma's testimony that neither defendant took any money from her but they took money from Ned, we have hereto-

fore noted our conviction that, when considered in relation to the manner in which defendants robbed Ned, Emma was merely saying that she herself had no money on her and that defendants did not take her two to three dollars from her person. Deputy Warren's testimony was properly admitted in evidence; its probative value was for the jury.

Finally, with reference to Assignment No. 3, we note that at no time during Warren's testimony with reference to the statements Emma made to him did defendants ever object on the ground that the statements did not corroborate her testimony. The one time defendants stated the ground for an objection it was, "This testimony has been previously covered." Assignment No. 3 is overruled.

[5] Under Assignment No. 5 defendants challenged the admission of the testimony of deputies Ward and Warren regarding prior conversations had with Sidney Freeman, an eyewitness to the episode at the Powell residence on the night of 3 February 1977, who was not present at the trial. The officers testified, over defendants' general objections, that they had spoken with Freeman on the morning after the robbery and later at the preliminary hearing in District Court. At both times the officers queried Freeman about the occurrence and the identity of the invaders. The deputies did not testify to the content of any statements attributable to Freeman; instead, they limited their testimony to a repetition of the questions they asked him and the statement that he answered the questions. Warren and Ward also described their fruitless efforts to later locate Freeman in order to insure his presence at trial.

Defendants' argument that the testimony complained of is inadmissible as hearsay is without merit for the officers never repeated Freeman's responses to their questions, and the questions themselves are not evidence. However, by asking those questions the district attorney was cleary trying to imply that had Freeman been present his answers would have paralleled and corroborated Ned and Emma's testimony. Such tactics were improper. The court should have sustained defendants' first objection to this line of questions and ended them then and there. Notwithstanding, when this episode is considered in relation to the whole trial we are convinced that the unanswered questions could not have affected the verdict.

Defendants' remaining assignments of error (Nos. 6, 7, 8 and 9) relate to the charge, which—when read contextually—discloses no prejudicial error. We therefore overruled these assignments without discussion.

In the record of defendants' trial we find no prejudicial error.

No error.

Justices BRITT and BROCK did not participate in the consideration or decision of this opinion.

STATE OF NORTH CAROLINA)
v.) ORDER ON REMAND
RUBEN SONNY CONNLEY)

No. 124

(Filed 12 July 1979)

1. **Constitutional Law § 49— waiver of counsel—express statement not required**

Under *Miranda v. Arizona*, 384 U.S. 436, a specific relinquishment is not prerequisite to a finding of waiver of counsel.

2. **Criminal Law § 75.12; Constitutional Law § 49— right to counsel—no express waiver—waiver sufficient**

Evidence was sufficient to support the trial court's conclusion that defendant waived his right to counsel, though he did not expressly do so, where such evidence tended to show that defendant was advised of his rights, and after refusing to sign a waiver form, freely and voluntarily chose to talk with an FBI agent; defendant ignored the questions he did not want to answer and the agent exerted no pressure to make him answer; and as soon as defendant said he wanted to talk to his lawyer, all questioning ceased.

3. **Criminal Law § 76.7— finding that confession was voluntary—hearsay testimony—sufficiency of evidence to support findings**

Though the trial court's legal conclusion that defendant's statements were voluntarily made could not be upheld on the basis of the court's finding concerning a doctor's appraisal of defendant's condition since that finding was based on incompetent hearsay, the court's remaining findings were sufficient to justify its conclusion that defendant's statements were voluntarily made where such findings were that defendant's statement made to an FBI agent was made in response to questions asked; the responses were in keeping with the questions asked; and, although defendant from time to time refused to respond, the responses given were nevertheless appropriate.

THIS case is before us on remand from the Supreme Court of the United States "for further consideration in light of *North Carolina v. Butler*, 441 U.S. --- (1979)." *North Carolina v. Connley*, 441 U.S. ---, 60 L.Ed. 2d ---, 99 S.Ct. 2046 (1979).

SHARP, Chief Justice.

Defendant Connley was indicted under N.C. Gen. Stat. § 15-144 (1978) for the murder of Garland W. Fisher, a Virginia State patrolman, at a roadblock on Interstate Highway No. 85 on 15 November 1976. At the 14 March 1977 special criminal session of GRANVILLE the jury returned a verdict of guilty of first degree murder and defendant was sentenced to life imprisonment.

[1] Upon defendant's appeal to this Court we ordered a new trial on the ground that defendant's incriminating statements, made during his in-custody interrogation on the night of the homicide, were improperly admitted in evidence because he had not *specifically* waived his right to have counsel present. *State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *judg't vacated and case remanded*, 99 S.Ct. 2046 (1979).

This Court's ruling in *Connley* was based upon our interpretation of the following pronouncement which Chief Justice Warren made in the majority opinion in *Miranda v. Arizona*, 384 U.S. 436, 470, 16 L.Ed. 2d 694, 721, 86 S.Ct. 1602, 1626 (1966): "[H]is [the accused's] 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 ours.)

We interpreted the foregoing statement as requiring an express waiver of counsel prior to police interrogation and thereafter ordered a new trial in any case in which the State, without having first shown defendant's clear-cut waiver of counsel, was permitted to introduce in evidence the defendant's incriminating statements made during an in-custody interrogation.[1] *State v. Butler* and the instant case were among those in which we granted new trials. *State v. Butler*, 295 N.C. 250, 244 S.E. 2d

1. *See, e.g., State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968); and the cases cited in *State v. Connley*, 295 N.C. at 338, 244 S.E. 2d at 670.

410 (1978), *judg't vacated and case remanded*, 99 S.Ct. 1755 (1979). In both *Butler* and *Connley* the State of North Carolina petitioned the Supreme Court for certiorari. In each case, the Supreme Court granted the petitions and vacated our judgment awarding a new trial. It then directed reconsideration of both cases in light of its opinion in *Butler*.

The Supreme Court said in *Butler* that we had erred in our reading of the *Miranda* opinion and that "the Court did not hold that such an express statement is indispensable to a finding of waiver [of counsel]." In further explanation, Mr. Justice Stewart, speaking for the majority, said:

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights dilineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the persons interrogated." *North Carolina v. Butler*, 441 U.S. ---, ---, 60 L.Ed. 2d 286, 292, 99 S.Ct. 1755, 1757 (1979).

As directed, we now proceed to reconsider Connley's case in light of the preceding pronouncement and to determine de novo whether defendant's actions and words preceding and during his interrogation clearly implied a waiver of his right to counsel and to remain silent.

At the trial Victor Holdren, Special Agent of the Federal Bureau of Investigation, testified as follows:

"I had occasion to talk with Ruben Sonny Connley at approximately 4:00 and 5:00 a.m. on November 15, 1976, in the emergency room at Duke Medical Center in Durham. I asked him if he would talk to me and he said he would. I furnished him an Advice of Rights form. He held up his right hand, which was bandaged;

so I held the form for him and gave him time to read the statement. Thereafter I read it to him and asked him if he understood what his rights were under the constitution and he stated to me, 'I know what it says and I understand, but I'm not going to sign it.' "

At that point in Holdren's testimony defendant objected to the admission in evidence of his statements to the FBI agent, and the judge conducted a voir dire to determine their admissibility. In pertinent part, Agent Holdren's additional testimony is summarized or quoted below. Defendant offered no evidence on voir dire.

Before attempting to talk with Connley, Holdren had consulted Dr. W. R. Belts, one of defendant's attending physicians, to determine whether defendant would be able to talk to him. Holdren testified, "He [Dr. Belts] said that Connley was in a stable condition; that he had received no medication to sedate him at all, and that he was alert and entirely capable of talking to me about this. I observed that Mr. Connley was alert and responded to the questions in a normal, rational way.

". . . The defendant appeared to be coherent. At times he would close his eyes, but would continue to respond to the questions.. . . [O]n a few occasions during the interview when I asked him a question he would not say anything. I did not offer him any threat or promises or hope of reward of any type. I did not attempt to coerce him to give me any statement.

". . . He appeared to be alert because he responded to the questions I asked him. I was with him 18 minutes. I based my opinion as to whether he was alert on what the doctor had said to me outside and the fact that he responded."

After having stated that he understood his constitutional rights but that he would not sign the "Advice of Rights" form, defendant proceeded, forthwith, to tell his story in appropriate answers to Holdren's questions. The narrative began with his departure from Atlanta, Georgia, on 14 November 1976 for Baltimore, Maryland, and continued through his activities during his stay in Baltimore and his encounter with Virginia State Trooper Fisher as he was driving back to Atlanta. Defendant told how he kidnapped Trooper Fisher and commandeered his patrol

car, and he recounted some of their conversation up to the time they arrived at the roadblock in North Carolina. At that point, Holdren testified, "He [Connley] said he would like to talk with his mouthpiece, and I took that to mean his attorney and we terminated the interview."

The trial judge found the facts to be in accordance with Holdren's testimony. Based upon that testimony he found and concluded, inter alia:

"[T]hat while the defendant did not specifically make the affirmative statement . . . 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 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 as explained by Officer Holdren.

". . . [T]hat defendant did knowingly, understandingly, voluntarily and without threat, promises, coercion of any kind, willingly, intelligently and intentionally answer questions asked him by Officer Holdren, and that the statement . . . the defendant [made] to Officer Holdren was knowingly [and] voluntarily . . . made with a full understanding of his . . . constitutional rights . . . and that the statements made by defendant to the officer should . . . be admitted in evidence against him."

[2] In light of *North Carolina v. Butler*, supra, we now hold that the trial judge's conclusion that Connley "did in fact waive his right to an attorney and his other constitutional rights" is fully supported by the evidence. Although Connley did not expressly waive his rights, "waiver can clearly be inferred from [his] actions and words." Equally applicable to defendant Connley is the statement which Mr. Justice Stewart made with reference to defendant Butler: "There is no doubt that this respondent was adequately and effectively apprised of his rights." 441 U.S. at ---, 60 L.Ed. 2d at 293, 99 S.Ct. at 1758. There can also be no doubt that Connley, after refusing to sign the waiver form, freely and voluntarily chose to talk with the agent; that he ignored the questions he did not want to answer and that Holdren exerted no

pressure to make him answer. As soon as defendant said he wanted to talk to his lawyer, all questioning ceased.

We therefore reverse our holding that defendant's statements to Agent Holdren were erroneously admitted and that defendant is entitled to a new trial because of the admission of these statements.

[3] On defendant's appeal to this Court his assignment of error No. 2 asserted that the trial judge erred in admitting, over his objection, Special Agent Holdren's statement on voir dire that Dr. Belts, had "said that Connley was in a stable condition; that he had received no medication to sedate him at all, and that he was alert and entirely capable of talking to [Holdren] about this."

As we pointed out in our opinion[2], the admission of this hearsay testimony from Agent Holdren was clearly error. However, because we were ordering a new trial on account of the admission of Connley's in-custody statements we said, "[W]e need not determine whether the court's findings 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)." 295 N.C. at 336, 245 S.E. 2d at 669. This comment was intended as a warning to the judge presiding at the next trial not to repeat this error, and the specific citation to *State v. Patterson* suggested our impression that without the incompetent evidence the judge's finding on voir dire would have been the same.

Since we now hold, in the light of *North Carolina v. Butler*, supra, that defendant validly waived his *Miranda* rights, it becomes necessary to determine whether the error committed by the trial judge in admitting Special Agent Holdren's testimony constitutes prejudicial error requiring a new trial.

The rules governing appellate review of a voir dire conducted to determine the voluntariness of a confession were well summarized by Justice Branch in *State v. Bishop*, 272 N.C. 283, 291, 158 S.E. 2d 511, 516-17 (1968):

"When a confession of a defendant is offered into evidence, and the defendant objects, the trial judge should then excuse the

2. *State v. Connley*, 295 N.C. at 335-36, 245 S.E. 2d at 668-69.

jury and in the absence of the jury hear the evidence of both the State and defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession. *State v. Rogers, supra; State v. Gray, supra; State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569.

"The general rule is that after such inquiry the trial judge shall make findings of fact to show the basis of his ruling on the admissibility of the evidence offered, and that the facts so found are conclusive on the appellate courts when supported by competent evidence. Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate courts. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363; *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833; *State v. Conyers, supra.*" *See also State v. Harris*, 290 N.C. 681, 691, 228 S.E. 2d 437, 443 (1976); *State v. Thompson*, 287 N.C. 303, 317, 214 S.E. 2d 742, 751 (1975), *death sentence vacated*, 428 U.S. 908 (1976); *State v. Woodruff*, 259 N.C. 333, 337, 130 S.E. 2d 641, 644 (1963).

Clearly, the trial court's legal conclusion that defendant's statements were voluntarily made cannot be upheld on the basis of his factual finding concerning the doctor's appraisal of defendant's condition since that finding was based on incompetent hearsay. The general rule, however, is that "[i]n a trial before the court without a jury if there is sufficient competent evidence supporting the judgment or finding, the admission of incompetent evidence does not constitute reversible error." *Bizzell v. Bizzell*, 247 N.C. 590, 605, 101 S.E. 2d 668, 678 (1958). *See also State v. Patterson*, 288 N.C. 553, 566-67, 220 S.E. 2d 600, 610 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *Cogdill v. Highway Comm.*, 279 N.C. 313, 320, 182 S.E. 2d 373, 377 (1971). The question confronting us, therefore, is whether the trial court's remaining findings of fact are sufficient to justify its legal conclusion that Connley's statements were voluntarily made. We hold that they are.

In addition to his findings of fact concerning the doctor's comments, the trial judge also determined as a fact: "That the statement made to Officer Holdren was made in response to questions asked, and that the responses were in keeping with the questions asked and [that] although the defendant from time to time refused to respond, nevertheless, the responses given were appropriate.

"That at no time in the officer's presence has anyone threatened the defendant in any way, promised him anything or held out any hope of reward, and that the defendant was not in any manner coerced.

"That he appeared to the officer to be alert."

These findings of fact are amply supported by competent evidence, which included defendant's statement that he knew what the Advice of Rights form said and understood it. The judge's findings are uncontradicted by any other evidence in the record and they fully justify his conclusion that defendant's statements were knowingly, understandingly, and voluntarily made. We therefore overrule defendant's assignment of error No. 2.

Having previously adjudged defendant's remaining assignments of error to be without merit, we now find no error in defendant's trial before Thornburg, J., at the 14 March 1977 special criminal session of Granville, and reverse our order vacating the verdict and judgment rendered therein. Our former decision, as reported in 295 N.C. 327, 245 S.E. 2d 663, is modified in accordance with this opinion, and this cause is remanded to the Superior Court of Granville County with directions that commitment issue as provided by law to put the sentence into effect.

Former opinion modified; case remanded.

WILLIAM G. SNOW AND GROVEWOOD, INC. v. DUKE POWER COMPANY

No. 113

(Filed 12 July 1979)

1. Fires § 3; Electricity § 7 — liability of power company for fire on customer's premises

A company supplying electricity to a customer's building is not liable for damages resulting from a fire unless plaintiff presents evidence sufficient to justify a jury in finding that the fire was proximately caused by the electricity supplied by the company to the building and that, in so supplying the electricity, the company was negligent.

2. **Fires § 3; Electricity § 7.1— fire damage—electrical origin**

Plaintiffs' evidence was sufficient to permit the jury to find that a fire at their barn was electrical in origin where it tended to show that the fire originated at a point where the wiring connecting the weatherhead under the eaves to the meter box was "hot" with electrical current; the initially compact and concentrated nature of the flames was consistent with an electrical fire; the fire took some time to spread from the front of the barn where the "hot wires" were located to the back of the barn; and the fire was not caused by stored combustibles, an electric fence, interior wiring, stoves, electrical appliances, arson or lightning.

3. **Fires § 3; Electricity § 7.1; Negligence § 31— fire caused by electricity—power company's exclusive control of transmission lines**

Plaintiffs' evidence was sufficient to permit the jury to find that defendant power company had exclusive control and management of the electrical current which allegedly caused plaintiffs' barn to burn where it tended to show that, with the exception of a riser wire running between the meter box and a weatherhead on the barn which was installed and owned by plaintiff barn owner, defendant owned the entire transmission system which brought power from its generators to the barn; defendant made and maintained the connections between the riser wire and the meter box and weatherhead and regularly inspected the riser wire; and defendant thus maintained exclusive control over the suitability and safety of the riser wire as a transmitter of electricity.

4. **Fires § 3; Electricity § 7.1; Negligence § 31— fire caused by electricity—res ipsa loquitur**

In this action to recover for fire damage to plaintiffs' barn and its contents, a permissible inference of negligence by defendant power company arose under the doctrine of res ipsa loquitur and plaintiffs made out a case for the jury on the issue of defendant's negligence where plaintiffs' evidence would permit the jury to find that the fire was caused by electricity transmitted over power lines under the exclusive management and control of defendant, and that such fires do not ordinarily occur in the absence of negligence.

ON plaintiffs' petition for discretionary review of decision of the Court of Appeals, 39 N.C. App. 350, 250 S.E. 2d 99 (1979), vacating verdict and judgment in favor of plaintiffs and remanding for entry of a directed verdict in favor of defendant.

On and prior to 1 January 1976 plaintiff William G. Snow was overseer of farming operations for Grovewood, Inc. Snow kept his farming equipment and tools in a feed barn belonging to Grovewood. In the early morning hours of 1 Janaury 1976 the barn and its contents were destroyed by fire. Plaintiffs instituted this action to recover damages for their loss, alleging that the barn and farming equipment therein had been destroyed by a fire caused by defendant's negligence.

Plaintiffs offered evidence tending to show that defendant was engaged in the transmission and sale of electrical power and furnished electricity to Grovewood's premises; that Grovewood, Inc. owns two tracts of land in Surry County upon which are located five feed barns, numerous tool sheds, some tenant houses and tobacco barns; that one of the feed barns, about 30 by 60 feet and constructed of weatherboard, was destroyed by fire on 1 January 1976; that the barn had a cement floor and was two stories tall; that sheds were attached to the front (south) and back (north) sides of the barn; that William G. Snow lived about two and one-half miles west of the barn and kept his farming equipment in it, including a tractor with front and rear cultivators, a baler and numerous small tools, such as rakes, hoes, shovels, pitchforks, etc.

The barn had no electrical outlets or wiring on the inside, and William G. Snow had never used any electricity on the inside of the barn or paid for any electrical services to the barn. There was only one outlet on the outside, coming directly from the meter box located on the front (south) side of the barn underneath the shed. The meter box was attached to the barn itself and was connected to a large wire, called the riser wire, that came down the south side of the barn from the weatherhead under the eaves. At the weatherhead the riser wire was connected to the large wire leading from the weatherhead to a power pole approximately 300 yards across the highway from the barn. Defendant owned and maintained a transformer located on the same pole. Seven thousand, two hundred volts of electricity entered the transformer from the transmission line and were supposedly reduced by the transformer to appropriate voltage levels for the consumer, *i.e.*, 120 or 240 volts.

Evidence for plaintiffs further tends to show that the meter had been inactive for ninety-nine months, *i.e.*, there was no indication that any power was used through that meter and no one had been billed for electric current during that period of time. On 1 December 1975 an employee of Duke Power Company named Kent Gibson removed the meter from the meter box. A few days later Ed Snow (William Snow's father) put a plastic bag over the meter box to keep children out of it.

Ed Snow lived 200 yards from the barn. He was awakened about 4:30 a.m. on 1 January 1976, went to the porch of his home,

and saw the barn was on fire. He saw "the fire burning just right up over the meter box just about the size of a big table. . . . Right up over the meter box. . . . [N]owhere else, only right over the top of that box." He called the fire department. Within ten to fifteen minutes the barn "was afire halfway back." The weather was clear but windy, the wind blowing from north to south. Despite all efforts of the fire department, the barn and its contents were completely destroyed. Following the fire, about 10 a.m. that morning, an employee of Duke Power Company disconnected the wire leading from the power pole to the barn.

Evidence for plaintiffs further tends to show that William G. Snow did not have any gasoline or other combustible materials stored in the barn and that there were no stoves of any kind in the barn. At the time of the fire it was very windy but there was no rain, thunder or lightning. William G. Snow did have an electric fence encompassing an area at the back (north) side of the barn; however, the fence was not energized during the night of the fire.

Fire Chief Bullin testified that the back (north) side of the barn was not burning when the firemen arrived on the scene; that they walked around the barn, found the wire leading to the power pole charred at the end closest to the barn, and received an electrical shock from it. Someone called Duke Power Company to disconnect it. The fire chief found no evidence of arson.

Defendant offered evidence tending to show that Duke Power Company owned and installed the electric line from a utility pole to a point at the edge of the roof of the barn (the weatherhead) twelve feet above the ground. The riser wire was supplied and installed by the customer's electrician. That wire ran down the side of the barn eight or ten feet and connected to the meter box which contained the meter. There was no electricity to the barn except to the test block in the meter box. Below the meter box was a "pigtail" with a "plug-in."

Kent Gibson, who had been employed by defendant for thirty years, removed the meter from the meter box on 1 December 1975. He cut the seal, removed the lid, loosened the bolts that held the meter in place, lifted the meter out, replaced the lid and resealed the box with a metal seal. There was no current flowing through the meter prior to its removal. Current from the riser

wire reaches the meter by means of a test block inside the meter box to which wires leading to the meter are attached. In order to remove the meter Mr. Gibson had to disengage from the test block the wires which fed electricity from the riser wire to the meter. Thus, after removal of the meter the wires inside the meter box which connected the meter to the test block were no longer hot as the bolts had been loosened which attached these wires to the test block; however, the riser wires which led to the meter box remained hot. "*It was hot up to the meter*, but it wasn't hot in the meter."

Evidence offered by the parties concerning the amount of damages is not set out since no issue concerning the amount of damages is raised on this appeal.

At the close of all the evidence defendant's motion for a directed verdict was denied. The usual issues of negligence and damages were submitted to the jury, and the judge charged, among other things, on res ipsa loquitur. The jury answered the issues in favor of plaintiffs, awarding William G. Snow $5,000 damages and Grovewood, Inc., $2,000. Judgment was entered accordingly, and defendant appealed. The Court of Appeals vacated the judgment and remanded the case for entry of a directed verdict in favor of defendant. We allowed plaintiffs' petition for discretionary review of that decision.

Tornow and Lewis by Michael J. Lewis, attorneys for plaintiff appellants.

William I. Ward, Jr.; Folger and Folger by Fred Folger, Jr., attorneys for defendant appellee.

HUSKINS, Justice.

The sole question presented on this appeal is whether the evidence is sufficient to repel defendant's motion for directed verdict and carry the case to the jury. We hold that it is.

Defendant's motion at the close of all the evidence for directed verdict under Rule 50(a), Rules of Civil Procedure, presents the question whether the evidence, viewed in the light most favorable to plaintiff, will justify a verdict in his favor. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E. 2d 197 (1973). In passing

upon such motion, "the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

[1] Electricity is an inherently dangerous substance. "Consequently, a company supplying it to a customer's building must use a high degree of foresight and must exercise the utmost diligence consistent with the practical operation of its business." *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966). Such company is not, however, liable for damages resulting from a fire, and is entitled to directed verdict, unless plaintiff presents evidence sufficient to justify a jury in finding that the fire was "proximately caused by the electricity supplied by the company to the building and that, in so supplying the electricity, the company was negligent." *Id.*

Plaintiffs contend the doctrine of res ipsa loquitur applies in the factual context of this case and that, aided by said doctrine, the evidence is sufficient to carry the case to the jury. Res ipsa loquitur is an evidentiary rule which in a proper factual setting permits a party to prove the existence of negligence by merely establishing the circumstances of an occurrence that produces injury or damage. 2 Stansbury, N.C. Evidence, § 227 (Brandis Rev. 1973). The principle of res ipsa loquitur is generally stated as follows: "[W]hen a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." *Newton v. Texas Co.*, 180 N.C. 561, 105 S.E. 433 (1920). Simply put, the doctrine of res ipsa loquitur recognizes that "common experience sometimes permits a reasonable inference of negligence from the occurrence itself." Stansbury, supra, § 227. Thus, in order to be aided by the inference of negligence permitted under res ipsa loquitur plaintiffs in this case must establish: (1) that the fire which destroyed the barn was electrical in origin; (2) that defendant had the exclusive control and management of the electrical current which caused

the fire; and (3) that such electrical fires do not ordinarily occur if the party who has control of the electrical current uses proper care.

When laid alongside the elements necessary to invoke the doctrine of res ipsa loquitur, what does the evidence show?

[2] With respect to the sufficiency of the evidence on the *actual cause* of the fire, we note at the outset that the origin of a fire may be established by circumstantial evidence. *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767 (1961); *Simmons v. Lumber Co.*, 174 N.C. 220, 93 S.E. 736 (1917). If the facts proven establish the more reasonable probability that the fire was electrical in origin, then the case cannot be withdrawn from the jury though all possible causes have not been eliminated. *Patton v. Dail*, 252 N.C. 425, 114 S.E. 2d 87 (1960); *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560 (1960); *Fitzgerald v. R.R.*, 141 N.C. 530, 54 S.E. 391 (1906). "Whether the circumstantial evidence is sufficient 'to take the case out of the realm of conjecture and into the field of legitimate inference from established facts,' must be determined in relation to the attendant facts and circumstances of each case." *Drum v. Bisaner, supra* (citations omitted).

The evidence tends to show that the fire was first seen burning "just right up over the meter box" on the front (south) side of the barn. The fire was about the size of a "big eating table" and in its first stages was strictly localized to the area right above the meter box. The fire burned from the front to the back of the barn (south to north). The back (north) side of the barn was not burning when reached by fire fighters some ten to twenty minutes after their arrival on the scene. On the night of the fire the wind was blowing strongly from north to south.

The cable running from the utility pole to the weatherhead on the south side of the barn had electrical current running through it on the night of the fire. Similarly, the riser wire running from the weatherhead to the meter box had electrical current running through it to the test block in the meter box. Soon after his arrival at the scene, the fire chief found the cable running from the weatherhead to the power pole charred at the end closest to the barn. The fire chief touched the wire and received an electrical shock from it.

Plaintiffs did not have any gasoline or other combustible materials stored in the barn. There were no stoves of any kind in the barn. There were no electrical outlets or other wiring inside the barn. The electric "weed chopper" fence which enclosed the pasture on the back side of the barn was not energized on the night of the fire. No evidence of arson was found by the fire chief. On the night of the fire there was no lightning or thunder after 2 a.m.

The foregoing evidence, considered in the light most favorable to plaintiffs, would permit a jury to find: (1) that the fire originated at a point where the wiring connecting the weatherhead to the meter box was "hot" with electrical current; (2) that the initially compact and concentrated nature of the flames was consistent with an electrical fire, *see Collins v. Electric Co.*, 204 N.C. 320, 168 S.E. 500 (1933); (3) that the fire took some time to spread from the front of the barn—where the "hot wires" were located—to the back of the barn. Moreover, plaintiffs' evidence pointing affirmatively to the electrical origin of the fire is bolstered by other evidence tending to eliminate other likely causes of the fire. This evidence tends to negative stored combustibles, the electric "weed chopper" fence, interior wiring, stoves, electrical appliances, arson, and lightning as probable causes of the fire. It may be said then, that the evidence on the actual cause of the fire is not merely conjectual or speculative but is such as would warrant a jury in forming a legitimate conclusion that the fire was caused by electricity transmitted over defendant's power lines.

In concluding that there was insufficient evidence as to the cause of the fire, the Court of Appeals relied on *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E. 2d 719 (1967), and *Maharias v. Storage Company*, 257 N.C. 767, 127 S.E. 2d 548 (1962). This reliance is misplaced. The holdings in *Phelps* and *Maharias* are limited to the particular facts presented in those cases and have no application to the very different factual context presented here. We note, moreover, that the facts in this case bear a stronger resemblance to the facts in *Collins v. Electric Co., supra*, than to the facts in *Phelps* and *Maharias*. In *Collins*, this Court concluded that the evidence of causation was sufficient to permit submission of the issue to the jury.

[3] Plaintiffs must next establish that defendant had the exclusive control and management of the electrical current which allegedly caused the barn to burn. The evidence on this point tends to show that defendant generated the electricity which caused the fire. Defendant transmitted this electricity to plaintiffs through high voltage transmission lines which led to a power pole located approximately 300 yards across the highway from the barn. On this same pole was a transformer designed to reduce the high voltage electricity entering it from the transmission lines to appropriate voltage levels for the consumer. This electricity was transmitted from the utility pole to plaintiffs' barn by a cable which was connected to a weatherhead which itself was attached to the eaves on the front side of plaintiffs' barn. At the weatherhead, the cable from the power pole was connected to a large wire, called the riser wire, which ran down the side of the barn some eight to ten feet and connected to the test block in the meter box installed some four to five feet above the ground.

With the exception of the riser wire, defendant owned the entire transmission system which brought power from its generators to the barn. Plaintiff Grovewood, Inc. owned and originally installed the riser wire; however, defendant *made and maintained the connections* between the riser wire and its transmission cable at the weatherhead and also at its meter box. Moreover, defendant's meter readers and servicemen regularly inspected the riser wire on their visits to the premises as part of their assigned duties.

The foregoing evidence, considered in the light most favorable to plaintiffs, indicates that defendant maintained the system by which electricity was generated and delivered to plaintiffs' barn and thus permits a jury finding that defendant had the exclusive control and management of the instrumentality which allegedly caused the fire. Plaintiff Grovewood, Inc.'s ownership and installation of the riser wire does not preclude a jury finding of exlcusive control in light of the evidence tending to show that the riser wire was used exclusively by defendant as one of the links in the transmission system by which electricity was delivered to plaintiffs' barn. This evidence indicates that defendant made and maintained the connections between the riser wire and other links in the transmission system—*i.e.*, the weatherhead and the meter box—and regularly inspected the riser wire. Thus,

a jury could reasonably infer that defendant, while not the legal owner of the riser wire, in effect maintained exclusive control over the suitability and safety of the riser wire as a transmitter of electricity.

[4] Plaintiffs' evidence is sufficient to permit a finding that the fire was caused by electricity transmitted over power lines under the exclusive management and control of defendant. The final question, then, in determining if a permissible inference of negligence arises under the doctrine of res ipsa loquitur, is whether such fires ordinarily occur in the absence of negligence. Our cases have generally recognized that it is not within the realm of ordinary experience for injuries of this nature to occur in the absence of negligence. *See Collins v. Electric Co., supra; Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735 (1925); *McAllister v. Pryor*, 187 N.C. 832, 123 S.E. 92 (1924); *Turner v. Power Co.*, 154 N.C. 131, 69 S.E. 767 (1910). In *Collins v. Electric Co., supra*, we held res ipsa loquitur to be applicable in a factual context closely resembling the facts in this case. Accordingly, we conclude that a permissible inference of negligence arises here under the doctrine of res ipsa loquitur and that plaintiffs have made out a case for the jury on the issue of defendant's negligence. It follows that defendant's motion for directed verdict at the close of all the evidence was properly denied by the trial court.

For the reasons stated the decision of the Court of Appeals is reversed and the cause remanded for reinstatement of judgment on the verdict.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DONALD GENE PHILLIPS AND MICHAEL JOEL PRESSLEY

No. 85

(Filed 12 July 1979)

1. **Indictment and Warrant §§ 14, 15; Perjury § 1— inaccurate testimony before grand jury—no perjury—motion to dismiss indictment—timeliness**

The trial court in a prosecution for arson did not err in denying defendants' motion to dismiss on the ground that the indictment against them was

based solely on the perjured testimony of the witness whose motel and residence were burned, since: (1) there was no evidence that perjury was actually committed, as assumptions made by the witness in his grand jury testimony did not amount to perjury but only to an unintentional misstatement of the facts and the accuracy of those assumptions was fully verified by another witness at trial; and (2) defendants' motion to dismiss the indictment, which was made at the conclusion of the evidence, was not timely. G.S. 15A-952(c).

2. Grand Jury § 2— proceedings secret—cross-examination of witness improper

Evidence elicited on cross-examination concerning an arson victim's grand jury appearance was not a proper subject for consideration on a motion to dismiss the indictment, since it is the policy of the State that grand jury proceedings should be secret. G.S. 15A-623(e).

3. Criminal Law § 117.3— jury instructions—witness testifying under immunity

Defendants had no standing to challenge either the propriety or the effectiveness of a grant of immunity to a witness testifying against them, since the privilege against self-incrimination is a personal one; furthermore, even if the grant of immunity in question were ineffective, defendants were not prejudiced by the court's instruction that the witness had been granted immunity and cautioning the jury to scrutinize his testimony with care before accepting it.

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

APPEAL by defendants from the judgment of *(Harry C.) Martin, J.*, at the 24 April 1978 Session of HAYWOOD Superior Court, docketed and argued at the Fall Term 1978 as Case No. 107.

Defendants were tried and convicted of arson. Sentences of life imprisonment were imposed under N.C. Gen. Stat. § 14-58 (Cum. Supp. 1977), and both defendants appealed. Evidence for the State tended to show:

On 15 May 1977 Joe Bill Deyton and his wife were the owners of a motel located on Lake Santeetlah, one mile outside of Robbinsville, North Carolina. The complex which housed the motel also contained the Deytons' living quarters. Around 2:00 a.m. that morning, after waiting up for some late-arriving motel guests, Deyton went to his residence, where his wife, daughter, and niece were already asleep. As he sat at the kitchen table drinking a cup of coffee, he heard his dog barking and went outside to investigate. When he stepped out the front door he "heard something go shush-boom!" Glancing up, he saw that "the whole end of [the] motel porch was on fire." At the same time Deyton saw two men running from the direction of the motel. They were carrying what appeared to be a five-gallon gasoline can. By the

light of the fire and four motel floodlights he recognized the men as the defendants, Donald Gene Phillips and Michael Joel Pressley. He had known these two men "all of his life."

The bedroom of Deyton's daughter was directly under the motel porch which was on fire. He immediately ran back into the residence to awaken his family and get them out of the burning building. This accomplished, he directed his wife to call the fire department. He then ran back outside and tried unsuccessfully to put out the fire with a garden hose. While thus engaged he saw a white 1966 Chevrolet pass by the motel headed toward Robbinsville. This car was "similar" to the 1966 Chevrolet he knew to be owned by Richard Godfrey Phillips, the nephew of defendant Michael Phillips.

The fire department never responded to the call and the building was totally destroyed.

Richard Phillips, who was indicted for arson along with the defendants, testified for the State under a grant of immunity. His evidence, summarized except when quoted, tended to show:

Richard Phillips returned to Graham County on 20 April 1977 after having worked in Chicago for approximately thirteen weeks. Upon his return he set up a campsite on Massey Branch Road near Lake Santeetlah. From 20 April 1977 until May 15th, the morning of the fire, he lived there with several other persons, including defendant Michael Pressley.

On Saturday, May 14, Richard Phillips made several trips away from the campsite. On one of these trips, accompanied by the defendants Pressley and Donald Phillips, he drove to Cherokee County to purchase liquor. After consuming two fifths of whiskey they returned to the campsite around 4:00 p.m. Around 11:00 p.m. defendants and their companions decided to go to a party at Cheoah Point, ten miles north of Robbinsville. Everyone was "pretty drunk by this time." Richard Phillips was driving his own car, a white 1966 Chevrolet. He was accompanied by the defendants and by Tony and James Phillips. When they reached Cheoah Point, they failed to find the party and headed back toward Robbinsville. On the way they passed the motel owned by Joe Deyton and his wife.

As they drove by the motel, Richard Phillips said, "We ought to set some nails under his [Joe Deyton's] tires." After Richard Phillips made this remark, James Phillips said, "Let's just burn him out." The suggestions "seemed like the most popular thing to do and everybody said, okay, we'll do it." Richard Phillips explained that he had nothing personally against Mr. Deyton; that he just "wanted to do something evil."

The five men then returned to the campsite where they obtained a five-gallon gasoline can. After considering methods of destroying the motel, the group decided as a part of their plan to disable the fire trucks at the Robbinsville Fire Department. Both defendants participated in the discussion. All of them then proceeded in Richard Phillips' Chevrolet to the home of Susan Costerolos, where they siphoned gas out of a car parked in front of her trailer and told her of their intention "to burn up Joe Bill Deyton." Despite her pleas and efforts to dissuade them they left for the motel. En route they stopped at the Graham County Rescue Squad Building and disabled the two fire trucks they found inside by throwing away the keys and tearing out the distributor wires.

When the group reached the Deytons' motel, Richard Phillips drove the car slowly past the building to be sure no one was outside. He then parked beside a dumpster approximately a quarter of a mile away. Michael Pressley and Donald Philips left the car, gasoline in hand, and headed toward the motel, saying they "were going to burn that motel down."

A short time later defendants ran back to the car from the direction of the motel. At that time the "whole area was lit up" by the burning building. As they got in the car, Donald Phillips said, "[L]et's get out of here . . . it's a blazing." Richard Phillips drove for approximately a half mile with his headlights turned off and then returned with his passengers to the Costerolos trailer.

Defendants presented evidence tending to show that they were at the trailer at the time the fire began, and that they knew nothing about the motel being burned until someone came to the trailer and told them about it.

Rufus L. Edmisten, Attorney General, and George J. Oliver, Assistant Attorney General, for the State.

Noland, Holt & Campbell by Edward Campbell for defendants.

SHARP, Chief Justice.

[1] At the conclusion of the evidence defendants moved to dismiss the case on the grounds that the indictment against them was based solely on the perjured testimony of the State's witness Joe Bill Deyton. The trial court's denial of this motion constitutes defendants' first assignment of error. Whether an indictment would ever be subject to dismissal on the foregoing grounds and, if so, under what circumstances, is a question we need not now explore since (1) there is no evidence that perjury was actually committed and (2) defendants' motion to dismiss was untimely.

The sole witness before the grand jury was Joe Deyton, the arson victim. At the trial Deyton testified on direct examination that there were some "inaccuracies" in the statements he had made to the SBI agent who investigated the fire. He told the agent he saw defedants get into a 1966 Chevrolet which came by the motel after the fire began and that Dickie Phillips (Richard Godfrey Phillips) was the driver. Deyton explained that he had *assumed* Richard Phillips was the driver because Phillips had driven up to the store at Deyton's motel many times in just such a car; and that, although he thought he had seen him, he couldn't be sure. He also testified that he had assumed that the two defendants, both of whom he had seen running from the scene of the fire, were passengers in the car. On the morning of the trial Deyton told the district attorney about these assumptions and advised him that there would be a discrepancy between his trial testimony and his former statements.

Deyton admitted on cross-examination, over the State's objection,[1] that his testimony before the grand jury and at the preliminary hearing contained the same inaccuracies. He explained that his former testimony was based on assumptions he had

1. The admission of this testimony is not assigned as error and the question whether a witness's grand jury testimony is admissible to impeach his testimony at trial is not at issue here. *But see* N.C. Gen. Stat. § 15A-623(e) (1978) and § 11-11 (1969). *See also State v. Ivey*, --- La. ---, 307 So. 2d 587 (1975).

made at the time of the fire, and that he reported those assumptions as fact because "he was so upset and so tore up" by the shock of his family's narrow escape from death and the loss of his home and possessions.

These facts fall far short of establishing perjury. The commonlaw definition of perjury is "a false statement under oath, knowingly, willfully and designedly made in a proceeding in a court of competent jurisdiction . . . as to some matter material to the issue or point in question." *State v. Lucas*, 244 N.C. 53, 54-55, 92 S.E. 2d 401, 402 (1956). There is nothing in Deyton's testimony which suggests that the inaccuracies in his grand jury testimony were wilfull or designedly made. An unintentional misstatement of the facts is not perjurious.

Furthermore, we note that Richard Phillips' testimony at trial fully verified the accuracy of Deyton's assumptions. Phillips swore that he was in fact the driver of the car Deyton saw and that the two defendants did indeed get into the car after the fire began.

We also note that Deyton testified, both at trial and before the grand jury, that he saw two men running away from the fire carrying a gasoline can and recognized them as the defendants. This testimony, standing alone, provided ample cause for the grand jury to believe defendants were involved in the arson.

[2] Finally, we call attention to the public policy of this State against allowing a defendant to cross-examine the witnesses before the grand jury in order to show the nature and character of the evidence upon which the bill of indictment was founded. *State v. Blanton*, 227 N.C. 517, 523-24, 42 S.E. 2d 663, 667 (1947). This policy is now codified in G.S. 15A-623(e) which states that "Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets." *See also* G.S. 11-11. We agree with the trial judge that the evidence elicited on cross-examination concerning Deyton's grand jury appearance was not a proper subject for consideration on a motion to dismiss the indictment.

[1] Under G.S. 15A-952(c) a motion to dismiss the indictment pursuant to G.S. 15A-955 "must be made at or before the time of ar-

raignment if arraignment is held prior to the session of court for which the trial is calendared." If arraignment is held during the session, the motion must be filed "on or before five o'clock p.m. on the Wednesday prior to the session when trial of the case begins." A failure to make the motion in apt time constitutes a "waiver." G.S. 15A-952(e). The trial judge, however, has the power to "grant relief from any waiver except failure to move to dismiss for improper venue." *Id.*

Other than specifying arraignment as the proper time for making the motion, these statutory rules substantially follow common-law practice. Under the common law of this State a motion to quash the indictment could be made as of right only up to the time the defendant entered his plea. Thereafter, the motion was addressed to the sound discretion of the trial judge. *State v. Colson*, 262 N.C. 506, 138 S.E. 2d 121 (1964). *See also, State v. Ballenger*, 247 N.C. 260, 100 S.E. 2d 845 (1957); *State v. Suddreth*, 223 N.C. 610, 27 S.E. 2d 623 (1943); *State v. Burnett*, 142 N.C. 577, 55 S.E. 72 (1906); *State v. Eason*, 70 N.C. 88, 90 (1874).

Defendants' motion to dismiss came at the conclusion of the evidence. Under either common-law practice or G.S. 15A-952, the motion was untimely and was therefore addressed to the discretion of the trial judge. *State v. Ballenger*, supra; *State v. Suddreth*, supra; G.S. 15A-952(e). His exercise of that discretion in refusing to hear the motion is not reviewable on appeal. *State v. Colson*, supra; *State v. Ballenger*, supra.

[3] In their second assignment of error defendants argue that the trial court erred in charging the jury that Richard Godfrey Phillips had testified under a grant of immunity. Defendants contend that the order dated April 24, 1978, granting immunity was ineffective because Phillips never formally asserted his privilege against self-incrimination as required by G.S. 15A-1051(b).

Because the privilege against self-incrimination is a personal one[2], the short answer to defendants' second assignment is simply that they have no standing to challenge either the propriety or the effectiveness of a grant of immunity to a witness testifying against them. *United States v. Braasch*, 505 F. 2d 139 (7th Cir.

2. *See, e.g., State v. Morgan*, 133 N.C. 743, 45 S.E. 1033 (1903); *State v. Smith*, 13 N.C. App. 46, 184 S.E. 2d 906 (1971).

1974); *United States v. Lewis*, 456 F. 2d 404 (3d Cir. 1972); *Lopez v. Burke*, 413 F. 2d 992 (7th Cir. 1969); *Commonwealth v. Simpson*, 370 Mass. 119, 345 N.E. 2d 899 (1976); *State v. Reed*, 127 Vt. 532, 253 A. 2d 227 (1969). Furthermore, even if the grant of immunity were ineffective and the judge's charge therefore superfluous, we fail to see how defendants could be prejudiced by an instruction telling the jury that Richard Phillips had been granted immunity and cautioning the jury to "scan and scrutinize [his] testimony with care before accepting it."

Upon oral argument defendants expressly abandoned their two final assignments of error: (1) that the trial judge erred in granting a change of venue (a move they themselves requested), and (2) that they were denied the effective assistance of counsel. Notwithstanding, we have examined both of these assignments and find no merit in either.

Our careful review of the record discloses a trial free from prejudicial error.

No error.

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

BARBEE v. JEWELERS, INC.

No. 153 PC.

Case below: 40 N.C. App. 760.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 June 1979.

BARDEN v. INSURANCE CO.

No. 148 PC.

Case below: 41 N.C. App. 135.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

CANTY v. DARSIE

No. 173 PC.

Case below: 41 N.C. App. 191.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 July 1979.

CHURCH v. STATE

No. 119 PC.

No. 77 (Fall Term).

Case below: 40 N.C. App. 429.

Petition by Attorney General for discretionary review under G.S. 7A-31 and notice of appeal allowed 12 July 1979.

CITY OF DURHAM v. KEEN

No. 161 PC.

Case below: 40 N.C. App. 652.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979. Motion of additional defendants to dismiss appeal for lack of substantial constitutional question allowed 12 July 1979.

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

DALE v. INSURANCE CO.

No. 165 PC.

Case below: 40 N.C. App. 715.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 12 July 1979.

DECKER v. DECKER

No. 159 PC.

Case below: 41 N.C. App. 191.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 June 1979.

ENGLISH v. REALTY CORP.

No. 189 PC.

Case below: 41 N.C. App. 1.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 12 July 1979.

HOLLAND v. HOLLAND

No. 143 PC.

Case below: 41 N.C. App. 191.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

HOSPITAL v. HOOTS

No. 137 PC.

Case below: 40 N.C. App. 595.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

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

IN RE YOW

No. 144 PC.

Case below: 40 N.C. App. 688.

Petition for discretionary review under G.S. 7A-31 denied 12 July 1979.

JENKINS v. FALCONER

No. 138 PC.

Case below: 40 N.C. App. 771.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 June 1979.

JOHNSON v. LOCKMAN

No. 186 PC.

Case below: 41 N.C. App. 54.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 June 1979.

KELLER v. OWEN

No. 158 PC.

Case below: 41 N.C. App. 191.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 July 1979.

LACKEY v. COOKE

No. 145 PC.

Case below: 40 N.C. App. 522.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 July 1979.

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

MacEACHERN v. ROCKWELL INTERNATIONAL CORP.

No. 185 PC.

Case below: 41 N.C. App. 73.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 July 1979.

MORGAN v. McLEOD

No. 134 PC.

Case below: 40 N.C. App. 467.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 June 1979.

MOYE v. GAS CO.

No. 129 PC.

Case below: 40 N.C. App. 310.

Petition by defendants for discretionary review under G.S. 7A-31 denied 12 July 1979.

ODOM v. LITTLE ROCK & I-85 CORP.

No. 180 PC.

No. 70 (Fall Term).

Case below: 40 N.C. App. 242.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals allowed 28 June 1979.

PARTIN v. POWER AND LIGHT CO.

No. 169 PC.

Case below: 40 N.C. App. 630.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

REALTY CORP. v. SAVINGS & LOAN ASSOC.

No. 170 PC.

Case below: 40 N.C. App. 675.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 June 1979. Motion for plaintiff to dismiss appeal for lack of substantial constitutional question allowed 28 June 1979.

REID v. ECKERDS DRUGS, INC.

No. 146 PC.

Case below: 40 N.C. App. 476.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

ROUSE v. MAXWELL

No. 147 PC.

No. 68 (Fall Term).

Case below: 40 N.C. App. 538.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 28 June 1979.

SMITH v. CURRIE

No. 135 PC.

Case below: 40 N.C. App. 739.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. BRANCH

No. 52.

Case below: 41 N.C. App. 80.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1979.

STATE v. BROADNAX

No. 166 PC.

Case below: 41 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. BUMGARNER

No. 227 PC.

No. 82 (Fall Term).

Case below: 42 N.C. App. 71.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 20 July 1979.

STATE v. CARSWELL

No. 172 PC.

Case below: 40 N.C. App. 752.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. CHAPMAN

No. 141 PC.

Case below: 40 N.C. App. 629.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. COVINGTON

No. 139 PC.

Case below: 40 N.C. App. 771.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1979.

STATE v. ELLIOTT

No. 157 PC.

Case below: 41 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. EUTSLER

No. 181 PC.

Case below: 41 N.C. App. 182.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 June 1979.

STATE v. HENLEY

No. 149 PC.

Case below: 40 N.C. App. 629.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 June 1979.

STATE v. JEFFERIES and STATE v. PERSON

No. 174 PC.

Case below: 41 N.C. App. 95.

Application by defendant Person for further review denied 28 June 1979.

STATE v. JONES

No. 183 PC.

Case below: 41 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 allowed. Case No. 78-CRS-376 remanded for resentencing 28 June 1979.

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

STATE v. LAUGHINGHOUSE

No. 78 PC.

Case below: 39 N.C. App. 655.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 June 1979. Appeal dismissed 28 June 1979.

STATE v. LAWRENCE

No. 123 PC.

Case below: 40 N.C. App. 427.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. LEGGETT

No. 154 PC.

Case below: 40 N.C. App. 771.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 July 1979.

STATE v. LEONHARDT

No. 219 PC.

Case below: 41 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 July 1979.

STATE v. McCRAY

No. 201 PC.

Case below: 39 N.C. App. 736.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 July 1979.

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

STATE v. MORRIS

No. 48.

Case below: 41 N.C. App. 164.

Defendant's notice of appeal under G.S. 7A-30 dismissed 12 July 1979. Petition for writ of certiorari to North Carolina Court of Appeals denied 19 July 1979.

STATE v. PATE

No. 167 PC.

Case below: 40 N.C. App. 580.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 July 1979.

STATE v. ROBINSON

No. 163 PC.

Case below: 34 N.C. App. 502.

Application by defendant for further review denied 12 July 1979.

STATE v. SPELLMAN

No. 150 PC.

Case below: 40 N.C. App. 591.

Petition by defendants for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. SUMLIN and STRAIN

No. 176 PC.

Case below: 40 N.C. App. 281.

Application by defendant Strain for further review dismissed 12 July 1979.

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

STATE v. THOMPSON

No. 162 PC.

Case below: 40 N.C. App. 281.

Application by defendant for further review denied 12 July 1979.

STATE v. TYNDALL

No. 208 PC.

Case below: 41 N.C. App. 406.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

STATE v. WOODALL

No. 182 PC.

Case below: 41 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 July 1979.

BESSIE LEATHERMAN v. FLOYD HERMAN LEATHERMAN AND LEATHERMAN, INC.

No. 27

(Filed 30 July 1979)

1. **Trusts § 13.4— wife's services in husband's business—use of joint bank account funds to capitalize corporation—no resulting trust in stock**

Plaintiff was not entitled to a resulting trust in one-half of the stock of a corporation formed upon incorporation of her husband's land clearing business because she had performed bookkeeping and other supportive services for the husband's business for many years, the income from the business was placed in joint bank accounts, and money in the joint bank accounts was used to capitalize the corporation where plaintiff failed to overcome the presumption that services rendered by a wife in her husband's business are gratuitously performed absent a special agreement to the contrary; the evidence showed that the funds in the joint account were the exclusive property of the husband, and plaintiff failed to show that her husband, by depositing funds in a joint account, intended to make her an *inter vivos* gift of such funds; and plaintiff thus failed to show that she had an ownership interest in the bank accounts.

2. **Trusts § 14.2— wife's services in husband's business—use of joint account funds to capitalize corporation—no constructive trust in stock**

Plaintiff wife was not entitled to have a constructive trust imposed on one-half of the stock of a corporation formed upon incorporation of her husband's business and capitalized with funds derived from the business which had been placed in joint bank accounts of plaintiff wife and defendant husband, although the wife had contributed her services to the building up of the business, since (1) defendant husband did not acquire any property through the use of funds to which plaintiff wife had an equitable or legal claim, and (2) even though there was a confidential relationship between the parties, there was no evidence that defendant failed to disclose any material fact with respect to the use of the funds to capitalize the corporation or that defendant violated any duty to plaintiff.

Justice BROCK did not participate in the consideration or decision of this case.

Chief Justice SHARP dissenting.

Justice HUSKINS joins in the dissent.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 38 N.C. App. 696, 248 S.E. 2d 764 (1978) reversing judgment entered by *Lewis, J.*, 11 July 1977, in CATAWBA Superior Court, *Judge Robert M. Martin* dissenting.

Plaintiff filed a complaint in this action on 31 October 1975 in which she alleged that she was entitled to be declared the owner of one-half of the capital stock of defendant corporation, Leatherman, Inc., held by defendant Floyd Leatherman (hereinafter referred to as defendant). Defendants filed a joint answer in which they denied the material allegations of the complaint. Defendants also averred that plaintiff lacked any ownership interest in the sole proprietorship from which the corporation was formed and that plaintiff lacked any ownership interest in the joint bank accounts from which funds were taken to capitalize the corporation.

Jury trial was waived and evidence offered at trial tended to show:

Plaintiff and defendant were married 17 August 1947 and obtained a divorce in May 1975. During the marriage three children were born to the couple. At the time of the separation defendant conveyed to plaintiff a house and ten acres of land clear of all liens. He also paid her a lump sum of $5,000.00 and agreed to pay her $500.00 monthly until her death or remarriage. The agreement stated that its provisions were not to affect this claim relating to the stock of the corporation.

In 1951 defendant bought a bulldozer from his father and began doing custom grading work. He was the sole operator of the bulldozer and did all the work on the various jobs for which he was hired. Plaintiff kept the books, answered the phone, paid the bills, and did other supportive work for the business. The income from the business was placed in a joint bank account to which both husband and wife made deposits. Plaintiff testified that all monies deposited to this account were derived from the grading business. Neither of them received a salary from this account, but funds from it were used to pay household and business expenses.

About 1960 the business began to expand, branching out to larger contract jobs, buying new equipment, and hiring additional personnel. As a consequence of this growth, plaintiff spent more time doing the support work of the business. By 1963 the company had begun doing out-of-state work, had hired twenty-eight employees, and had accumulated several more pieces of equipment. Between 1963 and 1965 plaintiff worked full time (forty hours or more weekly) in the business office maintained in the

couple's home. During this time neither plaintiff nor defendant was paid a salary. Both business and household funds continued to be channeled through the joint checking account. During this time the couple also placed some money in joint savings accounts.

In 1965 the sole proprietorship was incorporated as Leatherman, Inc. $32,382.02 was transferred from the joint checking and savings accounts to accounts in the name of the corporation. All of the equipment which the business had acquired was likewise transferred to the corporation. Plaintiff aided the accountants who did the financial work for the new corporation. Her duties continued to require her full time. The corporation's net worth was approximately $93,000.00 and all of its 930 shares were issued to defendant. Plaintiff protested this arrangement and her husband and the accountants explained that this was necessary for "tax purposes." Defendant also told her that she was "going to get it [the business] anyway" as they would execute cross-wills to each other. These wills were executed shortly thereafter.

After the corporation was formed plaintiff continued to do the office work required to support the business and defendant continued to do the on-the-job supervision of the grading. The office duties increased when the firm began to submit competitive bids to acquire contract work. In 1966 defendant was paid a salary of $20,000.00. From this salary the household expenditures were made. It was explained to plaintiff that this compensation was for both of them and was paid in this manner to reduce the amount of taxes and social security which were withheld. After she protested, plaintiff was paid a salary for the first time in 1971. She continued to receive a salary until she left the employ of the corporation in 1974.

From 1951 until 1965 all financing for the business was arranged through loans cosigned by both plaintiff and defendant. After 1965 financing for the corporation was obtained through similar loans to the couple who in turn lent funds to the corporation. Purchases of equipment were handled similarly with both the husband and the wife signing the required financing documents.

Defendant never told plaintiff that any of the company's stock would be transferred to her. After they separated she asked him to compensate her for the work she had done in the

business by transferring some of its stock to her. He refused and this action was begun.

On 11 July 1977 judgment *nunc pro tunc* was entered. The court found, among other things, that plaintiff owned a one-half interest in the joint accounts which were used to capitalize the corporation. The court imposed a constructive trust in the amount of $16,191.01 upon defendant's stock holdings in defendant corporation. Defendants excepted to various findings of fact made by the court, to the imposition of a constructive trust upon the stock, and to the entry of judgment based on said findings of fact and conclusions of law.

Rudisill & Brackett, by J. Steven Brackett, for plaintiff-appellant.

Patton, Starnes & Thompson, by Thomas M. Starnes, for defendant-appellees.

BRITT, Justice.

Plaintiff contends the Court of Appeals erred in failing to uphold the constructive trust imposed by the trial court on the stock holdings of defendant in the corporation. In its decision the Court of Appeals held that plaintiff had failed to show from the facts and circumstances that a "special contract" existed between herself and defendant which entitled her to compensation for work performed for the business; therefore, her claim of legal ownership in the stock could not be maintained. The Court of Appeals held that plaintiff had failed to show any wrongdoing on the part of defendant which justified the imposition of a constructive trust. The decision of the Court of Appeals is well reasoned and is based upon sound legal principles. It is therefore affirmed.

[1] Two classes of trusts arise by operation of law; resulting trusts and constructive trusts. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). "[T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; whereas a constuctive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity

transfers the beneficial title to some person other than the holder of the legal title." Bowen, *supra* at pages 13-14. Before either type of trust can be imposed by the court, it must be shown that the party seeking to invoke these doctrines has been deprived of the beneficial interest to which he is entitled in some property. The elementary flaw in plaintiff's case for a resulting trust is her failure to prove that she owned a portion of the funds in the joint accounts. Absent an enforceable interest in those funds, she cannot have an equitable interest in the stock purchased therewith.

The trial court found "[t]hat the funds transferred from joint accounts to the corporate account in 1966 were the property of the plaintiff and defendant, either of whom could have withdrawn any or all of the funds at any time." Although denominated a finding of fact, this is actually a mixed question of law and fact which may be reviewed on appeal. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976); *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). We do not believe that the trial court correctly applied the law to the facts shown at the trial of this case. Plaintiff has not overcome the presumption that services rendered by a wife in her husband's business are gratuitously performed absent a special agreement to the contrary. *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1961); *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E. 2d 171 (1951); *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541 (1922). Nor has plaintiff sustained the burden of proving that her husband, by depositing funds to an account in the name of himself and his wife, intended to make her an *inter vivos* gift of such funds. Smith, *supra*.

"A wife in North Carolina may recover from her husband, on the basis of an express contract, for services rendered him in connection with his business or outside of the purely domestic relations of the marital status. The status, or marriage, nothing else appearing, negatives an implied promise on the part of the husband to do so." 2 R. Lee, North Carolina Family Law § 110, p. 43 (1963). In this case there is no evidence of an express contract providing that plaintiff be compensated for her work in her husband's business.

The facts and circumstances of a particular case may, of course, give rise to an implied promise that the wife will be paid.

Smith, *supra;* Sprinkle, *supra; Eggleston v. Eggleston,* 228 N.C. 668, 47 S.E. 2d 243 (1948); *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418 (1945); Dorsett, *supra.* In *Dorsett,* plaintiff and her husband maintained a shop in Greensboro where bicycles, locks, guns and keys were repaired. The wife brought an action in *quantum meruit* to recover pay for services rendered in the defendant's shop. Chief Justice Clark, writing for the court, reasoned:

> "There are instances where there is not only a matrimonial partnership between a husband and wife, but a financial or business partnership; also, where the wife is to receive compensation from her husband for services rendered, but in all such cases the business partnership, or the liability of the husband to the wife for compensation, must arise out of an agreement, not out of the marital relation. . . ." Dorsett, *supra* at page 358.

The court in *Dorsett* sustained defendant's demurrer to the complaint because plaintiff had failed to allege an agreement, understanding, or intention—express or implied—that she was to be compensated for her work. Likewise, plaintiff in the case before us has not alleged an agreement for compensation between herself and defendant. Nor does the evidence reveal that either an explicit or implicit agreement for plaintiff's compensation existed between the parties.

The evidence in this case is unlike that in *Eggleston v. Eggleston, supra,* where plaintiff wife was granted a new trial after this court determined that evidence of a partnership between her and her husband, the defendant, had been improperly excluded. Much like the parties in this case, the Egglestons—through their joint efforts— developed a thriving commercial enterprise from a small family business which began with a single gas station. Mrs. Eggleston testified that she operated the filling station and maintained its books. Her duties in the business were, in short, very similar to those which plaintiff performed for the grading business in this case. The feature which distinguishes *Eggleston* from the case before us, however, is that in that case the husband and wife filed partnership income tax returns on which they listed themselves as partners. This fact is evidence from which the jury could infer that there was an implied agreement or con-

tract between the parties providing for the wife's compensation. No similar circumstance is shown in this case. There is simply no evidence from which the trial court could find an agreement to pay for plaintiff's services. Quite properly, the court did not find that such an agreement existed.

The evidence is also insufficient to sustain the finding of co-ownership of the accounts on the theory that both plaintiff and defendant exercised control over the funds deposited therein.

> Under the laws in this jurisdiction, nothing else appearing, money in the bank to the joint credit of husband and wife belongs one-half to the husband and one-half to the wife. *Bowling v. Bowling*, 243 N.C. 515, 519, 91 S.E. 2d 176; *Smith v. Smith*, 190 N.C. 764, 767, 130 S.E. 614; *Turlington v. Lucas*, 186 N.C. 283, 290, 119 S.E. 366.
>
> But in the absence of evidence to the contrary the person making a deposit in a bank is deemed to be the owner of the fund. If a husband deposits his own money in a bank and the money is entered upon the records of the bank in the name of the husband or his wife, it is still the property of the husband, nothing else appearing. *Hall v. Hall*, 235 N.C. 711, 714, 71 S.E. 2d 471; *Nannie v. Pollard*, 205 N.C. 362, 171 S.E. 341; *Jones v. Fullbright*, 197 N.C. 274, 277, 148 S.E. 229; *Thomas v. Houston*, 181 N.C. 91, 93, 106 S.E. 466.
>
> Such deposit does not constitute a gift to the wife. To make a gift *inter vivos* there must be an intention to give coupled with a delivery of, and loss of dominion over, the property given, on the part of the donor. Donor must divest himself of all right and title to, and control of, the gift. Such gift cannot be made to take place in the future. The transaction must show a completely executed transfer to the donee of the present right to the property and the possession. *Buffaloe v. Barnes*, 226 N.C. 313, 318, 38 S.E. 2d 222; *Nannie v. Pollard, supra; Thomas v. Houston, supra.* When a husband deposits his money in the name of husband or wife, this fact taken alone does not necessarily indicate an intent to make a gift to the wife. It may, indeed, be only for the convenience of the husband. Furthermore, he does not thereby divest himself of dominion over the fund. He may withdraw any or all of it at any time. "The delivery of the deposit book for

such an account is not sufficient to meet the formal requirements for a gift." 14 N.C. Law Rev. 133, and cases there cited (N. 23).

When a husband deposits his money in this manner he merely constitutes the wife his agent with authority to withdraw funds from the account, and the agency is terminated by death of the husband. (See cases cited in the second paragraph next above.) The agency may be terminated during the lives of husband and wife by withdrawal of the fund and closing the account by the husband, notice to the agent and the bank, or by other methods recognized by law for termination of the principal and agent relation. Annotation, 161 A.L.R., Joint Deposit—Powers as to, pp. 71-95; Zollmann Banks and Banking (Perm. Ed.), Vol. 5, s. 3231, p. 250; *Cashman v. Mason*, 72 F. Supp. 487, 491.

Smith, *supra* at pages 154-155.

Plaintiff testified that she did not deposit any of her personal funds in the joint accounts and that all of the "money that went into those accounts was money that was earned on grading jobs by Floyd Leatherman either personally or through his employees." This testimony makes it clear that the funds in the joint accounts were the exclusive property of defendant. Both husband and wife had the authority to deposit and withdraw money from the accounts. The evidence of both parties tends to show that plaintiff acted as the agent of her husband, not the owner, with regard to these funds. Nowhere in the record is there evidence which would sustain a finding that defendant intended to make a gift of his property to his wife. On the facts presented the court could not properly find that plaintiff was a co-owner of the joint accounts.

Absent an ownership interest in the joint checking and savings accounts, plaintiff is clearly not entitled to have a resulting trust imposed upon defendant's stock holdings in the corporation. A resulting trust arises, if at all, when valuable consideration is given by one party for property but title thereto is put in the name of another. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); Bowen, *supra;* D. Dobbs, *Remedies* § 4.3, p. 241 (1973). In the present case plaintiff did not furnish any of the consideration

used by defendant to acquire the stock on which plaintiff seeks to have her claim imposed. Granting a resulting trust would therefore be improper.

[2] Plaintiff further contends, however, that a constructive trust may be imposed upon the stock in her favor even though it be determined that she had no ownership interest in the funds in the joint accounts. Her argument is that defendant will be unjustly enriched if he is allowed to retain the stock acquired in violation of the confidential marital relationship with funds which were the product of the joint efforts of the couple. This argument cannot sustain the imposition of a constructive trust in this case.

Ordinarily, a constructive trust arises where "a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." R. Lee, *Trusts* § 13a, p. 67 (7th ed. 1978). Plaintiff's argument overlooks the fact that no unjust enrichment can inure to defendant in this case because he has not acquired any property through the use of funds to which she has an equitable or legal claim.

Assuming that defendant was enriched unjustly, however, plaintiff's case would still fail as she has not shown that defendant violated any duty to her. There must be some actual or presumptive fraud, some breach of duty, or other wrongdoing before a constructive trust can be imposed. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970); Fulp, *supra;* Bowen, *supra;* Teachey, *supra.* We are fully cognizant of the fact that "[t]he relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable." *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968); *see also: Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951). Where such a confidential relation exists, the person in whom the confidence is reposed must exercise good faith in his dealings with the other party. He must not take advantage of the fiduciary relation between them to obtain profit for himself, and he must fully apprise the other of all material facts surrounding the transactions between them. We believe that defendant fulfilled the obligation to his wife in this case.

As the Court of Appeals noted, the evidence discloses that defendant explained the process of incorporation to his wife and discussed with her the issuance of the stock in the corporation in his name. Nor can any wrongdoing on his part be implied from the execution of cross-wills by the parties subsequent to the issuance of the stock. In so doing defendant did not acknowledge an interest on the part of his wife in the business, but rather, he acknowledged that she was at that time the natural object of his bounty. The court made no other findings of fact which tend to support an inference of malfeasance on the part of defendant with regard to the confidential relationship between himself and his wife. Absent any breach of duty to her, plaintiff is not entitled to have the court impose a constructive trust upon defendant's stock in the corporation.

For the reasons stated the decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

Chief Justice SHARP dissenting.

In brief summary, the material facts in this case are the following:

Plaintiff-wife and defendant-husband were married on 17 August 1947. At that time he was "hauling lumber" and she was working at Carolina Mills in Newton. She continued to work at the mill until July 1950, about three months before their first child was born. At that time the parties had saved no money and "did good to live." In 1956 a second child was born; the third came in 1958.

In 1951 defendant bought a bulldozer from his father and for nearly ten years, with plaintiff's help, defendant operated a one-man, one-machine grading business under the name of Leatherman Clearing and Grading. In 1959, for the first time, the business hired outside help. By 1960 it also owned a scraper, employed from four to six men, and rented additional equipment. Beginning in 1963 the business increased steadily and more jobs

required additional equipment. After "joint discussion" the parties purchased the necessary equipment. She and defendant both signed every purchase contract and the security instrument, and each piece of equipment was paid for with a check which plaintiff wrote on the parties' joint bank account. When a performance bond was required plaintiff also signed it along with defendant. They filed a joint federal tax return which included the business. No separate business return of any kind was filed.

From the beginning plaintiff handled the money and did the bookwork. She made deposits, paid the bills, answered the telephone, kept up with defendant's whereabouts on the various jobs, and kept in touch with callers. All money from the business, which was the parties' sole source of income, was deposited in one checking account in the names of "Mr. or Mrs. Floyd Leatherman." Neither took a salary but all bills, business and personal, were paid from this account. Plaintiff testified that "the business came first"; that other money was used only for "the necessary things because we were struggling to build this business."

In 1963 the business employed 28 men and had begun to do work out of the State. In consequence of the increased payroll and other expenses, quarterly reports, "federal forms," individual work sheets, tax record-keeping, etc., plaintiff was then working more than 40 hours a week and continued to do so during 1964 and 1965. When defendant was working out of town plaintiff's responsibilities were increased. The job foreman reported to her every afternoon, and she took care of various problems, including those caused by broken machinery. On occasion, she would take parts and payroll to defendant on jobs in South Carolina.

The headquarters of the business were at the parties' residence, where they used the kitchen and a corner of the bedroom as an office. This arrangement continued until 1964 when they built a new home which included an office with appropriate facilities on the main floor. In addition to her business duties plaintiff did her own housekeeping, took care of the children, and cooked the meals. At no time did she have any household help. In 1963 two of the parties' children were in school; the youngest, about 5 years old, was at home.

In 1965 the parties were still using the same joint checking account from which all personal and business bills were paid, and neither received a salary. At that time the business had grown to such an extent that plaintiff sought the advice of A. M. Pullen Company, certified public accountants, "about a change in the organization of the business." As a result the business was incorporated in January 1966, and the money in the parties' joint checking and savings accounts, $32,382.02, was transferred to the corporation. This money and the equipment which the business of Leatherman Clearing and Grading had purchased from time to time constituted "the capitalization of the corporation." When defendant informed plaintiff he had put all the stock in his name she said, "Well, why?" His reply was that "it would be better this way for tax purposes." Plaintiff could not understand this explanation and was not satisfied by it. When she continued to protest, defendant said, "Well, look, after all you are going to get it anyway. We will make out a will and leave it to you." Thereafter the parties made joint wills in which the survivor took all, and an entry was made on the corporate minutes that in the event of his death plaintiff was to receive his salary until the estate was settled.

According to plaintiff, the net worth of "the going business" at the time of the incorporation was $93,000.00. After the incorporation plaintiff, along with defendant, continued to sign personally the performance bonds and notes of the corporation. Their practice was to borrow the money from the bank and then lend it to the corporation. In 1972 the parties bought a house in Wilmington to be used as a dormitory for their employees working in that area, and the title to this property was taken in their joint names.

Although plaintiff continued to manage the office and "handle the financing" until 1971 only defendant drew a salary from the corporation. He explained to her that the $20,000.00 he drew from 1966 to 1970 represented "joint compensation for both of us"; that the corporation was paying only one salary in order "to cut down on taxes—to save social security and other withholdings." When she inquired what she would do for social security in her old age, he said, "You can always draw on Floyd's." In 1971, however, she insisted that she too be put on a salary and defendant agreed to it.

About 1972 the parties "had some domestic problems" and in January 1974 they separated. She said when defendant told her sometime in 1975 that she would not get anything from the business, "That was my first true realization that I was not going to realize any of the ownership in Leatherman, Inc."

Defendant testified that plaintiff had never demanded payment for any services she rendered the business; that all the money from the business was either put in joint checking or savings accounts; and that she "was not restricted as to using those funds for her own personal purposes if she so desired." He also testified that plaintiff never claimed any part of the money in the joint accounts which were transferred to the corporation, but "she complained about the manner in which the stock was issued from the time it was issued, and from then on."

Throughout his testimony defendant insisted that all the money in the joint accounts was his because he "did the work in the sense that [he] set out on the back of the tractor in the sun and did the grading work." He conceded, however, that from the beginning plaintiff did all "the office work—taking care of the bills, bookwork, and that sort of thing"—and that, at the same time, she took care of the home and the three children. On cross-examination defendant said that in 1965 the business was grossing half a million dollars and he "was running that with a one-woman office staff, and Bessie Leatherman was doing all of the work for the business in the office." With reference to salaries after the incorporation defendant testified, "From 1966 to 1970 my individual salary from the business was $20,000. The agreement between Mrs. Leatherman and me . . . was it was salary for both of us. . . . It was my understanding that the $20,000 was for the work both of us did in the business." In 1971 he told her to put herself on the payroll and she did.

After the parties separated they entered into a separation agreement which provided that the consideration in the Separation Agreement was without prejudice to plaintiff's claim to a part of the stock in Leatherman, Inc. The parties were divorced on 20 May 1975 and plaintiff brought this action on 31 October 1975 for a judgment declaring her to be the owner of one-half of the capital stock of Leatherman, Inc.

Judge Lewis heard the case without a jury. At the conclusion of the evidence he found the facts to be substantially as testified to by both plaintiff and defendant. In brief summary he specifically found the following pertinent facts (enumeration ours):

1. From the inception of "the bulldozer business" until 1966 (when the business was incorporated) the earnings of the business were allowed to accumulate in the joint personal checking account of the plaintiff and defendant—the only checking account either maintained. Plaintiff drew no salary from the business. [All the evidence tends to show that neither plaintiff nor defendant drew any salary.] Between 1966 and 1971 there was an understanding between the plaintiff and defendant that the "salary paid by the corporation to the defendant was for the work of both the plaintiff and defendant."

2. From its inception "until 1970 plaintiff was the sole office staff for the business operated by the plaintiff and the defendant"; that in 1965 the business generated gross income of about $500,000.00 and continued to grow through 1970 "during which time plaintiff remained the sole office staff."

3. From its inception plaintiff "frequently exercised partial managerial control of the business in the Catawba County area while the defendant was handling out-of-State business. . . ."

4. When the business was incorporated in December 1965 and all of its stock, 930 shares, were issued to defendant, its net worth was approximately $94,000.00.

In January and February 1966 funds totaling $32,382.02 were transferred from the joint checking and savings account of plaintiff and defendant to the corporation. These funds "were the property of the plaintiff and defendant, either of whom could have withdrawn any or all of the funds at any time." These funds represented about one-third of the net assets of the corporation.

5. That at the time all of the stock of the corporation was issued to defendant and the funds in the joint account transferred to the corporation, defendant told plaintiff that the reason for this was the auditor's feeling that "it was more appropriate from a tax point of view to have the stock so titled"; that she would get it all anyway eventually; and that both then made a will cross-conveying to the other all of their individual property.

6. There existed in January 1966 a confidential and fiduciary relationship between the plaintiff and defendant arising out of their marriage.

7. After the business was incorporated plaintiff continued to take care of the office affairs of the corporation but drew no salary and the expenses of the marriage were paid out of the salary of the corporation paid the defendant.

8. Plaintiff and defendant separated on 4 January 1974 and were divorced on 20 May 1975. When plaintiff told defendant she ought to be compensated for her ownership in the business and paid for what she had done, defendant refused and this action was commenced.

Upon the foregoing findings the court concluded that defendant holds title to the 930 outstanding shares of stock in Leatherman, Inc., but that he holds the stock subject to a constructive trust in the amount of $16,191.01 in favor of the plaintiff. He entered judgment accordingly and defendant appealed to the Court of Appeals. Plaintiff did not appeal.

The Court of Appeals held that (1) plaintiff had failed to overcome the presumption that her services to her husband's business were rendered gratuitously and that there was no showing that defendant intended to make a gift to his wife of the funds derived from his business which he placed in the joint accounts; (2) that there was no showing of any wrongdoing on defendant's part; and (3) that therefore the trial court erred in imposing a constructive trust on the stock of the business corporation which had been capitalized with funds from the joint accounts. This Court affirms.

From the majority's decision and the rationale which produced it, I dissent. In my view, the trial judge's findings of fact are supported by all the evidence in the case and the majority decision cannot be supported either by the evidence or the authorities cited therein.

As I read the Court's opinion the majority reasons as follows:

1. Before the Court can impose a trust upon the stock in Leatherman, Inc., to which defendant holds the legal title, plaintiff must prove she owned a portion of the funds in the plaintiff's

and defendant's joint checking and savings accounts which were transferred to the corporation.

2. Services rendered by a wife in connection with a business in which her husband is engaged are all presumed to be gratuitous "absent a special agreement to the contrary." Plaintiff has neither alleged nor proved a special agreement for compensation for services performed. Nor has she proved a gift from her husband of any funds deposited in the joint account.

3. "The facts and circumstances may, of course, give rise to an implied promise that the wife will be paid," but the evidence in this case reveals neither.

4. Defendant did not breach the confidential relationship existing between himself and his wife when he had all the stock in the corporation issued to himself alone because he told her at the time he had done so.

As I see this controversy the majority of the Court of Appeals and this Court have misconstrued plaintiff's pleadings and the theory of her case. She did not bring this suit upon the theory of *quantum meruit* for wages withheld for "supportive work." It is quite true that she neither alleged nor attempted to prove that her husband promised to pay her wages or a salary for the more than 20 years she worked with him in the "bulldozer business." On the contrary, she brought this action upon the theory that she was a full partner with her husband in the business at the time of the incorporation; that her labors in behalf of the business had helped produce the funds which provided the corporate capital and entitled her to half the capital stock. It is quite clear that under our present rules of civil procedure the complaint is adequate to support this theory. G.S.1A-1, Rule 8(a); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Roberts v. Reynolds*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

Decisions of this Court have long recognized that "[t]here are instances where there is not only a matrimonial partnership between a husband and wife, but a financial or business partnership; . . . but in all such cases the business partnership . . . must arise out of an agreement, not out of the marital relation, *ex jure marito*, which if extended to business matters, would make each responsible for the debts of the other." *Dorsett v. Dorsett*, 183

N.C. 354, 358, 111 S.E. 541, 543 (1922). In *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948), a case strikingly similar to this one, the plaintiff-wife sought to show the existence of a partnership between herself and her husband by evidence of dealings *inter partes* for a long period of time (15 years) and her contributions in services to the joint undertaking. In reviewing the law with reference to interspousal partnerships, this Court said:

" 'A contract, express or implied, is essential to the formation of a partnership.' . . . But we see no reason why a course of dealing between the parties of sufficient significance and duration may not, along with other proof of the fact, be admitted as evidence tending to establish the fact of partnership provided it has sufficient substance and definiteness to evince the essentials of the legal concept, including, of course, the necessary intent. . . . 'Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of all the circumstances attendant on its creation and operation.'

"Not only may a partnership be formed orally, but 'it may be created by the agreement or conduct of the parties, either express or implied.' . . . 'A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such.' " (Citations omitted.) *Id.* at 674, 47 S.E. 2d at 247.

Certainly plaintiff and defendant neither orally nor in writing entered into a formal partnership agreement. However, the course of dealing between them from 1951 until the business was incorporated in 1969 was consistent only with a business partnership, and their conduct for several years thereafter corroborated its existence. The law does not contemplate that a husband and wife living together in harmony, struggling to rear three children and to get ahead in business, will deal at arms length and speak in formal terms. It looks at their conduct to divine their intent.

Looking at their conduct, we see that plaintiff's "supportive work" was not just occasional help. From the inception of the business she did all the office work, many outside chores, and

handled the money. During the last ten years before the parties separated she worked in the office more than 40 hours a week and acted as manager in her husband's absence from the local job in addition to doing her kitchen and household work and caring for her children. Under these circumstances it is hard to understand the majority's view that "plaintiff did not furnish any of the consideration used by defendant to acquire the stock of the corporation." It is quite impossible to believe that defendant, who knew plaintiff's full contribution and devotion to the business could have thought for a minute that she did not believe she shared his interest in the business. Certainly his conduct prior to the incorporation led her to believe that she was a partner in a joint enterprise. All the money was deposited in the account of "Mr. or Mrs. Floyd Leatherman"—not Mr. Leatherman with authority to Mrs. Leatherman to draw upon it. Further, it is of considerable significance that prior to the incorporation neither plaintiff nor defendant ever drew a salary from the business. It is partners who divide profits or reinvest their money in the business as plaintiff and defendant did. Their money went first to pay the expenses of the business, then to living expenses, and the balance remained in the joint checking account or was transferred to a joint savings account. Both were industrious and conservative. It was not until the incorporation that either drew a salary. The defendant then began to draw a salary of $20,000.00 a year but he specifically stated that it was compensation the corporation was paying for the work they both did. This post-incorporation arrangement is also significant in that it rebuts any presumption that defendant considered plaintiff's services to the bulldozer business gratuitous.

Finally we note that plaintiff assumed liability along with defendant for all the debts of the bulldozer business. From its inception, along with defendant, she signed every note for a loan from the bank, the purchase money, note and mortgage for each piece of equipment, every performance bond and, when they bought business property in Wilmington, the title to it was taken in both their names and she also signed the note and mortgage. Indubitably there is sufficient evidence in the record to support the trial judge's findings and conclusions that "the business was operated by the plaintiff and defendant" and that "the funds transferred from joint accounts to the corporate account in 1966 were the property of the plaintiff and defendant."

I would hold, therefore, that the trial judge was correct when he subjected defendant's stock in the corporation to plaintiff's claim to the extent of $16,191.01, one half of the joint checking and savings accounts. Although the trial judge ruled that defendant held the stock "subject to a constructive trust," in my view defendant holds it subject to both a resulting and constructive trust. *See Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979). A resulting trust commensurate with plaintiff's interest arose in her favor because she furnished a part of the consideration. A constructive trust arose because the defendant breached the confidential relation, which the majority concedes existed between him and his wife, when he took title to all the stock in his name alone and told her he did so because "it would be better that way for tax purposes." Defendant's explanation—patently "a snow job"—deceived her at the time and kept her from taking any action to protect her interests in 1966. At that time relations between the partners were still amicable and she was lulled into a false sense of security by his suggestion that "some day it would all belong to her" and they would make joint wills.

Since plaintiff accepted the rulings of the trial judge which were in favor of defendant and did not appeal them, this appeal involves only plaintiff's right to one-half of the parties' joint checking and savings accounts. My vote is to reverse the Court of Appeals and affirm the judgment of the trial judge.

Justice HUSKINS joins in this dissent.

EULA WOOD, EMPLOYEE, PLAINTIFF v. J. P. STEVENS & COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE CO., DEFENDANTS

No. 62

(Filed 30 July 1979)

1. Master and Servant § 68— workmen's compensation—occupational disease

In determining whether a given illness falls within the general definition of occupational disease set out in G.S. 97-53(13), the Industrial Commission must determine first the nature of the disease from which plaintiff is suffering—that is, its characteristics, symptoms and manifestations, and then the Commission must decide if the illness plaintiff has contracted falls within the statutory definition.

2. **Master and Servant § 68— workmen's compensation—characteristics of byssinosis—judicial notice improper**

The Industrial Commission erred in assuming that byssinosis was "an irritation of the pulmonary air passages" without hearing evidence and making findings of fact, since the causes and development of byssinosis and the structural and functional changes produced by the disease are still the subject of scientific debate; the N.C. Supreme Court has never considered a case involving byssinosis; and, under the circumstances, judicial notice as to the essential characteristics of the disease is inappropriate.

3. **Statutes § 5.11— technical term in statute—expert opinion evidence admissible**

While the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent.

4. **Master and Servant § 68— workmen's compensation—occupational disease—time of disablement**

The current version of G.S. 97-53(13) defining occupational disease applies to all claims for disablement in which the disability occurs after the statute's effective date, 1 July 1971.

5. **Master and Servant § 68— workmen's compensation—occupational disease—law in effect at time of disablement**

An employee's right to compensation in cases of occupational disease should be governed by the law in effect at the time of disablement.

6. **Master and Servant § 47— workmen's compensation—no contract**

The rights of an injured employee under the Workmen's Compensation Act are governed by statute and are not contractual in the usual sense of that term.

7. **Statutes § 8— retroactive effect—test**

A statute is not unconstitutionally retroactive merely because it operates on facts which were in existence before its enactment; instead, a statute is impermissibly retrospective only when it interferes with rights which had vested or liabilities which had accrued prior to its passage.

8. **Statutes § 8; Master and Servant § 68— workmen's compensation—occupational disease—law in effect at time of disablement—no retroactive application**

Since an employee has no right to claim compensation in occupational disease cases until disablement occurs and the employer is exposed to no liability until that date, then applying the law in effect at the time of disablement to a claim arising from that disablement does not involve a retroactive application of the law.

9. **Master and Servant § 94.1— workmen's compensation—byssinosis—time of disablement—finding required**

Where plaintiff alleged that she was disabled by byssinosis after the effective date of the present version of G.S. 97-53(13), it became incumbent upon

the Industrial Commission to determine when plaintiff became disabled before it decided which law applied to her claim.

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

APPEAL by plaintiff under G.S. 7A-30 from the Court of Appeals decision, reported in 36 N.C. App. 456, 245 S.E. 2d 82 (1978), which affirmed the North Carolina Industrial Commission's opinion entered 10 February 1977. This case was docketed and argued as Case No. 48 at the Fall Term 1978.

Eula Wood, plaintiff, instituted this action under the Workmen's Compensation Act to recover for a disease allegedly contracted in her employment with J. P. Stevens. In her claim for compensation (NCIC Form 18), filed 5 December 1975, Miss Wood alleges that she contracted byssinosis "prior to the 1st day of July, 1958, at Roanoke Rapids, Halifax [County]"; that the disease was "caused by regular exposure to cotton dust for approximately 48 years in spinning area"; and that as a result of this disease she suffered "permanent total disability from impairment of respiratory pulmonary functions" beginning November 12, 1975. Her doctor filled out page 2 of NCIC form B-1 and stated that it was his diagnostic impression that plaintiff was suffering from "byssinosis Grade III [and] chronic bronchitis in a non-smoker."

In response to plaintiff's claim the defendants (her employer and its insurance carrier) denied liability on the ground that the alleged occupational disease was not covered by the Workmen's Compensation Act as it existed at the time the disease was contracted.

At the hearing before Deputy Commissioner Denson on 7 December 1976 the parties stipulated to the following:

"1. The legal issue of coverage should be determined before proceeding with further medical examination or hearing for the purpose of presenting factual evidence in this cause. . . .

"3. This cause shall hereafter be treated as a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

"4. At the time of the alleged contracting of the alleged occupational disease, the parties were subject to and bound by the provisions of the Workmen's Compensation Act.

"5. The employer-employee relationship existed between plaintiff and defendant employer at that time."

In accordance with the stipulation no evidence was introduced in the case and Deputy Commissioner Denson heard the matter on a motion to dismiss for failure to state a claim upon which relief can be granted. In her opinion she took judicial notice that "byssinosis is an irritation of the pulmonary air passages caused by the inhalation of cotton dust" and held that it was not a compensable occupational disease covered by G.S. 97-53 as it appeared in 1958. She therefore denied plaintiff's claim.

Plaintiff appealed to the full Commission from the denial of her claim and moved the Commission for leave to present expert medical testimony as to the meaning of the term "oral or nasal cavities" as used in the 1958 version of G.S. 97-53. Plaintiff alleged that "there are expert witnesses available from the field of pulmonary medicine who are of the opinion that a definition of 'oral or nasal cavities' includes pulmonary air passages and lungs when those words are assigned their normal meaning as used in the field."

On 10 February 1977 the full Commission filed an "opinion and award" in which it denied plaintiff's motion and affirmed the ruling of Deputy Commissioner Denson. Plaintiff appealed to the Court of Appeals. In an opinion written by Judge Hedrick, Judge Brock concurring, the Court of Appeals affirmed the full Commission. Judge Mitchell having dissented, plaintiff appealed as a matter of right to this Court.

Davis & Hassell by Charles R. Hassell, Jr., for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Dan M. Hartzog and George W. Dennis III for defendant appellees.

SHARP, Chief Justice.

The Industrial Commission concluded as a matter of law (1) that plaintiff's claim was governed by the law in effect in 1958 and (2) that in 1958 byssinosis was not compensable as an occupational disease under G.S. 97-53(13). The Commission heard no evidence but based its decision solely on the stipulations of the

parties and information contained in the forms filed by plaintiff for workmen's compensation benefits. The Court of Appeals affirmed the dismissal. 36 N.C. App. 456, 245 S.E. 2d 82 (1978).

For the reasons which follow we conclude that the Commission's findings of fact are insufficient to enable the Court to determine the rights of the parties. The case must therefore be remanded for further findings of fact in the light of the legal principles enunciated in this opinion. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942); *Farmer v. Lumber Co.*, 217 N.C. 158, 7 S.E. 2d 376 (1940).

In denying plaintiff's claim the Deputy Commissioner concluded that "byssinosis was not an occupational disease mentioned in and covered by the Workmen's Compensation Act" as it existed in 1958. The Commissioner explained in an accompanying opinion that byssinosis was "an irritation of the pulmonary air passages" and therefore did not fall within the scope of the 1958 statute which provided compensation for "[i]nfection or inflammation of the . . . oral or nasal cavities." Both the full Commission and the Court of Appeals affirmed.

Assuming, *arguendo*, that it is the 1958 version of G.S. 97-53(13) which controls this case, an issue which we will discuss subsequently, nevertheless we believe that it was error for the Commission to dismiss plaintiff's claim without hearing evidence or making findings of fact.

[1] Whether a given illness falls within the general difinition set out in G.S. 97-53(13) presents a mixed question of fact and law. The Commission must determine first the nature of the disease from which the plaintiff is suffering—that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law.

[2] In this case, instead of hearing evidence and making findings of fact as to the nature of claimant's illness, the Commission simply assumed that "byssinosis is an irritation of the pulmonary

air passages." This assumption was proper only if the nature of byssinosis is subject to judicial notice, that is, if the characteristics of the disease are "either so notoriously true as not to be the subject of reasonable dispute or [are] capable of demonstration by resort to readily accessible sources of indisputable accuracy." *Kennedy v. Parrott*, 243 N.C. 355, 358, 90 S.E. 2d 754, 756 (1956). While it is clear that judicial notice can be used in rulings on demurrers or motions to dismiss for failure to state a claim, we do not think it is appropriate in this case.

The causes and development of byssinosis, and the structural and functional changes produced by the disease, are still the subject of scientific debate.[1] This Court has never before considered a case involving byssinosis, and our research discloses only a handful of such cases from other jurisdictions. Under these circumstances judicial notice as to the essential characteristics of the disease is inappropriate. In the absence of evidence or judicial notice, the Commission's legal conclusion that plaintiff's illness was noncompensable cannot stand. It may be that the Court of Appeals and the Industrial Commission are entirely correct in their conclusions as to the characteristics and nature of byssinosis. We simply do not know and are not convinced that knowledge of this disease is so notorious as to justify judicial notice.

We recognize that it might be appropriate for the Commission to dismiss a claim without hearing evidence or making findings of fact when the claim on its face discloses an absolute bar to recovery or shows to a certainty that claimant is entitled to no relief under any state of facts which could be proved in support of the claim. Such circumstances are not present here.

Plaintiff also contends that the Commission erred in denying her "motion for leave to present further evidence." In that motion, which was filed before the full Commission, plaintiff alleged that there were "expert witnesses available from the field of pulmonary medicine who are of the opinion that a definition of

1. 5A Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialties § 33.59a (1972 & 1976 Supp.); Bouhuys, Schoenberg, Beck and Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, in 5 Traumatic Medicine and Surgery for the Attorney 607 (Service Vol. 1978); Dickie and Chosy, *Some Important Occupational Diseases*, in 3 Traumatic Medicine and Surgery for the Attorney 729, 742 (Service Vol. 1975).

'oral or nasal cavities' includes pulmonary air passages and lungs when those words are assigned their normal meaning as used in the field."

[3] Because this testimony was offered on a motion to present new or additional evidence, the decision whether to hear the testimony was one addressed to the discretion of the Commission. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965); G.S. 97-85. However, because the case must be remanded for a hearing de novo, we note that, while the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent. *Order of Railway Conductors v. Swan*, 329 U.S. 520, 525, 91 L.Ed. 471, 476, 67 S.Ct. 405, 408 (1947); *Satterley v. City of Flint*, 373 Mich. 102, 111, 128 N.W. 2d 508, 513 (1964); *Southern Pacific Co. v. Brown*, 207 Or. 222, 231, 295 P. 2d 861, 865 (1956). "Expert testimony may be received as an aid to proper interpretation if the statute or rule (a) used technical terms not generally understood . . .; or (b) is ambiguous or indefinite." *Hillman v. Northern Wasco County People's Utility District*, 213 Or. 264, 297, 323 P. 2d 664, 680 (1958). *See also Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951) in which this Court based its construction of the term "tenosynovitis caused by trauma" on both medical treatises and expert testimony presented to the Commission. 234 N.C. at 130, 66 S.E. 2d at 696.

We also disagree with the Industrial Commission's conclusion that it is necessarily the 1958 version of G.S. 97-53(13) which governs this case. In 1958 when plaintiff left her employment as a spinner with J. P. Stevens the statutory definition of occupational disease set out in G.S. 97-53 included the following:

"Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." 1935 N.C. Pub. Laws ch. 123, *as amended by* 1957 N.C. Sess. Laws ch. 1396, § 6.

In 1963 the statute was amended to include infections or inflammations of "any other internal or external organ or organs of the body" caused by exposure to one of the above-named substances. 1963 N.C. Sess. Laws ch. 965, § 1. This amendment applied only to cases in which "the last exposure in an occupation

subject to the hazards of such disease occurred on or after" July 1, 1963. *Id.* Because plaintiff retired from her position with J. P. Stevens in 1958, this amendment is manifestly inapplicable to her claim.

In 1971 G.S. 97-53(13) was amended again. It now reads as follows:

"Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

Unlike the 1963 amendment this addition to the Act was not limited to cases in which the "last exposure" to the hazards of the disease occurred after its effective date. Instead, the amendment expressly applies to all "cases originating on and after July 1, 1971." 1971 N.C. Sess. Laws ch. 547, § 3.

Citing its decision in *Booker v. Medical Center*, 32 N.C. App. 185, 231 S.E. 2d 187 (1977), *rev'd*, 297 N.C. 458, 256 S.E. 2d 189 (1979), the Court of Appeals held the 1971 amendment inapplicable on the grounds that a case "originates" within the meaning of the statute when an employee "contracts" the disease. Because plaintiff retired from her job in 1958, the Court reasoned that she must have "contracted" the disease prior to 1 July 1971. Having concluded that neither the 1963 nor the 1971 amendments applied to plaintiff's claim, the Court of Appeals then held that the claim was governed by the law "as it existed in 1958 when the plaintiff was last exposed to the cotton dust which allegedly caused her disease." 36 N.C. App. at 461, 245 S.E. 2d at 86. For the reasons which follow we hold this interpretation of the statute to be incorrect.

Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972); *State v. Wiggins*, 272 N.C. 147, 158 S.E. 2d 37 (1967), *cert. denied*, 390 U.S. 1028, 20 L.Ed. 2d 285, 88 S.Ct. 1418 (1968). A "case" is defined by Black's Law Dictionary (rev. 4th ed. 1968) as a "general term for an action, cause, suit, or controversy, at law or

in equity; . . . an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice." In the ordinary understanding of that phrase a case "originates" when the cause of action arises. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979).

[4] Under our Workmen's Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement. G.S. 97-52. Until that time the employee has no cause of action and the employer had no liability. We hold therefore that the current version of G.S. 97-53(13) applies to all claims for disablement in which the disability occurs after the statute's effective date, 1 July 1971.

[5] This holding is consistent with the statutory scheme for occupational diseases established by G.S. 97-52. That statute provides for "[d]isablement or death of an employee resulting from an occupational disease described in G.S. 97-53 [to] be treated as the happening of an injury by accident." The long-standing rule in both this and other jurisdictions is that the right to compensation in cases of *accidental* injury is governed by the law in effect at the time of injury. *Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965); *Oaks v. Mills Corp.*, 249 N.C. 285, 106 S.E. 2d 202 (1958); *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958). *See also* 82 Am. Jur. 2d *Workmen's Compensation* § 346 (1976); 99 C.J.S. *Workmen's Compensation* § 21 (1958 & Cum. Supp. 1979). If disablement resulting from an occupational disease is treated as an injury by accident as required by G.S. 97-52, it follows that the employee's right to compensation in cases of occupational disease should be governed by the law in effect at the time of disablement. *See McCann v. Walsh Construction Co.*, 282 App. Div. 444, 123 N.Y.S. 2d 509 (1953), *aff'd*, 306 N.Y. 904, 119 N.E. 2d 596 (1954); *McIntyre v. E. J. Lavino & Co.*, 344 Pa. 163, 25 A. 2d 163 (1942) where similar statutes were construed to identical effect.

In his comprehensive treatise on workmen's compensation, Professor Larson cites the date of disablement as providing the most workable solution to the difficult problem of determining which law to apply in cases of occupational disease:

"Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced

cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, *determine which year's statute applies*, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory.

"Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration." 4 A. Larson, Workmen's Compensation Law § 95.21 (1979) (Emphasis added).

G.S. 97-53 applies expressly to all causes of action arising after its effective date. Even in the absence of such a provision, however, we believe the better rule in cases involving occupational disease is to apply the law in effect at the time the employee becomes disabled, at least where the statute does not dictate a contrary result. Our decision in this regard is in accord with authority from other jurisdictions. *Dickow v. Workmen's Compensation Appeals Board*, 34 Cal. App. 3d 762, 109 Cal. Rptr. 317 (1973); *Argonaut Mining Co. v. Industrial Accident Commission*, 104 Cal. App. 2d 27, 230 P. 2d 637 (1951); *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P. 2d 408 (1969); *Hirst v. Chevrolet Muncie Division of General Motors Corp.*, 110 Ind. App. 22, 33 N.E. 2d 773 (1941); *Ross v. Oxford Paper Co.*, 363 A. 2d 712 (Me. 1976); Moore's Case, 362 Mass. 876, 289 N.E. 2d 862 (1972); *Biglioli v. Durotest Corp.*, 26 N.J. 33, 138 A. 2d 529 (1958); *Rogala v. John Deere Plow Co.*, 31 App. Div. 2d 867, 297 N.Y.S. 2d 877 (1969); *McCann v. Walsh Construction Co.*, 282 App. Div. 444, 123 N.Y.S. 2d 509 (1953), *aff'd*, 306 N.Y. 904, 119 N.E. 2d 596 (1954); *McIntyre v. E. J. Lavino & Co.*, 344 Pa. 163, 25 A. 2d 163 (1942); *Romano v. B. B. Greenberg Co.*, 108 R.I. 132, 273 A. 2d 315 (1971).

In *Frisbie v. Sunshine Mining Co., supra*, claimant had worked for respondent company from 1947 to 1954 as an underground miner. Upon learning in 1954 that claimant was suffering from grade three silicosis, respondent transferred him to surface work as a boiler tender and watchman. Claimant continued to work for

the company until 1966 when he was forced to quit by severe respiratory problems.

The workmen's compensation board found that claimant's last injurious exposure to silica dust was in 1954 and that he became totally disabled on March 11, 1966. The board denied appellant's claim for compensation on the ground that under the statute as it existed in 1954, disability in silicosis cases was compensable only if it followed within two years of claimant's last exposure. Appellant argued that the law in effect at the time of his disability should control and that his claim was therefore compensable since the two-year limitation contained in the earlier law had been deleted. On appeal the Idaho Supreme Court reversed the board's decision and held for claimant:

"It is our opinion that appellant's contention is correct. A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; rather, a law is retroactive only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage. 2 Sutherland, Statutory Construction, § 2202, p. 117 (3d Ed. 1943); 82 C.J.S., *Statutes* § 412, p. 980. In cases such as the present, the right to compensation does not accrue and the rights of the parties do not become fixed until the occurrence of the event, in this case appellant's disability, which gives rise to a cause of action." 93 Idaho at 172, 457 P. 2d at 411.

In *McIntyre v. E. J. Lavino & Co., supra*, an employee of defendant company contracted manganese poisoning while operating a mill for drying ore. In September, 1937, he was transferred to defendant's chrome department and thereafter had no contact with manganese. He was discharged on 4 February 1938 and on the 24th became totally disabled. Defendant argued that the claim was not covered by the Occupational Disease Act because, by its terms, it did not go into effect until January 1, 1938, while the employee's last exposure to manganese dust was in September 1937. On appeal the Pennsylvania Supreme Court upheld the award:

"In the case of accidents compensable under the Workmen's Compensation Act, the accident and the damage resulting therefrom, the cause and the effect, are usually determinable im-

mediately and they are practically simultaneous. But, because in disability arising from an occupational disease, both cause and effect are protracted and a long interval is apt to elapse between the exposure and the disability, it becomes necessary to fix a point of time at which the injury which is the subject of compensation shall be deemed to arise and the right to compensation accrue. Accordingly the Occupational Disease Compensation Act of 1937 provides, section 3, that 'The date when the disability occurs from occupational disease shall be deemed to be the date of injury or accident.' Thus it makes the occurrence of the disability the event which constitutes the compensable injury, although the disability is necessarily preceded by an exposure and an occupational disease of which it is the culmination. Since the date when McIntyre's disability occurred was February 24, 1938, this was the time when a compensable injury occurred, and, it being subsequent to the effective date of the act, no retroactive construction of the statute is involved." (Citations omitted.) 344 Pa. at 166-67, 25 A. 2d at 164-65.

In both of the cases discussed above the claimant was still an employee of the defendant company at the time the law was amended, though not exposed to the particular hazard which caused his disease. The same result has been reached, however, in cases where the law was changed after the employee left his job but prior to his disability.

McCann v. Walsh Construction Co., supra, for example, involved a claim by an employee who had worked for various construction companies in jobs requiring exposure to compressed air. The last such exposure was from July to December, 1938. Thereafter he worked only intermittently. None of his subsequent jobs required him to work in compressed air.

On December 11, 1950, claimant became disabled by caisson's disease, an illness caused by working in compressed air. At the time claimant left his job in 1938 the workmen's compensation act allowed recovery only when disability occurred within 12 months after contraction of the disease. In 1946 the act was amended to exclude "compressed air illness" from the twelve-month limit. Despite the fact that claimant had left his job prior to the amendment, the court followed the general rule and applied the law in effect at the time of disability. Similar holdings can be found in *Dickow v. Workmen's Compensation Appeals Board, supra;*

Argonaut Mining Co. v. Industrial Accident Commission, supra; *McAllister v. Board of Education*, 79 N.J. Super. 249, 191 A. 2d 212 (1963), *aff'd*, 42 N.J. 56, 198 A. 2d 765 (1964); and *Rogala v. John Deere Plow Co., supra.*

Having construed the current version of G.S. 97-53(13) as applying to all cases in which disablement occurs after its effective date, the next question is whether there are any constitutional barriers to such a result.

Courts in a few jurisdictions have refused to apply the law in effect at the time of disability in cases where the statute granting recovery was enacted after the claimant terminated his employment. *See, e.g., Walker v. Johns-Mansville Products Corp.*, 311 So. 2d 506 (La. Ct. App. 1975); *Anderson v. Sunray Electric*, 173 Pa. Super. 566, 98 A. 2d 374 (1953). This result has been justified on the grounds that to hold otherwise would be to allow an impairment of contract. In *Anderson v. Sunray Electric, supra*, for example, the court stated:

"When an employer and employee accept the occupational disease legislation their relation, like that created by the workmen's compensation statutes, becomes contractual and their rights are to be determined under the applicable provisions of the existing law, which become part of the terms of employment. . . . But unless the claimant is employed by the employer at the time when the act or the amendment becomes effective the provisions thereof do not become a part of the terms of employment, and legislation enacted after the employment has ceased will not support a recovery of compensation . . . . To rule otherwise would unconstitutionally impair the vested rights of both the employer and employee in the contract of employment." (Citations omitted.) 173 Pa. Super. at 568-69, 98 A. 2d at 375.

[6] Although superficially appealing, this interpretation does not withstand close analysis. The Workmen's Compensation Act is often spoken of as being part of the employment contract.[2] However, the relationship between a covered employer and employee is clearly not contractual in the usual sense of that term.

2. See, e.g., *Hornaday v. Pool Co.*, 267 N.C. 521, 525, 148 S.E. 2d 554, 557-58 (1966).

Under traditional contract law the rights of the parties are fixed at the time the contract is entered. One would therefore expect a court following this theory to apply the law in effect at the time the employment contract begins. In cases of accidental injury, however, the well-established rule in this and other jurisdictions is that the claim is governed by the law in effect at the time of *injury*, despite the fact that the law may have changed radically between the formation of the contract and the date of injury.

Similarly, we note that our original Workmen's Compensation Act was made binding on all qualified employers and employees who failed to give notice of nonacceptance, despite the fact that their employment contracts may have antedated adoption of the act, G.S. 97-3, 97-5, and despite the fact that their contract may have expressly provided to the contrary. G.S. 97-6.

The liability of the employer under our Workmen's Compensation Act arises not from the individual employment contract but from the Act itself. This point was aptly expressed in *McAllister v. Board of Education, supra*:

"The courts have used the term 'contract' in workmen's compensation cases much as they have used that term when speaking of marriage 'contracts.' In employment, like in marriage the parties must agree to enter the relationship, but once they do the law dictates to them their rights and liabilities. And, as in marriage—within legal limitations having nothing to do with the impairment of contract—the law may change those rights and liabilities, not only at any time during the relationship but sometimes even after it has been terminated, as, for example, after the employee has stopped working for the employer because of an injury. . . .

"The net result of all this is that the workmen's compensation 'contract' includes everything that the Legislature and the courts say it shall include, whether added before or after the injury. It is therefore arguing in a circle to seek what the 'contract' includes and whether it has been impaired." 79 N.J. Super. at 259-60, 191 A. 2d at 217-18.

Similarly, in *Todeva v. Oliver Iron Mining Co.*, 232 Minn. 422, 428, 45 N.W. 2d 782, 787-88 (1951), the court had this to say:

"In determining the nature and scope of the right of a disabled workman or of his dependents if he dies from a compensable injury, it is well to bear in mind that compensation acts are *sui generis*, and the rights and liablities created thereunder are to be given full force and effect according to their own unique status, although they may not fit into the timeworn grooves of other areas of the law. In a certain limited sense, the rights and liabilities arise out of contract, on the theory that the statute becomes a part of the contract of employment . . . but, strictly speaking, such rights and liabilities are created independently of any actual or implied contract and, pursuant to the police power, are imposed upon the employment status or relationship as a cost of industrial production." (Citations omitted.)

[7] The proper question for consideration is not whether the amendment affects some imagined obligation of contract but rather whether it interferes with vested rights and liabilities. As we observed in *Booker v. Medical Center*, a statute is not unconstitutionally retroactive merely because it operates on facts which were in existence before its enactment. 297 N.C. at 467, 256 S.E. 2d at 195. *See in accord, Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P. 2d 408 (1969); *Tennessee Insurance Guaranty Association v. Pack*, 517 S.W. 2d 526 (Tenn. 1974); *Sizemore v. State Workmen's Compensation Commissioner*, 219 S.E. 2d 912 (W.Va. 1975). Instead, a statute is impermissibly retrospective only when it interferes with rights which had vested or liabilities which had accrued prior to its passage. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952); *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950); *B-C Remedy Co. v. Unemployment Compensation Commission*, 226 N.C. 52, 36 S.E. 2d 733 (1946).

[8] An employee has no right to claim compensation in occupational disease cases until disablement occurs; and, until that date, the employer is exposed to no liability. Consequently, applying the law in effect at the time of disablement to a claim arising from that disablement does not involve a retroactive application of the law.

In all cases of occupational disease other than silicosis and asbestosis, "disablement" is equivalent to "disability" as defined in G.S. 97-2(9). *See* G.S. 97-54. G.S. 97-2(9) defines "disability" to

mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The term refers not to physical infirmity but to a diminished capacity to earn money. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951).

Plaintiff alleged in her "Notice of Accident to Employer" that regular exposure to cotton dust while in J. P. Stevens' employ led to her "permanent total disability from impairment of respiratory pulmonary functions" on November 12, 1975.

[9] Given plaintiff's allegation that she was disabled after the effective date of the present version of G.S. 97-53(13), it became incumbent upon the Commission to determine when plaintiff became disabled before it decided which law applied to her claim. The Commission, however, heard no evidence on this point and made no factual determination as to the date of disablement. The case must therefore be remanded for a determination of that issue.

If the Commission finds that plaintiff became disabled after July 1, 1971, the effective date of current G.S. 97-53(13), it should determine her claim in accordance with that statute. If it finds that disablement occurred prior to July 1, 1971, then the 1958 version of the statute will control and the case should be determined in accordance with the principles set out in the first part of this opinion.

In summary, we hold that the Industrial Commission erred in dismissing plaintiff's claim without hearing evidence or making findings of fact and that both it and the Court of Appeals used the wrong test in determining the applicable law. We express no opinion as to either the merits or timeliness of her claim.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. WILLIAM BOONE

No. 39

(Filed 30 July 1979)

1. **Larceny § 6— booster box in defendant's possession—admissibility of evidence**

In a prosecution of defendant for felonious larceny, the trial court did not err in admitting into evidence a "booster box," a device used by professional shoplifters, found in defendant's car along with stolen sweaters within minutes after the sweaters were discovered missing from a store, since such evidence was relevant because it had a logical tendency to show a design or plan on the part of defendant and one or more of his companions to steal merchandise from the store.

2. **Burglary and Unlawful Breakings § 1.2— entry into store during business hours—no breaking**

An entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a); therefore, defendant's entry into a store at the time it was open to the public could not serve as the basis for a conviction for felonious entry, since the entry was with the consent, implied if not express, of the owner.

3. **Criminal Law § 138.4— counts consolidated for judgment—conviction of one crime vacated—resentencing unnecessary**

Where defendant was convicted of felonious larceny and felonious entry and the counts were consolidated for judgment, but defendant's motion to dismiss the felonious entry charge should have been granted, defendant was not entitled to be resentenced, since the sentence of imprisonment for not less than eight nor more than ten years was within the limits of punishment that can be imposed for larceny alone and since defendant's conduct in the larceny merited the sentence he received. G.S. 15A-1447(e).

ON petition for discretionary review from a decision of the Court of Appeals, reported at 39 N.C. App. 218, 249 S.E. 2d 817, opinion by *Judge Hedrick* with *Judge Vaughn* and *Judge Arnold* concurring. Defendant was convicted of felonious entry and larceny before *Judge Fountain* at the 22 March 1978 Criminal Session of DARE Superior Court and sentenced to imprisonment for not less than eight nor more than ten years. The Court of Appeals vacated the conviction for felonious entry and remanded the case for resentencing.

Rufus L. Edmisten, Attorney General, by Amos C. Dawson III, Assistant Attorney General, for the state.

Twiford, Trimpi & Thompson, by Russell E. Twiford and John C. Trimpi, Attorneys for defendant.

EXUM, Justice.

Defendant was convicted of both felonious entry under G.S. 14-54(a) and felonious larceny. The two counts were consolidated for judgment. The Court of Appeals found no error in the larceny conviction but held that since defendant entered the store in question with the implied consent of the storekeeper, his motion to dismiss the felonious entry charge should have been granted. Pursuant to this holding, it remanded for resentencing. We agree with the Court of Appeals' decision on the merits as to both the felonious entry and larceny charges, but we hold that under the circumstances of this case defendant is not entitled to be resentenced.

The state's evidence tended to show that defendant entered Indian Imports, a clothing store in Nags Head, at about 7:15 p.m. on 18 November 1977. The store was open to the public at the time. Defendant asked for directions to Elizabeth City. He left briefly and then returned with three other people. He waited just outside the door while they went inside. They remained in the store for three to five minutes and then left with defendant. There were no other customers in the store.

Shortly after defendant and his companions left, the salesclerk in the store noticed two sweaters missing. She immediately called the police and gave them a description of defendant, his car and his companions. The police located and stopped defendant's car. He and the three persons who had entered the store were in it. Upon searching the car with defendant's consent, the police found seven sweaters belonging to Indian Imports and a cardboard "booster box." The fair market value of the sweaters was estimated to be $250.00 to $300.00. Neither defendant nor his companions had purchased the sweaters from the store.

Defendant offered no evidence.

This appeal presents two questions: (1) whether the trial court improperly admitted the "booster box" into evidence and (2) whether the trial court erred in denying defendant's motion to dismiss the felonious entry charge.

[1] The "booster box" was described as a device used by professional shoplifters to conceal stolen merchandise. Defendant con-

tends that the "booster box" and testimony concerning it should not have been admitted because there was no showing that it was used in the crime charged. According to his argument, this evidence tended only to show his disposition to commit a theft and was, therefore, inadmissible.

In so arguing, defendant relies in part on *State v. Stone*, 240 N.C. 606, 83 S.E. 2d 543 (1954). Defendant in *Stone* was charged with incest and assault with intent to commit rape. Found in his possession at the time of his arrest, some nine months after the alleged commission of the crimes charged, were two prophylactics. These were admitted into evidence over defendant's objection. On appeal, this Court found prejudicial error in the admission of the prophylactics and granted defendant a new trial.

Stone is distinguishable from the present case. We read its holdings as resting on two grounds: (1) remoteness, and (2) lack of any logical relevancy between the possession of the prophylactics and the issue of defendant's guilt. Here the "booster box" was found in defendant's car along with the stolen sweaters within minutes after the sweaters were discovered missing. Defendant was charged with larceny. There was testimony that the "booster box" was a device used by professional shoplifters. Possession of the "booster box" under these circumstances is relevant because it has a logical tendency to show a design or plan on the part of defendant and one or more of his companions to steal merchandise from the store.

The present case falls squarely within the holding of *State v. Fogleman*, 204 N.C. 401, 168 S.E. 536 (1933). Defendant in *Fogleman* was charged with the murder of a store owner, apparently during an attempted robbery. Introduced against him were a number of items seized from his car, including a shotgun, some shells and various burglary tools. There was no showing that any of these items was used in the commission of the crime charged. Nevertheless this Court sustained the admission of this evidence, stating, *id.* at 406, 168 S.E. at 539 (*quoting* Wigmore on Evidence): " '[T]he acquisition or possession of instruments, tools, or other means of doing the act is admissible as a significant circumstance; the possession signifies a probable design to use; the instruments need not be such as are entirely appropriate, nor such as were actually put in use.' " It is always relevant on the

question whether defendant committed a certain act to show that he had a plan or design to commit it. "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design." II Wigmore on Evidence § 304 at 202 (3d ed. 1940). This reasoning supports admission into evidence here of the "booster box." Defendant's assignments of error relating to its admission and to testimony concerning it are without merit.

[2] We next hold that the Court of Appeals correctly reversed the trial court's denial of defendant's motion to dismiss the felonious entry charge. Felonious entry is defined in G.S. 14-54(a) as follows:

> "Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2."

Defendant argues that in order for an entry to be punishable under this section it must be a wrongful entry, *i.e.*, without the consent of the owner. He points out that the store was open to the public at the time he entered. Therefore, according to his argument, his entry was not without the consent of the owner, and he did not violate G.S. 14-54(a). The Court of Appeals agreed with this argument. We agree with the Court of Appeals.

The question whether an entry must be without the owner's consent in order to sustain a conviction under statutes similar to G.S. 14-54(a) is one that has sharply divided courts in other jurisdictions. *See* Annotation, Burglary—Entry with Consent, 93 A.L.R. 2d 531. The primary basis for this split, however, appears to be differing statutory requirements in the various jurisdictions. *Smith v. State*, 362 P. 2d 1071 (Alaska 1961). Our primary task here, then, is discerning the meaning of G.S. 14-54(a).

Felonious entry is a statutory crime. *State v. Mumford*, 227 N.C. 132, 41 S.E. 2d 201 (1947). The first statute in North Carolina that punished nonburglarious breaking was Chapter 166 of the Laws and Resolutions of the State of North Carolina 1874-75. It read as follows:

"That any person who shall wilfully break into a storehouse where any merchandise or other personal property is kept, or any uninhabited house, with intent to commit a felony, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years."

This statute was amended by Chapter 323 of the Laws and Resolutions of the State of North Carolina 1879 to include within its coverage the "entering of a dwelling house in the night time otherwise than by breaking" with intent to commit a felony. The nonburglarious breaking or entry statute was subsequently embodied in Revisal § 3333 as follows:

"If any person shall break or enter a dwelling-house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking-house, counting-house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony or other infamous crime therein; every such person shall be guilty of a felony, and imprisoned in the state's prison or county jail not less than four months, nor more than ten years."

Defendant in *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911), was tried and convicted of a violation of Revisal § 3333. The state's evidence in *Goffney* showed that defendant was apprehended as he broke and entered Mr. Barnes' store. The evidence also showed, however, that Barnes had instructed an employee of his to induce defendant to commit the offense. On these facts, this Court held that a directed verdict of not guilty should have been entered, stating, *id.* at 628, 73 S.E. at 164:

"In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one.

"Upon the facts in evidence no crime was committed, because the entry was with the consent and at the instance of the owner of the property."

Goffney, then, clearly stands for the proposition that an entry, even if with felonious intent, cannot be punished when it is with the owner's consent.

The state here argues that *Goffney* was an entrapment case and that its holding should be limited to circumstances where the owner of the property actively induced the crime. We do not agree. The result in *Goffney* was not based on entrapment. It instead rested on the court's holding that under the statute an entry must be without consent and the well-established proposition that "[i]f want of consent is an element of a crime, an act done with the consent of the person affected cannot be made the basis of a criminal charge." *State v. Nelson*, 232 N.C. 602, 604, 61 S.E. 2d 626, 628 (1950).

Defendants in *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943), were tried and convicted of a violation of C.S. § 4235, the successor to Revisal § 3333. C.S. § 4235, which in all respects material to the question before us was identical to current G.S. 14-54(a), read as follows:

> "If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, counting-house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years."

Defendants in *Friddle* were charged with both breaking and entry and larceny from a store. They admitted taking sugar from the store but contended they did so with the consent of an agent of the store's owner. This Court granted a new trial because of an inadequate instruction on felonious intent, but noted, *id.* at 260, 25 S.E. 2d at 752 (1943): "The breaking and entry and the taking, it is true, must be *without the consent and against the will of the owner.*" (Emphasis supplied.)

In a 1955 amendment to then G.S. 14-54, the General Assembly provided that: "Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor." 1955 Session

Laws, Ch. 1015.[1] This provision, which with insignificant modification is now codified as G.S. 14-54(b), expressly requires that an entry must be wrongful, *i.e.*, without consent of the owner, in order to be punishable. The misdemeanor of wrongful breaking or entry as defined in G.S. 14-54(b) has been consistently held to be a lesser included offense of the crime of felonious breaking or entry as defined in G.S. 14-54(a) with the only distinction between the two being the lack of felonious intent in the case of the misdemeanor. *State v. Dickens*, 272 N.C. 515, 158 S.E. 2d 614 (1968); *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965); *State v. Dozier*, 19 N.C. App. 740, 200 S.E. 2d 348 (1973), *cert. denied*, 284 N.C. 618 (1974). The crime defined by subsection (b) could not be a lesser included offense of the crime defined by subsection (a) unless the element of wrongfulness was common to both. This is so because the greater offense must include all the elements of the lesser offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970).

In one form or another, then, since 1879, it has been a crime in North Carolina to enter a building with the intent to commit a felony. Entry under this statutory crime has consistently been held to mean entry without the owner's consent.[2] This usage has been adopted by our trial judges in their Pattern Jury Instructions, which require, among other things, a finding by the jury that the breaking or entry was without the consent of the owner or tenant of the building in order to sustain a conviction under G.S. 14-54(a). N.C.P.I.—Crim. § 214.30 (Dec. 1976).

We believe this well-established interpretation is the proper reading of the statute. It is, moreover, supported by sound policy considerations.

The interpretation contended for by the state would render the statute so broad as to make it virtually meaningless. A witness entering a courthouse intending to commit perjury would be guilty of felonious entry. *State v. Keys*, 244 Or. 606, 617, 419 P. 2d 943, 948 (1966) (Goodwin, J., dissenting). Equally guilty would be a man entering his own home or office intending to file a

1. This was the last revision of the statute except for the 1969 amendments which simplified and rearranged it. *See* 1969 Session Laws, Ch. 543, § 3.

2. The state argues that this Court adopted a contrary view in *State v. Stubbs*, 266 N.C. 274, 145 S.E. 2d 896 (1966). We do not read *Stubbs* so broadly. There is language, unsupported by authority, in *Stubbs* which supports the state's position; but the facts are completely inapposite to the present case because *Stubbs* involved an obviously nonconsensual breaking and entry.

fraudulent tax return. Loewy, Criminal Law in a Nutshell § 6.11 (1975). If such persons do that which they intend, they will commit criminal acts; but their crimes should only be, respectively, perjury and tax evasion—not felonious entry. The reading of the statute argued for by the state would so broaden its coverage as to include acts never envisioned by the legislature. Yet the argument which would sustain defendant's conviction here would apply equally to these acts.

We do not believe the General Assembly intended this statute to have such broad scope. We therefore hold, in accordance with an established interpretation in this state, that an entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a).[3]

The state's evidence here established that defendant entered the store at a time when it was open to the public. His entry was thus with the consent, implied if not express, of the owner. It cannot serve as the basis for a conviction for felonious entry. As the Court of Appeals correctly ruled, defendant's motion to dismiss this charge should have been granted.

[3] We do not think it necessary, however, to remand this case for resentencing. In so holding, we rely on G.S. 15A-1447(e), which reads as follows:

> "If the appellate court affirms one or more of the charges, but not all of them, and makes a finding that the sentence is sustained by the charge or charges which are affirmed and is appropriate, the court may affirm the sentence."

This provision was enacted as a part of Chapter 711 of the 1977 Session Laws. Section 39 of Chapter 711 provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions *without regard to when a defendant's guilt was established or when judgment was entered against him* . . . ." (Emphasis supplied.) G.S. 15A-1447(e) thus applies to our consideration of defendant's appeal even though judgment was rendered against him on 23 March 1978.

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3. We note in passing that there may be occasions when subsequent acts render the consent void *ab initio*, as where the scope of consent as to areas one can enter is exceeded, *State v. McKinney*, 21 Or. App. 560, 535 P. 2d 1392 (1975), or the defendant conceals himself in a building until a time he is not authorized to be there in order to facilitate a theft, *Levesque v. State*, 63 Wis. 2d 412, 217 N.W. 2d 317 (1974).

Defendant was convicted of felonious larceny and felonious entry. The two charges were consolidated for judgment, and defendant was sentenced to imprisonment for not less than eight nor more than ten years. This sentence was within the limits of punishment that can be imposed for larceny alone. *See* G.S. §§ 14-70, 14-2. The record gives rise to a reasonable inference that defendant was a participant in a carefully coordinated scheme to steal from Indian Imports. There is evidence that he had in his car a device commonly used by professional shoplifters. It is clear that the larceny itself is the gravamen of this case. Without any aggregation of the crimes defendant was charged and tried for, we believe his conduct in this transaction merits the sentence he received.

Under these circumstances, we find that defendant's conviction for larceny, which we affirm, will sustain the sentence he received and that the sentence is appropriate. It is not, therefore, necessary to remand this case for resentencing.

The decision of the Court of Appeals is affirmed except insofar as it remanded the case to the trial court for resentencing.

Modified and affirmed.

STATE OF NORTH CAROLINA v. STEPHEN CARL SILHAN

No. 82

(Filed 30 July 1979)

1. Jury § 2.1— denial of special venire from another county—publicity of other offenses

The trial court in a prosecution for kidnapping, crime against nature, and assault with intent to commit rape did not abuse its discretion in the denial of defendant's motion for a special venire from another county because of alleged radio, television and newspaper publicity in the county of trial concerning defendant's arrest for subsequent offenses in another county.

2. Criminal Law § 66.5— lineup—no right to counsel

Defendant was not entitled to be furnished counsel at a lineup where the court found upon supporting evidence that he voluntarily appeared in the lineup at a time when he was not in custody, since a person's right to counsel at the time of a lineup confrontation attaches only at or after the initiation of adversary judicial criminal proceedings.

3. Criminal Law § 66.5— lineup—waiver of counsel—absence of suggestiveness—independence of in-court identification

The trial court properly refused to suppress lineup and in-court identifications of defendant because he was not represented by counsel at the lineup where the court found upon supporting evidence (1) that the State had fully advised defendant of his rights under *Miranda*, that he was not required to appear in the lineup, and that he had the right to have an attorney present at the lineup; (2) that the State showed by clear and convincing evidence that defendant voluntarily waived his right to counsel; (3) that the lineup was fair and reasonable with no police suggestiveness; and (4) that the in-court identifications were based solely upon the witnesses' recollections of the events in question.

4. Constitutional Law § 30; Bills of Discovery § 6— denial of motion for "favorable evidence"

The trial court did not err in the denial of defendant's motion for "favorable evidence" in the form of statements made by the victims to a deputy sheriff so that he could see if there was any exculpation since defendant was not entitled to such disclosure under either G.S. 15A-904 or the principle enunciated in *Brady v. Maryland* 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, and since the "favorable evidence" defendant sought through discovery was brought out before the jury in testimony of the State's witnesses.

5. Rape § 18.2— assault with intent to rape—sufficiency of evidence

In this prosecution for assault with intent to commit rape, the State's evidence was sufficient to support an inference that defendant intended to rape the victim as well as to commit the crime against nature where it tended to show that, after tying the victim's hands, defendant removed all her clothing; when she told him "to take out [her] tampax if he was going to do anything," he pulled it out and threw it away; and defendant then forced the victim to perform oral sex on him.

6. Kidnapping § 1.3— instructions—substantial time period or distance not required

It would have been improper for the court to have charged that in order to constitute kidnapping under G.S. 14-39(a) any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance.

7. Kidnapping § 1— constitutionality of kidnapping statute—conviction of kidnapping and rape

The kidnapping statute, G.S. 14-39, prima facie violates no provision of the State or Federal Constitutions. Furthermore, the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

State v. Silhan

APPEAL by defendant under G.S. 7A-27(a) from the judgment imposed by *Long, J.*, at the 10 October 1977 Session of CHATHAM County Superior Court. This case was docketed and argued as Case No. 93 in the Spring Term, 1978.

In four separate bills of indictment defendant was charged with (1) the kidnapping of Johnny Marvin Johnson, (2) the kidnapping of Suzanne Daniel Johnson, (3) crime against nature performed upon Suzanne Daniel Johnson and (4) assault with intent to rape Suzanne Daniel Johnson. The jury found defendant guilty of all four offenses. Evidence for the State tended to show:

About noon on Saturday, 25 September 1976, Johnny Marvin Johnson and his wife Suzanne Daniel Johnson, both over 16 years old, were fishing in the Buckhorn Dam area of Chatham County. The Dam area was almost deserted and, except for some children fishing above the dam, they saw no other person except defendant. Johnny testified, "I first observed another person when we were fishing below the dam. He was walking from the dam toward us and would fish every now and then. That person was Mr. Silhan. He had on blue jeans, a shirt, a camouflage coat and black boots. He was wearing dark glasses." Later that afternoon the Johnsons having had little success fishing, decided to return home. On the way to their car, which was in a parking area above the river, they passed the person they had seen fishing. Johnny was walking ahead of Suzanne when he "heard something that sounded like a person running" behind him. He turned around and saw that this man had grabbed Suzanne "around the neck and had a gun pointed to her head."

Suzanne described the assault as follows: "The man told Johnny to break open his gun and take the shells out and lay it on the ground. Johnny was carrying a tackle box and shotgun at the time. The man then told Johnny to go to the blue van which was parked in the parking area with the cars. When we got to the van he told Johnny to lay down flat on his stomach on the floor of the van. He then gave me some long rope or nylon cord and told me to tie Johnny's hands. After I tied Johnny, the man then tied my hands, got into the driver's seat and drove a short distance away.

"After the van came to a stop, he took off his belt and wrapped it around Johnny's legs. He then blindfolded Johnny and put

something in his mouth. The man then covered Johnny with some green clothes that were laying in the van. Then he came over to me and pulled my T-shirt over my head. He removed my britches, shoes, socks and underwear. After he pulled my bra down I told him to take out my tampax if he was going to do anything. He pulled it out and threw it out the back of the van.

"The man next pulled down his britches and took out his private parts and put it in my mouth. He told me that if I didn't swallow it he would kill us. When he reached a climax he untied my hands and told me to dress. He released us and told us to run toward the creek and left." After getting safely away from their assailant the Johnsons drove home and immediately reported the incident to the county sheriff.

The Johnsons described their assailant to the police and, in accordance with their description, an SBI agent made a composite picture of the man who had assaulted Suzanne and kidnapped them. They also provided a description of his van: blue with plaid seats, a bluish rug, a torn latch decal on the rear doors, and a North Carolina license plate with a military decal on the bumper. Later, when shown a photographic lineup which did not include a picture of defendant Silhan, the Johnsons did not identify any of the photographs as being of their assailant. However, at a lineup in Sanford on 4 May 1977, independently of each other, both Suzanne and Johnny Johnson identified defendant. They also made in-court identifications of defendant.

Two Wildlife Resources Commission enforcement officers who work at the Buckhorn Dam area testified that in May of 1976 they had seen a blue Chevrolet van with a Fort Bragg decal on the bumper parked in the area and that they had also seen defendant carrying a rifle and a side arm. The van these officers saw fitted the description provided by the Johnsons, and it was eventually traced to the defendant.

Defendant was a soldier stationed at Fort Bragg, and he and his wife Connie Silhan lived in Sanford, North Carolina. Defendant offered the following evidence which tended to establish an alibi:

On the day of the assault and kidnapping he was not required to be at the base. At approximately 9:30 a.m. he and his friend

Bobby Moore left his home and drove his blue van to the Economy T.V. and Appliance Company where defendant's wife worked. There he exchanged car keys with his wife and drove her Plymouth "Baracuda" back to their home. Defendant and Bobby Moore planned to sand Mrs. Silhan's automobile in preparation for a painting. When the compressor which powered the sander was found to be inadequate they went to Coggin's Heating and Air Conditioning business to use a larger compressor. They remained on the Coggin's premises from 11:00 or 11:30 a.m. until almost 5:00 p.m., when the two men returned to defendant's home. Defendant testified that he did not drive the van again that day after leaving it with his wife at work, nor did he drive the van to Buckhorn Dam at any time on 25 September 1976.

On cross-examination defendant admitted that prior to September 1976 he had driven his van to the Buckhorn Dam area, and that he always carried his guns. Notwithstanding, on redirect examination, defendant stated that on 25 September 1976 his pistol was not in his possession, but was at the home of his father-in-law. Defendant's mother-in-law, Mrs. Violet Mae Wicker, corroborated this assertion by testifying, "The gun was in my house in September of 1976."

Defendant's wife also corroborated his story and testified that he and Bobby Moore arrived at her place of employment on 25 September 1976 at approximately 9:30 a.m. At that time defendant told her he was leaving the van with her so that he could sand her car. The van was parked on the corner outside and she could see it from where she stood at work. About noon that day Connie Silhan and a friend drove by Coggin's, where they saw defendant working on the car. When Connie returned to her work that afternoon the van had not been moved, and when she "got off work at approximately 3:15 to 3:30" she drove the van "straight home." Defendant was not there, but he arrived around 4:30 or 4:45 p.m. and did not leave home again that day. Bobby Moore also remained at defendant's house watching television, eating "some sandwiches, and drinking Pepsi, Coke and things like that" until 10:30 or 11:00 p.m.

Bobby Moore testified that although he remembered helping defendant sand Mrs. Silhan's car, he could be no more specific about the date than to say it occurred in "September of '76." However, Clyde Moore, Bobby's father, testified that on 25

September 1976 he saw defendant and his son Bobby at Economy T.V. and Appliance. Clyde Moore was certain of the date because he was working "on an odd-type dryer" that day and had checked his records to verify the date. He further testified that defendant did indeed leave the blue van with Mrs. Silhan at work and that no one could have moved the van prior to Mrs. Silhan's departure, because it was impossible to back out the van. "She was [only] able to drive it home that day by waiting until the man at the barber shop moved his car so she could pull out of the parking place."

The jury having found the defendant guilty as charged in each of the four indictments returned against him, the judge imposed the following sentences: For the kidnapping of Suzanne Johnson, imprisonment for life; for the kidnapping of Johnny Johnson, imprisonment for not less than 20 nor more than 25 years to commence at the expiration of the life sentence; for crime against nature performed upon Suzanne Johnson, 10 years' imprisonment to run concurrently with the kidnapping sentence; and, for the assault upon Suzanne Johnson with intent to commit rape, 10 years' imprisonment also to run concurrently.

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

Jimmy L. Love for defendant.

SHARP, Chief Justice.

[1] Defendant's first assignment of error is to the trial judge's denial of his motion, made under G.S. 15A-958, for a special venire from another county. In his motion defendant asserted that because of radio, television and newspaper publicity with reference to "his arrest for subsequent offenses in Cumberland County[1], the general feeling in Chatham County is that he is guilty" of the crimes for which he has been indicted. Upon the voir dire, in support of his motion defendant called the following witnesses:

1. The record in this case does not reveal the time of defendant's arrest or the nature of the crimes with which he was charged in Cumberland County. Our records, however, reveal that he was arrested in Cumberland on 20 September 1977 upon charges of first-degree murder, first-degree rape, and assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Silhan*, 295 N.C. 636, 247 S.E. 2d 902 (1978).

(1) A high school junior who, in consequence of conversations with his family and friends, testified he did not believe defendant could have a fair trial in Chatham County but thought he himself "could sit on the jury and decide guilt or innocence based on the evidence presented at trial";

(2-3) Two employees of the Pittsboro Herald who, from what they had heard, thought defendant was guilty as charged and believed he could not get a fair trial in Chatham. One, who had discussed the case with her friends but had not heard a discussion "on the street," said she did not know why she thought so, but she "just didn't think" defendant could get a fair trial in Chatham. The other, a typesetter, said "[T]he offense is emotionally charged . . . I have a feeling about things happening close to home, things happening in Chatham County."

(4) A photographer for WRAL Television, a station which covers 19 counties, including Chatham, said that at the time of defendant's arrest in Cumberland he took two short films of about 20 or 30 seconds. One film showed him entering the law enforcement center; the other, the courthouse. The purpose of the films was "just to show him [defendant]." The photographer testified that in his opinion "the coverage of Silhan was within the normal limits of news reporting . . . [it] just recited that he was charged with certain crimes and his name and when he was arrested. Nothing inflammatory about it. There were no interviews of sheriffs or attempted interview of Silhan, or attorneys."

The State's rebuttal evidence consisted of the testimony of three members of the Chatham County Sheriff's Department. In brief summary, they testified that in the course of their duties they went about the county among its citizens; that outside the sheriff's office they encountered very little discussion of the case. One had heard none at all. One said, "There just hasn't been much discussion of this case with me. I haven't been asked directly about the case." The third first learned that Silhan was charged with murder and rape in Cumberland when he "was called to go to Fayetteville and pick him up." The consensus was, "Silhan can receive a trial in Chatham County by a fair and impartial jury."

It is well settled in this jurisdiction that "[a] motion for change of venue or a special venire is addressed to the sound

discretion of the trial judge, and an abuse of discretion must be shown before there is any error." *State v. Blackmon*, 280 N.C. 42, 46, 185 S.E. 2d 123, 126 (1971). *Accord, State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968). The evidence in this case falls far short of establishing an abuse of discretion. Moreover, the record fails to show that any prospective juror had read any newspaper account, or seen or heard any other news releases pertaining to the case, or had been in any manner prejudiced against defendant. Our statement in *State v. Dollar*, 292 N.C. 344, 351, 233 S.E. 2d 521, 525 (1977), is applicable here.

"Nothing in the present record indicates an abuse of discretion in [the court's] ruling. The record does not show the defendant's examination of prospective jurors nor does it show that he exhausted the peremptory challenges allowed him by law. Apparently, jurors were found who were not aware of, or were not affected by, the publicity of which the defendant complains and nothing in the record indicates that, prior to verdict, he was not content with the twelve jurors who found him guilty." *Accord, State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973). Assignment No. 1 is overruled.

Defendant's second assignment of error is to the trial judge's refusal to suppress the Johnsons' in-court and out-of-court identifications of defendant. His primary objection to the identification procedures is that he did not have counsel present at the time the Johnsons identified him in the lineup. He also contends that the lineup was so "impermissibly suggestive" that it tainted the Johnsons' subsequent in-court identification. These contentions do not withstand scrutiny.

At the voir dire following defendant's motion to suppress, Detective Larry Hipp testified in brief summary as follows:

On 11 May 1975, approximately eight months after the incident at Buckhorn Dam, Detective Hipp stopped defendant, who was driving his van on Highway No. 87. Hipp requested defendant to accompany him to the Sanford Police Station. Defendant agreed to go and Hipp rode with him in the van. They arrived at the police department about 5:30 p.m. Defendant was then advised that he was a suspect in a crime and asked to be in a lineup. At that time he was fully advised of his constitutional rights as

delineated in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and thereafter he signed the waiver of rights form. Hipp said, "We advised him he didn't have to be in a lineup if he didn't want to be, but we would like for him to be. . . . It was decided at this time that he would go home, change clothes, and return after he got a sandwich. I drove to his home behind him . . . [but] did not stay at his home while he changed clothes or ate." The police suggested that defendant change his apparel because he had been in "army clothes" and they knew they "wouldn't be able to find people in town dressed the same way he was or near the same way to put in the lineup."

When defendant voluntarily returned to the police station about 7:00 or 7:30 p.m. he was again advised, this time orally, "that he did not have to be in the lineup and that he was entitled to have his attorney present." Defendant declared that "he didn't need one at this time." The lineup, conducted about 8:30 p.m., consisted of six white males, similar to defendant in height, weight and coloring. Because defendant wore dark glassses, the officers procured dark glasses for all the other participants. To show the lineup's character, Detective Hipp identified two photographs of it which were introduced in evidence.

The Johnsons, who had been requested to come to Sanford "to see if the person who committed the crime against them was in the lineup," viewed the lineup separately. Johnny first viewed the six people in the lineup and identified defendant Silhan by number. Hipp neither approved nor disapproved his selection; nor did he tell Johnson the name of the man whom he had identified. Hipp "then took Johnny Johnson back and brought his wife down to view the lineup." She also identified Silhan by number. Thereafter, "the people in the lineup were shifted numerically and mixed up." Johnny was brought back, and this time each member of the lineup was instructed to step forward and say, "break the gun down." When Silhan stepped forward and uttered that phrase, Johnson said, "That's definitely him, there's no doubt." Hipp brought Suzanne Johnson back and the whole procedure was repeated. When Silhan stepped forward and said, "break the gun down," she started crying and said, "That's him."

Johnny and Suzanne Johnson each testified that his identification of defendant at the lineup was based solely upon his

observations during the kidnap and assault; that no officers had in any way influeced their identification of defendant at the lineup.

Defendant's version of the events on the day of the lineup parallels Detective Hipp's statements with one exception. Defendant concedes that he signed the waiver of rights form shortly after he arrived at the police station; that when he left the police station and went home to change clothes and eat, he knew he had a choice of not going back. He denies, however, that anything was said to him about an attorney at the time of the lineup. Defendant was put under arrest after the lineup and he employed his own attorney that night.

[2, 3] Based upon the foregoing evidence the trial judge found that defendant had voluntarily appeared in the lineup at a time when he was not in custody. Thus, even in the absence of a waiver, it was not required that defendant be furnished counsel at the lineup. A person's right to counsel at the time of a lineup confrontation depends upon whether the proceeding is still in the investigatory stage or has become a criminal prosecution. The right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *State v. Finch*, 293 N.C. 132, 140, 235 S.E. 2d 819, 824 (1977). *Accord, Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972). The judge further found (1) that the State had fully advised defendant of his rights under *Miranda*, that he had not been required to appear in the lineup, and that he had been informed of the right to have an attorney present and had waived that right, and (2) that the lineup was fair and reasonable with no police suggestiveness. The judge concluded that the Johnsons' identification of defendant was based soley upon their recollection from events of 25 September 1976, and that the State had shown "by clear and convincing evidence that the defendant voluntarily, knowingly and intelligently waived the presence of an attorney at the lineup." The record evidence and the law amply support the court's findings. They are therefore binding on this Court. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Defendant's assignment No. 2 is overruled.

[4] Assignment of Error No. 3 addresses the trial judge's denial of defendant's motion for "favorable evidence." On 19 September

1977 defendant filed a motion requesting that the State provide him with copies of any and all evidence in its possession "that might tend to exculpate him in any way." The State responded that it had no such evidence. Following the voir dire on defendant's other pretrial motions, defendant narrowed his request by asking for the statements Mr. and Mrs. Johnson made to one of the deputies "so that he could see if there is any exculpation." The judge denied the motion "on the grounds that it is a general or broadside motion and not a specific request for discovery."

Although perhaps not entirely correct in his assessment of defendant's motion, the judge did not commit prejudicial error in denying it. Defendant was not entitled to this disclosure under either G.S. 15A-904 (1978) or the principle enunciated in *Brady v. Maryland* 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. 83, 87, 10 L.Ed. 2d 215, 218, 83 S.Ct. 1194, 1196-97 (1963). Under *Brady* the district attorney's conduct would constitute prejudicial error only if "there was (a) suppression by the prosecution after a request by the defense (b) of material evidence (c) favorable to the defense." *State v. Gaines*, 283 N.C. 33, 45, 194 S.E. 2d 839, 847 (1973).

Defense counsel asserts that defendant's motion for favorable evidence "went directly" to the Johnsons' testimony at trial. He suggests that there were two discrepancies in the Johnsons' testimony at trial and the statements they made to Deputy Sheriff Shaner shortly after the incident at Buckhorn Dam. An examination of the record, however, makes it clear that each of the two items of "favorable evidence" defendant had sought through discovery was thereafter brought out before the jury in the testimony of State's witness, Deputy Sheriff Whitt, and the cross-examination of Johnny Johnson himself.

First, defendant contends that had Deputy Shaner's notes on the Johnsons' account of the events of 25 September 1976 (which she transcribed that same day) been made available they would have shown that Johnny had originally described their attacker's van as a Ford and not a Chevrolet, as he later testified. However, on cross-examination Johnny testified that when he made his

statement to Mrs. Shaner he had indeed told her that defendant's van was a Ford, but after he had compared Ford and Chevrolet vans and noted the difference between them—particularly on the inside—he "made up his mind it was a Chevrolet van" and so informed the officers.

Second, defendant asserts that, after telling Deputy Shaner they had seen "another man at the river other than the defendant" that day, Johnny testified on cross-examination that he didn't remember telling Mrs. Shaner that Mr. Silhan was talking to another guy; that he didn't see anybody before the incident besides Mr. Silhan, himself and his wife. Once again, defendant could not possibily have suffered any prejudice from the lack of Mrs. Shaner's notes. Deputy Sheriff Whitt, a witness for the State, testified on cross-examination as follows: "On September 25th I asked Mr. and Mrs. Johnson to tell me exactly what they could about the incident and Mrs. Shaner took notes. I recall that they said they did or thought they saw the subject talking to another guy—that was fishing. Mr. Johnson stated that a green army belt was used to tie his legs."

[5] Defendant's assignments 6 and 7 challenge the trial judge's denial of his "motion to dismiss at the close of the State's evidence and again at the close of all the evidence, in particular with respect to the charge of assault with intent to commit rape." Defendant contends that all the evidence tends to show that the assailant's only intent was to force Mrs. Johnson to perform oral sex on him and that he never intended to rape her.

The following statement of the law is clearly applicable to this case:

"To convict a defendant on the charge of an assault with an intent to commit rape the State must prove not only an assault but that the defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part. It is not necessary that defendant retain that intent throughout the assault; if he, at any time during the assault, had an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. 'Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence; it must ordinarily be proven by circumstantial evidence, *i.e.*, by

facts and circumstances from which it may be inferred.' . . . To convict a defendant of an assault with intent to commit rape 'an actual physical attempt forcibly to have carnal knowledge need not be shown. (Citation omitted.)" *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160 (1974).

Albeit the mental processes of the sexual assailant in this case are beyond comprehension, the inconsistency between his contentions here and his actions at the scene of his crimes is patent. After tying Mrs. Johnson's hands defendant removed all her clothing. Then when she told him "to take out [her] tampax if he was going to do anything," he pulled it out and threw it out the back of the van. Such evidence clearly supports the inference that defendant's ultimate intention was not just to commit the crime against nature, but rape. The motions to nonsuit were properly overruled.

[6] In his assignments Nos. 8, 9, and 10, defendant charges as error the failure of the trial judge to charge the jury that in order to constitute kidnapping under G.S. 14-39(a) (Cum. Supp. 1977) any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance. These assignments require little discussion for they are based upon disapproved dictum in the opinion of the Court of Appeals in *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), a case in which that court *affirmed* the defendant's conviction of two charges of crime against nature and kidnapping. Although the defendant Fulcher took no exceptions to the charge in his case, and the charge was not in the record, in its opinion the Court of Appeals reviewed the North Carolina Pattern Instruction on Kidnapping (Crim. 210.10, revised January 1976) and found them insufficient. It concluded that if the charge against the defendant is kidnapping by unlawful confinement or restraint, the trial judge in instructing the jury must define those terms as meaning confinement or restraint for a substantial period and not merely incidental to the commission of another crime; that if the charge is kidnapping by moving from one place to another, the judge must define the term as meaning movement from one place for substantial distance and not merely incidental to the commission of another crime. *Id.* at 241, 237 S.E. 2d at 915.

Upon Fulcker's appeal this Court also affirmed his convictions, but disapproved the Court of Appeals' construction of G.S.

14-39(a) and its proposed instructions to juries summarized above. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In a unanimous opinion written by Justice Lake, we held that in enacting G.S. 14-39(a) (effective 1 July 1975) the legislature intended to change the law which this Court had previously enunciated with reference to the requirements of restraint and asportation in kidnapping. "It follows," the Court said, "that the Court of Appeals erred in its holding that 'substantiality' in terms of distance or time is an essential of kidnapping and in its pronouncements that the trial judge must instruct the jury that 'confinement' or 'restraint,' as used in this statute, means confinement or restraint 'for a substantial period' and that 'removal' as used in this statute, requires a movement 'for a substantial distance.' We, therefore, cannot approve the instructions to juries proposed by the Court of Appeals upon these points. *Id.* at 522-23, 243 S.E. 2d at 351.

Defendant's conduct, as detailed by Johnny and Suzanne Johnson, clearly constituted kidnapping under G.S. 14-39(a) and the court's charge correctly applied the law to the evidence in this case. Assignments 8, 9, and 10 are therefore without merit. However, before leaving these assignments, we note that we have considered them despite counsel's failure to comply with App. R. 10, particularly § (b)(2), and warn that this Court cannot be counted on to ignore routinely such a disregard of its rules.

[7] Defendant's final contention is that G.S. 14-39 is "unconstitutional and if not, [then] under the facts of this case . . . the kidnappings [were] merely incidental to the other felonies of crime against nature and assault with intent to commit rape." This same contention was considered and overruled in *State v. Fulcher*, supra. In that case we held that prima facie the statute violated no provision of the State or Federal Constitutions. We further held that the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. In this case it is clear that the confinement, restraint and asportation of both Mr. and Mrs. Johnson were separate offenses from the sexual assault of Mrs. Johnson. Assignment No. 11 is overruled.

In defendant's trial we find

No error.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. MICHAEL DEAN KELLER

No. 101

(Filed 30 July 1979)

1. **Homicide § 30 — first degree murder — reliance on premeditation and deliberation — necessity for submitting second degree murder**

In a prosecution for first degree murder on the theory of premeditation and deliberation, the trial court must submit to the jury an issue of second degree murder as an alternative verdict.

2. **Criminal Law § 106.5 — accomplice testimony — sufficiency for conviction**

The testimony of an accomplice was sufficient to sustain defendant's conviction of first degree murder, and the fact that the accomplice admitted that he perjured himself at a prior trial wherein he denied any knowledge of or participation in the murder bore only on the credibility, not the sufficiency, of his testimony.

3. **Criminal Law § 34.7 — evidence of another crime — competency to show motive**

Evidence concerning defendant's complicity in the killing of the victim's brother on the day prior to the killing of the victim was admissible to show defendant's motive in killing the victim where the evidence showed that the victim's brother was killed by defendant in a robbery attempt; defendant and his accomplice were seen by the victim while returning from a remote spot where they disposed of the body; and defendant and the accomplice feared that the victim might seek to harm them to avenge his brother's death.

Justice BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Ferrell* at the 18 September 1978 Criminal Session of CALDWELL 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. Defendant appeals pursuant to G.S. 7A-27(c).

Rufus L. Edmisten, Attorney General, by Buie Costen, Special Deputy Attorney General, and Grayson G. Kelley, Associate Attorney, for the state.

McElwee, Hall, McElwee & Cannon by John E. Hall and William H. McElwee III for defendant appellant.

EXUM, Justice.

[1] The principal question presented is whether this Court will continue to adhere to the rule, most recently reaffirmed in *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976), that in a prosecution for first degree murder on the theory of premeditation and deliberation the trial court must submit at least second degree murder as an alternative verdict. The answer is yes. For failure of the trial court to submit second degree murder as a lesser included offense, defendant is granted a new trial. Other questions involve the sufficiency of the evidence to support the verdict and the admission of evidence of another crime allegedly committed by defendant. We find no error in the rulings on these points.

Defendant was charged and convicted of the murder of Edward Lee Greene. Principal testimony against defendant was that of Jackie Robinette, defendant's alleged accomplice, who testified pursuant to a negotiated plea arrangement. Robinette testified, in brief summary, as follows: For apparent motives which will be discussed later in the opinion defendant used a "sawed-off" shotgun to force Greene to drive him in a van to an abandoned house where the two of them met Robinette. Defendant forced Greene to lie on the ground while his hands and legs were taped together. Robinette and defendant placed Greene back in the van. Robinette urged defendant not to kill Greene, simply to rob him. With Robinette driving the van and defendant following in Robinette's car, they drove toward Wilkesboro. After passing the carwash where Greene's body was ultimately found, defendant, who was communicating with Robinette by CB radio, told Robinette to turn off the highway onto a side road. When Robinette turned off and stopped the van, defendant came up to it and shot Greene. He then told Robinette to shoot Greene. Robinette shot Greene several times. Defendant and Robinette then decided to leave Greene and the van at a carwash about a quarter-mile away. When they stopped at the carwash, they

discovered that Greene was still alive. Defendant then borrowed a knife from Robinette and cut Greene in the throat. The throat wounds caused Greene's death. Defendant offered no evidence.

The court submitted the case to the jury upon the theory of premeditation and deliberation. The jury was instructed to find defendant guilty of first degree murder or not guilty. The jury was not instructed upon any lesser included offense.

Defendant contends the court erred in failing to instruct the jury upon the lesser included offense of second degree murder. He relies upon *State v. Harris, supra.* Defendant's contention has merit.

In *Harris* defendant was tried and convicted of the murders of Bernice Clark Harrington, Azalle Jackson, Gertrude Clark Harmon, and Haveleigh White. The state's evidence tended to show that each of these murders was planned and executed by defendant in retaliation for Gertrude Harmon's earlier having blinded defendant in one eye by assaulting him with some highly corrosive substance. Azalle Jackson (Gertrude Harmon's sister) and Haveleigh White (Harmon's close friend) had testified in Harmon's favor at her trial for her assault against defendant. Bernice Clark Harrington was also a sister of Harmon. Harmon's assault against defendant took place on 23 September 1974. The evidence tended to show that defendant on 9 January 1975 within a period of several hours methodically proceeded to accost and murder, seriatum, each of his victims. A note was found in defendant's house which stated: "Joe Lewis Harris. Born July 10, 1935. Murdered September 23, 1974. All responsible shall pay." Defendant had stated over the telephone to Gertrude Harmon on 28 December 1974. " . . . I am going to kill you and all the Clarks."

Harris did not testify. His defense was insanity. The trial court submitted possible verdicts to the jury of guilty of murder in the first degree, not guilty by reason of insanity, or not guilty. The jury returned a verdict of guilty of murder in the first degree. This Court, in a carefully considered opinion by Justice Moore, in which all members of the Court fully concurred, found it error for the trial judge to fail to submit murder in the second degree as an alternative verdict. After considering at length the cases of *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968); *State*

v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928); and *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909), this Court stated unequivocally and without qualification, 290 N.C. at 730, 228 S.E. 2d at 432:

> "We hold, therefore, that in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. Again, we reaffirm the rule originally stated in *State v. Spivey, supra*, that in those cases in which the State proves a murder committed by one of the means stated in G.S. 14-17, or in the perpetration or attemped perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper; provided, that there is no evidence, or any inference deducible therefrom, tending to show a lesser offense. *See State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Spivey, supra.*"

The case *sub judice* is indistinguishable from *Harris*. As in *Harris* the state here relied and the case was submitted to the jury solely on the theory of premeditation and deliberation. The evidence of premeditation and deliberation was no stronger here than it was in *Harris*. Neither was there any positive evidence in *Harris*, as there is not here, of the absence of premeditation and deliberation. Therefore under our long standing rule applied as early as 1928 in *State v. Newsome, supra*, and reaffirmed as late as 1976 in *Harris*, the court was required to submit the issue of second degree murder to the jury.

The state urges that we abandon the rule as stated in *Harris* and apply, instead, the general rule that a lesser included offense is not required to be submitted unless there is some positive evidence to sustain it. *See, e.g., State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). We decline to abandon the rule so recently affirmed in *Harris*. To apply it in *Harris* and not here would evidence an approach to criminal cases by this Court most charitably described as incongruous. There is, furthermore, reason behind the rule. Ordinarily premeditation and deliberation, being operations of the mind, must always be proved, if at all, by circumstantial evidence.

State v. Constance, 293 N.C. 581, 238 S.E. 2d 294 (1977). In the case at bar, as in *Harris*, no one testified that defendant premeditated and deliberated. These mental operations of defendant must be inferred, if at all, from the circumstances of the case. Perhaps the only reasonable inference which could be made here is that defendant did indeed premeditate and deliberate the killing. Nevertheless *in first degree murder cases* the jury must be left free to draw or not to draw this inference; and if the jury chooses not to draw it, it should be given the alternative of finding defendant guilty of second degree murder. *State v. Newsome*, *supra*, 195 N.C at 564, 143 S.E. at 193.

This Court has not applied this rationale in cases involving crimes other than first degree murder which have as an essential element a specific criminal intent on the part of the defendant. *State v. Allen*, 297 N.C. 429, 255 S.E. 2d 362 (1979) (In burglary prosecution, no error in refusing to submit nonfelonious breaking and entering where state's evidence tends to establish that defendant intended to rape occupant, defendant's defense is alibi and mistaken identity, and there is no evidence of nonfelonious breaking and entering); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971) (In assault with intent to commit rape prosecution, no error in refusing to submit assault on a female where there was no evidence tending to show that victim was assaulted for any purpose other than rape or for no purpose at all). The rule in first degree murder cases thus differs from the rule governing submission of lesser included offenses in other crimes involving specific intents. The first degree murder rule is, however, firmly rooted in our cases. More importantly it was carefully reconsidered, reaffirmed and applied in *Harris*. In keeping with that reasonable predictability rightly expected of appellate courts, it should be applied here.

Because we have determined defendant must be given a new trial, we shall comment briefly only upon those of his remaining assignments of error which raise issues likely to recur on retrial.

[2] Defendant argues the court erred in failing to grant his motion to dismiss for insufficiency of evidence at the close of the state's evidence. He contends the testimony of Robinette is the only evidence offered by the state sufficient to take the case to the jury and that this testimony is inherently unworthy of belief

because Robinette admitted that he perjured himself at a prior trial wherein he denied any knowledge of or participation in the killing of Greene.

The court properly denied defendant's motion. It is well-established that the uncorroborated testimony of an accomplice will sustain a conviction so long as the testimony tends to establish every element of the offense charged. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). That Robinette may have lied earlier bears only on the credibility, not the sufficiency, of his testimony. The credibility of witnesses is a matter for the jury rather than the court. Contradictions and discrepancies in the state's evidence do not warrant dismissal of the case. *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

[3] Defendant also objected to the introduction of evidence concerning his complicity in the killing of A. C. Greene, brother of Edward Greene, the day prior to the killing of Edward Greene, the latter being the crime for which defendant was here tried. He argues that this was evidence of an unrelated, prior crime which the state was improperly allowed to use in proving the commission of a separate independent offense.

The general rule is that "[e]vidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's North Carolina Evidence, § 91, pp. 289-290 (Brandis rev. 1973); *see also, State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949). There are, however, a number of well-defined exceptions to this general rule of inadmissibility. These are listed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). One is that "Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused." 240 N.C. at 176, 81 S.E. 2d at 367. The evidence in question falls within this exception.

Robinette's testimony reveals that in a robbery attempt A. C. Greene was killed by defendant on the day prior to the killing of Edward Greene. Defendant and Robinette then left A. C. Greene's body in his car at a remote road. While returning from disposing of the body, they were seen by Edward Greene. At that time defendant and Robinette, fearing that Edward Greene might seek to harm them to avenge his brother's death, discussed killing Edward Greene and initially decided that it would not be necessary to kill him. For reasons not disclosed in the record defendant, on the day following A. C. Greene's murder, compelled Edward Greene to go with him to meet Robinette. The killing of Edward Greene as above described then took place. There was also evidence that defendant and Robinette made an attempt to take from Edward Greene money which they had unsuccessfully sought to take from his brother.

Defendant's remaining assignments of error do not raise issues which are likely to recur at retrial or which demand comment at this time. For the reasons given defendant is granted a

New trial.

Justice BROCK did not participate in the consideration or decision of this case.

RAY D. COLLINS v. QUINCY MUTUAL FIRE INSURANCE COMPANY

No. 111

(Filed 30 July 1979)

Insurance §§ 115, 126— fire insurance—property insured by co-tenant—insurable interest

G.S. 58-176 providing that insurance coverage shall in no event be for more than the "interest of the insured" encompasses more than legal title and is broad enough to cover the entire property which is insured by one co-tenant, acting as agent, for the benefit of all the owners.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL from *Lupton, J.*, 31 May 1977 Session of FORSYTH Superior Court.

Plaintiff instituted this action to recover the sum of $15,000 under the provisions of a fire insurance policy issued by defendant to plaintiff insuring a dwelling house located in Clemmons Township, Forsyth County, North Carolina. After filing answer, defendant moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. A motion for summary judgment was heard by Judge Lupton upon the following instruments: Affidavit of Betty Capps, Office Manager for Jack Hoots Insurance Service, Inc.; affidavit of Roger Swisher, a self-employed insurance broker; a proof of loss statement; a non-waiver agreement; the insurance policy issued by defendant and the affidavit of plaintiff Ray D. Collins. The undisputed evidence arising from these documents may be summarized as follows: In January, 1973, plaintiff asked Mr. Swisher to obtain fire insurance coverage in the amount of $15,000 on a one family tenant dwelling located in Clemmons Township, Forsyth County. This property was owned by plaintiff, Max Bingham and Thad Bingham as tenants in common, and plaintiff advised Mr. Swisher of this fact at the time he requested coverage. Mr. Swisher, who was not defendant's agent, then requested Jack Hoots Insurance Service, Inc., an agent of defendant, to issue fire insurance coverage on the dwelling. Mr. Swisher averred that:

> I don't recall that I did, prior to January 4, 1976, inform anyone with Jack Hoots Insurance Service, Inc. that Mr. Collins owned only a one-third (1/3) interest in the property that we talked about earlier, or that Mr. Collins was not the sole owner of the property. There's a remo—there is a possiblity that I did inform them that Ray was acting as an agent for an association, a group. It seems to me that at some time or other, in the course of this period of three years, that I did say to them that Ray Collins was acting as an agent for a partnership association. No, I do not recall specifically, when I might have made some mention of that. . . .

On 10 January 1973, a fifty dollar deductible fire insurance policy was issued by defendant in the name of Ray D. Collins which policy provided for fire insurance coverage from 10 January 1973 to 10 January 1976. This policy was in full force and effect when the dwelling insured was damaged by fire on 4 January 1976 in an amount appraised at $9,040. Pursuant to the requirements of G.S. 58-176, the policy provided that it insured:

> The insured named above [Ray D. Collins] and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured.

The documents before Judge Lupton contain conflicting evidence as to whether an employee of Jack Hoots Insurance Service, Inc., contacted plaintiff to obtain more information concerning the property prior to the issuance of the policy. In their respective affidavits, Jack Hoots and Betty Capps averred that Mr. Swisher never informed either of them of the limited interest that plaintiff held in the property.

After considering the evidence and hearing argument of counsel, Judge Lupton entered judgment on 10 June 1977 granting judgment for plaintiff in the amount of $2963.33 (one-third of the appraised damage less the fifty dollar deductible) and dismissed the remainder of the claim. Plaintiff appealed and the Court of Appeals reversed and remanded, holding that there was a triable issue as to whether plaintiff was manager of the property in which he owned an undivided interest with two other persons as tenants in common. The Court of Appeals reasoned that if plaintiff was the managing agent, he had an insurable interest. Defendant petitioned this Court for discretionary review, and its petition was allowed on 6 March 1979.

Badgett, Calaway, Phillips, Davis & Montaquila by Susan Rothrock Montaquila and Richard G. Badgett for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Keith W. Vaughan for defendant appellant.

BRANCH, Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in reversing the trial court's granting of

defendant's motion for summary judgment. We agree with the decision of the Court of Appeals that no material issue of fact was raised with regard to waiver of any policy provision by the insurance company. Thus, resolution of this question is dependent on our construction of the policy language required by G.S. 58-176 which provides that the insurance coverage shall not in any event be for more than "the interest of the insured. . . ."

Defendant apparently contends that this policy provision refers to the nature and extent of the insured's legal title. Plaintiff, on the other hand, contends that the "interest of the insured" may be broader than the extent of his legal title, and his status as managing agent for his co-tenants gave him an insurable interest in the entire property. The question thus presented appears to be one of first impression.

Prior to 1945, former G.S. 58-177, which contained the standard policy provisions, required that the policy contain the following language: "This entire policy shall be void . . . if the interest of the insured be other than unconditional and sole ownership." Being cognizant of the reason for this provision and the detrimental consequences strict construction might have for the insured, this Court stated in *Roberts v. Insurance Co.*, 212 N.C. 1, 192 S.E. 873 (1937):

> . . . Therefore, clauses in policies requiring a truthful statement of the interest of the applicant for insurance . . . are to be construed not technically to the prejudice of the policyholder, but rationally and fairly to protect the insurance company from the extraordinary risks, and from the certain and numerous losses which would fall upon them from insurance not actually owned by the persons insured.

In 1945, the pertinent statutes were amended, and the requirement of "unconditional and sole ownership" was omitted. G.S. 58-176 now provides that insurance coverage shall in no event be "for more than the interest of the insured. . . ." The reason for this provision appears to be the same as for the old "unconditional and sole ownership" provision. By limiting the insurer's liability to the "interest of the insured," the insurer is protected against fraud, material misrepresentations, or risks which it could not reasonably foresee or those which are of no consequence to the insured. More importantly, we are of the opinion

that the current provision is susceptible of a broader construction than the former provision. The former provision required the insured's interest to be "unconditional and sole ownership." Even though the statute spoke of ownership, the cases construing that provision did not limit "ownership" to legal title. *See, Roberts v. Insurance Co., supra.* Moreover, this Court has held that "interest of the insured" in the current statute encompasses more than legal title. *King v. Insurance Co.*, 258 N.C. 432, 128 S.E. 2d 849 (1963). The limiting phrase "unconditional and sole ownership" does not appear in G.S. 58-176 which contains the current standard policy provisions. The omission of this phrase undoubtedly broadens the scope of coverage allowed by statute.

Our inquiry must focus on whether the statutory policy provision limiting coverage to the "interest of the insured" is broad enough to allow recovery, for the full value of property destroyed by fire, on a policy issued to one tenant in common, who without notice to the insurer was ostensibly acting on behalf of his co-tenants.

It is generally stated that where, by the terms of the policy, the insurer is not to be liable beyond the interest of the insured in the property, a stranger to the contract cannot collect thereon simply because he was the owner of an undivided interest in the property destroyed. 5A Appleman, *Insurance Law and Practice*, § 3361 (1970). However, it is not unusual, among joint owners of property, to leave the responsibility for management of the property to one of the owners. Generally, authority to take charge of property includes authority to take reasonable measures to protect the property against destruction or loss, to keep it in reasonable repair and if the property is of the kind which is ordinarily insured, to insure it. 3 Am. Jur. 2d *Agency* § 87 (1962). Therefore, it is recognized that if insurance is taken for the benefit and at the expense of all co-tenants, each is entitled to his share of the proceeds, as where the one takes out insurance on the whole, and calls on his co-tenants to contribute to the payment of the premiums, or pays them from rents of the common property. 46 C.J.S. *Insurance* § 1141 (1946).

It is apparent from the judgment entered in instant case that the trial judge equated "interest of the insured" with legal title of the insured. We are of the opinion that the trial judge erred in

granting defendant's motion for summary judgment based on such a limited construction. Further, absent fraud or material misrepresentation, we hold that the term "interest of the insured" is broad enough to cover the entire property which is insured by one co-tenant, acting as agent, for the benefit of all the owners. Such construction does not increase the risk assumed by the insurance company. Plaintiff, the named insured, sought protection for the full value of the rental property in question and paid premiums on the assumption that the property was fully covered. Defendant contracted to insure the property for full value to the extent of plaintiff's interest. We find Justice Reade's common-sense statement in *Willis v. Insurance Companies*, 79 N.C. 285 (1878), apropos:

> Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But on the other hand the insured are generally plain men without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is that they are to pay the insurers so much money, and if they are burnt out the insurers pay them so much. Where therefore there has been good faith on the part of the insured and a *substantial* compliance with the contract on their part, the Courts will require nothing more.

For the purposes of the risk assumed by defendant, we think it is immaterial whether plaintiff was acting as an agent for his co-tenants or whether he was the sole owner. Had plaintiff procured the insurance by fraud or misrepresentation of a material fact, defendant would have been protected by the standard policy provisions of G.S. 58-176. Defendant alleges no fraud or misrepresentation of any material fact. Had the other co-tenants procured insurance on the property, defendant would have incurred only pro rata liability pursuant to G.S. 58-176. Defendant assumed the risk which it intended. It has not been misled, and its rights have in no way been affected by its ignorance concerning ownership of the property.

We note that this difficulty would not have arisen had the broker, through whom plaintiff sought insurance, been an agent of defendant. In such case, the agent's knowledge that plaintiff was acting on behalf of himself *and* his co-tenants would have been imputed to the insurer making it liable for the full value of the property in case of loss. Clearly the equities are in plaintiff's favor because even had he known that Mr. Swisher was a broker rather than an agent, the legal implications of that status would not have been apparent to him.

Plaintiff need not, however, depend on equity for relief. The term "interest of the insured" is broad enough to cover plaintiff's ostensible status as managing agent for his co-tenants. Thus, there is presented a triable issue of fact as to whether plaintiff was actually acting as agent for the other owners of the property. If the jury finds that plaintiff was acting as agent for the other owners, defendant would be liable to the full extent of the loss, the insurance proceeds inuring to the benefit of plaintiff and his co-tenants according to their respective ownership.

The decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES HAYWOOD

No. 107

(Filed 30 July 1979)

1. Receiving Stolen Goods § 1— elements

The essential elements of feloniously receiving stolen goods are: (1) receiving or aiding in the concealment of goods, (2) of a value of more than $200.00, (3) stolen by someone else, (4) the receiver knowing or having reasonable grounds to believe the goods to have been stolen, and (5) the receiver acting with a dishonest purpose.

2. Receiving Stolen Goods § 5.1— sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for feloniously receiving stolen goods where: defendant's testimony that he did not steal the

suit he was charged with receiving but obtained it in an exchange with another person and a store manager's testimony that the suit was missing from his store and had not been sold permitted inferences that defendant received the suit and it was stolen by someone else; defendant's knowledge or reasonable grounds to believe that the suit was stolen could be inferred from his willingness to sell the suit at a mere fraction of its actual value; a dishonest purpose could be inferred from defendant's sale of the suit and conversion of the proceeds to his own use; and evidence that the price of the suit was $215.00 established that the value of the goods received was more than $200.00.

3. Criminal Law § 15— motion to dismiss for improper venue—timeliness

In order to raise a question of venue, it is necessary to file a motion to dismiss for improper venue prior to trial, G.S. 15A-952, and the issue of venue cannot be raised under a motion to dismiss for insufficiency of the evidence.

4. Criminal Law § 15— proof of venue

The State adequately proved venue where the indictment charged that defendant "unlawfully, wilfully and feloniously did *have* and *receive* one (1) suit" in Guilford County, and the State's evidence showed that defendant was in possession of the suit in Guilford County, since under G.S. 14-71 venue is proper in any county in which defendant has possession of the stolen goods, and the additional allegation that the goods were "received" in Guilford County was mere surplusage.

ON appeal pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, opinion by *Judge Erwin* with *Judge Parker* concurring and *Judge Robert M. Martin* dissenting, finding no error in defendant's conviction for feloniously receiving stolen goods before *Judge Crissman* at the 13 February 1978 Criminal Session of GUILFORD Superior Court. Defendant was sentenced to imprisonment for not less than five nor more than seven years. The decision of the Court of Appeals was reported at 39 N.C. App. 639, 251 S.E. 2d 620.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the state.

Wallace C. Harrelson, Attorney for defendant appellant.

EXUM, Justice.

The principal question presented by this appeal, and the one over which the panel below disagreed, is whether the trial judge properly denied defendant's motion to dismiss at the close of all the evidence. Upon careful examination of the record, we con-

clude there is substantial evidence of each element of the offense of feloniously receiving stolen goods. Defendant's motion was therefore properly denied.

The state's evidence tended to show that in the early months of 1977 police officers in Greensboro were running an undercover operation for the purpose of recovering stolen goods in a television shop at the corner of Freeman Mill Road and Four Seasons Boulevard. Defendant entered this shop on 26 January 1977 carrying three suits in a green garbage bag. One of these suits was gray, size forty-three long, with the brand name Heritage Collection by Hart, Schaffner & Marx, and a $215.00 price tag. The indictment charged defendant with feloniously receiving only this suit. Defendant asked $85.00 for all three of the suits in the bag and was paid $80.00 for them.

Raymond Jones, manager of the McLeod-Watson-Van Straaten store in Durham, identified the gray, size forty-three long suit as one he had discovered missing from his store between the 20th and 25th of January 1977. He testified that the suit had not been sold by the store and that its price was $215.00.

Defendant testified in his own behalf. He stated that he had been in the business of buying suits at low prices on sale and reselling them at a profit for about three years. He expressed some uncertainty as to where he had gotten the suit in question here, but at one point he stated:

> "Yes, I am in the business of selling clothes. I know about clothes. Yes, I presume I know a good deal in clothes when I see one. It was between December and January 26th, about the time I went to the place, the TV shop, that I got this suit.
>
> "Yes, knowing about clothes, I know that people take these price tags off when they sell them. Like I said, I didn't pay no attention to the price tag being on there. I figured I could give him two suits and take it, that I paid $40.00 for.
>
> "I didn't say where I got the suit. I didn't take the suit. I did not steal the suit. I didn't ask the person I got it from if he stole it. He said he got a suit and he couldn't wear a forty-three long. I am telling the ladies and gentlemen of the jury

that I paid for it by giving him two suits, I think, I'm not sure. I gave him two suits for this and probably another one. I said earlier I wasn't sure. He could have told me any kind of name—I still couldn't believe any kind of name. No, I didn't know his name.

"Care—why should I care whether it was stolen or not? Yes, by him selling it, I didn't think it would be stolen, by him wanting to swap two suits. No, I did not know him to be a man who dealt in clothes and to have a good reputation. Most people I dealt with, I didn't know a thing about them, only the places they worked."

Defendant assigns as error the denial of his motion to dismiss for insufficiency of evidence. "To withstand defendant's motion [to dismiss], there must be substantial evidence against the accused of every essential element that goes to make up the crime charged." *State v. Allred*, 279 N.C. 398, 404, 183 S.E. 2d 553, 557 (1971). Since this moton was made at the close of all the evidence, we must consider both the state's and defendant's evidence in determining the correctness of its denial. *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978).

[1] The essential elements of feloniously receiving stolen goods are: (1) receiving or aiding in the concealment of goods, (2) of a value of more than $200.00, (3) stolen by someone else, (4) the receiver knowing or having reasonable grounds to believe the goods to have been stolen, and (5) the receiver acting with a dishonest purpose. *See* G.S. §§ 14-71, 14-72; *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968); *State v. Neill*, 244 N.C. 252, 93 S.E. 2d 155 (1956); *State v. Brady*, 237 N.C. 675, 75 S.E. 2d 791 (1953); N.C.P.I.—Crim. § 216.40.

[2] Defendant contends there is no evidence that the suit which he was charged with receiving was stolen by someone else. We disagree. In his testimony quoted above, defendant stated that he had gotten the suit in an exchange with another person. Although there are a number of suits described in the record, he was obviously speaking of the suit from McLeod-Watson-Van Straaten because he said it was a forty-three long, and no other suit was so described in the testimony. Defendant's testimony thus provides evidence that he received this suit from someone else. Mr. Raymond Jones testified that this suit was discovered missing from

the store and that it had not been sold. From this testimony a reasonable inference arises that the suit was stolen. This testimony together with defendant's statements that he did not steal the suit but, rather, received it from someone else, leads to a second reasonable inference that someone else stole the suit. Construing this evidence in the light most favorable to the state, then, we conclude it provides substantial evidence that (1) defendant received the suit and (2) it was stolen by someone else.

Defendant's knowledge or reasonable grounds to believe that the goods were stolen can be implied from his willingness to sell the suit at a mere fraction of its actual value. *See State v. St. Clair*, 17 N.C. App. 22, 193 S.E. 2d 404 (1972); *State v. Hart*, 14 N.C. App. 120, 187 S.E. 2d 351 (1972); *State v. Scott*, 11 N.C. App. 642, 182 S.E. 2d 256 (1971). A dishonest purpose can be inferred from defendant's selling the suit and converting the proceeds to his own use. Finally, there was plenary evidence that the price of the suit was $215.00, thus establishing that the value of the goods received was more than $200.00.

[3] There was thus substantial evidence of each of the elements of feloniously receiving stolen goods. Defendant nevertheless contends that his motion to dismiss for insufficiency of the evidence should have been granted because there was no proof that the receiving took place in Guilford County, as alleged in the indictment. When the question of venue is properly and timely raised, the burden of proof is on the state to show that the offense was committed in the county named in the indictment. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977). In order to raise this question, however, it is necessary to file a motion to dismiss for improper venue prior to trial. G.S. 15A-952. Defendant failed to make such a motion. He cannot raise the issue under his motion to dismiss for insufficiency of the evidence.

[4] Nevertheless, we note that the state did adequately prove venue. The portion of the indictment to which defendant points charges that he "unlawfully, wilfully and feloniously did *have* and *receive* one (1) suit" in Guilford County. Under G.S. 14-71, venue is proper in any county in which a defendant was in possession of the stolen goods. The state alleged and proved and defendant here admitted that he was in possession of the suit in Guilford County. This was sufficient to establish venue. The additional

allegation that the goods were "received" in Guilford County was, under these circumstances, mere surplusage and imposed no additional burden of proof on the state. *See State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). Defendant's assignment of error is without merit.

We have examined each of the other assignments of error brought forward in defendant's brief and conclude the issues raised therein were correctly decided by the Court of Appeals. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM JAMES COLVIN

No. 54

(Filed 30 July 1979)

1. **Homicide § 17.2— evidence of threats**

The trial court in a first degree murder case did not err in permitting a witness to testify that defendant had said he was going to kill his wife if she tried to take his children away from him, since evidence of such threat was admissible to show premeditation and deliberation, and this was so even though the threat was conditional.

2. **Criminal Law § 169.7; Homicide § 17.1— defendant's intent—evidence improperly excluded—subsequent similar evidence admitted**

Even if the trial court erred in excluding defendant's testimony on direct examination in response to a leading question that he did not intend to shoot his wife, defendant was not prejudiced thereby since, during defendant's further testimony, he related his version of the events leading to his wife's death and stated without objection that "it was not my intention to fire that weapon at all."

3. **Witnesses § 1.2— nine year old witness—competency**

Defendant failed to show an abuse of discretion in the trial court's ruling that a nine year old child was competent to testify.

4. **Homicide § 30.2— first degree murder—no instruction on voluntary manslaughter required**

The trial court in a first degree murder case did not err in failing to instruct the jury that a killing in the heat of passion upon adequate provocation would be voluntary manslaughter, since there was no evidence in the record which could support a finding by the jury of adequate provocation.

BEFORE *Judge Snepp* at the 11 September 1978 "Schedule B" Session of MECKLENBURG Superior Court, and on a bill of indictment proper in form, defendant was tried and convicted of murder in the first degree. He was sentenced to life imprisonment and appeals under G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the state.

Hicks & Harris, by Tate K. Sterrett, Attorneys for defendant appellant.

EXUM, Justice.

Defendant's principal assignments of error challenge: (1) the admissibility of testimony concerning threats he made against his wife; (2) the exclusion of testimony by defendant that he did not intentionally kill his wife; (3) the trial court's ruling that a nine-year-old child was competent to testify; and (4) the adequacy of the instructions to the jury on malice and heat of passion. We find no error prejudicial to defendant in any of these instances.

The state's evidence tended to show that in March of 1978 defendant and his wife, Betty Mae Colvin, were having marital difficulties. Defendant had told state's witness Johnny Jackson that his wife was in the process of leaving him, and she was going to take their children with her. Defendant said that he would kill his wife before he would allow her to take his children away from him. Defendant also made statements on 18 March 1978 to three other people, all of whom testified at trial, that he was going to kill unnamed people and go to jail.

On the morning of 19 March 1978 Betty Mae Colvin went to Emma Howze's house. She stayed until mid-afternoon, when she and Ms. Howze went to the Colvins' apartment. Defendant was there. Mrs. Colvin went upstairs, and defendant ordered Ms. Howze out of the house. Ms. Howze left and stood on the porch by the open front door. Mrs. Colvin came downstairs. Defendant got a rifle, pointed it at his wife's head and pulled the trigger. She fell, half inside and half outside the front door. According to medical testimony, Betty Mae Colvin died as a result of a gunshot wound to the head.

Defendant next pointed the rifle at Ms. Howze. A scuffle between the two of them ensued, and Ms. Howze was shot in the foot. Defendant ran.

Defendant presented two witnesses who testified that while they were with defendant on 19 March 1978 they did not hear him make any threatening statements concerning his wife. Defendant testified in his own behalf. He said that on 19 March 1978 his wife told him she was not returning home. Later that afternoon, she and Emma Howze came to defendant's apartment. While his wife was upstairs getting a blouse, defendant told Ms. Howze to get out of his house. When she refused, defendant got a rifle out of the closet, hoping that he could scare Ms. Howze and make her leave. Ms. Howze grabbed the rifle. During a struggle between defendant and Ms. Howze, the rifle fired. When defendant looked up his wife was lying at the bottom of the stairs. Defendant did not know whether he was the one who in fact pulled the trigger of the rifle.

Defendant said he ran because he was scared. He went to Chester, South Carolina, and stayed with his mother. He planned to turn himself in but was waiting until he received money from the settlement of a car accident so that he could hire a lawyer to represent him.

[1] By his first assignment of error defendant argues it was error to allow Jackson to testify that defendant said he was going to kill his wife if she tried to take his children away from him. Defendant contends this evidence was irrelevant and immaterial. We disagree. "Anything that a party to the action has said, if relevant to the issues and not subject to some specific exclusionary rule, is admissible against him as an admission." *State v. Gaines*, 283 N.C. 33, 42, 194 S.E. 2d 839, 845 (1973) (*quoting* Stansbury's North Carolina Evidence § 167 (2d ed. 1963)). In a first degree murder trial, evidence of threats made by defendant against the victim are 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 (1971). This is so even though the threat was conditional. *State v. Baity*, 180 N.C. 722, 105 S.E. 200 (1920); *State v. Rose*, 129 N.C. 575, 40 S.E. 83 (1901). Defendant's first assignment of error is overruled.

[2] When defendant first took the stand at trial, the following exchange, which is the basis of his second assignment of error, took place:

> "Q. Now, let me ask you this, Mr. Colvin. Did you intentionally kill Betty Mae Colvin?
>
> MR. DAVIS: Objection.
>
> COURT: Sustained.
>
> A. No, sir.
>
> COURT: You will not consider that answer, ladies and gentlemen."

The question was leading, and the trial court could properly have sustained the objection to it on that ground. *Cf. State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932 (1976) ("Was your husband in the habit of carrying lots of cash on him or not, Mrs. Hunt?" held leading question). This was the first substantive inquiry made of defendant on direct examination. The danger of the desired answer being suggested by the form of the question was especially high at that point. Good practice would have dictated allowing defendant to relate his version of the events before inquiring as to any specific intent he might have had. Then, even if a particular question were leading, the trial court would have been in a position to determine whether defendant could give an independent answer.

Although the question here was leading, we note that this Court found error in the sustaining of an objection to a virtually identical question in *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972) ("Did you at any time have any intention in your mind of killing George Thomas Smith?"). Defendant in *Freeman*, like defendant here, was charged with first degree murder. When the state relies on premeditation and deliberation in such a case it must prove a specific intent to kill. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). A defendant's testimony that he had no such intent is clearly relevant and ought to be admitted.

Even if the trial court's ruling here was error under *Freeman*, we see no prejudice to defendant by it. During defendant's further testimony he related his version of the events

leading to his wife's death. According to him the rifle was accidently fired during a scuffle with Ms. Howze at a time when defendant thought his wife was still upstairs. He also testified that he did not know whether he pulled the trigger, and he stated without objection that "it was not my intention to fire that weapon at all."

Defendant's defense that he did not intend to shoot his wife was clearly before the jury. Even if the exclusion of his initial statement that he did not intend to kill his wife was error, there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." G.S. 15A-1443(a). This holding is in accord with the general rule that no prejudice arises from "the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted." *Powell v. Daniel*, 236 N.C. 489, 492, 73 S.E. 2d 143, 145 (1952). Defendant's second assignment of error is overruled.

[3] Defendant's third assignment of error challenges the trial court's ruling that Adrian Michelle Young, a nine-year old child, was competent to testify. The question on this issue is "whether the witness understands the obligations of the oath and has sufficient intelligence to give evidence." *State v. Thomas*, 296 N.C. 236, 242-43, 250 S.E. 2d 204, 208 (1978). The trial court here conducted a voir dire and, on the basis of the evidence adduced therein, found that the witness satisfied these criteria. The witness subsequently gave clear and consistent testimony. The trial court's finding of competency will be reversed only on a showing of abuse of discretion. *State v. Cox*, 280 N.C. 689, 187 S.E. 2d 1 (1972). No such showing was made here. Defendant's third assignment of error is overruled.

[4] By his ninth assignment of error defendant contends that the trial court's instructions to the jury were inadequate because there was no instruction that a killing in the heat of passion upon adequate provocation would be voluntary manslaughter. We find no merit in this contention. There is no evidence in the record which could support a finding by the jury of adequate provocation. That being the case, the trial court was not required to instruct on heat of passion. *See State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979); *State v. Hankerson*, 288 N.C. 632,

220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). This assignment of error is overruled.

We have examined defendant's other assignments of error and find they do not merit discussion. In the trial there was

No error.

WACHOVIA MORTGAGE COMPANY v. AUTRY-BARKER-SPURRIER REAL ESTATE, INC.; KLUTTS REALTY AND CONSTRUCTION COMPANY, INC.; J. VAUGHN KLUTTS, JOY W. KLUTTS, RICHARD W. AUTRY, PATRICIA D. AUTRY, ROBERT N. SPURRIER, BLANDINA W. SPURRIER AND JOHN J. BARKER

No. 53

(Filed 30 July 1979)

Appeal and Error § 46 — equally divided Court — judgment affirmed — no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals in the case is affirmed without precedential value.

Justice BROCK did not participate in the consideration or decision of this case.

ON petititon for discretionary review of the decision of the Court of Appeals, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), affirming judgment of *Martin (Harry C.), J.*, entered 12 August 1977 in Mecklenburg Superior Court.

Plaintiff instituted this action on 12 November 1975 to recover deficiencies of $303,925.92 and $147,198.20 remaining after foreclosure of deeds of trust securing a land acquisition and development loan and a construction loan made by plaintiff to certain of defendants including defendant Klutts Realty and Construction Company, Inc. (defendant Klutts Realty). The two loans were made in connection with a townhouse development project in Mecklenburg County known as Treva Woods.

The initial land acquisition and development loan, in amount of $500,000, was secured by a note and deed of trust dated 14 March 1973 executed by defendant Klutts Realty and others. The construction loan, in amount of $576,200, was secured by a note

and deed of trust dated 18 October 1973 executed by certain of defendants including defendant Klutts Realty.

In their answer and amended answers defendants denied liability for the alleged deficiencies and pleaded numerous further defenses. In its third defense defendant Klutts Realty pleaded a counterclaim for $750,000.00.

Plaintiff moved for summary judgment with respect to certain of the further defenses and with respect to the counterclaim. Following a hearing at which it considered the pleadings, depositions, exhibits, answers to interrogatories and affidavits, the trial court granted partial summary judgment as requested by plaintiff.

Defendants appealed to the Court of Appeals. That court affirmed the judgment of the trial court and ordered the cause remanded for further proceedings. Defendant Klutts Realty petitioned this court for discretionary review of that part of the Court of Appeals decision upholding summary judgment as to its third defense and counterclaim. We allowed the petition.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, William L. Rikard, Jr., and Heloise C. Merrill, for plaintiff-appellee.

Mraz and Meacham, by John A. Mraz, for defendant-appellants.

PER CURIAM.

Due to absence on account of illness, Justice Brock did not participate in the decision of this case. The remaining six justices are equally divided as to whether the trial court erred in granting plaintiff's motion for summary judgment with respect to the third defense and counterclaim pleaded by defendant Klutts Realty. Therefore, the decision of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation. *See, e.g., Townsend v. Railway Company,* 296 N.C. 246, 249 S.E. 2d 801 (1978), and cases cited therein.

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

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

GODWIN v. CLARK, GODWIN, HARRIS & LI

No. 171 PC.

Case below: 40 N.C. App. 710.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 July 1979. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 30 July 1979.

JENKINS v. THEATRES, INC.

No. 194 PC.

Case below: 41 N.C. App. 262.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 July 1979.

REAL ESTATE TRUST v. DEBNAM

No. 193 PC.

No. 86 (Fall Term).

Case below: 41 N.C. App. 256.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 30 July 1979.

ROUSE v. MAXWELL

No. 147 PC.

No. 68 (Fall Term).

Case below: 40 N.C. App. 538.

Petition by third-party defendant Simpson for writ of certiorari to North Carolina Court of Appeals allowed 30 July 1979.

STATE v. CHAMBERS and HICKS and DUNN

No. 230 PC.

Case below: 41 N.C. App. 380.

Petition by defendants for discretionary review under G.S. 7A-31 denied 30 July 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 July 1979.

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

STATE v. CROUCH

No. 235 PC.

Case below: 41 N.C. App. 612.

Petition by defendant for certiorari to North Carolina Court of Appeals allowed 3 August 1979 and the cause is remanded to the Court of Appeals for consideration of the case on its merits.

STATE v. LONG

No. 191 PC.

Case below: 41 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 July 1979.

STATE v. WARD

No. 250 PC.

Case below: 41 N.C. App. 768.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 August 1979.

STATE v. WILLIAMS

No. 203 PC.

Case below: 41 N.C. App. 287.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 July 1979.

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

APPEAL AND ERROR

§ 46. Presumptions Arising from Lower Court Proceedings

Where one member of the Supreme Court did not participate in a case and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without precedential value. *Mortgage Co. v. Real Estate, Inc.*, 696.

ARREST AND BAIL

§ 9.1. Propriety of Release on Bail

Whether or not a particular defendant, depending upon the date his crime was committed, faces the death penalty, the crime of first degree murder is a "capital offense" within the meaning of G.S. 15A-533(b). *S. v. Sparks*, 314.

§ 9.2. Bail After Trial

Defendant failed to show an abuse of the trial court's discretion in refusing to set bail while the case was on appeal. *S. v. Sparks*, 314.

ASSAULT AND BATTERY

§ 8. Defense of Self

Where an assault being made on defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law. *S. v. Clay*, 555.

§ 14.4. Nonsuit in Felonious Assault with Firearm

Evidence was sufficient for the jury where it tended to show that defendant shot his victim in the shoulder. *S. v. Gibbs*, 410.

§ 15.6. Instructions on Defense of Self

Trial court's instructions on the force permissible for defendant to protect herself were improper but were more favorable than those to which defendant was entitled. *S. v. Clay*, 555.

ATTORNEYS AT LAW

§ 2. Admission to Practice

When a decision of the Board of Law Examiners rests on a specific fact or facts the existence of which is contested, the Board must resolve the factual dispute by specific findings of fact. *In re Rogers*, 48.

When an applicant for admission to the Bar makes a prima facie showing of his good moral character and, to rebut the showing, the Board of Law Examiners relies on specific acts of misconduct the commission of which is denied by the applicant, the Board has the burden of proving the specific acts by the greater weight of the evidence. *Ibid.*

The "whole record" test is the proper scope of judicial review of findings of the Board of Law Examiners. *Ibid.*

The Board of Law Examiners erred in denying an applicant permission to stand for the N. C. Bar examination on the ground the applicant had failed to demonstrate his good moral character where the record did not contain substantial evidence to support findings, had they been made, that the applicant (1) altered an order form so as to have a clock radio shipped to him but billed to another and (2) posed as another person in an effort to cash a check drawn to the other person. *Ibid.*

AUTOMOBILES

§ 130. Punishment for Driving Under the Influence

A district court judge did not have inherent power to suspend the entire sentence imposed upon a defendant for a second offense of operating a motor vehicle while under the influence of intoxicating liquor. *In re Greene*, 305.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

N. C. law does not grant a defendant the right to discover the criminal record of a State's witness. *S. v. Ford*, 144.

Trial court did not err in denial of defendant's motion for "favorable evidence" in the form of statements made by the victims to a deputy sheriff so that he could see if there was any exculpation. *S. v. Silhan*, 660.

BOUNDARIES

§ 8.2. Parties in Action to Establish Boundary

Trial court erred in entering a judgment determining the boundary between the parties' land since plaintiff children who were the remaindermen of plaintiff father's tract were not brought into court so as to give the court jurisdiction over their persons. *Wadsworth v. Georgia-Pacific Corp.*, 172.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1.2. What Constitutes "Breaking"

An entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a). *S. v. Boone*, 652.

§ 3.1. Description of Premises in Indictment

There was no fatal variance where a first degree burglary indictment alleged the number of the victim's residence was 130 and the evidence showed the number was 126. *S. v. Simpson*, 399.

§ 5. Sufficiency of Evidence Generally

State's evidence failed to show that the victim was in actual occupation of his motel room at the time of an alleged breaking or entering by defendant and only second degree burglary should have been submitted to the jury, where defendant pushed the victim into the motel room as he opened the door. *S. v. Jolly*, 121.

§ 5.8. Breaking and Entering of Residence

Evidence was sufficient for the jury where it tended to show that defendant broke a window pane and extended his hand in which he held a pistol into the victim's home. *S. v. Gibbs*, 410.

§ 6.2. Instructions on Felonious Intent

Trial court in a first degree burglary case properly instructed on defendant's intent to rape at the time he entered the victim's home. *S. v. Faircloth*, 388.

§ 7. Instructions on Lesser Included Offenses

Trial court in a burglary case properly refused to submit felonious breaking or entering where the evidence tended to show that defendant gained entry into the

CONSTITUTIONAL LAW—Continued

§ 50. Speedy Trial Generally

Defendant was not denied a speedy trial by the lapse of time between the date the U.S. Supreme Court ordered reconsideration of his case and the time when the N.C. Supreme Court ordered that defendant receive a new trial. *S. v. Sparks*, 314.

§ 52. Requirement that Delay be Prejudicial

Defendant was not denied his right to a speedy trial by the more than five year delay between commission of the crimes charged and the date the indictments were returned. *S. v. McGuire*, 69.

§ 56. Right to Trial by Jury

Trial of defendant by a jury who had the opportunity to hear other pleas and sentences imposed in unrelated cases did not violate the spirit of G.S. 15A-943. *S. v. Hunt*, 131.

Defendant was not entitled to a mistrial in a first degree murder case where, in the presence of the jury that tried defendant, the grand jury returned five unrelated first degree murder indictments. *S. v. Sparks*, 314.

§ 80. Death and Life Sentences

On retrial the trial court did not err in imposing a life sentence upon defendant for conviction of first degree murder, and defendant's contention that the maximum penalty he could receive was imprisonment for 10 years under G.S. 14-2 was without merit. *S. v. Sparks*, 314.

§ 82. Conditions of Confinement

Defendant, who was stabbed by other inmates while in prison, was not denied adequate medical care and therapy, and evidence was sufficient to show that reasonable steps were taken to protect defendant's safety. *S. v. Sparks*, 314.

CONTRACTS

§ 29.3. Special Damages

Plaintiff wife was not entitled to recover damages for mental anguish suffered as a result of defendant husband's alleged breach of a provision of a separation agreement that he would pay any deficiency in plaintiff's 1968 income taxes resulting from a disallowance of her attempted deduction of counsel fees. *Stanback v. Stanback*, 181.

CONVICTS AND PRISONERS

§ 3. Injury to Prisoners

Evidence was sufficient to show that reasonable steps were taken to protect defendant's safety after his injury at the hands of other prison inmates. *S. v. Sparks*, 314.

COUNTIES

§ 6.2. Expenditures of Funds

An appropriation by a board of county commissioners to a school for dyslexic children was not authorized by statute. *Hughey v. Cloninger*, 86.

CRIMINAL LAW

§ 9. Principals in the First or Second Degree

It is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the principle of acting in concert. *S. v. Joyner*, 349.

§ 9.3. Determination of Guilt as Principal in Second Degree

Defendant could properly be convicted of the crime against nature, assault inflicting serious injury, and armed robbery under the principle of concerted action although there was no evidence that defendant did any act necessary to constitute such crimes. *S. v. Joyner*, 349.

§ 15. Venue

The issue of venue cannot be raised under a motion to dismiss for insufficiency of the evidence. *S. v. Haywood*, 686.

Venue in an action for receiving stolen goods was properly shown to be Guilford County where the evidence showed that defendant was in possession of the stolen goods in Guilford County. *Ibid.*

§ 15.1. Pretrial Publicity as Ground for Change of Venue

Trial court did not err in denying defendant's motion for change of venue made on the ground that prejudicial publicity prevented his getting a fair trial. *S. v. Faircloth*, 100.

§ 29. Mental Capacity to Stand Trial

Trial court did not err in failing to have defendant examined by a psychiatrist when his capacity to proceed was raised by him at trial. *S. v. McGuire*, 69.

Court's conclusion that defendant was competent to stand trial was supported by expert testimony that defendant was competent to stand trial as a result of receiving medication. *S. v. Buie*, 159.

§ 31. Judicial Notice

In a prosecution for first degree burglary where the State relied upon eye witness identification of defendant by bright moonlight, the court on appeal takes judicial notice of the phase of the moon and the time of rising of the moon from the records of the U.S. Naval Observatory and awards defendant a new trial. *S. v. Dancy*, 40.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

In a prosecution for first degree burglary and armed robbery, trial court committed prejudicial error in the admission of a portion of defendant's confession in which he admitted he committed sodomy with a dog. *S. v. Simpson*, 399.

§ 34.2. Admission of Evidence of Other Offenses as Harmless Error

Testimony by a co-conspirator in a robbery-murder that he had on one occasion obtained cocaine from one defendant, if erroneous, was not prejudicial. *S. v. Logner*, 539.

§ 34.7. Admission of Evidence of Other Offenses to Show Intent or Motive

Evidence concerning defendant's complicity in the killing of the victim's brother on the day prior to the killing of the victim was admissible to show defendant's motive in killing the victim. *S. v. Keller*, 674.

Evidence that defendants had robbed the male victim of his social security check on 3 January was relevant to show that when defendants entered the vic-

tims' residence on 3 February their purpose was to rob the male victim of his monthly check. *S. v. Yellorday*, 574.

§ 40.1. Admissibility of Evidence and Record at Former Trial

Trial court did not err in allowing the court reporter to read from the transcript corroborative testimony from defendant's first trial in this same case. *S. v. Sparks*, 314.

§ 43. Photographs

A photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence. *S. v. Hunt*, 447.

§ 50.1. Expert Opinion Testimony

Trial court did not err in admitting testimony by a forensic pathologist as to the possible position of the victim's body at the time of infliction of a bullet wound. *S. v. Sparks*, 314.

§ 57. Evidence in Regard to Firearms

Trial court in a first degree murder case properly admitted evidence concerning chemical tests performed on defendant's hands and trousers which tended to show the presence of gunpowder. *S. v. Sparks*, 314.

§ 61.2. Evidence of Footprints

A photograph of a shoe sole impression, when shown by extrinsic evidence to represent, depict or portray accurately the shoe sole print it purports to show, is admissible as substantive evidence. *S. v. Hunt*, 447.

§ 62. Lie Detector Tests

Trial court in a rape case had the discretion to admit the results of a polygraph test administered to defendant where it was stipulated that the results of such test would be admissible in evidence, and the results of a psychological stress evaluation test were not admissible where there had been no such stipulation. *S. v. Milano*, 485.

Trial court properly excluded a question posed to a lie detector examiner relating to the admissibility of a polygraph test in court. *Ibid.*

§ 66.1. Competency of Witness to Identify Defendant; Opportunity for Observation

Identification testimony by a witness who had an opportunity to see defendant within a few feet of her in broad daylight for approximately five seconds was not inherently incredible. *S. v. Davis*, 556.

§ 66.3. Pretrial Lineups or Showups

Trial court properly excluded a question asked of a police officer concerning the "inherent danger" of a show-up identification. *S. v. Milano*, 485.

§ 66.5. Right to Counsel at Lineup

Defendant was not entitled to be furnished counsel at a lineup where he voluntarily appeared in the lineup at a time when he was not in custody. *S. v. Silhan*, 660.

Trial court properly refused to suppress lineup and in-court identifications of defendant because he was not represented by counsel at the lineup where the court found that defendant waived his right to counsel, the lineup was not suggestive, and the in-court identifications were of independent origin. *Ibid.*

CRIMINAL LAW—Continued

§ 66.6. Suggestiveness of Lineup

Lineup identification procedures involving defendant were not impermissibly suggestive. *S. v. Davis*, 566.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Evidence was sufficient to support the trial court's conclusion that a photographic identification procedure was proper and was not impermissibly suggestive. *S. v. Gibbs*, 410.

§ 67.1. Voice Identification

Voice identification procedures involving defendant were not impermissibly suggestive. *S. v. Davis*, 566.

§ 71. Shorthand Statements of Fact

In a prosecution for second degree murder of defendant's child, trial court did not err in allowing lay witnesses to testify they had observed burns on the body of the child since such statements were admissible as shorthand statements of fact. *S. v. Stinson*, 168.

§ 73.2. Statements not Within Hearsay Rule

Testimony by officers that they asked an eyewitness who was not present at trial certain questions about the identity of the robbers, that the eyewitness answered their questions, and that they had later unsuccessfully tried to locate the eyewitness did not constitute hearsay. *S. v. Yellorday*, 574.

§ 74.3. Confessions Implicating Codefendants

In a prosecution of three defendants, trial court did not err in permitting an SBI agent to testify with respect to a pretrial statement made by one defendant since the statement was made freely and voluntarily and did not implicate the defendant who complained of its admission. *S. v. Hunter*, 272.

§ 75.7. What Constitutes Custodial Interrogation

Evidence was sufficient to support trial court's conclusion that defendant's inculpatory statement made to officers was voluntary and did not stem from a custodial interrogation. *S. v. Clay*, 555.

§ 75.8. Warning of Constitutional Rights Before Resumption of Interrogation

Miranda warnings given to defendant at 9:30 a.m. and 10:10 a.m. prior to an interview of defendant which lasted until 2:45 p.m. were still effecitve when officers again interviewed defendant at 5:15 p.m. *S. v. Simpson*, 399.

§ 75.9. Volunteered Statements

Miranda warnings were not necessary to render admissible defendant's volunteered statement in which he gave a false name and falsely told officers the person they were looking for was his cousin who lived at a different address. *S. v. Powell*, 419.

§ 75.11. Waiver of Constitutional Rights Before Interrogation

Evidence was sufficient to support trial court's conclusion that defendant waived his right to counsel though he did not expressly do so. *S. v. Connley*, 584.

§ 75.14. Defendant's Mental Capacity to Confess

Trial court erred in denying defendant's motion to suppress his confession made approximately 24 hours after commission of the crime charged where defend-

ant offered evidence that he was mentally incompetent at the time he confessed. *S. v. Ross*, 137.

§ 76.6. Sufficiency of Voir Dire Findings

Trial court's finding that no hope of reward or inducement was made by police officers for defendant to make certain statements was sufficient to support trial court's admission of defendant's statements. *S. v. Stinson*, 168.

§ 78. Stipulations

The courts are not bound by a stipulation that officers had no probable cause to conduct a warrantless search of the glove compartment of defendant's car. *S. v. Phifer*, 216.

§ 87.4. Redirect Examination of Witnesses

In a prosecution for robbery-murder in Wake County in which a coconspirator testified that he and another unarmed person had committed a robbery-murder in Johnston County about three weeks before the crimes in question, defendants were not prejudiced by the court's admission of irrelevant testimony on redirect that the other participant in the Johnston County robbery-murder was not one of certain named persons, that the other participant was not from Lee, Chatham or Johnston Counties, and that the other participant was armed with a .22 caliber rifle. *S. v. Logner*, 539.

§ 88.4. Cross-Examination of Defendant

Defendant was not prejudiced by the district attorney's question on cross-examination as to whether defendant had been convicted of first-degree burglary. *S. v. Hunt*, 131.

§ 89.2. Corroboration of Witnesses

Telephone company records showing that numerous telephone calls had been made between the residence of a coconspirator who testified for the State and the residence of one defendant during a short period of time prior to the robbery-murder were properly admitted to corroborate the testimony by the coconspirator. *S. v. Logner*, 539.

§ 89.4. Impeachment by Prior Inconsistent Statements

Defendant failed to show he was prejudiced by the trial court's refusal to permit defendant to have the prosecutrix read from the transcript of a prior trial in order to refresh her recollection of a prior inconsistent statement. *S. v. Joyner*, 349.

§ 89.5. Slight Variances in Corroborating Testimony

Trial court did not err in admitting as corroborating evidence a statement which varied slightly from the witness's testimony at trial. *S. v. Wilkins*, 237.

§ 92.4. Consolidation of Charges Against One Defendant

Trial court did not err in consolidating for trial charges against defendant which arose from two break-ins of the same dwelling. *S. v. Powell*, 419.

§ 92.5. Motion for Severance

Trial court did not err in denying motion for severance made by two defendants on the ground that outbursts by a third defendant deprived them of a fair and impartial trial. *S. v. McGuire*, 69.

CRIMINAL LAW—Continued

§ 99.2 Court's Expression of Opinion by Questions or Remarks During Trial

The trial judge did not, by asking certain questions, impermissibly comment on the evidence. *S. v. Hunt*, 258.

§ 99.4. Court's Expression of Opinion in Ruling on Objections

Trial court did not express an opinion by telling a witness that the witness could not draw any conclusions but could testify to what he saw. *S. v. Faircloth*, 388.

§ 99.8. Court's Examination of Witnesses

Trial court's questions to a 61 year old robbery victim were solely for the purpose of clarifying his confused testimony and did not constitute an expression of opinion. *S. v. Yellorday*, 574.

§ 101. Misconduct Affecting Jury

Trial court did not err in failing to poll the jury individually as to whether they had heard a statement made by one defendant. *S. v. McGuire*, 69.

§ 102.5. Improper Questions by Prosecutor

Defendant was not entitled to a mistrial based on allegedly improper questions of the district attorney in questioning defendant about evidence which the trial court had suppressed. *S. v. Gibbs*, 410.

District attorney's questions to officers in which he implied that the answers of an absent eyewitness would have paralleled and corroborated testimony by the victims had he been present were improper but did not constitute prejudicial error. *S. v. Yellorday*, 574.

§ 106.5. Sufficiency of Accomplice Testimony to Overrule Nonsuit

The fact that an accomplice admitted that he perjured himself at a prior trial wherein he denied any knowledge of or participation in the murder in question bore only on his credibility and not the sufficiency of his testimony to sustain defendant's conviction. *S. v. Keller*, 674.

§ 112.1. Instructions on Reasonable Doubt

Trial court's instructions on reasonable doubt were sufficient. *S. v. Logner*, 539.

Trial court's definition of reasonable doubt was proper. *S. v. Faircloth*, 100.

§ 113.3. Charge on Subordinate Features; Request for Instructions

Trial court's failure to instruct the jury on eyewitness testimony in this rape case was not prejudicial error in the absence of a request by defendant for such an instruction. *S. v. Milano*, 485.

§ 113.7. Charge on Acting in Concert

It is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the principle of acting in concert. *S. v. Joyner*, 349.

Trial court's instruction on acting in concert was not unfavorable to defendant. *Ibid.*

Evidence was sufficient to support an instruction that defendant was acting in concert with others in acts constituting rape, robbery and assault. *S. v. Barnes*, 442.

CRIMINAL LAW—Continued

§ 114.2. No Expression of Opinion in Court's Statement of Evidence or Contentions

In a prosecution for rape and crime against nature, trial court's instruction that defendant contended that if the jury found he participated in any of the sexual acts, he thought it was with the victim's consent and that it seemed to him that "everybody was just trying to have a little fun," was not so lacking in evidentiary support and contrary to what defendant contended that the trial court ridiculed his defense and therefore expressed an opinion on the evidence. *S. v. Joyner*, 349.

Trial court did not express an opinion that a conspiracy had been proved by his statement in the charge, "Now we are involved at this issue ladies and gentlemen of the jury, with a conspiracy." *S. v. Logner*, 539.

Trial court did not express an opinion that the fact of a robbery had been proved by his statement that "the court may have erroneously in this charge referred to the date of this robbery 7 February." *Ibid.*

Trial court did not express an opinion that it had been proved that a State's witness was present at the robbery-murder in question. *Ibid.*

§ 114.3. No Expression of Opinion in Other Instructions

Defendant was not prejudiced when the court failed to include not guilty as a possible verdict in one portion of the charge. *S. v. Barnes*, 442.

Defendant was not prejudiced when the court instructed on the elements of first degree rape and then stated that the evidence did not prove first degree rape and the jury could not return such a verdict. *Ibid.*

§ 117.4. Charge on Credibility of Accomplice Testifying for the State

Defendants had no standing to challenge either the propriety or effectiveness of a grant of immunity to a witness testifying against them, and defendants were not prejudiced by the court's instruction that the witness had been granted immunity and cautioning the jury to scrutinize his testimony. *S. v. Phillips*, 600.

Trial court sufficiently summarized testimony bearing on the credibility of a State's witness and sufficiently informed the jury that the witness was testifying pursuant to a grant of immunity from the State. *S. v. Logner*, 539.

§ 118.2. Charges on Contentions of Defendants

It was not error for the court to state defendant's contentions in a manner consistent with defendant's own testimony even if defendant's testimony did strain credulity. *S. v. Barnes*, 442.

§ 120. Instructions on Possible Punishment

Trial judge did not abuse his discretion in failing to charge on the possible punishment for all offenses submitted to the jury. *S. v. Jolly*, 121.

§ 122.1 Jury's Request for Additional Instructions

Defendant was not prejudiced by the judge's denial of the jury's request to review evidence although the judge's ruling was based on a misapprehension of the law. *S. v. Ford*, 28.

Where the jury, after deliberating for one hour, requested additional instructions on second degree murder, voluntary manslaughter and malice, trial court was not required to repeat its original instructions on intent and heat of passion. *S. v. Wilkins*, 237.

CRIMINAL LAW—Continued

§ 128.2. Motion for Mistrial

Defendant in a first degree murder prosecution was not entitled to a mistrial because the prosecutor introduced a lady to the jury as the widow of the victim. *S. v. Sparks*, 314.

§ 138.4. Sentence Where There Are Several Charges

Where defendant was convicted of felonious larceny and felonious entry, the counts were consolidated for judgment, but defendant's motion to dismiss the felonious entry charge should have been granted, defendant was not entitled to be resentenced since the sentence of imprisonment was within the limits of punishment that can be imposed for larceny alone. *S. v. Boone*, 652.

§ 138.7. Evidence Considered in Determining Sentence

There was no merit to defendant's contention that the trial court erred in sentencing him in that it took into consideration when he would be eligible for parole if given a life sentence. *S. v. Wilkins*, 237.

§ 140. Concurrent and Cumulative Sentences

In a prosecution for kidnapping, first degree rape and armed robbery, the trial court did not err in failing to provide for all sentences to run concurrently, since the three crimes, though arising from the same incident, were separate offenses. *S. v. Faircloth*, 100.

§ 142. Continuance of Prayer for Judgment or Suspension of Sentence

The courts of N.C. do not have an "inherent" power to continue prayer for judgment on conditions or to suspend sentence where an active sentence is made mandatory by the General Assembly. *In re Greene*, 305.

§ 158. Conclusiveness of Record

Defendant is not entitled to introduce into evidence a court record showing that a charge against a witness had been dismissed on the ground that the prosecutor, at the time he questioned the witness, was holding the court record in his hand and asking questions based thereon since there was nothing in the record on appeal to show what document the prosecutor was holding at the time he was cross-examining the witness. *S. v. Gibbs*, 410.

§ 162. Objections to Evidence

Defendant was not prejudiced by the admission into evidence of the results of a trigger-pull test performed on the murder weapon since defendant did not object at the appropriate time. *S. v. Wilkins*, 237.

§ 165. Exceptions to Argument of Prosecutor

There was no merit to defendant's contention that the district attorney in his jury argument exceeded the bounds of propriety to the prejudice of defendant since defendant made no objection at trial to the jury argument. *S. v. Hunter*, 272.

§ 175.2. Review of Orders During Trial

Trial judge did not abuse his discretion in the denial of defendant's motion for a recess to locate an allegedly newly discovered witness. *S. v. Ford*, 144.

§ 177. Determination and Disposition of Cause

Where one member of the Supreme Court did not participate in the consideration or decision of the case and the remaining six justices were equally divided, the opinion of the Court of Appeals is affirmed without precedential value. *S. v. Oxner*, 44.

DAMAGES

§ 11.1. Punitive Damages

Defendant's conduct in a trespass and false imprisonment case was sufficiently outrageous to warrant the submission of issues of punitive damages to the jury. *Blackwood v. Cates*, 163.

§ 12.1. Pleading Punitive Damages

Plaintiff's complaint stated a claim for punitive damages for the tort of intentional infliction of serious emotional distress accompanying breach of contract. *Stanback v. Stanback*, 181.

DESCENT AND DISTRIBUTION

§ 8. Bastards

The N. C. statutes governing the right of an illegitimate child to inherit from, by, and through his father do not violate the Equal Protection and Due Process Clauses of the U. S. Constitution. *Mitchell v. Freuler*, 206.

DIVORCE AND ALIMONY

§ 21. Enforcement of Alimony Awards

Plaintiff was entitled to specific performance of a separation agreement not incorporated into the parties' divorce decree. *Moore v. Moore*, 14.

§ 21.3. Evidence in Proceeding to Enforce Alimony Award

In an action for specific performance of alimony provisions of a separation agreement not made a part of the parties' divorce decree, trial court erred in excluding evidence of defendant's income, assets and liabilities. *Moore v. Moore*, 14.

ELECTRICITY

§ 7.1. Sufficiency of Evidence of Negligence of Power Company in Causing Fire

A permissible inference of negligence by defendant power company arose under the doctrine of res ipsa loquitur in this action to recover for fire damage to plaintiffs' barn. *Snow v. Power Co.*, 591.

EMINENT DOMAIN

§ 6.3. Evidence of Damages to Remaining Land

G.S. 136-112 in no way attempts to restrict expert real estate appraisers to any particular method of determining the fair market value of property either before or after condemnation, and it was not error for the court to permit defendant's witness to testify that he derived defendant's damages by application of the value of the part taken plus damages to the remainder formula. *Board of Transportation v. Jones*, 436.

§ 13.5. Instructions in Condemnation Action

Trial court properly instructed on the before and after value method to compute defendant's damages. *Board of Transportation v. Jones*, 436.

Plaintiff could not complain that the trial court failed adequately to define general and special benefits where plaintiff failed to request further instruction. *Ibid.*

EVIDENCE

§ 22.1. Evidence at Former Trial or Proceeding

In an action by dependents of a deceased employee to recover death benefits, a transcript of the employee's testimony at an earlier hearing on the employee's claim for benefits was not inadmissible as hearsay. *Booker v. Medical Center*, 458.

§ 32.1. Parol Evidence Rule; Requirement of Integration

In an action for specific performance of an option agreement to convey interests in real estate, the admission of parol testimony concerning purchase price and expiration date was not permissible. *Craig v. Kessing*, 32.

§ 32.3. Subsequent Parol Agreements

In an action for specific performance of an option agreement to convey interests in real estate, the exception to the parol evidence rule made in the case of subsequently altered instruments was inapplicable. *Craig v. Kessing*, 32.

§ 34.1. Admissions

A party's adverse statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than judicial admissions. *Woods v. Smith*, 363.

The allegation of negligence against one defendant in the complaint of plaintiff who joins two defendants asserting claims of negligence against them in the alternative, when admitted by the second defendant in his answer, is not a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to plaintiff. *Ibid.*

FALSE IMPRISONMENT

§ 2.1. Sufficiency of Evidence

Defendant could be held liable for a false arrest and imprisonment of plaintiff even though a police officer actually made the arrest. *Blackwood v. Cates*, 163.

§ 3. Damages

Defendant's conduct in a trespass and false imprisonment case was sufficiently outrageous to warrant the submission of issues of punitive damages to the jury. *Blackwood v. Cates*, 163.

FIRES

§ 3. Evidence

A permissible inference of negligence by defendant power company arose under the doctrine of res ipsa loquitur in this action to recover for fire damage to plaintiffs' barn. *Snow v. Power Co.*, 591.

GRAND JURY

§ 2. Nature and Functions

Evidence elicited on cross-examination concerning an arson victim's grand jury appearance was not a proper subject for consideration on a motion to dismiss the indictment. *S. v. Phillips*, 600.

HOMICIDE

HOMICIDE—Continued

Where the jury could properly have found that defendant inflicted a number of injuries on the body of his two year old son over a period of time and then finally inflicted blows sufficient to cause death, the jury could have inferred the necessary malice to support a conviction of second degree murder. *S. v. Stinson*, 168.

§ 24.1. Instructions on Presumptions Arising from Use of Deadly Weapon

Trial court's instructions on the presumptions arising from use of a deadly weapon were proper. *S. v. Harris*, 24.

The trial court in a second degree murder prosecution did not err in using the phrase "If the State proves beyond a reasonable doubt *or it is admitted*" when instructing on presumptions arising from the intentional infliction of a wound proximately causing death. *S. v. Wilkins*, 237.

§ 24.2. Instructions on Defendant's Burden of Overcoming Presumption of Malice

Trial court in a homicide case erred in giving the jury an instruction which was subject to the interpretation that the jury should infer malice and unlawfulness from evidence that defendant intentionally inflicted a wound on deceased with a deadly weapon causing death in the absence of evidence raising a reasonble doubt as to the existence of these elements. *S. v. Patterson*, 247.

§ 28.4. Instructions on Duty to Retreat

The use of deadly force in a defense of the habitation is justified only to prevent a forcible entry into the habitation under certain circumstances, but once the assailant has gained entry, the usual rules of self-defense replace the rules governing defense of habitation with the exception that there is no duty to retreat. *S. v. McCombs*, 151.

§ 30. Instruction on Second Degree Murder Where Premeditated and Deliberated Murder Charged

In a prosecution for first degree murder on the theory of premeditation and deliberation, trial court must submit to the jury an issue of second degree murder as an alternative verdict. *S. v. Keller*, 674.

§ 30.2. Submission of Lesser Degree of Crime; Manslaughter

Trial court in a second degree murder case did not err in failing to instruct the jury on voluntary manslaughter. *S. v. Ford*, 144.

Trial court in a first degree murder case did not err in failing to instruct the jury that a killing in the heat of passion upon adequate provocation would be voluntary manslaughter. *S. v. Colvin*, 691.

§ 31.1. Punishment for First Degree Murder

On retrial the trial court did not err in imposing a life sentence upon defendant for conviction of first degree murder, and defendant's contention that the maximum penalty he could receive was imprisonment for 10 years under G.S. 14-2 was without merit. *S. v. Sparks*, 314.

HUSBAND AND WIFE

§ 13. Enforcement of Separation Agreement

Plaintiff was entitled to specific performance of a separation agreement not incorporated into the parties' divorce decree. *Moore v. Moore*, 14.

In an action for specific performance of alimony provisions of a separation agreement not made a part of the parties' divorce decree, trial court erred in excluding evidence of defendant's income, assets and liabilities. *Ibid.*

INDICTMENT AND WARRANT

§ 14. Grounds to Quash

Trial court in a prosecution for arson did not err in denying defendants' motion to dismiss on the ground that the indictment against them was based solely on the perjured testimony of the witness whose motel and residence were burned. *S. v. Phillips*, 600.

§ 15. Time for Making Motion to Quash

Defendants' motion to dismiss the indictment which was made at the conclusion of the evidence was not timely. *S. v. Phillips*, 600.

§ 17.1. Variance; Charging Same Offense

There was a fatal variance between the indictment and proof where the indictment charged defendant kidnapped the victim for the purpose of facilitating flight following the commission of the felony of rape but the evidence tended to show that defendant kidnapped the victim for the purpose of facilitating the commission of the felony of rape. *S. v. Faircloth*, 100.

§ 17.3. Variance; Place

There was no fatal variance where a first-degree burglary indictment alleged the number of the victim's residence was 130 and the evidence showed the number was 126. *S. v. Simpson*, 399.

INSURANCE

§ 67. Accident Insurance; Presumptions

When plaintiff in an action to recover death benefits under a policy insuring against loss of life due to "accidental bodily injury" makes a showing of unexplained, violent death by external means which is not wholly inconsistent with accident, the presumption arises that the means were accidental. *Moore v. Insurance Co.*, 375.

§ 67.2. Accident Insurance; Sufficiency of Evidence

Trial court erred in directing a verdict against plaintiff in an action on a death policy where plaintiff's evidence did not establish conclusively that her husband died by suicide but would also permit an inference of accident from a showing of the unexplained, violent death by external means. *Moore v. Insurance Co.*, 375.

§ 126. Fire Insurance; Conditions as to Sole Ownership

G.S. 58-176 providing that insurance coverage shall in no event be for more than the interest of the insured encompasses more than legal title and is broad enough to cover the entire property which is insured by one cotenant, acting as agent, for the benefit of all the owners. *Collins v. Insurance Co.*, 680.

JUDGMENTS

§ 25.3. Setting Aside; Imputation to Litigant of Attorney's Failure to Plead

Trial court properly allowed plaintiff's motion to set aside a divorce judgment entered in her favor because of excusable neglect of her attorney in filing a complaint based on one year's separation rather than on adultery. *Wood v. Wood*, 1.

JURY

§ 2.1. Grounds for Motion for Special Venire

Trial court did not abuse its discretion in denial of defendant's motion for a special venire from another county because of alleged publicity in the county of trial concerning defendant's arrest for subsequent offenses in another county. *S. v. Silhan*, 660.

KIDNAPPING

§ 1. Elements of Offense

There was a fatal variance between the indictment and proof where the indictment charged defendant kidnapped the victim for the purpose of facilitating flight following the commission of the felony of rape but the evidence tended to show that defendant kidnapped the victim for the purpose of facilitating the commission of the felony of rape. *S. v. Faircloth*, 100.

The kidnapping statute prima facie violates no provision of the State or Federal Constitutions, and restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. *S. v. Silhan*, 660.

§ 1.3. Instructions

It would have been improper for the court to have charged that in order to constitute kidnapping any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance. *S. v. Silhan*, 660.

LARCENY

§ 6. Competency and Relevancy of Evidence

In a prosecution of defendant for felonious larceny, trial court did not err in admitting into evidence a "booster box." *S. v. Boone*, 652.

MALICIOUS PROSECUTION

§ 8. Pleadings

Plaintiff's complaint failed to state a claim for malicious prosecution based on a prior civil suit where it contained no allegation there was an arrest of her person, seizure of her property, or some other element of special damage resulting from the action. *Stanback v. Stanback*, 181.

MASTER AND SERVANT

§ 47.1. Workmen's Compensation; Construction Generally

It is generally held that the right of a deceased employee's dependents to compensation is governed by the law in force at the time of death. *Booker v. Medical Center*, 458.

§ 68. Workmen's Compensation; Occupational Diseases

In an action by deceased employee's dependents to recover death benefits, evidence was sufficient to support the Industrial Commission's conclusion that the deceased employee's serum hepatitis resulted from his handling of blood samples in his work as lab technician and that serum hepatitis was not an ordinary disease of life to which the general public is equally exposed. *Booker v. Medical Center*, 458.

MASTER AND SERVANT—Continued

An employee's right to compensation in cases of occupational disease should be governed by the law in effect at the time of disablement. *Wood v. Stevens & Co.*, 636.

Judicial notice as to the essential characteristics of byssinosis was inappropriate. *Ibid.*

§ 90. Workmen's Compensation; Notice to Employer of Accident

In an action by dependents of a deceased employee to recover death benefits, the employer waived its right to notice of the employee's disease where it failed to raise that issue at the hearing before the Industrial Commission. *Booker v. Medical Center*, 458.

§ 91. Workmen's Compensation; Filing of Claim Generally

Since plaintiff dependents' claim for compensation did not arise until the employee's death, his failure to file a claim for disability compensation within the statutory period did not bar his dependents' claim for death benefits. *Booker v. Medical Center*, 458.

§ 94.1. Workmen's Compensation; Insufficiency of Findings by Industrial Commission

Where plaintiff alleged that she was disabled by byssinosis after the effective date of the present version of G.S. 97-53(13), it became incumbent upon the Industrial Commission to determine when plaintiff became disabled before it decided which law applied to her claim. *Wood v. Stevens & Co.*, 636.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Property owners who have signed a voluntary annexation petition have the right to withdraw from the petition at any time up until the governing municipal body has taken action on the petition by annexing the area described in the petition, and when signatures have been withdrawn from a voluntary annexation petition, the governing body is without jurisdiction to take any further action on the petition as submitted. *Conover v. Newton*, 506.

§ 2.1. Annexation; Compliance With Statutory Requirements in General

The fact that the metes and bounds description in a resolution of intent to annex failed to close because one small piece of property was not included within it was not fatal to the validity of the annexation ordinance. *Conover v. Newton*, 506.

An amendment of an annexation report after the public hearing but before passage of the annexation ordinance to reflect minor changes in the financing of services for the current fiscal year in the area proposed to be annexed and to reflect a reduction in size of the area was within the amendment authorization of G.S. 160A-37(e). *Ibid.*

NEGLIGENCE

§ 31. Effect of Doctrine of Res Ipsa Loquitur on Sufficiency of Evidence

A permissible inference of negligence by defendant power company arose under the doctrine of res ipsa loquitur in this action to recover for fire damage to plaintiffs' barn. *Snow v. Power Co.*, 591.

PERJURY

§ 1. Nature and Essentials of Offense of Perjury

Trial court in a prosecution for arson did not err in denying defendants' motion to dismiss on the ground that the indictment against them was based solely on the perjured testimony of the witness whose motel and residence were burned. *S. v. Phillips*, 600.

PRISONS

§ 2. Custody and Control of Prisoners

Defendant, who was stabbed by other inmates while in prison, was not denied adequate medical care and therapy. *S. v. Sparks*, 314.

PROCESS

§ 19. Actions for Abuse of Process

Plaintiff's complaint failed to state a claim for abuse of process where it failed to allege that defendant committed any willful act not proper in the regular course of the proceeding once he initiated the suit against plaintiff. *Stanback v. Stanback*, 181.

PROHIBITION, WRIT OF

§ 1. Generally

A Writ of Prohibition was issued by the Supreme Court directing a district court judge, upon a defendant's plea of guilty or plea of nolo contendere in his court to a charge of a second or third offense of operating a motor vehicle in violation of G.S. 20-138, G.S. 20-139(a) or G.S. 20-139(b), to pronounce judgment in accordance with the provisions of G.S. 20-179. *In re Greene*, 305.

PUBLIC OFFICERS

§ 8.1. Presumption of Regularity of Official Acts

The presumption of the regularity of official acts applies to the mailing of notice to a taxpayer of a tax foreclosure sale of his property, and the party attacking the foreclosure sale has the burden of proving such notice was not mailed to the taxpayer. *Henderson County v. Osteen*, 113.

RAPE

§ 1. Elements of the Offense

There was a fatal variance between the indictment and the proof where the indictment charged defendant kidnapped the victim for the purpose of facilitating flight following commission of the felony of rape but the evidence tended to show that defendant kidnapped the victim for the purpose of facilitating the commission of the felony of rape. *S. v. Faircloth*, 100.

§ 4.3. Evidence of Character of Prosecutrix; Unchastity

The exclusion of cross-examination of a rape victim as to the length of her pregnancy when she had an abortion prior to the incident in question cannot be held prejudicial error where the verdict could not have been influenced thereby. *S. v. Milano*, 485.

RAPE—Continued

§ 5. Sufficiency of Evidence

Evidence in a first degree rape case was sufficient to show that the rape of the victim was procured by the use of a deadly weapon where it tended to show that defendant used a knife. *S. v. Faircloth*, 100.

State's evidence was sufficient to show a rape victim's resistance was overcome and her submission procured by use of a deadly weapon so as to support submission of an issue of defendant's guilt of first degree rape. *S. v. Joyner*, 349.

§ 6. Instructions

Trial court's instructions in a second degree rape case on withdrawn consent were improper. *S. v. Way*, 293.

Defendant was not prejudiced when the court instructed on the elements of first degree rape and then stated that the evidence did not prove first degree rape and the jury could not return such a verdict. *S. v. Barnes*, 442.

§ 6.1. Instructions on Lesser Degrees of Crime

Trial court in a first degree rape case erred in failing to submit second degree rape to the jury where defendant presented evidence that he did not have a gun on the day in question, and where there was evidence that would support a jury finding that the victim submitted to intercourse with defendant because of fear or duress. *S. v. Drumgold*, 267.

§ 18.2. Assault with Intent to Commit Rape; Sufficiency of Evidence

In a prosecution for assault with intent to commit rape, State's evidence was sufficient to support an inference that defendant intended to rape the victim as well as to commit the crime against nature, although the rape was not carried out. *S. v. Silhan*, 660.

§ 18.4. Assault with Intent to Commit Rape; Instructions on Lesser Included Offenses

In a prosecution for assault with intent to commit rape, trial court did not err in failing to submit the lesser included offense of assault on a female as a permissible verdict where all the evidence concerning the assault tended to show that the purpose of the victim's assailant was to commit rape. *S. v. Allen*, 429.

RECEIVING STOLEN GOODS

§ 5.1. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for feloniously receiving stolen goods where defendant's testimony that he did not steal the suit he was charged with receiving but obtained it in exchange with another person, and a store manager's testimony that the suit was missing from his store and had not been sold, permitted inferences that defendant received the suit and that it was stolen by someone else. *S. v. Haywood*, 686.

ROBBERY

§ 3. Competency of Evidence

Trial court did not err in allowing a witness who was not present at the crime scene to testify concerning the amount of money on hand at the start of the day's business where there was testimony by others that something of value, money, was taken from the store. *S. v. Hunt*, 447.

ROBBERY—Continued

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

Trial court properly submitted to the jury a charge of armed robbery where the evidence tended to show that defendant robbed the victim by the use of a knife. *S. v. Faircloth*, 100.

State's evidence was sufficient for the jury to find that a ring was taken from the victim by "threatened use" of a firearm within the meaning of the armed robbery statute where a pistol had previously been pointed at the victim to force her to commit certain acts and this continuing threat extended to the taking of the ring. *S. v. Joyner*, 349.

State's evidence was sufficient to support a charge of armed robbery of the prosecutrix and the verdict of the lesser included offense of common law robbery. *S. v. Yellorday*, 574.

§ 5.2. Instructions Relating to Armed Robbery

Defendants were not prejudiced by the court's instruction requiring the jury to find that defendants took and carried away both money and the victim's pistol in order to find them guilty of armed robbery when the indictment charged only the stealing of money. *S. v. Logner*, 539.

§ 5.4. Instructions on Lesser Included Offenses

When the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by use of what appeared to be a firearm, evidence elicited on cross-examination that the witness could not positively testify that the instrument used was in fact a firearm is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. *S. v. Thompson*, 285.

RULES OF CIVIL PROCEDURE

§ 7. Form of Motions

A motion was not fatally defective because it failed to state the rule number under which the movant was proceeding. *Wood v. Wood*, 1.

§ 8.1 Complaint

An incorrect choice of legal theory should not result in dismissal of a claim if the allegations of the complaint are sufficient to state a claim under some legal theory. *Stanback v. Stanback*, 181.

§ 12. Defenses and Objections

Defendant's Rule 12(b)(6) motion to dismiss a complaint for abuse of process based on a federal civil suit was not converted into a Rule 56 motion for summary judgment by the court's consideration of the complaint in the prior federal action which was made a part of plaintiff's complaint. *Stanback v. Stanback*, 181.

§ 20. Permissive Joinder of Parties

The allegation of negligence against one defendant in the complaint of plaintiff who joins two defendants asserting claims of negligence against them in the alternative, when admitted by the second defendant in his answer, is not a binding judicial admission entitling the second defendant to summary judgment when the negligence of the first defendant is, as a matter of law, imputed to plaintiff. *Woods v. Smith*, 363.

RULES OF CIVIL PROCEDURE—Continued

§ 50.2. Directed Verdict Against Party with Burden of Proof

There is no impediment to directing a verdict for the party with the burden of proof where the credibility of movant's evidence is manifest as a matter of law. *Bank v. Burnette*, 524.

§ 56. Summary Judgment

The granting of summary judgment on grounds other than those raised in the written motion for summary judgment is not improper. *Conover v. Newton*, 506.

§ 56.1. Summary Judgment Motion; Timeliness; Notice

The court's action in hearing plaintiffs' motions for summary judgment while discovery procedures initiated by defendant were still pending did not constitute prejudicial error. *Conover v. Newton*, 506.

Assuming that the conversion of a Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion for summary judgment by the court's consideration of matters outside the pleadings brings into effect the 10 day notice requirement of Rule 56(c), defendant was not prejudiced by the lack of 10 days' notice in this case. *Conover v. Newton*, 506.

§ 60.1. Relief from Judgment or Order; Notice of Motion

Defendant was charged with constructive notice of plaintiff's oral Rule 60(b) motion for relief from a divorce judgment entered at the same session of court at which the case was regularly calendared. *Wood v. Wood*, 1.

§ 60.2. Relief from Judgment or Order; Grounds

Trial court properly allowed plaintiff's motion to set aside a divorce judgment entered in her favor because of excusable neglect of her attorney in filing a complaint based on one year's separation rather than on adultery. *Wood v. Wood*, 1.

SCHOOLS

§ 1. Establishment and Maintenance in General

An appropriation by a board of county commissioners to a school for dyslexic children was not authorized by statute. *Hughey v. Cloninger*, 86.

§ 14. Criminal Liability of Parents for Failure to Send Children to School

Defendant's motion for directed verdict should have been allowed in a prosecution for violation of the N.C. compulsory school attendance law. *S. v. Vietto*, 8.

SEALS

§ 1. Generally

A signatory to an instrument may not introduce parol testimony that he did not intend to adopt a seal printed on the instrument as his own where there is no ambiguity on the face of the instrument as to the adoption of the seal. *Oil Corp. v. Wolfe*, 36; *Bank v. Cranfill*, 43.

SEARCHES AND SEIZURES

§ 10. Search and Seizure on Probable Cause

The courts are not bound by a stipulation that officers had no probable cause to conduct a warrantless search of the glove compartment of defendant's car. *S. v. Phifer*, 216.

SEARCHES AND SEIZURES—Continued

§ 11. Search and Seizure on Probable Cause; Vehicles

A warrantless search of the locked glove compartment of defendant's car after his arrest on an outstanding warrant for traffic violations could not be justified as a valid inventory search where the officers violated police standards for towing and inventory of the vehicle, and where the officers utilized the towing and inventory procedure as a pretext concealing an investigatory motive. However, officers lawfully searched the glove compartment based on probable cause. *S. v. Phifer*, 216.

§ 12. Stop and Frisk Procedures

An officer had reasonable grounds to stop and frisk defendant at 4:30 a.m. near the scene of a burglary and robbery. *S. v. Buie*, 159.

§ 13. Search and Seizure by Consent

The Miranda warnings need not be given by officers before obtaining consent to a search. *S. v. Powell*, 419.

§ 14. Voluntary, Free, and Intelligent Consent to Warrantless Search

Officers properly seized a stolen wallet found in defendant's room pursuant to defendant's consent to a limited search for identification. *S. v. Powell*, 419.

§ 118. Consent to Warrantless Search Given by Owners of Vehicle

Trial court's findings supported its conclusion that defendant voluntarily consented to a search of his car prior to his arrest for burglary and armed robbery, and to a search of his car at the police station after his arrest. *S. v. Jolly*, 121.

A consent search of defendant's car after his arrest was not illegal because defendant was not taken before a magistrate before he gave his written consent to the search. *Ibid.*

STATUTES

§ 5.11. Definitions

While the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent. *Wood v. Stevens & Co.*, 636.

TAXATION

§ 7. Public Purpose

Direct disbursement of public funds to private entities is now a constitutional means of accomplishing a public purpose provided there is statutory authority to make such appropriation. *Hughey v. Cloninger*, 86.

§ 31.1. Sales Taxes; Particular Transactions

A retailer doing business in a county which imposes the 1% local sales tax is required to collect that tax when it sells and delivers within that county used tangible personal property accepted in trade as part payment on the sales price of new property that was delivered outside the county. *Equipment Co. v. Coble, Sec. of Revenue*, 19.

§ 41.2. Foreclosure of Tax Lien Under G.S. 105-414; Notice

The presumption of the regularity of official acts applies to the mailing of notice to a taxpayer of a tax foreclosure sale of his property, and the party attacking the foreclosure sale has the burden of proving such notice was not mailed to the taxpayer. *Henderson County v. Osteen*, 113.

TAXATION—Continued

Trial court's finding that the sheriff's office failed to mail notice of a 1970 tax foreclosure sale to the taxpayer was supported by the evidence. *Ibid.*

TRESPASS

§ 7. Sufficiency of Evidence

Even if there was implied consent for defendant and two policemen to enter plaintiffs' property, defendant was liable for trespass because of his subsequent act of participating in a false arrest of one plaintiff. *Blackwood v. Cates*, 163.

TRUSTS

§ 4. Charitable Trusts; Construction, Operation and Modification

Plaintiff had no standing to maintain an action to have the court award him a Morehead Scholarship on the ground that the Trustees of the Morehead Foundation abused their discretion in failing to award him a scholarship. *Kania v. Chatham*, 290.

§ 13.1. Creation of Resulting Trust; Express Agreement

A resulting trust arises where the person claiming it proves payment on the purchase price made to the grantee or grantor after delivery of the deed but pursuant to a promise made to the grantee before the deed was delivered. *Cline v. Cline*, 336.

§ 13.4. Creation of Resulting Trust; Implied Contracts; Effect of Domestic Relationships Between Grantee and Payor

Plaintiff was not entitled to have either a resulting trust or a constructive trust imposed on one-half of the stock of a corporation formed upon incorporation of her husband's land clearing business where she had performed bookkeeping and other supporting services for the husband's business for many years, the income from the business was placed in joint bank accounts, and money in the joint accounts was used to capitalize the corporation. *Leatherman v. Leatherman*, 618.

§ 15. Actions to Establish Resulting and Constructive Trusts; Limitations

Plaintiff's action to establish a resulting trust in land was not barred by the statute of limitations where plaintiff was in possession of the land within three years prior to institution of the action. *Cline v. Cline*, 336.

§ 19. Actions to Establish Resulting and Constructive Trusts; Sufficiency of Evidence

Evidence was sufficient to establish either a constructive or a resulting trust in plaintiff's favor in land which the parties occupied. *Cline v. Cline*, 336.

UNIFORM COMMERCIAL CODE

§ 47. Default and Enforcement of Security Interest; Notice of Sale of Collateral

An actual address of a debtor is an address where a notice of sale could reasonably be expected to be received by the addressee in the ordinary course of the mails. *Bank v. Burnette*, 524.

Plaintiff's evidence established as a matter of law that notice of sale was sent to the actual address of the debtor, and plaintiff was therefore entitled to the conclusive presumption of commercial reasonableness. *Ibid.*

WILLS

§ 34.1. Devise of Life Estate and Remainder

At the death of a female life tenant without children, her one-third interest in realty passed to the surviving male life tenant for his life, and at his death will pass to his children only and not also to the child of a male life tenant who predeceased the female life tenant. *Vick v. Vick*, 280.

WITNESSES

§ 1.2. Children as Witnesses

Defendant failed to show an abuse of discretion in the trial court's ruling that a nine year old child was competent to testify. *S. v. Colvin*, 691.

WORD AND PHRASE INDEX

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